

(2023) 01 GAU CK 0003

Gauhati High Court

Case No: Writ Petition (Civil) No. 1376 Of 2019, 3845 Of 2021

Cham Chun Nahar
Ahmed And 8 Ors.

APPELLANT

Vs

Gauhati High Court
And 47 Ors.

RESPONDENT

Date of Decision: Jan. 5, 2023

Acts Referred:

- Constitution Of India, 1950 - Article 229, 235
- Gauhati High Court (Service) Rules, 1967 - Rule 7(3A), 63, 63A

Hon'ble Judges: Sanjay Kumar Medhi, J

Bench: Single Bench

Advocate: Kn Choudhury, J. Patowary, Uk Nair, Mp Sarma, Kk Mahanta, A. Chamuah

Final Decision: Allowed

Judgement

1. The writ jurisdiction of this Court has been sought to be invoked by the petitioners by questioning the legality and validity of initially the officiating arrangement of the private respondent no. 5 as the Secretary to the Honâ€™ble the Chief Justice of this Court (hereinafter HCJ) and the subsequent order of regularization of the services of the respondent no. 5 in the said capacity. The challenge is mainly based upon the lack of eligibility and qualification of the said respondent no. 5 in both the aforesaid processes.
2. Before going to the issue which has arisen for determination in these cases, it would be convenient to state the facts in brief.
3. In the first writ petition, registered as WP(C)/1376/2019, there are 9 numbers of petitioners, who at the time of filing of the writ petition were

serving as Administrative Officers (Judicial) in the Principal Seat of this Court. Such service was in substantive capacity which they have reached from the post of LDA which they were earlier holding on the strength of their selection in the period 1988 to 1997. It is the case of the petitioners that the post of Administrative Officer (Judicial) is one of the feeder post for Secretary to the HCJ as per the Rules holding the field. There is no dispute that the concerned Rules are the Gauhati High Court (Service) Rules, 1967 (hereinafter the Rules). The respondent no. 5 was appointed as a Lower Divisional Assistant in the Gauhati High Court on 13.12.2004 and thereafter, was promoted to the cadre of Senior Judicial Assistant (SJA) which he is holding in a substantive capacity. The said post of SJA is in the feeder cadre to the post of Administrative Officers (Judicial), which the petitioners were holding. On 25.11.2016, the respondent no. 5 was appointed as Protocol Officer temporarily. Thereafter, vide an order dated 10.09.2018, the said respondent no. 5 was appointed as Secretary to the HCJ on officiating basis. In both the orders of promotion, it was, however recorded that the respondent no. 5 shall maintain his seniority in the original cadre, i.e. Senior Judicial Assistant and his future promotion will be made on that basis. The aforesaid order dated 10.09.2018 is the subject matter of challenge in the first writ petition WP(C)/1376/2019.

4. During the pendency of the first writ petition wherein, the officiating promotion of the respondent no. 5 as Secretary to the HCJ is under challenge,

one out of two posts of Protocol Officer had fallen vacant. Accordingly, on 14.09.2018, a Notice Inviting Options from intending Senior Judicial

Assistant was issued to fill up one vacant post of Protocol Officer in the Principal Seat. The petitioners alleged that the notice dated 14.09.2018 was

issued with an ulterior motive of regularizing the officiating appointment of the respondent no. 5 as Secretary to the HCJ as in case of appointment of

someone as the Protocol Officer, there would be no option for the respondent authorities to revert back the respondent no. 5 to the post of Protocol

Officer and in the process, his service as the Secretary to the HCJ can be regularized.

5. As per the petitioners, by flouting all rules and regulations, the officiating arrangement of the respondent no. 5 as the Secretary to the HCJ was

regularized vide an order dated 24.08.2020. As the representation dated 24.09.2020 submitted against the aforesaid order dated 24.08.2020 was not considered, the second writ petition WP(C)/3845/2021 has been filed. In the second writ petition, there are 20 numbers of petitioners, who are serving as Administrative Officers (Judicial) in the Principal Seat in their substantive capacity.

6. It may be mentioned that in WP(C)/1376/2019, an application for impleadment of party respondents was filed which was registered as

IA(Civil)/1577/2019. The 42 numbers of applicants in that IA support the case of the petitioners. This Court vide order dated 22.05.2019 had allowed

the application by impleading the applicants as Interveners nos. 1 to 42. Further, in WP(C)/3845/2021, an application was filed by the applicants / writ

petitioners praying for a direction to restrain from bestowing further promotional benefits to the respondent no. 5. This Court vide order dated

25.10.2021 had directed maintenance of status quo as regards the service of the respondent no.

5. The interim order was extended from time to time and it is not in dispute that as on date, the respondent no. 5 is still holding the post of Secretary to the HCJ.

7. I have heard Shri J. Patowary, learned counsel for the petitioners. I have also heard Shri UK Nair, learned Senior Counsel assisted by Shri MP

Sarma, learned counsel for the High Court and Shri KK Mahanta, learned Senior Counsel assisted by Shri A. Chamuah, learned counsel for the

respondent no. 5. The records in original produced by Shri Sarma, learned counsel have been carefully examined.

8. Referring to the Rules, Shri Patowary, learned counsel for the petitioners has submitted that from the cadre of SJA, one is normally promoted to the

post of Administrative Officer (Judicial) in which cadre, all the petitioners as well as the interveners are placed. While the cadre of Administrative

Officer (Judicial) is a feeder cadre for the Secretary to the HCJ, there is another stream for such consideration. An incumbent, who is a SJA, can be

promoted to the rank of Court Officer and Protocol Officer and both the aforesaid posts are also the feeder posts to the rank of Secretary to the HCJ.

In other words, the Secretary to the HCJ can be promoted from Administrative Officer (Judicial), Court Officer and Protocol Officer. In the instant

case, the substantive appointment of the respondent no. 5 is Senior Judicial Assistant. However, vide order dated 25.11.2016, the respondent no. 5 was temporarily appointed as Protocol Officer. The said order was however accompanied by a rider as per which, the said respondent no. 5 would maintain his seniority in the original cadre of Senior Judicial Assistant and his further promotion will be considered on that basis. Shri Patowary, learned counsel has contended that in the Gradation List of SJA, the position of the respondent no. 5 is 45 and is below than those of the petitioners at the time when they were holding the said post.

9. The petitioners contend that, as on principle, they are not aggrieved by the order of 25.11.2016 as options were called for from other SJA at that time. The grievance arose by the subsequent action of issuing an order dated 10.09.2018 when the respondent no. 5 who was temporarily holding the post of Protocol Officer was appointed as Secretary to the HCJ on officiating basis. The learned counsel however submits that the same rider is also attached to the order dated 10.09.2018 that the respondent no. 5 shall maintain his seniority in his original cadre i.e. Senior Judicial Assistant and his further promotion will be made on that basis. Thereafter, vide the subsequent order dated 24.08.2020, the officiating arrangement of the respondent no. 5 as Secretary to the HCJ was regularized w.e.f., 04.07.2020.

10. Shri Patowary, learned counsel for the petitioners submits that appointment to the post of Secretary to the HCJ is a promotional post and cannot be made by way of regularizing an officiating arrangement. He submits that the concept of regularization of the post of Secretary to the HCJ is alien to the Rules of 1967. He further submits that not only the rights of the petitioners for a fair consideration for promotion to the rank of Secretary to the HCJ have been violated, the respondent no. 5 has been given undue favour both in appointing him as Secretary to the HCJ on officiating basis and regularizing the aforesaid arrangement. The learned counsel submits that the basic requirement to be beneficiary of such action is to be a member in the feeder cadre on substantive basis. In the instant case, it is submitted that the respondent no. 5 is still in the substantive capacity of SJA as his promotion to the post of Protocol Officer was on temporary basis and from such temporary arrangement, the scope of further promotion would lead to

a situation of lawlessness.

11. Shri Patowary, learned counsel for the petitioners submits that even otherwise, the impugned action cannot be sustained inasmuch as, both the orders dated 25.11.2016 and 10.09.2018 are conditional orders whereby a condition is attached that the seniority of the respondent no. 5 in his original cadre of SJA would be maintained and his further promotion would be considered on that basis.

12. In support of his submissions, Shri Patowary, learned counsel for the petitioners has placed reliance upon the following case laws-

- i. 2000 (1) GLT 36 [Laishram Randhoni Devi Vs. Gauhati High Court and Ors.]
- ii. (2011) 12 SCC 137 [Registrar General, High Court of Judicature of Madras Vs. R. Perachi and Ors.]
- iii. (2011) 14 SCC 187 [State of West Bengal Vs. Debasish Mukherjee and Ors.]

13. This Court in the case of Laishram Randhoni Devi (supra), while dealing with Rules of 1967 had laid down that though Rule 63A confers powers to the HCJ to relax age or qualification for appointment to the service of the High Court in appropriate cases according to his discretion, such powers are to be exercised in a reasonable manner. The relevant part of the aforesaid judgment is extracted hereinbelow:

“8. The other point which is highlighted in the affidavit in opposition is that the Rule 63 and 63-A give wide powers to the Chief

justice in this matter and in view of that the decision of the Chief Justice cannot be challenged. Let us have a look at Rule 63 and 63-A

which are quoted below:

63. “

63-A “

The said power cannot be used by the Chief justice in an arbitrary or capricious manner and he cannot have one practice or procedure for

one Outlying Bench and another norm for another Outlying Bench”.

9. The Supreme Court considered the power of the Chief Justice under Article 229 of the Constitution in (1971) 2 SCC 137 {N. (sic.M)

Gurumoorthy-Vs-Accountant General}, (1989) 4 SCC 187 {Supreme Court employees' Welfare Association-Vs-Union of India} and (1997) 5

SCC 1 {The State of u. P.-Vs-C. L Agarwal}. No doubt that the Chief Justice has the overall power to deal with his employees in the manner

as provided by the Rules, but the discretion cannot be according to the length of the foot of the Chancellor. It cannot be allowed that one

Chief Justice will take one view and another will set it at naught. This may amount to unreasonable exercise of power and may even amount

to discrimination.â€

14. The case of R. Perachi (supra), is in connection with Article 235 of the Constitution of India wherein it has been held that the expression

â€œcontrolâ€ of the High Court over the Subordinate Courts is of comprehensive sense and includes the control of Superintendence over the

Subordinate Courts and the persons manning them, both on the judicial and the administrative side.

15. In the case of Debasish Mukherjee (supra), the issue is with regard to higher pay scales conferred to a particular employee of the Calcutta High

Court. The Honâ€™ble Supreme Court, in clear terms has laid down that though in orders of such nature the scope of judicial review may be narrow

and limited, there is no doubt that such orders are justiciable. For ready reference, the relevant paragraphs are extracted hereinbelow:

â€œ36. The fact that in regard to certain types of action or orders of Chief Justice, the scope of judicial review may be very narrow and

limited is different from saying that an order of the Chief Justice granting certain relief to High Court employees whose service conditions

are governed by Rules, is not justiciable. Such orders are justiciable.

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44. It is therefore clear that the Chief Justice has the power and authority to grant premature increments in exceptional circumstances. But

the Chief Justice cannot grant such relief in an irrational or arbitrary manner. If the Rules provide that premature increments could be

granted in exceptional circumstances, there should be a reference to the existence of exceptional circumstances and application of mind to

those exceptional circumstances. When neither the recommendation considered by the Chief Justice nor the order of the Chief Justice

referred to any exceptional circumstances and did not even refer to the Rule relating to grant of relief in exceptional circumstances, the

question of assuming exceptional circumstances does not arise. The order dated 13.2.2003 is justiciable.â€

16. Per contra, Shri Nair, learned Senior Counsel for the High Court submits that there is no illegality or irregularity in the impugned orders dated

10.09.2018 and 24.08.2020. Drawing the attention of this Court to the prayer made in the first writ petition WP(C)/1376/2019, it is submitted that it is

the order dated 10.09.2018 by which the respondent no. 5 was made the Secretary to the HCJ on officiating basis which was under challenge along

with another order pertaining to another incumbent, who was appointed as Protocol Officer. The said incumbent had however left the said post and

the only challenge remaining was the order dated 10.09.2018. The learned Senior Counsel submits that the appointment of the respondent no. 5 as

Protocol Officer vide order dated 25.11.2016 is however not under challenge. According to the learned Senior Counsel, the said order is a substantive

appointment.

17. The learned Senior Counsel for the High Court submits that Protocol Officer being one of the posts in the feeder cadre for promotion to the rank

of the Secretary to the HCJ, there was no illegality in the order dated 10.09.2018.

18. As regards the submission of the petitioners that there was a pre-conceived notion to give the benefit of substantive appointment to the respondent

no. 5, options were invited from SJA to fill up one vacant post of Protocol Officer, Shri Nair, the learned Senior Counsel submits that the notice dated

14.09.2018 was issued only to maintain transparency. The learned Senior Counsel however could not elaborate on the effect of the rider

accompanying the order on officiating basis dated 10.09.2018.

19. The learned Senior Counsel for the High Court further submits that the Rules being silent on filling up of the post of Protocol Officer which

however is to be regarded as a feeder cadre for the post of Secretary to the HCJ coupled with the fact that powers of relaxation have been conferred

upon the HCJ, the orders impugned are not to be interfered with. The learned Senior Counsel has referred to Article 229 of the Constitution of India

which gives the absolute power to the HCJ to make appointments. Reference has also been made to Section 63A as per which, the HCJ has the power to relax the qualification and eligibility in case of any appointment. He accordingly submits that the present writ petitions be dismissed. Shri MP Sarma, learned counsel assisting Shri Nair has produced the records in original pertaining to the present issue.

20. Shri KK Mahanta, the learned Senior Counsel for the respondent no. 5 has endorsed the submissions made on behalf of the High Court. The learned Senior Counsel concedes that the decision making process is of the High Court which has been ably defended and he is only supporting the said defence. At the same time, he submits that since the appointment of the respondent no. 5 is the subject matter of challenge, he would advance the necessary arguments against the writ petitions. At the outset, Shri Mahanta, the learned Senior Counsel submits that the order dated 25.11.2016 of appointment of the respondent no. 5 as Protocol Officer is not under challenge. The said appointment, according to the respondent no. 5 is substantive appointment as along with the petitioners all eligible officers were considered. He further submits that it is not in dispute that the respondent no. 5 had served in the said capacity as Protocol Officer for more than two years. Therefore, there is no illegality in considering the case of regularization of the service of the respondent no. 5 to the exclusion of the others. While admitting that the respondent no. 5 is not a LLB degree holder, the learned Senior Counsel submits that Rule 63A of the Rules gives adequate powers to the HCJ to relax the Rules. He submits that when a discretionary power have been conferred upon an authority, the scope of judicial review should be minimal and therefore, both the writ petitions are required to be dismissed.

21. Shri Mahanta, the learned Senior Counsel for the respondent no. 5 has placed reliance upon the following case laws-

- i. (1971) 2 SCC 137 [M. Gurumoorthy Vs. Accountant-General, Assam and Nagaland and ors].
- ii. (1979) 2 SCC 34 [Chief Justice of Andhra Pradesh and Ors. Vs. L.V.A. Dixitulu and Ors.]
- iii. (1980) 4 SCC 226 [Baleshwar Dass and Ors. Vs. State of U.P. and Ors.]
- iv. (1996) 7 SCC 37 [OS Singh and Anr. Vs. Union of India and Anr.]

v. (1998) 3 SCC 72 [High Court of Judicature for Rajasthan Vs. Ramesh Chand Paliwal and Anr.]

vi. (2000) 8 SCC 25 [Rudra Kumar Sain and Ors. Vs. Union of India and Ors.]

vii. (2001) 1 SCC 637 [Ramesh K. Sharma and Anr. Vs. Rajasthan Civil Services and Ors.]

viii. 2021 SCC Online TS 1252 [K. Shailendra Moses Vs. State of Telangana]

22. In the case of M. Gurumoorthy (supra), the issue was the interference of the Executive with the powers exercised by the HCJ under Article 229

of the Constitution of India. The said authority, perhaps would not be applicable to the facts of the instant case where a judicial review is sought for.

Similar is the case of Chief Justice of Andhra Pradesh (supra) wherein the control over the Subordinate Judiciary vested in the High Court under

Article 235 was also held to be exclusive in nature wherein, interference from the Executive is not warranted.

23. In the case of Baleshwar Dass (supra), it has been held that if an incumbent was appointed substantively to a temporary or permanent post, he

becomes a member of the Service. The touchstone is the substantive capacity. The said observation was made on completion of probation of an

incumbent. However, in the instant case the respondent no. 5 was not appointed in substantive capacity.

24. In the case of OS Singh (supra), the Honâ€™ble Supreme Court explained the distinction between substantive appointment and officiating

appointment. It has further been held that since a person cannot be treated as officiating on a post after he has been substantively appointed on that

post, the said expression cannot be construed as referring to the period of officiation subsequent to the date of substantive appointment. The facts of

the instant case are however distinguishable as, at no point of time, the respondent no. 5 was substantively appointed either in the post of Protocol

Officer or in the post of Secretary to the HCJ on officiating basis.

25. In the cases of High Court of Judicature for Rajasthan (supra), and Ramesh K. Sarma (supra), the Honâ€™ble Supreme Court had discussed

regarding the High Courtsâ€™ power under Articles 235 and 229 of the Constitution of India.

26. In the case of Rudra Kumar Sain (supra), it has been laid down that to hold an appointment to be substantive in nature, though made as a stop-gap arrangement, the person should possess the requisite qualification. For ready reference, paragraph 20 of the judgment is extracted hereinbelow-

“20. In the Service Jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such appointment cannot be held to be “stop-gap or fortuitous or purely ad hoc”.

It is seen that the essential requirement is to possess the requisite qualification which in the present is the degree of LLB.

27. In the case of K. Sailendra Moses (supra), the Telangana High Court followed the law laid down by the Hon^{ble} Supreme Court in the cases of OS Singh (supra) and RK Sain (supra).

28. In his reply, Shri Patowary, learned counsel for the petitioners submits that though the Rules holding the field give power to the HCJ to relax the qualification and criteria, he submits that such power needs to be exercised in a reasonable manner and only to overcome any difficulty or lacuna. The said power cannot be exercised to the prejudice of other eligible candidates. He submits that the respondent no. 5 is not an LLB degree holder which is an essential consideration and therefore, could not have come into the zone of consideration for promotion to the rank of Secretary to the HCJ.

29. To appreciate the issue involved, it would be appropriate to refer to the concerned Rule governing the appointment of the Secretary to the HCJ i.e.

Rule 7(3A) of the Rules, 1967. The relevant extract is quoted hereinbelow-

“The Secretary to the Hon^{ble} Chief Justice shall be appointed from among the Gazetted Officers of the High Court’s Services belong to Class-II(AA), Class-II(B) or Class-II(C), having a degree in Law, considered suitable by the Chief Justice”

30. An analysis of the Rule makes it apparent that the said appointment to the post of Secretary to the HCJ can be made on fulfillment of the following ingredients:

i. From Gazette Officers of the High Court service

ii. Such Gazette Officers should belong to Class-II(AA), Class-II(B) or Class-II(C).

iii. The said Officer should have a degree in law.

iv. This Officer has to be considered suitable by the HCJ.

31. The first three ingredients are objective in nature and only for the fourth ingredient namely, suitability, the element of subjective satisfaction would

come in. There is also no dispute that the post of Protocol Officer belongs to Class-II(C). The aforesaid Rules are also to be read along with Rule

63A which gives discretion to the HCJ to relax the qualification for appointment. Rule 63A is quoted hereinbelow:

“The Chief Justice shall have powers to relax age or qualifications for appointment to the service of the High Court in appropriate cases

according to his discretion.”

32. With the aforesaid backdrop of the concerned Rules and the interpretation thereof by various judicial pronouncements referred above, the records

of the case which has been placed in original are required to be examined. The HCJ vide endorsement dated 04.09.2018 had recommended the name

of the respondent no. 5, who was a Protocol Officer in Class-II(C) for appointment as the Secretary to the HCJ on officiating basis by endorsing the

condition in the note that he will maintain seniority in his original cadre of SJA. Consequently, the notification dated 10.09.2018 was issued. The file

further reveals that a subsequent exercise was done which was proposed vide a note dated 03.07.2020 on the issue of regularization of the post

Secretary to the HCJ. The note also contains an observation that on an earlier occasion, an incumbent was posted to the aforesaid post who did not

have a degree in law and also that absolute discretion be given to the Chief Justice to appoint any suitable person to hold the post. The said note was

approved by the HCJ on 04.07.2020. The approval was on the following considerations, which are required to be put on records:

“ORDER IN REFERENCE TO PRE-PAGE

Considering, (i) the consistently good work done by Mr. Nirod Sarma while attached with various Chief Justices as depicted from his ACR's;

(II) The efficiency, integrity, punctuality, dedication towards duties without taking break, knowledge of computer applications,

thoroughness in performance of all tasks, searching judgments and preparing templates of judgments, quality of interaction with

officers/officials within the institution and of other institutions, confidentiality maintained by him, his good and differential behaviour with

the Registrars, as observed by me during his attachment as Secretary to the Chief Justice;

(iii) That Sri Sarma has attended office every single day of my tenure as Chief Justice of Gauhati High Court from 9.30 A.M., or earlier if

required, till late night;

(iv) the earlier precedence of Sri Shailendra Choudhury;

(v) absolute discretion vested with the Chief Justice to appoint suitable person to hold the post of Secretary to the Chief Justice;

(vi) powers vested with the Chief Justice under Article 229 of the Constitution of India in this regard;

(vii) the law laid down by the Hon'ble Supreme Court of India as referred to in the note put up before me;

(viii) the fact that Mr. Sarma has been serving on temporary and officiating basis as Secretary to Chief Justice of Gauhati High Court for

the last over two years, and in case of such sensitive post ad-hocism is not good for managing and administering the Secretariat of the

Chief Justice;

I hereby, by virtue of powers vested under Article 229 of the Constitution of India, read with Rule 63A of the Gauhati High Court Service

Rules, 1967, exercise my discretion and relax the qualification for appointment to the post of Secretary to the Chief Justice, Gauhati High

Court; and regularize the appointment of Sri Nirod Sarma as Secretary to the Chief Justice, Gauhati High Court.

CHIEF JUSTICE

33. The aforesaid considerations in the opinion of this Court while exercising the powers under Rule 63A of the Rules cannot be termed to be

adequate. Other than merely stating "the earlier precedence of Shri Shailendra Choudhury", there is absolutely no discussion regarding relaxation of

the mandatory requirement of the incumbent to have an LLB degree. At this stage, the original records produced reveal that Shri Shailendra

Choudhury, the earlier incumbent was a Class-II(B) Officer (Stenographer Stream) who was well versed with stenography and typing and this aspect

played a very important role in his appointment as Secretary to the HCJ. As per the Rules, a post in Class-II(B) is a feeder post for the Secretary to

the HCJ. In contradistinction, the respondent no. 5 does not possess any such qualification and therefore the case of Shailendra Choudhury could not

have been cited as a precedent. There is absolutely no doubt in the mind of this Court that relaxation powers have been vested upon the HCJ for

relaxing the age or qualification of an incumbent. But whether such discretionary power can be exercised to do away with an essential qualification is

a debatable issue. However assuming that even a requirement which is mandatory in nature can be relaxed, there should be adequate discussion to

show that there was application of mind to do away with such requirement. A perusal of the file notings, however do not show any such application.

As observed above, the case of Shri Shailendra Choudhury is not similar.

34. This Court is also of the opinion that the powers vested by Rule 63A, which is discretionary in nature, has to be exercised in a reasonable manner

and for a situation of necessity. There was no dearth of eligible candidates in the feeder cadre having the requisite mandatory qualification to be

considered for the post of Secretary to the HCJ. When there were a number of eligible candidates, there was no occasion at all to take recourse to

the relaxation powers under Rule 63A to give a benefit to the respondent no. 5 who is otherwise not qualified to be appointed as the Secretary to the

HCJ.

35. In course of his argument, the learned Senior Counsel for the High Court has drawn the attention of this Court to the averments made in

paragraph 5 of the affidavit-in-opposition dated 29.03.2022, the said paragraph 5 is a reply to paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17,

18, 19, 20, 21, 22 and 23 of WP(C)/3845/2021. The said paragraph covers seven pages and there is no specific dealing with the averments and the

replies are evasive in nature. Though towards the last part of the paragraph, the exercise of the discretionary powers by the HCJ have been tried to

be incorporated, this Court finds force in the counter argument of Shri Patowary, learned counsel for the petitioners that the order has to stand on its

own footing and cannot be improved by way of an affidavit. In this regard, reference may be made to the case of Mohinder Singh Gill & Anr. Vs.

Chief Election Commissioner, New Delhi & Ors., reported in (1978) 1 SCC 405, wherein the landmark case of Commissioner of Police, Bombay Vs.

Gordhandas Bhanji, reported in AIR 1952 SC 16 was also relied upon. The following excerpts are of relevance and extracted herereinbelow:

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be

judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an

order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought

out. We may here draw attention to the observations of Bose J. In Gordhandas Bhanji (AIR 1952 SC 16) (at p. 18):

Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the

officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities

are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be

construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older.”

36. Another important factor which intrigues this Court is that the initial appointment of the respondent no. 5 as the Secretary to the HCJ on officiating

basis vide order dated 04.09.2018 is itself clouded. In this connection, an argument was advanced on behalf of the High Court that since the

respondent no. 5 was in the feeder cadre of Protocol Officer, there was no illegality in appointing him as the Secretary to the HCJ on officiating basis.

This argument is not sustainable in view of the settled law that even for appointment on in-charge basis or officiating basis, the qualifications required

cannot be done away with and the procedure laid down in the Rules has to be substantially followed.

37. An argument was sought to be advanced by Shri Nair, the learned Senior Counsel for the High Court that the order of appointment dated

25.11.2016 of the respondent no. 5 as Protocol Officer was substantive in nature. This argument however is difficult to be accepted in view of the

rider attached to the order dated 25.11.2016 that the respondent no. 5 would maintain his seniority in his original cadre of SJA. If the promotion as

Protocol Officer was made on substantive basis, the question of attaching such a rider to the promotion order dated 25.11.2016 would not have arisen.

38. The impugned action also appears not to be in consonance with law in view of the riders attached in both the orders dated 25.11.2016 and

10.09.2018. Vide the first order dated 25.11.2016, the respondent no. 5 was posted as a Protocol Officer and vide the second order dated 10.09.2018

he was appointed as the Secretary to the HCJ on officiating basis. Both the aforesaid orders had contained a clear rider to the following effect:

Shri Nirod Sarma shall maintain his seniority in his original cadre i.e. Senior Judicial Assistant and his further promotion will be considered/ made on that basis.

39. The significance of the rider is that the arrangements were absolutely temporary where no right, whatsoever was conferred upon the respondent

no. 5 either to continue as Protocol Officer or be considered for promotion to the rank of the Secretary to the HCJ.

40. This Court is fortified in being critical of the aspect of regularizing of the service of the respondent no. 5 as Secretary to the HCJ in view of the

decision of the Honâ€™ble Supreme Court in the case of (2006) 4 SCC 1 : [Secretary, State of Karnataka and Ors. Vs. Umadevi (3) and Ors.]. The

Honâ€™ble Supreme Court, in clear terms has laid down as follows:

â€œ53. â€¦ The question of regularisation of the services of such employees may have to be considered on merits in the light of the

principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State

Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed,

who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should

further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where

temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also

clarify that regularisation, if any already made, but not sub-judice, need not be reopened based on this judgment, but there should be no

further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the

constitutional scheme.â€

However, in the instant case, none of the pre-conditions are seen to be fulfilled. The entry of the respondent no. 5 into the post of Secretary to the

HCJ on officiating basis was not preceded by any discernible selection process, the incumbent was not in the feeder cadre in his substantive posting

and he did not have the requisite qualification to hold the post on regular basis.

41. In view of the above, this Court is of the considered opinion that the impugned orders dated 10.09.2018 and 24.08.2020 by which the respondent

no. 5 was first made the Secretary to the HCJ on officiating basis and subsequently regularized as such, are unsustainable in law and accordingly set

aside. The respondent no. 5 is therefore required to be reverted back to the post of Protocol Officer if the High Court so desires or to his substantive

post of Senior Judicial Assistant. To avoid causing of any prejudice to the respondent no. 5, it is provided that if the persons below the respondent no.

5 in the Gradation List are promoted to any higher post, the respondent no. 5 may also be considered for the same by giving retrospective effect so far

as notional benefits are concerned.

42. Accordingly, both these writ petitions stand allowed.

43. The records of the case in original are returned back to Shri MP Sarma, the learned counsel for the High Court.

44. No order as to cost.