

P.S. Gopinathan Vs State of Kerala and Others

Court: Supreme Court of India

Date of Decision: May 9, 2008

Acts Referred: Constitution of India, 1950 " Article 136, 233, 233(1)
Kerala Higher Judicial Service Rules, 1961 " Rule 1, 2, 5(2), 6

Citation: AIR 2008 SC 2768 : (2008) AIRSCW 4602 : (2008) 3 CLT 174 : (2008) 7 SCALE 564 : (2008) 7 SCC 70 :
(2008) 2 SCC(L&S) 225 : (2008) 3 SLJ 268 : (2009) 1 SLR 590 : (2008) 4 Supreme 85

Hon'ble Judges: S. B. Sinha, J; P. P. Naolekar, J

Bench: Division Bench

Advocate: P.S. Patwalia, Jayanth Muthraj and K.V. Mohan, for the Appellant; Parag P. Tripathi, A.A.G., Jawahar Lal Gupta, L.N. Rao, T.L.V. Iyer, Romy Chacko, Arpit Gupta, B.S. Verma, G. Prakash, Vismai Rao and T.G. Narayan Nair, for the Respondent

Final Decision: Allowed

Judgement

P.P. Naolekar, J.
Leave granted.

2. The appellant was directly recruited to the post of Munsiff and was later promoted to the post of Subordinate Judge. Thereafter, the appellant

was promoted to the Kerala State Higher Judicial Service, whereas the respondents 3 to 5 were directly recruited to the Higher Judicial Service.

3. The subordinate judiciary in the State of Kerala consisting of District Judges, Chief Judicial Magistrates, Subordinate Judges, Munsiffs, Judicial

Magistrates of the First Class, Judicial Magistrates of the Second Class, was functioning in the matter of appointment and promotions as two

separate wings, (1) consisting of the Kerala State Higher Judicial Service and the Kerala Civil Judicial Service and (2) the Kerala Criminal Judicial

Service. The Higher Judicial Service consisted of District Judges. The Kerala Civil Judicial Service consisted of Subordinate Judges and Munsiffs,

whereas the Kerala Criminal Judicial Service consisted of Chief Judicial Magistrates, Judicial Magistrates of the First Class and Judicial

Magistrates of the Second Class. The Civil Judicial Service and the Criminal Judicial Service came into being as a result of the orders issued under

G.O.(Ms) 24/73/Home dated 12.2.1973 and with that the subordinate judiciary was also bifurcated for the first time into Civil Wing and Criminal

Wing. The Higher Judicial Service all along constituted one separate Service to which after the implementation of the G.O. dated 12.2.1973, only

the Civil Judicial Service Officers are eligible to be considered. Thus, there was subordinate Civil Judicial Service and the Criminal Judicial Service.

Promotion to the Higher Judicial Service was available from the Kerala Civil Judicial Service only.

4. The Higher Judicial Service was constituted under the Kerala State Higher Judicial Service Rules published on 18.7.1961. It consisted of two

categories : Category 1 - Selection Grade District & Sessions Judge and Category 2 : District & Sessions Judge (including Additional District &

Sessions Judge). Appointment to Category 2 was to be made by transfer (promotion) from the category of Civil Judicial Service or by direct

recruitment from the Bar. The number of posts to be filled up by direct recruitment is 1/3rd of the permanent posts in Categories (1) and (2) taken

together. While under the said Rules, a select list of subordinate Judges (Civil category) was prepared on 8.1.1991 and approved by the

Administrative Committee of the High Court, was also approved by the Full Court on 11.1.1991. The Government also approved the select list of

Subordinate Judges by its order dated 19.11.1991 for appointment as District & Sessions Judges. The appellant was ranked No. 2 in the said list.

A letter dated 10.12.1991 was addressed by the Registrar, High Court, to the Commissioner and Secretary to the Government in Home

Department, wherein it was stated that the sanction had been accorded for the establishment of three Special Courts at Thiruvananthapuram for the

trial of mark list cases in the light of the Supreme Court direction dated 20.8.1991; the Government had also sanctioned three posts of District

Judges; as per the Government Order, the Government had approved 11 Sub-Judges for appointment as District Judges in the Kerala State

Higher Judicial Service and in order to provide three District Judges in the new Special Courts to be established at Thiruvananthapuram, the actual

appointment as District Judges of the following three officers was considered necessary to be made: (i) P.S. Gopinathan; (ii) K.S. Gopinathan Pillai;

and (iii) M.V. Viswanathan; and, therefore, the Government orders and notifications appointing the above three officers as a panel of District

Judges in the Kerala State Higher Judicial Service may be issued immediately.

5. In place of the Kerala Civil Judicial Service and the Kerala Criminal Judicial Service, a common Service was brought into force by the Kerala

Judicial Service Rules, 1991 published in the Gazettee on 31.12.1991 and amendment to the Kerala Higher Judicial Service Rules, 1961 vide

G.O.(P) No. 47/92/Home dated 28.2.1992 was given retrospective effect from 1.1.1992, the date of coming into force of the Kerala Judicial

Service Rules. The common Service constituted under the said Rules consisted of the following categories of officers:

Category 1 : Subordinate Judges/Chief Judicial Magistrates Category 2: Munsiffs/Magistrates.

6. After the enactment of the Kerala Judicial Service Rules, 1991, the Governor in exercise of the powers conferred by Clause (1) of Article

233(1) appointed three Sub-Judges, including the appellant, as District & Sessions Judge in the Kerala State Higher Judicial Service on

14.1.1992, without prejudice to the claims of candidates to be recruited from the Bar to satisfy the provisions in Rule 2(b) of the Kerala State

Higher Judicial Service Rules, 1961.

7. Before the appointment order of the appellant was issued on 14.1.1992, the new Rules integrating two lower subordinate Services had come

into force and the question arose whether the vacancies in the three courts created as per the direction of the Supreme Court would be filled up by

temporary appointments and the order of the Governor issued could be treated as appointing the officers temporarily without there being any claim

of seniority by the officers who had been appointed to fill up those vacancies. The Administrative Committee of the High Court approved and

made the following recommendations among other matters:

(1) The panel of Sub Judges prepared by the High Court and approved by the Government be annulled except in the case of those already

appointed from the panel;

(2) Even in the case of those appointed from the panel after 1.1.1992, their appointment may be treated as temporary 6 without probationary

rights. Their seniority in the category be decided later after a fresh panel is prepared;

(3) Steps be taken to prepare a fresh panel for appointment as District Judges from among Sub Judges/Chief Judicial Magistrates in service on

1.1.1992;

(4) While taking such steps, the case of Shri K.N. Balakrishna Panicker, the senior most Sub Judge who had been superseded last time, be

considered after assessing his judgments.

The Committee recommended that the case of K.N. Balakrishna Panicker (respondent No. 6), the senior-most Sub-Judge who had been

superseded last time be also considered after assessing his judgments. The Full Court approved the recommendations made by the Administrative

Committee.

8. From the Official Memorandum issued by the High Court dated 9.9.2005, the reason for taking the decision for posting the appellant on a

temporary basis appears to be that the select list was prepared on the basis of the seniority list which had been prepared before the integration of

the two Services, i.e. Civil Judicial Service and Criminal Judicial Service. After the integration of the two Services, the select list was prepared and

the appointment order was issued on the said basis, whereas before the appointment order was issued on 14.1.1992, the rules were amended and

the two Services were integrated. Therefore, there was a necessity to prepare the fresh seniority list in the light of the integration of the Civil and

Criminal Wings of the State Subordinate Judiciary w.e.f. 1.1.1992. Pending preparation of the combined seniority list, a posting order was issued

without any probationary rights.

9. On 29.2.1992, the High Court passed the order with regard to the posting of the appellant who had been appointed as a District Judge in the

Kerala State Higher Judicial Service and he was posted as an Additional District Judge, Kozhikode and was directed to hand over his charge to

the Additional Sub-Judge, Vadakara. The posting of the appellant along with other officers was made temporary without probationary rights and

their seniority in the category of the District Judges was to be determined later. By this order, the High Court posted the appellant as Additional

District Judge on temporary basis without probationary rights and seniority was left open to be considered on a later date.

10. The appellant joined service on 7.3.1992 as per the posting order. Respondents 3 to 5 were the direct recruits from the Bar to the Higher

Judicial Service.

11. On 29.2.1992, Rule 2(b) of the Rules was substituted by providing for the category of Chief Judicial Magistrates also to be a feeder category

for appointment to Category (2) of the Kerala State Higher Judicial Service under the Service Rules, which came into effect on 1.1.1992. While

so, respondents 3 to 5 were directly appointed as District Judges by the Governor. Respondents 3 and 4 were appointed on 31.3.1992 and they

took charge on 2.4.1992, whereas respondent 5 was appointed by order dated 30.5.1992 and he took charge on 1.6.1992.

12. After the introduction of Service Rules, 1991, which came into effect on 1.1.1992, the High Court drew a fresh panel of Sub-Judges and Chief

Judicial Magistrates for promotion as District & Sessions Judges from the integrated seniority list of Sub-Judges and Chief Judicial Magistrates.

The fresh panel was approved by the Full Court on 21.2.1992.

13. On 15.7.1992, the Governor of Kerala approved the panel of Sub-Judges and Chief Judicial Magistrates for appointment as District &

Sessions Judges in the Kerala State Higher Judicial Service, without prejudice to the claim of the candidates to be recruited from the Bar as

provided in Rule 2(b) of the Kerala State Higher Judicial Service Rules, 1961. In the said panel, respondent 6 (K.N Balakrishna Panicker) was

shown at Sl. No. 1, whereas the appellant was at Sl. No. 2. On the same day, the Governor of Kerala was pleased to appoint the Sub-Judges and

Chief Judicial Magistrates at Sl. Nos. 1 to 8 in the panel approved in the Government Order as District & Sessions Judges in the Kerala State

Higher Judicial Service without prejudice to the claims of the candidates to be recruited from the Bar. This appointment order indicates respondent

6 at Sl. No. 1 and the appellant at Sl. No. 2.

14. On 31.7.1992, the High Court passed an order whereunder the appellant who was posted in the Motor Accident Claims Tribunal, Kozhikode

(now temporary District Judge) who had been appointed as District & Sessions Judge in the Kerala State Higher Judicial Service as per the

Government Order, was allowed to continue in the present post as regular District Judge. This order indicates that the appellant was appointed

temporarily as District Judge and by a later appointment order issued by the Governor he was treated as a regular District Judge and was allowed

to continue on the same post.

15. On the basis of the office memorandum of High Court dated 29.9.1992, it was proposed to show the seniority of the appellant below the 6th

respondent. The appellant made a representation on 28.10.1992 to the High Court claiming that his appointment as District & Sessions Judge

should not be treated as a temporary one and to treat him senior to respondents 3 to 6 in the category of District & Sessions Judges. On

16.8.1994, a draft seniority list of Selection Grade District & Sessions Judges was published. The appellant was shown below respondents 3 to 6.

While the appellant was shown at Sl. No. 60, respondents 3 to 6 were shown at Sl. Nos. 56, 57, 58 and 59. The appellant again submitted a

representation on 25.10.1994 challenging the assignment of seniority to the respondents above the appellant. On 18.1.1995, the High Court issued

an order declaring completion of the probation period by the appellant. In the said order, the commencement of the appellant's probation was

shown as on 31.7.1992 (the date when the second posting order was issued). As per the representation, the commencement of the probation of

the appellant as on 31.7.1992 could not have been shown. The appellant was appointed as District & Sessions Judge as per the order and

notification dated 14.1.1992 and joined duty on 7.3.1992 and continued to be in service without any break and, thus, the commencement of the

period of probation should have been from that date. The appellant submitted representation to that effect on 17.4.1995. Thereafter, a reminder

representation on 7.2.1998 and another representation on 20.5.2000 were made by the appellant. On 18.12.2003, the High Court issued order

permitting respondents 3 to 5 as Selection Grade District & Sessions Judges in preference to the appellant. On 8.3.2004, the appellant filed

representation challenging the seniority list in the category of District & Sessions Judges in Selection Grade given to the respondents in preference

to the appellant. On 12.3.2004, the High Court sent a communication to the appellant stating that his representations for re-fixation of his seniority

in the cadre of District & Sessions Judge were under consideration. The appellant's representation for advancing the date of his promotion as

Selection Grade District Judge would also be considered. Thereafter on 1.9.2004, the High Court gave permission to respondents 3 to 5 and the

appellant to the category of Selection Grade District Judges with retrospective effect from 3.7.2000, 12.7.2000, 12.7.2000 and 12.7.2000

respectively. In the said order, the appellant was shown at Sl. No. 14, whereas respondents 3 to 5 were shown as Sl. Nos. 11, 12 and 13

respectively. The appellant was shown junior to respondents 3 to 5 in the category of Selection Grade District Judges. Therefore, the appellant

again submitted a representation on 15.9.2004. On 2.11.2004, the High Court again permitted respondents 3 to 5 as Super Time Scale District &

Sessions Judges w.e.f. 13.10.2004, 14.10.2004 and 28.10.2004 respectively, whereas the appellant was retained as Selection Grade District &

Sessions Judge. Respondent 6 had already left the Judicial Department while holding the post of District & Sessions Judge and he was appointed

as Railway Claims Tribunal.

16. On 22.5.2005, the appellant filed a writ petition before the High Court of Kerala challenging the draft seniority list dated 16.8.1994, order

dated 18.1.1995 (declaration of the probation of the appellant), order dated 18.12.2003 (promotion of respondents 3 to 5 to the post of Selection

Grade District & Sessions Judges) and order dated 1.9.2004 [proceedings of the High Court (2nd respondent) permitting respondents 3 to 5 as

Super Time Scale District & Sessions Judges]. On 9.9.2005, during pendency of the writ petition, the High Court rejected the appellant's

representation for re-fixation of his seniority in the category of District & Sessions Judges. On 13.10.2005, the appellant's representation

challenging the draft seniority list was also rejected. The appellant challenged the Office Memorandum dated 13.10.2005 by amendment of the

writ petition. On 19.2.2007, the learned Single Judge of the High Court referred the case to be heard by a Bench of two Judges. It would be

pertinent to note that in the writ petition the appellant had not challenged the Memorandum dated 15.7.1992 whereby the Governor of Kerala had

approved the fresh panel of Sub-Judges and Chief Judicial Magistrates for appointment as District & Sessions Judges, the order of appointment of

the appellant from the panel as District & Sessions Judge in the Kerala State Higher Judicial Service by order dated 15.7.1992 or the posting

order dated 31.7.1992 whereby the appellant was shown to be a temporary District Judge and was posted as regular District Judge after the

issuance of the order of appointment on the post of District Judge by order dated 15.7.1992.

17. The Division Bench of the High Court has taken into consideration various aspects which had arisen for determination of the court, namely, as

to which order, i.e. order dated 14.1.1992 or order dated 15.7.1992 shall be taken to be the first appointment order which is relevant for Rule

2(b) of the Kerala Higher Judicial Service Rules; whether it is open to 2nd respondent- High Court to treat the order dated 14.1.1992 passed by

the Governor under Article 233 to have given the appellant status of a temporary employee appointed in the Higher Judicial Service and not to

treat that period of service as on probation. The High Court further considered the effect of not challenging the orders passed by the Governor on

15.7.1992 and 31.7.1992, by the appellant. Whether the appointment order issued by the Governor under Article 233 can be pronounced as

having no legal effect or illegal on account of violation of the rules which provide for the integration of Civil and Criminal Wings and the order of

appointment being issued without taking into consideration the integrated service on the feeder post.

18. The High Court held that the Governor is the appointing authority of the District Judges in the State which shall be done by the Governor in

consultation with the High Court. The High Court while issuing the order of posting treated the appellant as temporary and acted entirely bonafide

since the amendment including Chief Judicial Magistrates in the feeder category for promotion as District Judges, was not only on the anvil but, in

fact, it was published on the same day with retrospective effect from 1.1.1992. Since Rule 6 of the Kerala Higher Judicial Service Rules declares

that the seniority will be determined on the first order of appointment, the High Court has committed an error in treating the appellant"s

appointment as temporary appointment, particularly when there is no indication in the order of the appointing authority, namely, the Governor, that

the appointment of the appellant was temporary. However, since the appellant has accepted the posting order treating him to be a temporary

employee while joining duty, the subsequent orders issued approving the fresh panel consisting both of Sub-Judges and Chief Judicial Magistrates

in purported compliance of the mandate of the Rules as amended, the appointment order of the Governor and thereafter the posting order

indicating him to be a temporary District Judge and appointing him as regular employed District Judge have not been challenged. Thus, the High

Court was of the view that since the appointment order dated 15.7.1992 issued by the competent authority, namely, the Governor, had not been

challenged by the appellant, he cannot challenge the previous order since there can only be one appointment order with reference to which

seniority can be ascertained under Rule 6 and the High Court took the appointment order dated 15.7.1992 as the order of appointment of the

appellant to the post of District Judge in the Higher Judicial Service and consequently dismissed the writ petition filed by the appellant herein.

19. It is submitted by Shri P.S. Patwalia, learned senior counsel appearing for the appellant that the appellant's seniority has to be counted from

the date of his appointment on 14.1.1992 made by the Governor in exercise of the powers under Article 233 in consultation with the High Court.

Merely because the rule has been amended with retrospective effect from 1.1.1992 whereby the feeder post to the transfer (appointment) to the

category of District & Sessions Judges (including Additional District & Sessions Judges) was made from the category of Subordinate Judges/Chief

Judicial Magistrates of the Kerala Judicial Service instead of the category of Subordinate Judges only, it is urged by the learned senior counsel that

the post being available prior to the rule being amended, the appellant's transfer (appointment) to the post of District & Sessions Judge could not

have been treated as temporary appointment without probationary rights.

20. It is urged by Shri Jawahar Lal Gupta, learned senior counsel appearing for respondent No. 3 that the appellant was although appointed on

14.1.1992 his appointment for all purposes and intent as expressly mentioned in the posting order dated 29.2.1992 had been treated as temporary

appointment without probationary rights which was accepted by the appellant by accepting the fresh appointment order dated 15.7.1992 as

permanent appointment on the post of Category (2) District & Sessions Judge and, thus, the appellant cannot now contend that the order dated

14.1.1992 was his appointment on the permanent basis on the cadre post of Category (2) District & Sessions Judge. That apart, it is submitted by

the learned senior counsel that the appellant having not challenged the order dated 15.7.1992 or order dated 31.7.1992 issued by the High Court

posting him, is not entitled to get the seniority on the basis of the order passed on 14.1.1992.

21. Shri L.N. Rao, learned senior counsel appearing for respondents 4 and 5 has submitted that although the post had accrued when the old rules

were in operation, the appointment has to be treated under the old rules but authority can certainly say that the appointment shall not be made

under the old rules and can defer the appointment until the new rules came into force.

22. Shri T.L.V. Iyer, learned senior counsel appearing for respondent No. 2 - Kerala High Court has supported the decision taken by the High

Court in treating the appointment of the appellant dated 14.1.1992 as temporary appointment.

23. The relevant rules of the Kerala State Higher Judicial Service Rules, 1961, which shall govern the appointment and seniority of Category

(2): District & Sessions Judges, read as under:

1. Constitution.- The service shall consist of the following categories, namely:

Category (1) Selection Grade District and Sessions Judge.

Category (2) District and Sessions Judge (including Additional District and Sessions Judge).

2. Method of appointment.- (a) Appointment to category (1) shall be made by the High Court by promotion from category (2).

(b) Appointment to category (2) shall be made by transfer from category 1, Subordinate Judges/Chief Judicial Magistrates of the Kerala Judicial

Service or by direct recruitment from the Bar, provided that the number of posts in category (2) to be filled up or reserved to be filled up by direct

recruitment shall be one-third of the permanent posts in categories (1) and (2) taken together.

(c) Appointment by promotion to category (1) and appointment by transfer to category (2) shall be made on the basis of merit and ability, seniority

being considered only where merit and ability are approximately equal.

3. Qualification.- (1)(a) No person appointed to category (2) either by transfer or by direct recruitment shall be eligible for promotion to category

(1) unless he is an approved probationer in category (2) on the date of occurrence of the vacancy.

(b) Omitted

(2) A candidate for appointment to category (2) from the Bar shall satisfy, the following general conditions namely:

xxx xxx xxx

4. Probation.- (a) Every person appointed to category (2) shall, from the date on which he joins duty, be on probation for a period of two years

on duty within a continuous period of three years.

(b) There shall be no probation for category (1).

5. Appointing Authority.- (1) All appointments to category (1) shall be made by the High Court.

(2) All first appointments to category (2) whether by direct recruitment or by transfer, shall be made by Governor in consultation with the High

Court.

5A. Postings and Transfers.- All postings and transfers of persons appointed to categories (1) and (2) shall be made by the High Court.

6. Seniority.- (1) The seniority of a person appointed either to category (1) or category (2) shall, unless he has been reduced to a lower rank as

punishment, be determined with reference to the date of the order of his first appointment to the said category:

xxx xxx xxx

Under Rule 1, the cadre of District & Sessions Judges is in two categories: Category (1) relates to Selection Grade District & Sessions Judges,

whereas Category (2) relates to District & Sessions Judges (including Additional District & Sessions Judges). Rule 2(b) provides for appointment

by transfer (promotion) to Category (2) i.e. District & Sessions Judges (including Additional District & Sessions Judges). Feeder post from

1.1.1992 shall be Subordinate Judges/Chief Judicial Magistrates of the Kerala Judicial Service or by direct recruitment from the Bar. Under

Clause (c) of Rule 2, the eligibility criteria for transfer/promotion to the post of District & Sessions Judge shall be on the basis of merit and ability

and seniority shall be taken into consideration only where the merit and ability of the promotee officer are approximately equal. Thus, the

promotion to the post of District & Sessions Judge in Category (2) from the post of Subordinate Judge/Chief Judicial Magistrate would be on the

basis of merit-cum-seniority. Under Rule 4, every person appointed to Category (2) shall be on probation for a period of two years within the

continuous period of his service for three years from the date of his joining duty on the promoted post. By virtue of Sub-rule (2) of Rule 5, the first

appointment to Category (2), whether by direct recruitment or by transfer, shall be made by the Governor in consultation with the High Court. Rule

6 on which the emphasis is laid by the appellant is in regard to the seniority of a person appointed either to Category (1) or Category (2), i.e.

District & Sessions Judges, says that unless the person appointed is reduced to a lower rank as punishment, his seniority shall be determined with

reference to the date of the order of his first appointment to the said category. Therefore, for the purposes of ascertaining the seniority of an officer,

the date of the order of his first appointment will have a relevant consideration under the rules.

24. It is an admitted fact that on 14.1.1992 the appellant was appointed on the post of District & Sessions Judge by the Governor in exercise of

the power conferred by Clause (1) of Article 233, without prejudice to the claim of candidates to be recruited from the Bar to satisfy the

provisions of Rule 2(b) of the Kerala State Higher Judicial Service Rules, 1961. However, as there was an integration of the Civil Judicial Service

and Criminal Judicial Service, the matter was referred to the Administrative Committee and the Committee recommended that the entire panel

prepared of Sub-Judges (which does not include the Chief Judicial Magistrates) and approved by the Government be annulled except in the case

of those already appointed from the panel. The Administrative Committee further recommended that the appointment from the panel after

1.1.1992 shall be treated as temporary without probationary rights and their seniority in the category be decided later after a fresh panel is

prepared and the directions were issued for preparation of the fresh panel. This recommendation of the Administration Committee was accepted

by the Full Court. The reason for taking this decision was that the select list was prepared on the basis of the seniority list which had been prepared

before integration of two Services. After the integration of two Services w.e.f. 1.1.1992, the appointment order was issued by the Governor on

14.1.1992 without taking into consideration the integrated service of the Sub-Judges and the Chief Judicial Magistrates. The appointment order of

the appellant was issued on 14.1.1992. In pursuance thereof and the decision taken by the High Court, a posting order was issued on 29.2.1992.

The posting order clearly specified that the appellant was being posted as Additional District Judge on temporary basis without probationary rights

in the category of District Judges and his seniority in the category of District Judges will be determined on a later date. The appellant took charge

of the post on 7.3.1992 without any demur or objection. When the appellant was continuing on the post, respondents 3 to 5 were appointed as

District & Sessions Judges in the quota of direct recruits. Later on, a fresh panel for the transfer/promotion was prepared by the High Court which

was approved by the Governor and a fresh appointment order issued on 15.7.1992 without prejudice to the claim of the candidates recruited from

the Bar. In pursuance of the appointment order issued by the Governor on 15.7.1992, on 31.7.1992 the appellant was posted on the same post

where he was serving on the post of Motor Accident Claims Tribunal. The posting order categorized him as "now temporary District Judge" and

he was allowed to continue on the post as a regular District Judge. The posting order treated the appellant as a temporary District Judge till that

date and he was treated as a regular District Judge from the date of posting, i.e. 31.7.1992, in pursuance of the order issued on 15.7.1992. All

along by posting order dated 29.2.1992 as well as by posting order dated 31.7.1992, the appellant's appointment on the post of District &

Sessions Judge has been treated on temporary basis. Yet, the appellant kept silence, accepted the orders and worked on the post as temporarily

appointed and posted District & Sessions Judge. It is after lapse of considerable period he made a representation on 28.10.1992 complaining that

he was appointed by appointment order dated 14.1.1992 and in pursuance of his posting orders he had joined the duty on 7.3.1992; thereafter he

had been continuously working on the post; later on, direct recruitment was made whereby three District & Sessions Judges were appointed but

he was being proposed to be ranked below K.N. Balakrishna Panicker; he cannot be treated as junior to Panicker in the light of the definition of

the term "appointed to service" as occurring under the rules and other provisions governing service and seniority he is entitled to be ranked above

Panicker; in view of the vested rights which accrued to him on the basis of his legal entitlement in the light of the inclusion of his name in the select

list, the admitted vacancy available and the order of appointment passed by the Governor, his appointment as District & Sessions Judge cannot at

all be treated as temporary.

25. The law of equitable estoppel by acquiescence has been clearly stated by Fry, J. in *Wilmott v. Barber* 1880, 15 Ch D 96, 105: 43 LT 95. It

has been said therein that the acquiescence which will deprive a man of his legal rights should amount to fraud. A man is not to be deprived of his

legal right unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites

necessary to constitute fraud of that description, are stated thus:

(i) The plaintiff (i.e. the party pleading acquiescence) must have made a mistake as to his legal rights;

(ii) The plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of the

mistaken belief;

(iii) The defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed with the

right claimed by the plaintiff. If he does not know of it, he is in the same position, as the plaintiff, and the doctrine of acquiescence is founded upon

conduct with a knowledge of your legal rights;

(iv) The defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which

calls upon him to assert his own rights; and

(v) The defendant, the possessor of the legal right must have encouraged the plaintiff in his expenditure of money, or in the other acts which he has

done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the

court to restrain the possessor of the legal right from exercising it, but nothing short of this will do. These principles were followed and applied in

many cases in India.

26. The appellant was appointed by the Governor by transfer/ appointment order issued on 14.1.1992 and his seniority was to be considered as

provided under Rule 6 of the Rules which says that the seniority of a person appointed shall be determined with reference to the date of the order

of his first appointment to the category. Thus, apparently when the order dated 14.1.1992 was issued by the Governor, it would be the first

appointment for the determination of the seniority of the appellant. There is nothing in the order dated 14.1.1992 on the basis of which it can be

treated to be an appointment on temporary basis made by the Governor. It is apparent from the posting order dated 29.2.1992 that the High

Court, because of the integration of two Services w.e.f. 1.1.1992 prior to the issuance of the order of appointment on 14.1.1992, has treated the

order of appointment as a temporary one and, therefore, the posting order specifically mentioned that the appellant's appointment would be

temporary without there being any probationary rights. Thereafter on 21.2.1992, a fresh panel was prepared by the High Court for the purposes of

transfer/promotion to Category (2): District & Sessions Judge and the proposal for promotion of the officers in that list has been accepted by the

Governor by issuance of the order of appointment including that of the appellant on 15.7.1992. On 31.7.1992, the appellant's posting order was

issued. Posting order clearly indicated that the appellant was working as a temporary District Judge and by virtue of the order issued on 15.7.1992

he shall be treated as permanent District Judge. While issuing the posting order of the appellant in pursuance of the order dated 14.1.1992, the

High Court has committed a mistake in treating it to be an order of temporary appointment of the appellant when there was nothing to this effect in

the appointment order. When the posting order was issued on 29.2.1992, the appellant was well aware of the order of his appointment dated

14.1.1992 whereby he was appointed on permanent basis on the post of District & Sessions Judge, yet when the posting order was issued treating

him to be a temporary appointee which was inconsistent with the order dated 14.1.1992, the appellant did not raise any objection and readily

accepting the posting order joined the service on 7.3.1992 as temporary Additional District Judge. The posting order dated 29.2.1992 specifically

mentioned that he has been posted as a temporary Additional District Judge without any probationary rights and thus the appellant was well aware

of the mistaken belief of the High Court in appointing and posting him as a temporary employee. As there was no objection and protest by the

appellant, a fresh panel prepared, recommended and fresh order of appointment of appellant was issued by the Governor. Again when the fresh

appointment order was issued on 15.7.1992 by the Governor and the appellant was posted on 31.7.1992 treating his first appointment order as a

temporary appointment, no protest was made by him. In view of the fact that the Governor issued an order dated 15.7.1992 even when order of

14.1.1992 was in existence, it is apparent that the appointing authority has also treated the first order dated 14.1.1992 as an order of appointment

on temporary basis. It is, therefore, apparent from the second appointment order that the appointing authority as well as the posting authority have

all along treated the appellant as a temporary District Judge, but the appellant did not object on both occasions when he joined on 7.3.1992 and

on 31.7.1992 of he being treated as temporary District Judge. The act and action of the appellant in accepting his appointment as temporary one

amounts to his assent to the temporary appointment and the appellant throughout till he raised an objection on 29.10.1992 has slept on his right of

being appointed permanently on the post of District & Sessions Judge. By his conduct at the time of the issuance of the order by the High Court on

29.2.1992 and thereafter issuance of the second appointment order on 15.7.1992 with full knowledge of his own right and the act of the High

Court which infringes it, led the High Court to believe that he has waived or abandoned his right. Lord Campbell in *Cairncross v. Lorrimer*, 3 LT

130 held that ""generally speaking if a party having an interest to prevent an act being done had full notice of its being done, and acquiesce it, so as

to induce a reasonable belief that he consents to it and the position of the others is altered by their giving credit to his sincerity, he has no more right

to challenge the act to their prejudice than he would have had if it had been done by his previous license.

27. The aforesaid facts clearly make out an acquiescence of the appellant of accepting order dated 14.1.1992 being treated as temporary

appointment order on the post of District & Sessions Judge and he cannot now be permitted to change his position and claim the permanent

appointment from 14.1.1992 to claim seniority on the post. Besides this, the High Court has rightly held that in the absence of the challenge to the

second appointment order dated 15.7.1992 from the fresh panel dated 21.2.1992, that order will stand, though later in time, and has to be given

effect to as an order of appointing the appellant on permanent basis under Rule 6 of the Rules.

28. For the aforesaid reasons, the appeal is dismissed. However, there shall be no order as to costs.

S.B. Sinha, J.

Although I respectfully agree with the opinion of my learned brother Naolekar, J., I would like to add a few words.

2. Respondents No. 3 to 5 herein were granted selection grade much prior to the appellant. They have also been granted super-selection grade.

They have been thus placed in Category - I of the services. For all intent and purport they were promoted much prior to the appellant herein.

3. Such orders of promotion in terms of the Rules were granted on the basis of merit and ability. Seniority was considered to be relevant only

where merit and ability were approximately equal. The inter se seniority, therefore, does not remain the sole criteria.

4. The case of the appellant for the purpose of grant of selection grade as also super-time scale must have been considered alongwith the said

respondents. They must have been found to be more meritorious. In that view of the matter, it is, in our opinion, not a fit case where we should

even exercise our jurisdiction under Article 136 of the Constitution of India.

5. No doubt the Governor is the appointing authority of the District Judges in the State. However, the same in terms of the constitutional

provisions, was required to be done in consultation with the High Court. The High Court keeping in view the amendments made in the Rule treated

the appointment of the appellant as temporary. Apart from the fact that the appellant accepted his posting orders without any demur in that

capacity, his subsequent order of appointment dated 15th July, 1992 issued by the Governor had not been challenged by the appellant. Once he

chose to join the mainstream on the basis of option given to him, he cannot turn back and challenge the conditions. He could have opted not to join

at all but he did not do so. Now it does not lie in his mouth to clamour regarding the cut-off date or for that matter any other condition. The High

Court, therefore, in our opinion, rightly held that the appellant is estopped and precluded from questioning the said order dated 14th January,

1992. The application of principles of estoppel, waiver and acquiescence has been considered by us in many cases, one of them being 283397

stating:

He seems to have voluntarily appeared before the Committee and taken a chance of having a favourable recommendation from it. Having done so,

it is not now open to him to turn round and question the constitution of the Committee.

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