IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Neutral Citation No.2023:PHHC:163681-DB

CWP-19775-2023 (O&M)

Shikha and others

……Petitioners

Versus

State of Haryana and others

……Respondents

(2)

CWP-22818-2023

Anudeep Kaur Bhatti

……Petitioner

Versus

High Court of Punjab & Haryana and others

……Respondents

(3)

CWP-23804-2023

Parvesh Singla

……Petitioner

Versus

High Court of Punjab & Haryana and another

……Respondents

(4)

CWP-26217-2023

Kavita Kamboj

……Petitioner

Versus

High Court of Punjab & Haryana and others

……Respondents

Reserved on: 05.12.2023
Pronounced on: 20.12.2023

CORAM : HON'BLE MR.JUSTICE G.S. SANDHAWALIA
HON'BLE MS.JUSTICE LAPITA BANERJI

Present:- Mr. Gurminder Singh, Senior Advocate with
Ms. Harpriya Khaneka, Advocate for the petitioner (s)
(in CWP-19775-2023).

Mr. Rajiv Atma Ram, Senior Advocate with
Mr. Brijesh Khosla, Advocate for the petitioner
(in CWP-22818-2023) and for the applicant
(in CM-17255-CWP-2023 in CWP-19775-2023).

Mr. Sanjay Kaushal, Senior Advocate with
Ms. Ojaswini Gagneja, Advocate and
Ms. Pawelpreet Kaur, Advocate for the petitioner
(in CWP-26217-2023)

Mr. S.S. Narula, Advocate and
Mr. Sidharth Grover, Advocate for the petitioner
(in CWP-23804-2023).

Mr. Vikramjeet Banerjee, Additional Solicitor General of India
with Mr. Abhishek Singh, Advocate,
Mr. Siddhartha Sinha, Advocate,
Mr. Lokesh Sinhal, Sr. Addl. AG, Haryana,
Ms. Shruti Jain Goyal, Sr. DAG Haryana and
for the respondent-State.

Ms. Munisha Gandhi, Senior Advocate with
Ms. Shubreet Kaur Saron, Advocate,
Ms. Manveen Narang, Advocate,
Ms. Aakanksha Gupta, for respondent No.3 (High Court)
(in CWP-19775-2023) and for respondent No.1
(in CWP Nos.22818, 23804 and 26217 of 2023).

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G.S. Sandhawalia, J.

The present judgment shall dispose of four writ petitions i.e. CWP Nos.19775, 22818, 23804 and 26217 of 2023. The facts are being taken from CWP No.19775 of 2023.

2. In the said case, the petitioners who are working as Civil Judge (Sr. Division)/Chief Judicial Magistrate in the State of Haryana seek quashing of the impugned letter dated 12.09.2023 (Annexure P-14) by filing amended writ petition, whereby the State has refused to accept the recommendations made by the High Court recommending the names of 13 persons for appointment of Additional District & Sessions Judges in the State of Haryana. Resultantly, a writ of mandamus is sought for the directions to the State of Haryana to give effect to the recommendations made by the High Court on 23.02.2023 (Annexure R-3/1) by issuing the necessary orders of appointment of the 13 posts of Additional District & Sessions Judges under Rule 6(1)(a) of the Haryana Superior Judicial Service Rules, 2007 (for short '2007 Rules').

3. It is pertinent to mention that the initial claim of the 7 writ petitioners was to conclude the process of selection to be done by way of promotion of the selected/recommended candidates and the notification of appointments in pursuance of the letter dated 24.08.2022 (Annexure P-2) was sought to be done, whereby the process had been initiated by this Court through the Registrar General, since for similar recommendations the State of Punjab had issued necessary orders for similarly situated candidates vide order dated 25.04.2023 (Annexure P-7) and notified the promotions. Directions had been issued on 06.09.2023 by us as to why the State Government was dragging its feet in issuing the requisite notification, in view of the provisions of Article 233 of the Constitution of India (for short 'the Constitution'). Resultantly, the Additional Chief Secretary, Department of Home Affairs had been directed to come present to justify as to what was the reason to sit on the recommendations of this Court. It is in such circumstances, the order was passed on 12.09.2023 (Annexure P-14) which is now subject matter of challenge.

4. The reasoning which is mentioned in the order dated 12.09.2023 can be summarized in as much as that the State Government had opted to take legal opinion from the Ministry of Law and Justice, Government of India vide communication dated 17.04.2023 (Annexure R-1/7) The opinions dated 31.05.2023 (Annexure R-1/8) being received on 19.06.2023 and 26.07.2023 (Annexure R-1/9) was made the basis of the rejection on the ground that it was binding upon the State Government and the State was not bound to accept the recommendations of the High Court. The lack of amendment of the 2007 Rules and the lack of consultation of the criteria adopted for filling up the vacancies vide internal resolution of

this Court dated 30.11.2021 (Annexure R-3/2) was objected to on the ground that it lacked binding effect. A fall back was made on Article 233 of the Constitution and Rule 6(1) (a) of the 2007 Rules in as much as to hold that High Court was acting arbitrarily in giving its opinion to the Governor. Therefore, the recommendation was not accepted for promotion of the recommended candidates to the post of Additional District & Sessions Judges on the ground that both the State Government and Central Government had come to the conclusion that the settled procedure under Article 233 read with Article 309 of the Constitution had not been duly followed while sending the names to the Government for promotion. A request was then made to send revised recommendations by following the set procedure as per law.

5. The unselected candidates having filed **CWP Nos.22818, 23804 and 26217 of 2023** in principle challenge quashing of the recommendation sent by this Court of the selected candidates dated 23.02.2023 and also challenged the result of the selection process which was initiated vide letter dated 24.08.2022. Apart from that challenge has also been made to the recommendations dated 11.11.2021 of the Recruitment and Promotion Committee (Superior Judiciary Services) and the resolution dated 30.11.2021 (Annexure P-6) which prescribed 50% qualifying marks in viva-voce. Resultantly, a writ of mandamus is sought for directing the High Court to recommend the candidates for promotion to the post of Additional District & Sessions Judges under Rule 6 (1)(a) of the 2007 Rules without keeping the criteria of 50% marks in written examination and viva voce and in terms of the provisions of 2007 Rules. A writ of prohibition is also sought against the State of Haryana for not

accepting the recommendations made by the High Court which is alleged to be in violation of the 2007 Rules.

6. A common reply in CWP-22818-2023 has been filed, which was treated as the lead case for the purpose of completing the pleadings in the three petitions filed by the non-recommended candidates. The averments were made that no public notice was given regarding the requirement of 50% marks in viva voce at any stage of selection process prior to the suitability test and the un-communicated criteria could not be applied by the High Court against the candidates. The stand as such to the said averments was supported in a short reply filed by the Government on the ground that it was intervening to undo the injustice caused on a representation which had been received from one Prem Pal, Advocate. It was, accordingly averred that the criteria had been changed by the Full Court vide resolution dated 30.11.2021 at their own without any consultation with the State Government. The same had never been conveyed to the candidates while calling them for written examination or at the time of interview and nor any public notice was issued or put up on the website of the High Court. In such circumstances, recommendations on the basis of the revised criteria had not been accepted being in the teeth of the statutory rules of 2007 and the constitutional provisions of the Article 233 of the Constitution of India.

7. The stand of the High Court was that having participated in the selection process the candidates could not hold out to contrary and find faults and lacunas in the selection process. Reliance was placed upon the judgment passed in **Mahinder Kumar Vs. High Court of M.P, (2013) 11**

SCC 87, wherein the primacy of the High Court was acknowledged regarding adopting of an appropriate procedure in the matter of selection for direct recruitment and promotion of the entry level District Judges. The minimum benchmark which had been prescribed for the written test as well as for the viva voce was only for the purpose of getting the best candidates. The petitioners having been duly considered as per the criteria were not found successful for promotion and there was only a right of consideration and the candidates who did not fulfill the requisite benchmark could not agitate that their legal rights had been violated. The criteria had been uniformly applied to the candidates in both the States of Punjab and Haryana and all the candidates had been assessed by the same benchmark and criteria, which had been objectively applied. Therefore, no prejudice has been caused to any candidate on account of applying the fresh criteria. It was clarified that after 2017 there was no practice of uploading any criteria on the website and none of the notices was issued thereafter for conducting the tests for promotion reflecting any such criteria. Articles 233 to 235 of the Constitution comprised of a complete code which extended to the posting and promotion to persons belonging to the Judicial Service of the State and the High Court exercised primary control over the subordinate judiciary. It is pointed out that it was only after the directions had been passed on 06.09.2023 by this Court prior to the date of hearing on 13.09.2023, the State Government had issued the impugned letter in indecent haste which lacked grace.

8. Keeping in view the pleading of the parties, the arguments addressed and the perusal of the record, the following question would arise for consideration:-

(i) Whether the State Government was justified in seeking legal opinion from the Union of India and whether it amounts to third party interference in the facts and circumstances, on account of having received a letter from a busy body who is neither an aspirant and nor an effected party?

(ii) Whether the action of the State Government or the High Court was arbitrary and not in consonance of Article 233 of the Constitution of India and whether there was effective consultation with the High Court?

(iii) Whether the writ petitions filed by the unselected candidates are liable to be maintained there being no violation of Article 14 in as much as 39 candidates each from both the States of Haryana and Punjab had been interviewed on the basis of the criteria fixing 50% marks to be obtained in the interview?

(iv) If Question No.(ii) is found in favour of the High Court and against the State Government, whether a writ of mandamus is liable to be issued directing it to act upon the recommendation of the High Court dated 23.02.2023 which was in consonance with the provisions of the rule?

Arguments raised:

9. Senior Counsel for the petitioners in CWP-19775-2023 has raised various arguments including the fallacy of fall back on seeking the legal opinion from the Union of India by the State of Haryana on the ground that there was no such requirement under Article 233 of the

Constitution and neither there was any obligation on the High Court to disclose the criteria of fixing a benchmark, since the purpose was to select the persons on the basis of merit and it is not for the State Government to question the benchmark. It is, accordingly, argued that the criteria of 50% marks benchmark in viva-voce which had been fixed on 30.11.2021 which had to be obtained individually only would make a candidate eligible for promotion was neither the part of the rule which need to be amended and, therefore, the objection of the State Government was without any basis. It is submitted that the Rule provided that the promotion was to be made on the basis of merit-cum-seniority principle and, therefore, fixing the criteria which had been applied to one and all could not be objected to by the State. The unselected candidates had never represented and only on the basis of one letter dated 29.03.2023 (Annexure R-1/6) of a meddlesome interloper, namely, Prem Pal, an advocate of Kurukshetra the State had referred the matter for legal opinion. It is, accordingly, submitted that as per rule 6 (1) (a) of the 2007 Rules the principle of merit-cum-seniority and passing of a suitability test was the criteria which had to be read alongwith Rule 8, so that the candidates who were eligible for promotion could be assessed for deciding their merit and the suitability for promotion by way of a written test and the viva-voce. The suitability was to be ascertained and examined by keeping in mind legal knowledge and efficiency and the Annual Confidential Reports and candidates having grading as C (integrity doubtful) were not be considered for promotion. The High Court was the most suitable as per settled law to adjudge the candidates and had done so and it was not within the domain of the State to question the criteria fixed or the recommendations.

10. It is further submitted that the consultation if any was to be done with the High Court under Article 233 of the Constitution and no third party could be introduced which had been done. The High Court had considered all objections and representations, but instead of further consulting the High Court, the State Government had opted to take the opinion of the Union of India. It is submitted that the State Government was rather objecting on the principle of seniority and ignoring the principle of merit, whereas the rule itself provided merit-cum-seniority and, therefore, rather than promoting the competent persons, the State was propagating the case for the less meritorious and violating the said rule. The principle had been universally applied across for similar recruitment process in the State of Punjab and across all 39 candidates each for both the State. State of Punjab had notified the said recommendations whereas it was only the State of Haryana who had taken a different view.

11. The following judgments were relied upon by counsel for the petitioners: **Chandra Mohan Vs. State of Uttar Pradesh, AIR 1966 SCC 1987, Chandramouleshwar Prasad Vs. Patna High Court and others, (1969) 3 SCC 56, The High Court of Punjab & Haryana and others Vs. The State of Haryana and others, (1975) 1 SCC 843, State of Haryana Vs. Inder Prakash Anand HCS and others, (1976) 2 SCC 977, Hari Datt Kainthla and another Vs. State of Himachal Pradesh and others, (1980) 3 SCC 189, State of Jammu & Kashmir Vs. AR Zakki and others, (1992) Supp. 1 SCC 548, State of Bihar Vs. Bal Mukand Sah, (2000) 4 SCC 640, All India Judges' Association and others Vs. Union of India and others, (2002) 4 SCC 247, KH Siraj Vs.**

High Court of Kerala and others, (2006) 6 SCC 395 and **Dheeraj Mor Vs. High Court of Delhi (2020) 7 SCC 401.**

12. Senior Counsel for the High Court has submitted that the Recruitment and Promotion Committee (Superior Judicial Service) had decided way-back on 11.11.2021 and had recommended a fresh criteria in supersession of the earlier criteria dated 29.01.2013 duly approved in the Full Court meeting and had fixed the necessary 50% marks to be obtained in the written test and 50% marks in the viva-voce individually which would make a candidate eligible for promotion. It is submitted that since Rule 8 of the 2007 Rules provided the consideration of the Annual Confidential Remarks of the preceding 5 years of the officers concerned to be taken into consideration and also an officer having grading as 'C' (Integrity Doubtful) was not to be considered eligible for promotion. Thus, a recommendation had been made that at least 4 B+ Good ACRs should be there in the preceding 5 years and the remarks should not contain doubtful integrity, as per paragraph (iii) of the recommendation pertaining to the ACRs and pertaining to the rule. The Full Court as such in its meeting dated 30.11.2021 (Annexure R-3/3) had only modified the paragraph No.(iii) of the benchmark of the ACRs in a different manner and had approved the report fixing a higher criteria of cut-off but given a recommendation to amend the rule regarding the issue of ACRs only which was to be examined by the Recruitment and Promotion Committee (Superior Judicial Service) and the Rule Committee.

13. She has further submitted that thereafter, another meeting had been held on 11.02.2022 (Annexure R-3/4) wherein recommendation was

made that the word 'and' be inserted at the end of sub-Rule (i) and before sub-Rule (ii) and the proviso of Rule 8 be substituted which provides that an officer with an entry of integrity doubtful in any year shall not to be eligible to appear in the said examination. The said recommendation was duly considered by the Full Court on 07.03.2022 (Annexure R-3/5) and the report as such was accepted and the State Governments were directed to issue necessary notification qua the amendment of the relevant rules from the date of the Full Court meeting dated 07.03.2022. It was, accordingly, pointed out that on 14.03.2022 (Annexure R-3/6) the State Government had been intimated the said recommendation and necessary recommendation had been made to issue notification qua amendment in the relevant rules, which apparently has never been done and neither any response has been received from the State Government. There was no dispute regarding the amendment of criteria of requirement of 50% marks in the interview which is one of the reason of rejection by the State and, therefore, the ground of rejection itself is *per se* on a wrong basis that the amendment of the rules had not been done.

14. Reference was made to the rules (Annexure P-1) to point out that same had been issued in exercise of the powers conferred by Article 233 read with Article 309 of the Constitution of India and the Governor of Haryana in consultation with the High Court had made the rules regulating the recruitment and conditions of service of persons to the Haryana Superior Judicial Service. It was, accordingly, argued that the consultation was to be done with the High Court and not to the contrary and the words of the Article were explicit wherein it was mentioned that the appointment of persons and posting of promotion to the District Judges shall be made

by the Governor of the State in consultation with the High Court. It was, accordingly, stressed that Rule 6 (1) (a) provided the principle of merit-cum-seniority and the passing of a suitability test. Rule 8 provided the procedure for promotion for assessing and testing the merit and the suitability of a member of the Haryana Civil Service (Judicial Branch) and the same was to be done on the basis of written objective test of 75 marks and viva voce of 25 marks, which was based on the aspect of ascertaining and examining the legal knowledge and efficiency in legal field of the candidates. The ACRs preceding five years had to be taken into consideration and the integrity aspect were further relevant considerations and it was for the High Court to consider the suitability and not for the State Government. The High Court could thus devise its procedure which had been duly done on 11.11.2021 (Annexure R-3/2) and approved by the Full Court on 30.11.2021 (Annexure R-3/3) and proposed the amendment of the rules, so that preference is to be given to merit.

15. It was pointed out that in pursuance of the criteria fixed necessary recommendations had been made of 13 judicial officers against the available vacant seats and the necessary approval of the Government was sought under Rule 6 (1) (a) which was to be conveyed and there was no reference to Rule 8, which was only within the purview of this Court. Vide letter dated 02.03.2023 (Annexure R-1/4) a clarification had been sought that the State Government being the appointing authority was wanting to take a consolidated decision regarding promotion orders of recommended members which would be clear from the said letter, whereby a reference had been made to an earlier selection process of the year 2019 pertaining to one Harish Goyal, Civil Judge (Sr. Division). It is,

thus, pointed out that in effect the State Government was wanting to highjack the decision making and the issue regarding 2019 selection process had already been given a quietus in as much as the case for consideration for relaxation of age had been rejected on 28.05.2021 and duly communicated to the Government, which fact had also been duly clarified in the letter dated 22.03.2023 (Annexure P-12) issued by the Registrar General of this Court. It is pointed out that on a representation made by one Prem Pal, an advocate of Kurukshetra dated 29.03.2023 the State Government had entertained his representations whereby for the first time confidential letters *inter se* the State Government had been referred to and the case of Harish Goyal, Shikha the petitioner in CWP-19775-2023 and Madhulika had been put forth and the objection had been taken regarding the minimum 50% marks to be obtained in the viva-voce. It is submitted that the said person was a stranger as such who had requested for declining the recommendations of the High Court or in the alternative prayed that consultation be made, so that fresh list of suitable officers be called. It is further submitted that on the basis of the said representation the matter was referred to the Union of India by the State Government vide communication dated 17.04.2023 which was in sharp contrast to the provisions of the Constitution. It was pointed out that reference had been made by the Chief Secretary for seeking opinion while referring to the original noting file dated 07.04.2023 which had been retained by this Court which had been produced on 14.09.2023. It was further pointed out that the opinion had thus been sought from the Department of Justice, Ministry of Law and Justice vide letter dated 17.04.2023 (Annexure R-1/7) and in pursuance of the said communication first opinion of the said

department dated 31.05.2023 had been received on 19.06.2023. Second opinion from the Department of Legal Affairs dated 26.07.2023 was received on 03.08.2023. It was pointed out that blindly following the opinion received vide letter dated 26.07.2023, the rejection order was passed vide impugned order dated 12.09.2023 (Annexure P-14), showing lack of total non-application of mind whereby the Government had decided not to accept the recommendation on the strength of the opinion of the Central Government and by taking the plea that proper procedure had not been followed while sending the names for promotion. Thus, counsel for the High Court in a manner has supported the arguments raised by the Senior Counsel for the petitioner in CWP-19775-2023.

Defence of the State:

16. Mr. Banerjee appearing for the State sought to defuse the situation and softened the stand by recoursing to an argument that the Constitutional scheme under Article 233 of the Constitution and the rules framed under Article 309 of the Constitution envisage about the consultation with the High Court. The balance envisaged under the Constitution had to be calibrated and taken care of, which is the spirit of the judgments which have also been relied by Mr. Gurminder Singh, Senior Counsel for the petitioner and also by him, though reading from different parts of the same judgments. It is his case that on an earlier occasion on 29.01.2013 (Annexure R-1/11), keeping in view the report of the Committee of Judges dated 19.11.2012 the criteria had been fixed for promotion to the post of Additional District & Sessions Judges in both the States of Punjab and Haryana. He has, accordingly, referred to the

communication addressed on 18.11.2014 (Annexure P-10 in CWP-22818-2023) to the then prospective candidates when the vacancies were to be filled under Rule 6(1)(a) of the 2007 Rules on the same principle of merit-cum-seniority and passing of suitability test. It is pointed out that the Registrar General of the High Court had in no clear terms notified the proposed amendment which was to be done under Rule 8 of the 2007 Rules as per the criteria adopted by the Full Court in the meeting held on 29.01.2013 and it could be downloaded from the website of the High Court. It is, thus, pointed out that candidates had been put to notice that the suitability test would consist of written objective test of 75 marks and the viva voce of 25 marks for assessing the legal knowledge and efficiency in the legal field in discharging higher duties and responsibilities. The 50% marks in aggregate of written test and viva voce would make a candidate eligible. Similarly they were also informed that as per Clause (v) of Rule 8 that the judgments delivered in a month or months during the last three years would be examined by the Committee and if the Committee grades the judgments below average, the officer shall not be liable to be considered for promotion. It is, accordingly, submitted that the change in criteria was made on 11.11.2021 (Annexure R-3/2) prescribing the 50% benchmark both in the written examination and the same had been approved by the Full Court on 30.11.2021 (Annexure R-3/3) had not been notified to the candidates. The proposal to amend the rules had been sent to the Rule Committee vide the said decision of the Full Court and thereafter in the joint meeting recommendations had been made on 11.02.2022 (Annexure R-3/4) which had then been accepted by the Full Court on 07.03.2022 (Annexure R-3/5) and the necessary letter had been

issued to the State Government to take action on the proposal of the amendment of the rules on 14.03.2022 (Annexure R-3/6).

17. It is, thus, the case of Mr. Banerjee that the criteria having been changed, the consultation process was not complete which was the requirement under Article 233 of the Constitution. He has further pointed out that the process of putting the recruitment of 39 eligible candidates into motion was made on 24.08.2022 and said communication addressed to them did not mention the change of criteria. The recommendation made subsequently on 23.02.2023 had been promptly responded to on 02.03.2023 (Annexure P-11) and the Chief Secretary had written to the Registrar General of the High Court asking for the Annual Confidential Reports (ACRs) and the status of the ACRs of other persons pending for approval and the fact that the senior officers had been left out and their names had not been mentioned in the recommendations. Therefore, clarification was sought regarding the criteria of selection and the suitability test, on the basis of which the principle of merit-cum-seniority had been affected and that names of senior officers had not been recommended. It is further the argument of Mr. Banerjee that the High Court while responding on 22.03.2023 (Annexure P-12) closed the chapter of consultation by addressing the said communication and without providing the criteria by holding out that in view of the law laid down, the opinion of the High Court was final and binding upon the State Government and by notifying to the State that the said candidates had not been successful in the suitability test conducted in terms of the said rules and, therefore, their names had not been recommended for promotion and two candidates as such were below the minimum age of 35 years. It is his

argument that a representation had then been received on 29.03.2023 from one Prem Pal, Advocate at Kurukshetra on 03.04.2023 which had been put up to the Government and in such circumstances a decision had been taken at the higher level to get an opinion from the Government of India. The said line of action was not a consultative process in any manner according to Mr. Banerjee and could not be said to be violative of Article 233 of the Constitution. On receiving the opinion dated 31.05.2023 from the Department of Justice and the second opinion from the Department of Legal Affairs dated 26.07.2023 the decision had been communicated to the High Court by passing the impugned order and the sacred relationship had not been breached as it was an independent decision of the State not to accept the recommendation of the High Court. It was, accordingly, argued that it is an independent decision of the State, though it might have been based on the opinion of the Union of India.

18. He, accordingly, placed reliance upon the judgment in **State of Assam v. Kusewar Saikia & Anr. (1969) 3 SCC 505,** wherein the Constitutional Bench of the Apex Court had held that the appointment of a person as Additional District Judge would be done by the Governor under Article 233 of the Constitution. Similarly, the judgment in **Chandramouleshwar Prasad (supra)** has been referred to point out there should have been proper consultation once a query as such had come from the Government and all the changes should have been placed before the State by the High Court but the same was not done and the consultation was required under the Constitution. While referring to the judgment passed in **State of Kerala Vs. Smt. A. Lakshmikutty and others (1986) 4 SCC 632,** it was argued that in the said case a panel of 14 names had

been sent for promotion as District Judges to fill up the 5 vacancies and, therefore, it was observed by the Apex Court there has to be an inter-change of views between the High Court and the State Government and the consultation had to be done with the High Court, which was to be an effective consultation. The High Court had herein virtually issued a fait accompli to the Governor to act on its recommendation, which was contrary to the advice of the Council of Ministers and thereby entered into the process of decision making which was constitutionally impermissible. The power of issuance of a writ of mandamus was limited and was wholly impermissible which has now been sought for.

19. He, accordingly, argued that the State Government had only asked to revise the list by following the said procedure as per law and once the State Government for good and pertinent reasons found it difficult to accept the recommendation, the consultation process should continue while referring to **Madan Mohan Choudhary Vs. State of Bihar and others, (1999) 3 SCC 396.** He stressed upon the word 'consult' which was the subject matter of consideration in the said case that the Constitution has conferred upon the High Court a sacred and noble duty to give the best of advice or opinion to the Governor and that it was a matter of trust and confidence between the Governor and the High Court. While relying upon the judgment passed in **Vimal Kumar and others Vs. State of Haryana and others, 2018 SCC Online P&H 1238,** SLP of which is pending before the Apex Court, it is pointed out that the test in question was only a suitability test and not a competitive test and the seniority of the persons had been restored by the Coordinate Bench which had been affected on account of promotion being given to the juniors having passed

the suitability test and promoted at an earlier point of time. While referring to the judgment in **N. Suresh Nathan and another Vs. Union of India and others, 1992 Supp.(1) SCC 584** it was contended that the change of criteria had been done wrongly and the candidates had not been put to notice. In the said judgment the Apex Court had held that practice which was being followed should not be deviated by upsetting the settled practice and same was held to be not justified. While referring to the judgment passed in **Sivanandan C.T. and others Vs. High Court of Kerala and others, 2023 SCC Online SC 994**, it is pointed out that change of criteria as such has been frowned upon by the Constitutional Bench and the Apex Court had come to the conclusion that the High Court's action was not justified and was not legally tenable and failed on the touchstone of fairness, consistency, and predictability and had been termed as arbitrary and violative of Article 14. The judgment rendered in **KH Siraj(supra)** was also relied upon to contend that though the rule in question was different but the constitutional balance had to be maintained and the responsibility of the High Court was much more. The greater power exercised by this Court had to be done with greater responsibility and the larger view had to be taken and the candidates who had been put to loss, the same had to be restored. Mr. Banerjee has referred to Rule 19 to submit that it was for the Government to make regulations which was not inconsistent with the rules and the residual power and the interpretation was to be decided by the Government in consultation with the High Court.

20. Mr. Gurminder Singh, Senior Advocate for the petitioners/recommended candidates in rebuttal has pointed out that even the decision as such of the State opened with the fait accompli that it was

bound by the opinion of the Union of India and decision was taken on the basis of the legal opinion of the Union of India and there was non-application of mind. The State has chosen not to come back to the High Court and there was lack of consultancy on their part. The State as such could not argue and it is unexpected from the State to say that meritorious candidates could not be selected in the teeth of the rule. It was the submission of the senior counsel that a benchmark was there in the mind of the interviewing authorities and a uniform criteria had been fixed which was applicable to one and all and the suitability test was a criteria which was not liable to be interfered with.

Arguments of counsels for the petitioners/non-recommendees

21. Mr. Rajiv Atma Ram, Senior Advocate led the charge for the unselected candidates alongwith Mr. Sanjay Kaushal, Senior Advocate. He has referred to Rule 6 (1) (a) to submit that promotion process had been set in motion and the candidates had been called for interview without putting them to notice regarding the change of criteria. He has placed reliance upon the judgment passed in **Renu and others Vs. District and Session Judge, Tis Hazari and another, 2014 (2) SCT 201** to argue that there should have been transparency and the eligibility criteria should have been published with certainty and clarity, so that the candidates were well aware. Similarly, while placing reliance upon the judgment passed in **State of Jammu & Kashmir and others Vs. District Bar Association, Bandipora, 2017 (1) SCT 439** arguments were raised that the recruitment of public employment must be in terms of prevailing rules and as per the constitutional principles while keeping in mind Article

14 and 16 of the Constitution. Similarly, reliance was placed upon **Anjali Bhardwaj and others Vs. Union of India and others, (2019) 18 SCC 246** that short-listing criteria should be known to each of the candidate. Reliance has also been placed upon the Coordinate Bench judgment passed in **Delhi Assam Roadways Corporation Ltd. Vs. The Haryana Urban Development Authority and others, 2008 (3) RCR (Civil) 389.**

22. Mr. Atma Ram has also raised the argument that the High Court cannot add to the rules for filling up the gaps under Article 162 of the Constitution as the said power lies with the Government and under Article 166 of the Constitution all executive action can be taken by the Governor. It was argued that there was no mention of the rules made in Chapter VI comprising of Articles 233 to 237. It was argued that it is only within the ambit of the State to make rules under Rule 19 as the rule was silent and the High Court was not competent to amend the Rules. The 50% cut-off which had been fixed has not been appreciated in **Sivanandan C.T. (supra)** and accordingly it was argued that there was legitimate expectations of the candidates, which had been shattered by putting the said requirement in place without notifying it to the candidates. It was, thus, argued that it was a arbitrary exercise done by the High Court while falling back upon the judgment passed in **A.R. Zakki (supra)** to contend that the consultation and open mind of the High Court was lacking, which should have been taken into consideration in view of the State Government. The power of appointment vested with the Governor had reliance was placed upon the judgment of the Apex Court passed in **High Court of Punjab & Haryana Vs. State of Haryana and others, (1975) 1 SCC 843.** While referring to **KH Siraj (supra)** it was contended that the

rules therein were different and, therefore, in the facts and circumstances the minimum 50% fixed had been upheld. Reliance has also been placed upon the judgment of the Full Bench of this Court passed in **Head Constable Sardul Singh Vs. Inspector General of Police, Punjab and others, 1970 AIR (Punjab & Haryana) 481** that the said decision was against the rules and, therefore, could not be applied.

23. Mr. Atma Ram has relied upon the judgment passed in **All India Judges' Association (supra)** to contend that the report of the Shetty Commission had been accepted by the Apex Court and the same had further been relied upon in **Ramesh Kumar Vs. High Court of Delhi and another, 2010 (1) SCT 717.** Reliance has been placed upon the judgment in **Ramesh Kumar (supra)** to contend that the no minimum marks could be fixed for interview would also not be helpful in view of the fact that there was specific rule as such which was subject matter of consideration which provided that the High Court could prescribe the criteria for such interviews. Resultantly, the principle of waiver was put into place while placing reliance upon the judgment in **M/s Motilal Padampat Sugar Mills Co. Ltd. Vs. The State of U.P and others, 1979 AIR (SC) 621**. It was contended that the plea of the High Court in its written statement itself was that the criteria had not been uploaded on the website and no notice had been issued and candidates had not been notified for the said change of criteria and, therefore, they could not now turn around and say that the writ petition was not maintainable.

24. Ms. Munisha Gandhi, Senior Advocate for the High Court in rebuttal to the arguments raised by Mr. Rajiv Atma Ram and Mr. Sanjay

Kaushal has pointed out that the rule itself provided the discretion to the High Court with the usage of word 'may'. Once now recommendees had themselves admitted that there was a criteria fixed in the year 2013, they could not be permitted to blow hot and cold that the High Court would have no power. It was pointed out that it a practice established to fill up the gaps which are there in the rules and, therefore, the candidates could not question as to the number of persons called to fill up the posts or to object what type of questions had to be asked in the interview. It was the sole discretion of the High Court and once it was put in black and white and decided by the Full Court and applied to candidates from both the States, it was beyond the arena of questioning by the candidates who had taken a chance being aware of the rule and being trained judicial minds themselves.

25. The judgment in **Sivanandan C.T. (supra)** was rather relied upon to point out that it was in peculiar circumstances since the scheme itself notified provided no cut-off for viva voce and interference had been done by the Apex Court. The reasons which had prevailed were primarily that the decision was contrary to the Rule 2 (c) which provided merit had to be drawn up on the basis of marks obtained in the aggregate. The scheme had been notified which also provided that there was no cut-off marks in respect of the viva voce and thirdly the notification had been issued on 30.09.2015 clarifying the process of short-listing on the basis of length of practice of the members of the Bar and lastly the decision had been taken to prescribe the cut-off marks after the test had been conducted. It was the case of the counsel for the High Court that equal treatment was given and, therefore, Article 14 to be applied and it was not a case of

different practice and rather candidates from both the States were weighed on the same golden scale and the same parameters. The sole purpose was that the best candidate should come forth and not as contended by the counsel for the non-recommendees that the best should not come forth. Merely because on an earlier occasion in the year 2013 the criteria had been put in public domain, the High Court was not bound by the same. While referring to communication dated 31.05.2019 (Annexure P-9) it was pointed out that the promotions had been earlier made in the year 2019 and there was no reference to criteria of 2013 and the High Court had not been notifying any such criteria after the year 2017. Therefore, fall back was made on the judgment of **Sujata Kohli Vs. Registrar General, High Court of Delhi and others, AIR 2020 SC 2512** that the fixing of criteria was within the domain of the High Court. It was also pointed out that un-selected candidates were cocksure about being selected as pointed from the representation dated 20.07.2013 (Annexure P-17) wherein a representation was made to this Court by the non-recommended candidate who alleged having secured more than 50% marks in the written examination and she was under a mis-conceived notion that she had already made it through the suitability test. It was, accordingly, submitted that if that was the case there was no reason as such to provide the interview of 25 marks. The sole criteria was thus prescribed not only to clear the objective test being a mere suitability test which was not even of those standards which a direct recruit would have to undergo by giving a written test of 750 marks and thereafter also to undergo through the grind of the interview which was of 250 marks. The sole purpose was to test the acumen and alertness of the judicial officers and once the candidates had

not been found suitable in the interview they could not as such contend that they have any legal or vested right as the rule itself provided that the merit-cum-seniority was to be taken into consideration. It was pointed out that the State had never been earlier informed about the criteria while referring to the communications of the year 2013-2014 and 2019 and the High Court would only communicate to them regarding the amendment in the rules. Therefore, it was misconceived notion that there has to be any consultation amongst the High Court and State to that extent on the aspect of criteria of the suitability test and the viva-voce.

26. Senior Counsel for the High Court further has clarified the said issue that there could be no comparison with the selection process of direct recruitment which did not provide any criteria of minimum marks for the interview. It was submitted that as per the rule it was a different stream for filling up the posts. The argument of Mr. Rajiv Atma Ram was validly repelled wherein reliance had been placed upon the report of the Shetty Commission by pointing out from the judgment of **All India Judges' Association (supra)** that the recommendation of Justice Shetty Commission had been accepted subject to modifications and the observations that there should be no cut-off in the interview and the same was only qua the direct recruitment. Reference was made to paragraph No.27 of the said judgment to point out that rather observations had been made that for the purpose of promotion there should be a suitability test which would lead to an incentive amongst the judicial officers to compete with each other and that there should be a objective method of testing the suitability of the subordinate judicial officers for promotion to higher judicial service and certain minimum standards had to be set. Further

directions were given that 25% of the posts should be filled up by way of promotion strictly on the basis of merit through the limited departmental competitive examination and rules should be framed in this regard. Relevant portion of the said judgment reads as under:-

> "27. Another question which falls for consideration is the method of recruitment to the posts in the cadre of higher judicial service i.e., District Judges and Additional District Judges. At the present moment, there are two sources for recruitment to the higher judicial service, namely, by promotion from amongst the members of the sub-ordinate judicial service and by direct recruitment. The subordinate judiciary is the foundation of the edifice of the judicial system. It is, therefore, imperative, like any other foundation, that it should become as strong as possible. The weight on the judicial system essentially rests on the subordinate judiciary. While we have accepted the recommendation of the Shetty Commission which will result in the increase in the pay scales of the subordinate judiciary it is at the same time necessary that the judicial officers, hardworking as they are, become more efficient. It is imperative that they keep abreast of knowledge of law and the latest pronouncements, and it is for this reason that the Shetty Commission has recommended the establishment of a judicial academy which is very necessary. **At the same time, we are of the opinion that there has to be certain minimum standards, objectively adjudged, for officers who are to enter the higher judicial service as Additional District Judges and District Judges.** While we agree with the Shetty Commission that the recruitment to the higher judicial service i.e., the District Judge cadre from amongst the advocates should be 25 per cent and the process of recruitment is to be by a competitive examination, both written and viva voce, **we are of the opinion that there should be an objective method of testing the suitability of the subordinate judicial officers for promotion to the higher judicial service**. Furthermore, there should also be an

> incentive amongst the relatively junior and other officers to improve and to compete with each other so as to excel and get quicker promotion. In this way, we expect that the calibre of the members of the higher judicial service will further improve. In order to achieve this, while the ratio of 75 per cent appointment by promotion and 25 per cent by direct recruitment to the higher judicial service is maintained, we are, however, of the opinion that there should be two methods as far as appointment by promotion is concerned : 50 per cent of the total post in the higher judicial services must be filled by promotion on the basis of principle of merit-cum-seniority. For this purpose, the High Courts should devise and evolve a test in order to ascertain and examine the legal knowledge of those candidates and to assess their continued efficiency with adequate knowledge of case law. The remaining 25 per cent of the posts in the service shall be filled by promotion strictly on the basis of merit through the limited departmental competitive examination for which the qualifying service as a Civil Judge (senior division) should be not less than five years. The High Courts will have to frame a rule in this regard."

27. It is, accordingly, pointed out that necessary rules were framed in the year 2007 which provided the criteria as per the judgment. The judgment of the Apex Court passed in **Ramesh Kumar (supra)** was accordingly distinguished on the ground that it was a case of direct recruitment and the unamended Delhi Higher Judicial Service Rules, 1970 were subject matter of consideration and in such circumstances it was held that question of fixing minimum marks in the interview did not arise. While placing reliance upon the judgment of **Syed T.A. Naqshbandi & Ors. v. State of J & K & Ors. (2003) 9 SCC 592,** it is pointed out that while considering the judgment in **All India Judges' Association (supra)** it has been specifically noticed that reliance upon the Shetty Commission

as such was not appropriate once statutory rules had come into play and would cover the area which has not been specifically covered. It is pointed out that once a criteria had been formulated by the High Court for the purpose of adjudging the merit, efficiency and integrity, the same cannot be said to be either arbitrary or irrational or illegal in any manner and Article 235 of the Constitution had also been brought into play to hold that it could not be challenged. Relevant portion of the said judgment reads as under:-

> "8. Reliance placed upon the recommendations of Justice Jagannatha Shetty Commission or the decision reported in All India Judges' Association & Others vs. Union of India & Others (supra) or even the resolution of the Full Court of the High Court dated 27.4.2002 is not only inappropriate but a misplaced one and the grievances espoused based on this assumption deserve a mere mention only to be rejected. The conditions of service of members of any service for that matter is governed by statutory rules and orders, lawfully made in the absence of rules to cover the area which has not been specifically covered by such rules, and so long they are not replaced or amended in the manner known to law, it would be futile for anyone to claim for those existing rules/orders being ignored yielding place to certain policy decisions taken even to alter, amend or modify them. Alive to this indisputable position of law only, this Court observed at Para 38, that " we are aware that it will become necessary for service and other rules to be amended so as to implement this judgment". Consequently, the High Court could not be found fault with for considering the matters in question in the light of the Jammu and Kashmir Higher Judicial Service Rules, 1983 and the Jammu and Kashmir District and Sessions Judges (Selection Grade Post) Rules, 1968 as well as the criteria formulated by the High Court. Equally, the guidelines laid down by the High Court for the purpose of adjudging the

efficiency, merit and integrity of the respective candidates cannot be said to be either arbitrary or irrational or illegal in any manner to warrant the interference of this Court with the same. Even dehors any provision of law specifically enabling the High Courts with such powers in view of Article 235 of the Constitution of India unless the exercise of power in this regard is shown to violate any other provision of the Constitution of India or any of the existing statutory rules, the same cannot be challenged by making it a justiciable issue before courts. The grievance of the petitioners, in this regard, has no merit of acceptance.

Question No.(i):

Whether the State Government was justified in seeking legal opinion from the Union of India and whether it amounts to third party interference in the facts and circumstances, on account of having received a letter from a busy body who is neither an aspirant and nor an effected party?

28. It is not disputed that on 23.02.2023 recommendations had been made for the promotion of the 13 judicial officers as Additional District & Sessions Judges and the necessary approval was sought to be conveyed to the High Court. The same was done after the interview had been duly conducted qua 39 candidates who had been put to notice vide communication dated 24.08.2022 (Annexure P-2). Their interviews were conducted on 30.11.2022 and 01.12.2022. It is not the grouse of any of the non-recommendees also, that the recommendations which were done by the interview board were biased or the said candidates had not been given due time. The objection for the first time was interestingly raised by the State by addressing a communication dated 02.03.2022 (Annexure P-11) wherein the ACRs of the recommended officers and the status of the ACRs of others was asked for. The justification as such was sought as to

why the officers who were "senior than the ones'" recommended had made the grade and thus the criteria of merit and suitability test was sought to be clarified alleging that the principle of merit-cum-seniority has been affected and officers senior to the recommended officers have not been recommended. Similarly reason for not recommending the names of 38 officers as per the available vacancies was questioned by the State Government. Relevant portions of the objections read as under:-

> "1. Please provide Annual Confidential Reports (ACR's) of recommended officers and the status of ACR's of others pending for approval of Hon'ble Full Court.
>
> 2. Kindly provide justification/clarification regarding Judicial Officers at Sr. No. 3, 4, 6, 7, 8, 10 & 11 of 2007 Batch and Sr. No. 13, 14 & 15 of 2009 Batch and Sr. No. 22, 24 & 25 of 2010 Batch (as per gradation list available at https://highcourtchd.gov.in/sub pages/top menu/dist/ud/pdf/ Haryana Gradation1.pdf). These officers seem to be senior to the last/current recommended officer but their names are not mentioned/recommended to the post of ADSJ in the lists. You are further requested to clarify the criteria of merit and suitability test, on the basis of which principle of merit cum-seniority has been affected and names of officers senior to the recommended officers have not been recommended.
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> xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
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> 5. As per status report filed by your office in the Apex Court and copy conveyed to this office vide letter No. 75/spl Litigation/L-1 dated 18.01.2023 in Civil Appeal No. 1867 of 2006 titled as Malik Mazhar v UPPSC, 39 vacancies in cadre of Haryana Superior Judicial Service under promotions quota are available. The case was listed for hearing on 28th February, 2023 and the State Government has been asked to be present through video conferencing in this case. Kindly provide the reason behind not recommending the names of 38 officers (as per

available vacancies) so that the directions of the Hon'ble Supreme Court may be duly complied with.

You are therefore, requested to provide clarification/justification in respect of above points, so that the State Government, being Appointing Authority can take consolidated decision regarding promotion order in respect of recommended/not recommended members in the cadre of the Haryana Civil Service (Judicial Branch) and in accordance with rule 10(i)(a) of the Haryana Superior Judicial Service Rules, 2007."

29. Reply to the said letter was given on 22.03.2023 (Annexure P-12) by the Registrar General of the High Court wherein it was clarified that the rule provided merit-cum-seniority principle read with the criteria laid down by the High Court for assessing the suitability of the candidate. It was specifically mentioned that candidates had not been successful in the suitability test in terms of the rules read with the criteria and their names had not been recommended on that ground. Two of the candidates were stated to be under age not having completed the minimum age of 35 years and, therefore, had not been called. Resultantly, while placing reliance upon Articles 233 to 235 of the Constitution and the judgments of the Apex Court, the State Government was requested to grant the necessary approval. Similarly on the query as such on the 39 posts which had not been filed up, it was clarified once the said process is complete, the process for remaining vacancies would be initiated. Relevant portion of the said reply reads as under:-

"That the recommendations contained in letter No. 117/GazI/VI.F.8 dated 23.02.2023 of this Court for appointment to the 13 posts of Additional District and Sessions Judges in the State of Haryana by way of promotion, process for which only

was initiated by this Court, were made strictly in terms of Rule 6(1)(a) of Haryana Superior Judicial Service Rules, 2007 which prescribes merit-cum- seniority read with criteria laid down by this Court for assessing suitability of a candidate for such appointment irrespective of (except Sr. No. 22 and 25] mentioned in the letter under reference were not successful in the suitability test conducted in terms of the said rules read with the said criteria, their names were not recommended for appointment by way of promotion So far as candidates having Sr. No. 22 and 25 mentioned in the said letter are concerned, at the time of initiation of process for the said appointment, they had not completed the minimum age of 35 years and were accordingly not called for the suitability test as in terms of the above referred to decision dated 12.09.2019 of this Court, they were not eligible for being considered for such appointment.

That all appointments and promotions concerning judiciary are under the control and supervision of this Court. All queries raised in the letter stand addressed and the recommendations in question have already been approved by the Full Court. Vide this Court's letter No. 851/Gazi./VI.F.8 dated 07.12.2019, the Government of Haryana has already been communicated that the recommendations of this Court are binding on the State Government under Article 235 of the Constitution of India.

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That as soon as the process for appointment and posting of 13 officers recommended for appointment through letter dated 23.02.2023 of this Court is completed, the process for filling up remaining vacancies in the Haryana Superior Judicial Service under promotion quota shall be initiated.

In view of the above quoted orders, you are hereby again requested that the approval/orders of the Government for appointment of 13 Haryana Civil Services (Judicial Branch) Officers, as Additional District and Sessions Judges by promotion under rule 6(1)(a) of the Haryana Superior Judicial Service Rules, 2007, as decided by this Court vide letter No.

117 GazI/VI.F.8 dated 23.02.2023. may be accorded and conveyed to this Court, immediately.

30. It is the case of the State itself as pleaded in the written statement that having received the letter of the High Court dated 22.03.2023 it had received the letter from one Prem Pal, Advocate dated 29.03.2023 on 31.03.2023. It was the said person who had raised the objection for the first time that the requirement of 50% marks in the viva-voce was not communicated to the candidates and the fact that the High Court was not competent to fix the minimum cut-off vide its own resolution. The cut-off on the basis of a internal resolution was thus stated to be an illegal and arbitrary act and, therefore, the State Government must intervene to stop the injustice. Admittedly, the State with great alacrity acted on the said letter, instead of getting back to the High Court to consult the High Court with regard to the criteria of 50% cut-off which had been put in the interview which apparently was done way-back on 11.11.2021 much before the process had even been initiated. The original file which had been summoned initially and produced by the Chief Secretary would go on to show that the said communication apparently was firstly received by the Chief Secretary on 31.03.2023 though the formal stamping has been put in the Chief Secretary's office on 03.04.2023. The noting portion would go on to show that the Government made an office noting on the said date itself. i.e. 03.04.2023 and the Chief Secretary on 07.04.2023 put down the following options:-

" a) We may seek the opinion of the Advocate General on the legal issues involved in the matter.

b) Since the High Court is pressing for expeditious approval, we may consider granting either approval for this proposal or seek further clarification as suggested."

31. On 17.04.2023, the following decision was taken in the presence of the Advocate General, whereby the matter was referred to the Government of India:-

"The matter was discussed with CM in the presence of Advocate General and CPSCM on 16 April 2023 at 06:00 PM. After detailed discussions, it was felt that the Government of India (Ministry of Law and Justice) may be requested to advise in the matter to pursue for further action. Accordingly, letter be drafted."

Relevant Provisions:

32. Article 233 of the Constitution reads as under:-

"233. **Appointment of district judges**.—(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

33. Relevant provisions of 2007 Rules read as under:-

Method of recruitment.

5. Recruitment to the Service shall be made by the Governor,-

(i) by promotion from amongst the Haryana Civil Servic (Judicial Branch) in consultation with the High Court, and

(ii) by direct recruitment from amongst eligible Advocates o the recommendations of the High Court on the basis of th written and *viva voce* test conducted by the High Court.

Regular recruitment.

6. (1) Recruitment to the Service shall be made,-

(a) 65 percent by promotion from amongst the Civil Judge

(Senior Division)/Chief Judicial Magistrates/Additional Civ
Judges (Senior Division) on the basis of principle of meri
cum-seniority and passing a suitability test Provided that n
person shall be promoted to the Service who is less than thirty
five years of age

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Procedure for promotion.

8. Procedure for promotion for assessing and testing the mer
and the suitability of a member of the Haryana Cixi Servic
(Judicial Branch) for promotion under clause (a) of sub-rule
(1) of rule 6, the High Court may-

(i) hold a written objective test of 75 marks and viva voce c
25 marks in order to ascertain and examine the lega
Knowledge and efficiency in legal field;

(ii) take into consideration Annual Confidential Reports of th
preceding five years of the officer concerned:

Provided that any officer having grading as C (integrit
doubtful). in any year shall not be eligible to be considered fc
promotion."

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Regulations.

19. The Government may make regulations not inconsister
with these rules to provide for all matters for which provisio
is necessary or expedient for the purpose of giving effect to
these rules.

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Residuary Matters.

26. In respect of all such matters regarding the conditions c
service for which no provision or insufficient provision ha
been made in these rules, the rules, directions or orders for th
time being in force and applicable to officers of comparabl
status in the Civil Services of the State Government sha
regulate the conditions of such service.

Interpretation.

27. If any question arises as to the interpretation of these rule
the same shall be decided by the Government in consultatio

with the High Court."

34. It is also a matter of record that in pursuance of the request sent on 17.04.2023, the first opinion from the Union of India dated 31.05.2023 was received on 19.06.2023 and the second opinion dated 26.07.2023. The State chose not to get back to the High Court at any point of time. The petitioners in CWP No.19775 of 2023 accordingly, approached this Court praying for the limited relief for concluding the process of selection and for formal notification of appointments alleging that the State of Punjab had already issued the necessary notification dated 25.04.2023 (Annexure P-7) and notified the promotion for similarly situated candidates. The matter was firstly taken up on 06.09.2023 by this Court while noting that more than six months had gone by and seeking explanation as to why the necessary notification had not been issued and why the State was dragging its feet and the matter was adjourned to 13.09.2023. It was only thereafter the rejection order was passed on 12.09.2023 (Annexure P-14) which is now subject matter of the amended writ petition. A perusal of the said letter would go on to show that the decision was totally based on the third party view and after consulting the Union of India, the State has decided not to accept the recommendations and asked for sending revised recommendations by taking the plea that a modified criteria had been adopted by the High Court without consulting the State Government as per internal resolution dated 30.11.2021 and, therefore, it did not bind the State Government. Uncharitable remarks were also made regarding the High Court acting arbitrarily and that there was a betrayal of trust. Relevant portion of the said letter reads as under:-

"I am directed to refer to your letter No. 117 GazI/VI.F.8 dated 23 Febuary, 2023 and No. 204 Gaz.I/VI.F.8, dated 22 March, 2023 on the subject noted above and to inform you that upon considering the above referred letters of promotion to Additional District and Sessions Judge (ADSJ) the State Government had decided to solicit legal opinion from the Ministry of Law and Justice, Government of India, New Delhi vide this office letter even No. dated 17 April. 2023.

2. Legal opinion fendered by the Ministry of Law and Justice, New Delhi is binding on the State Government and has to be followed as per the Ministry's OM. No. F.18(1)/69, dated 20 May, 1967 1967 & & 28 28 March. March. 1969.

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3…….(ii) In view of the effects of the alleged non-consultation, appointing authority/Government of Haryana is not bound to accept the recommendations of the Selection Committee/High Court as such.

(iii) Haryana Superior Judicial Service Rules, 2007 being a subordinate legislation framed under Article 309 of the Constitution requires consultation with all stakeholders before amending any provision thereof.

(iv) The recommendations of the High Court of the Punjab and Haryana for filling up of vacancies of Additional District & Sessions Judges by promotion without consulting State Government an modified criteria may fall within the scope of Judicial review.

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5. Moreover, the Supreme Court if India in "Chandramouleshwar Prasad v Patna High Court & Ors." (1970) 2 SCR 666 has held that appointments to the post of District Judges (including Additional District Judges) whether by direct recruitment or by way of promotion is governed by Article 233 and not Article 235. The Constitution has conferred upon High Court a sacred and noble duty to give best advice or the opinion to the

> Governor, The High Court cannot act arbitrarily in giving its opinion to the Governor or else it will be a betrayal of trust. If the advice is not supportable by any material on record and is arbitrary in character, it may not have any binding value/effect.
>
> 6. Therefore, keeping in view the position explained above, the State Government decided not to accept the present recommendation for promotion of 13 Haryana Civil Service (Judicial Branch) Officers to the post of Additional District and Sessions Judges (ADSJ), as the State Government as well as the Central Government (Ministry of Law and Justice) have observed that the settled procedure under Article 233 read with article 309 of the Constitution of India, i.e. Haryana Superior Judicial Service Rules, 2007 has not been followed while sending names to the Government for promotion. Hence, you are requested to send revised recommendations by following set procedure as per law."

35. In sum and substance keeping in view the sequence of events, two things are clear that the argument raised by Mr. Gurminder Singh, Senior Counsel for the petitioners in CWP Nos.19775 of 2023 is substantiated by the record as such that the whole process was sought to be de-railed on account of a representation filed by a third party element being a District Court lawyer who was pushing a certain set of candidates in his objection raised to the State and who had no locus-standi in the matter but the State proceeded to act on the same and went on to consult the Union of India without getting back to the High Court. The same is apparently in contradiction to the procedure which is prescribed under Article 233 of the Constitution. The element of a third private party having been introduced by the State has done extreme violence to the selection process and de-railed the same which we will go on to discuss

further and the justice delivery system in the State of Haryana has been set back and badly impacted and continues to suffer on account of the fact that the State Government showed its proactivity in a case where it was not required and rather than permitting the officers who had been duly recommended, it has apparently sought to push the case of the non-meritorious candidates in spite of the fact that the rule provides otherwise.

36. The settled case law starting from 1960s would go on to show that law has already been crystallized on the said issue and the power of this Court as such by specific observations that no third party as such can come to the picture when the consultation takes place between the Governor and this Court. In **Chandra Mohan (supra)** the dispute as such was regarding the recruitment of District Judges and whether the rules framed by the Governor empowering him to recruit District Judges from the judicial officers were unconstitutional. The Constitutional Bench had accordingly held that the High Court was reduced to a position of transmitting authority of the lists of suitable candidates for appointment prepared by the Selection Committee. Resultantly, while allowing the appeal, it was held that the mandate under Article 233 of the Constitution could not be disobeyed by not consulting the High Court or by consulting the High Court and also other persons. It was further held that the constitutional mandate was clear that the High Court is expected to know better in regard to the suitability of a person belonging either to the judicial service or to the Bar, to be appointed as District Judge. Relevant part of the said judgment reads as under:-

> "We are assuming for the purpose of these appeals that the "Governor" under Art. 233 shall act on the advice of the

Ministers. So, the expression "Governor" used in the judgment means Governor acting on the advice of the Ministers. The constitutional mandate is clear. The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of district judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the "judicial service" or to the Bar, to be appointed as a district judge. Therefore,a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him. This mandate can be disobeyed by the Governor in two ways, namely, (i) by not consulting the High Court at all, and (ii) by consulting the High Court and also other persons. In one case he directly infringes the mandate of the Constitution and in the other he indirectly does so, for his mind may be influenced by other persons not entitled to advise him. That this constitutional mandate has both a negative and positive significance is made clear by the other provisions of the Constitution. Wherever the Constitution intended to provide more than one consultant, it has said so: see Arts. 124(2) and 217(1). Wherever the Constitution provided for consultation of a single body or individual it said so: see Art. 222. Art. 124(2), goes further and makes a distinction between persons who shall be consulted and persons who may be consulted. These pro- visions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein. To state it differently, if A is empowered to appoint B in consultation with C, he will not be exercising the power in the manner prescribed if he appoints B in consultation with C and D.

We would, therefore, hold that if the Rules empower the Governor to appoint a person as district judge in consultation

> with a person or authority other than the High Court, the said appointment will not be in accordance with the provisions of Art. 233(1) of the Constitution.

37. In **Inder Prakash Anand HCS and others (supra)** a Four Judges Bench held that if the recommendation of the High Court was not to be binding on the State, the consequences would be unfortunate while dismissing the appeal filed by the State against the judgment of the Full Bench of this Court which had quashed the order retiring the officer from service against the recommendations of this Court. Relevant portion of the said judgment reads as under:-

> "18. The control vested in the High Court is that if the High Court is of opinion that a particular Judicial Officer is not fit to be retained in service the High Court will communicate that to the Governor because the Governor is the authority to dismiss, remove, reduce in rank or terminate the appointment. In such cases it is the contemplation in the Constitution that the Governor as the head of the State will act in harmony with the recommendation of the High Court. If the recommendation of the High Court is not held to be binding on the State consequences will be unfortunate. It is in public interest that the State will accept the recommendation of the High Court. The vesting of complete control over the Subordinate Judiciary in the High Court leads to this that the decision of the High Court in matters within its jurisdiction will bind the State. "The Government will act on the recommendation of the High Court. That is the broad basis of Article 235". See Shamsher Singh's case (supra) at page 841.
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> 19. In the present case, the order of the State retiring the respondent from service after the expiry of three months from the date of the order 20 August, 1971 has been rightly quashed by the High Court. The High Court did not make any recommendation to that effect.

38. In **Hari Datt Kainthla and another (supra)** it was held that while making the recommendation for the post of District & Sessions

Judge and Additional District & Sessions Judge, the High Court had to keep in mind it was responsible post and merit alone must guide it in making the recommendation. In **M.M. Gupta and others Vs. State of Jammu & Kashmir and others, (1982) 3 SCC 412,** it was held that if the State Government finds it difficult to accept the recommendations of the High Court, it should communicate to the High Court and effective consultation should be done for achieving the true objective of getting proper District Judges. Relevant portion of the said judgment reads as under:-

> ".....normally, as a matter of rule, the recommendations made by the High Court for the appointment of a District Judge should be accepted by the State Government and the Governor should act on the same. If in any particular case, the State Government for good and weighty reason find it difficult to accept the recommendations of the High Court, the State Government should communicate its views to the High Court and the State Government must have complete and effective consultation with the High Court in the matter. There can be no doubt that if the High Court is convinced that there are good reasons for the objections on the part of the State Government, the High Court will undoubtedly reconsider the matter and the recommendations made by the High Court. Efficient and proper judicial administration being the main object of these appointments, there should be no difficulty in arriving at a consensus as both the High Court and the State Government must necessarily approach the question in a detached manner for achieving the true objective of getting proper District Judges for due administration of justice."

39. The issue of consultation or deliberation was held to be exchange of mutual view points of each other and examination of the relative merits of the other point of view as laid down by a Three Judges Bench in **AR Zakki and others (supra).** It was accordingly held that the

said consultation or deliberation could not be complete or effective if the parties do not make the respective points of view known to each other. The said observations would come useful in the sense that it was never the State Government's concern that the criteria fixed was bad and all along it had objected on a wrong apprehension that the rule had not been amended. The benchmark which had thus been fixed was within the ambit as per Rule 8 of the 2007 Rules and it was not for the State Government to opine that the criteria was not known to the candidates.

40. In **Bal Mukand Sah (supra)** another Constitutional Bench went on hold that the power of the Governor is clearly fettered and regulated by Articles 233 and 234 of the Constitution on the consultation of the High Court and of total clearance by the High Court by way of recommendation of the appointees. The primacy of the High Court being the expert body controlling the District Judiciary and any inroads by the legislative was frowned upon and it was observed that it was for the High Court to set as to what type of material should be available to it both at the grass-root level of District Judiciary as well as the apex level of justice to ensure the dispensation of justice. The effort of scheme foisting the scheme of reservation on the High Court and consultation was thus frowned upon. Relevant portion of the said judgment reads as under:-

> "58……..It is now time for us to take stock of the situation. In the light of the Constitutional scheme guaranteeing independence of Judiciary and separation of powers between the executive and the judiciary, the Constitutional makers have taken care to see by enacting relevant provisions for the recruitment of eligible persons to discharge judicial functions from grass-root level of the Judiciary up to the apex level of the District Judiciary, that rules made by the Governor in

consultation with the High Court in case of recruitment at grass-root level and the recommendation of the High Court for appointments at the apex level of the District Judiciary under Article 233, remain the sole repository of power to effect such recruitments and appointments. It is easy to visualise that if suitable and competent candidates are not recruited at both these levels, the out turn of the judicial product would not be of that high level which is expected of judicial officers so as to meet the expectations of suffering humanity representing class of litigants who come for redressal of their legal grievances at the hands of competent, impartial and objective Judiciary. The Presiding Officer of the Court if not being fully equipped with legal grounding may not be able to deliver goods which the litigating public expects him to deliver. Thus, to ensure the recruitment of the best available talent both at grass-root level as well as at apex level of District Judiciary, Articles 233 and 234 have permitted full interaction between the High Court which is the expert body controlling the District Judiciary and the Governor who is the appointing authority and who almost carries out the ministerial function of appointing recommended candidates both by the Public Service Commission and the High Court at the grass-root level and also has to appoint only those candidates who are recommended by the High Court for appointment at the apex level of District Judiciary. Any independent outside inroad on this exercise by legislative enactment by the State Legislature which would not require consultation with an expert agency like the High Court would necessarily fall foul on the touchstone of the Constitutional scheme envisaging insulation of judicial appointments from interference by outside agencies, bypassing the High Court, whether being the Governor or for that matter Council of Ministers advising him or the Legislature. For judicial appointments the real and efficacious advice contemplated to be given to the Governor while framing rules under Article 234 or for making appointments on the recommendations of the High Court under Article 233 emanates only from the High Court which forms the bed- rock and very soul of these exercises. It is

axiomatic that the High Court, which is the real expert body in the field in which vests the control over Subordinate Judiciary, has a pivotal role to play in the recruitments of judicial officers whose working has to be thereafter controlled by it under Article 235 once they join the Judicial Service after undergoing filtering process at the relevant entry points. It is easy to visualise that when control over District Judiciary under Article 235 is solely vested in the High Court, then the High Court must have a say as to what type of material should be made available to it both at the grass-root level of District Judiciary as well as apex level thereof so as to effectively ensure the dispensation of justice through such agencies with ultimate object of securing efficient administration of justice for the suffering litigating humanity. Under these circumstances, it is impossible to countenance bypassing of the High Court either at the level of appointment at grass-root level or at the apex level of the District Judiciary. The rules framed by the Governor as per Article 234 after following due procedure and the appointments to be made by him under Article 233 by way of direct recruitment to the District Judiciary solely on the basis of the recommendation of the High Court clearly project a complete and insulated scheme of recruitment to the Subordinate Judiciary. This completely insulated scheme as envisaged by the founders of the Constitution cannot be tinkered with by any outside agency dehors the permissible exercise envisaged by the twin Articles 233 and 234. It is a misnomer to suggest that any imposition of scheme of reservation for filling up vacancies in already existing or created sanctioned posts in any cadre of district judges or Subordinate Judiciary will have nothing to do with the concept of recruitment and appointment for filling up such vacancies. Any scheme of reservation foisted on the High Court without consultation with it directly results in truncating the High Courts power of playing a vital role in the recruitment of eligible candidates to fill up these vacancies and hence such appointments on reserved posts would remain totally ultra vires the scheme of the Constitution enacted for that purpose by the founding fathers. It is also to be noted that the concept of social

> justice underlying the scheme of reservation under Article 16(4) read with Article 335 cannot be said to be one which the High Court would necessarily ignore being a responsible Constitutional functionary. In fact what is required is that the right decision should be arrived at in the right manner. In the facts of the present case, it is an admitted position that the High Court of Patna has already consented to have 14% reservation for SC candidates and 10% reservation for ST candidates in recruitment of Munsiffs and Magistrates at grass-root level of Subordinate Judiciary and rules framed under Article 234 by the Governor of Bihar in consultation with the High Court have permitted such reservation. Thus, it is not as if the purpose of reservation cannot be achieved without reference to the High Court. But as the saying goes you can take a horse to the water but cannot make it drink by force . Thus what is expected of the executive and the Governor is to have an effective dialogue with the High Court so that appropriate reservation scheme can be adopted by way of rules under Article 234 and even by prescribing quota of reservations of posts for direct recruits to District Judiciary under Article 233 if found necessary and feasible. That is the Constitutional scheme which is required to be followed both by the High Court and by the executive represented through the Governor. But this thrust of the Constitutional scheme cannot be given a go-bye nor can the entire apple-cart be turned topsy-turvey by the legislature standing aloof in exercising its supposed independent Legislative power dehors the High Courts consultation."

41. Keeping in view the legal opinion taken as such from the Union of India on the representation of Prem Pal and having fallen back upon the same while not accepting the recommendations of the High Court and not consulting the High Court further and asking it to send the recommendations by holding that resolution of the High Court was not shared and is lacking consultation and apparently is violative of the observations as laid down by the Constitutional Bench. Thus, we hold that

the action of the State Government on seeking legal opinion of third party is not justified.

Question No.(ii):

> Whether the action of the State Government or the High Court was arbitrary and not in consonance of Article 233 of the Constitution of India and whether there was effective consultation with the High Court?

42. The argument which has been raised is that the requirement of minimum 50% in the interview had not been put to the candidates and the decision of the High Court was arbitrary. The sequence of events would go on to show that the decision as such undisputedly was taken way-back on 11.11.2021 wherein the Recruitment and Promotion Committee (Superior Judiciary Services) had in order to bring the uniformity in case of promotion to the Superior Judicial Services in the sister States of Punjab & Haryana fixed the relevant date for the initiation of the process of the recruitment to the posts which had to be filled up to the said Superior Judicial Services. It was to be done on the basis of merit-cum-seniority rule and passing of a suitability test. Keeping in mind the Rules applying to both the States, the decision taken regarding the suitability test as per the relevant rules was made of securing 50% marks in the written test and 50% marks in viva-voce individually which would make a candidate eligible for promotion. Relevant portion reads as under:-

> "In terms of Rule 7(3) (a) of the Punjab Superior Judicial Service Rules, 2007 and Rule 6(1) (a) of Haryana Superior Judicial Service Rules, 2007, the suitability test shall consist of written objective test of 75 marks and viva voce of 25 marks so as to assess legal knowledge and efficiency in legal field for discharging higher duties and responsibilities.

> Securing 50% marks in the written test and 50% marks in viva voce individually would made a candidate eligible for promotion."

43. It is not disputed that this portion had superseded the earlier criteria which was being followed which had been fixed on 29.01.2013. The criteria was accepted by the Full Court on 30.11.2021 and only the other portion regarding the ACRs and the benchmark falling in part (iii) of the earlier criteria had been modified and the matter had been sent to two Committees for comprehensive examination. This aspect is also admitted by the State while rejecting the recommendations that by virtue of the decision dated 30.11.2021 the modification was done in the criteria. The aspect of the criteria had necessarily to be fixed in one looks at Rule 8(1)(i) which has been reproduced above in paragraph No.33. Rule 8(1)(i) provides the passing of a suitability test for assessing the merit for promotion to the post of Additional District Judge, which had to be left to the High Court. It is not disputed that on an earlier occasion also in 2013 the High Court had fixed the criteria of obtaining 50% marks in aggregate of written test and interview which would make a candidate eligible for promotion and it was not the State which had done so. Thus, at this point of time to say that the High Court had acted in an arbitrary manner in fixing the criteria which sought to enhance the level of merit on the basis of a cut-off by way of an interview of candidates evenly placed and having sufficient service experience having served the High Court cannot be accepted. The rule provides that the 25 marks which are provided are for examining the legal knowledge and efficiency in the legal field. As noticed it is not the case of the candidates that they did not get the requisite time and were not asked the adequate number of questions or that the

Committee of Judges was biased against any of them. In such circumstances it is not both for the candidates and for the State to turn around and say that that the method as such was arbitrary and criteria should have been notified. It has been time and again held that the quality of officers who are fit to be promoted as District Judges is best known to the High Court. Reliance can be placed upon the judgment of the Apex Court **Chandramouleshwar Prasad (supra),** wherein it was held that notification dated 17.10.1968 appointing the petitioner therein as a temporary District & Sessions Judge was not in compliance with Article 233 of the Constitution in the absence of consultation. Resultantly, the following observations came by giving primacy to the High Court wherein the High Court had transferred the petitioner to District Singhbhum as Additional District & Sessions Judge while noting the earlier officer's appointment as District & Sessions Judge, Arrah was done by the Government. Relevant portion of the said judgment reads as under:-

> "7. The question arises whether the action of the Government in issuing the notification of October 17, 1968 was in compliance with Art. 233 of the Constitution. No doubt the appointment of a person to be a District Judge rests with the Governor but he cannot make the appointment on his own initiative and must do so in consultation with the High Court. The underlying idea of the Article is that the Governor should make up his mind after there has been a deliberation with the High Court. The High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as District Judges. The High Court alone knows their merits and also demerits. This does not mean that the Governor must accept whatever advice is given by the High Court but the Article does require that the Governor should obtain from the High Court its views on the

merits or demerits of persons among whom the choice of promotion is to be limited. If the High Court recommends A while the Governor is of opinion that B's claim is superior to A's it is incumbent on the Governor to consult the High Court with regard to its proposal to appoint B and not A. If the Governor is to appoint B without getting the views of the High Court about B's claim vis-a-vis A's to promotion, B's appointment cannot be said to be in compliance with Art. 233 of the Constitution. The correspondence noted above which passed between the High Court and the Secretariat from 28th September 1968 to 7th October 1968, shows that whereas the High Court had definitely taken the that Misra as the senior Additional District Sessions Judge should be directed to take charge from Chakravarty, the Government was not of the view that according to the records in its appointment department Misra was the senior officer at Shahabad among he Additional District and Sessions Judges. Government never suggested to the High Court that the petitioner was senior to Misra or that the petitioner had a better claim han Misra's and as such was the person fit to be appointed temporarily as District and Sessions Judge, Before the notification of October 17, 1968 Government never attempted to ascertain the views of the High Court with regard to the petitioner's claim to the temporary appointment or gave the High Court any indication of its own views with regard thereto excepting recording dissent about Misra's being the senior officer in the cadre of Additional District and Sessions Judges at Arrah. Consultation with the High Court under Art. 233 is not an empty formality. So far as promotion of officers to the cadre of District Judges is concerned the High Court is best fitted to adjudge the claims and merits of persons to be considered for promotion. The Governor cannot discharge his function under Art. 233 if he makes an appointment of a person without ascertaining the High Court's views in regard thereto. It was strenuously contended on behalf of the State of Bihar the materials before the Court amply demonstrate that there had been consultation with the

> High Court before the issue of the notification of October 17, 1968. It was said that the High Court had given the Government its views in the matter; the Government was posted with all the facts and there was con- sultation sufficient for the purpose of Art. 233. We cannot accept this. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation. In our opinion, the notification of October 17, 1968 was not in compliance with Art. 233 of the Constitution. In the absence of consultation the validity of the notification of 17th October, 1968 cannot be sustained.

44. Thus, the above judgment would go on to show that the State Government was not within its right to take a different decision and overrule the recommendation of this Court on the basis of a meddlesome interloper namely Prem Pal, Advocate who was in no way connected remotely with the selection process.

45. Closer home in the another Constitutional Bench judgment passed in **High Court of Punjab and Haryana and others (supra)** in the year 1975 the dispute was regarding the power of confirmation of the promotees as well as of a direct recruit namely Justice N.S. Rao as he was then with the High Court and not with the Government. The Government had passed an order reverting the said officer and this Court gone on to hold that the power to confirm was the part of the power to appoint and the Governor was the appointing authority and the confirmation was to be done by him on the advice of the minister and the confirmation was not a

matter of control of District Courts by the High Court. The said decision was reversed by holding that the entire control of appointment and promotion to the post of District Judges vested with the High Court while placing reliance upon the judgment passed **Kuseswar Saikia (supra).** Resultantly, it was held that the control over the District Judges includes the posting of District Judges and the reversion as such could not have been by the Government. Relevant portion of the said judgment reads as under:-

> "49. The confirmation of persons appointed to be or promoted to be District Judges is clearly within the control of the High Court for these reasons. When persons are appointed to be District Judges or persons are promoted to be District Judges the act of appointment as well as the act of promotion is complete and nothing more remains to be done. Confirmation of an officer on successful completion of his period of probation is neither a fresh appointment nor completion of appointment. Such a meaning of confirmation would make appointment a continuing process till confirmation. Confirmation of District Judges is vested in the control of the High Court for the reason that if after the appointment of District Judges the Governor will retain control over District Judges 'Until confirmation there will be dual control of District Judges. The High Court in that case would have control over ,confirmed District Judges and the Governor would have control over unconfirmed District Judges. That is not Article 235."

46. Reliance upon the judgment of the Apex Court in **Mahinder Kumar (supra)** can be done, wherein it was held that a normalization process had been adopted and it had been held that merit was a fundamental criteria and there could be no dispute that none of the aggrieved candidates have made any allegations of malafides or lack of

bonafides against any of the members of the Selection Committee. The High Court was fully empowered to prescribe its own fair procedure for the purpose of evaluation of the marks and no fault as such could be found in the same. Relevant portion of the said judgment reads as under:-

> "61. When we consider the said question, it will have to be borne in mind that in the various decisions placed before us, by both the parties, the common principle stated is that in the matter of selection to a post in the higher judiciary MERIT should be the fundamental criteria. No one can dispute with the said proposition. Therefore, what is to be ultimately examined is as to whether the process adopted by the High Court in the matter of selection of entry level District Judges, pursuant to the advertisement dated 21.08.2006, which led to the ultimate selection and appointment of the third respondent, while holding the rest of the 14 candidates as not found suitable for appointment, can be found fault with. It is relevant to mention that none of the aggrieved candidates have made any allegation of mala fides or lack of bona fides, as against any of the Selection Committee members or for that matter in the manner in which the interview was held by the interviewing committee or with regard to the valuation of marks arrived at either by the District Judges or in the normalization of marks ultimately arrived at by the common evaluators. The only submission was that the methodology adopted by the Selection Committee in resorting to the normalization process was a departure in the midway of the selection process and therefore, on that score the ultimate selection cannot be approved. As far as the said challenge is concerned we have held that having regard to the power vested in the High Court under Rule 7, as well as paragraph 9 of the advertisement, in particular para 9 (iv), the High Court was fully empowered to prescribe its own fair procedure for the purpose of evaluation of the marks of the candidates, in order to make the ultimate selection. Therefore, in the absence of any other attack to the selection process made by

> the High Court by constituting a Selection Committee and the procedure followed by the said Selection Committee, which ultimately arrived at the merit list of the 15 shortlisted candidates for finalizing the selection, it will have to held that no flaw can be found in the said process adopted by the High Court."

47. Reliance can be placed upon the judgment of the Apex Court passed in **Sasidhar Reddy Sura Vs. State of Andhra Pradesh and others, (2014) 2 SCC 158** to hold that once there was a rule in place, the weightage should not be given to the recommendations made by the Shetty Commission and, thus, the order passed by the High Court was set aside. The importance of the rules had been highlighted and once it has been held that rule is silent, nothing would hinge on the opinion as such given by the Commission. Relevant portion of the said judgment reads as under:-

> "14. The said concept, with regard to the minimum age, has been brought only from the report of the Commission. For the reasons recorded in the report of the Commission, the Commission was of the view that the post of a District and Sessions Judge, being an important post, which not only requires integrity and intelligence but also requires maturity, the Commission was of the view that a person not having completed 35 years of age should not be appointed to the said post. It is pertinent to note that this was merely a recommendation or suggestion made by the Commission. The recommendation or suggestion, if not supported by the Rules, cannot be implemented. In the instant case, the Rules are silent with regard to the minimum age. It only speaks about the maximum age. In the circumstances, one cannot read provisions incorporated in the report of the Commission into the Rules. The Rules are statutory and framed under the provisions of Article 309 of the Constitution of India. In our opinion, if the recommendations made by the Commission and the statutory Rules are at variance, the provisions incorporated

> in the Recruitment Rules have to be followed. It is pertinent to note that when such a question had been raised before this Court, in the case of Syed T.A. Naqshbandi's case (supra), this Court had also observed that till relevant recruitment rules are suitably amended so as to incorporate the recommendations made by the Commission, provisions of the statutory rules must be followed.
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> 17. In our opinion, the High Court was in error while giving undue weightage to the recommendations made by the Commission, especially when the Rules do not provide for any minimum age for the appointment to the post in question. Moreover, even Article 233 of the Constitution of India is also silent about the minimum age for being appointed as a district judge."

48. The judgment passed in **Renu and others (supra)** relied upon by Mr. Rajiv Atma Ram pertains to the issue whereby the Supreme Court was dealing with the appointment of Class-IV employee posts and it was laid down that fair procedure should be set into place. It was in such circumstances the observations had come by the Apex Court that the Chief Justice of each High Court is the controlling authority and, therefore, Article 235 which gives administrative control over the subordinate courts also gives control over the ministerial staff. In such circumstances directions were issued that there should be centralized recruitment and that there should be compliance of statutory rules and, therefore, the said judgment is strictly not applicable, as the consideration has to be done as per the rules which are already in place here.

49. A closer perusal of the judgment in **State of Jammu & Kashmir (supra)** would go on to show that the issue therein was of regularization of 209 daily rated workers and the matter had been

remanded accordingly keeping in view the Constitutional Bench judgment passed in **Secretary, State of Karnataka Vs. Umadevi, 2006 (2) SCT 462** and, therefore, the said judgment would not be applicable in the case of unselected candidates in the peculiar facts and circumstances. The judgment of **Anjali Bhardwaj (supra)** has been rendered regarding appointments under the Right to Information Act, 2005 and in the absence of any specific rules being framed, the necessary directions were issued that a definite criteria for such appointments should be made public in advance while filling up such posts by the Selection Committee. The consideration of the rules will be done herein while deciding the issues which have arisen and, therefore, the said judgment can also be said to be not applicable. A perusal of the judgment **Delhi Assam Roadways Corporation Ltd (supra)** would go on to show that it pertained to the allotment of institutional plots which were more than the one's advertised. The Coordinate Bench had noticed that the allotment had been made to the property dealers and loss making companies and in such circumstances observed that there was no pre-determined criteria published and nothing was before the Selection Committee, whereby the recommendations had been made in favour of the private respondents. In the larger public interest and in the interest of HUDA, the Bench directed resort to public auction, keeping in view the law laid down by the Apex Court and, therefore, not much assistance can be taken from the said judgment.

50. A closer perusal of the judgment in **Head Constable Sardul Singh (supra)** would go on to show that it pertained to the rights of consideration and the selection process of the Head Constable to the rank of Assistant Sub-Inspector of Police. In such circumstances, the Full

Bench came to the conclusion that the memo had been issued by the Inspector General of Police contrary to the police rules and, therefore, the said instructions were held void, having not been issued by the State Government which alone had the right to make rules under the Police Act, 1861. Therefore, in the absence of any constitutional guidelines and the rules being notified in the present case, the said judgment would not be applicable. Mr. Atma Ram's argument that the executive instructions cannot be put in place to supplement the rules, if there was a gap apparently seems to be against the law laid down in **KH Siraj (supra)** itself, wherein it was held that the High Court would supplement the rule which may not deal with every aspect of the matter. Relevant portion of the said judgment reads as under:-

> "62.Thus it is seen that apart from the amplitude of the power under Rule 7 it is clearly open for the High Court to prescribe bench marks for the written test and oral test in order to achieve the purpose of getting the best available talent. There is nothing in the Rules barring such a procedure from being adopted. It may also be mentioned that executive instructions can always supplement the Rules which may not deal with every aspect of a matter. Even assuming that Rule 7 did not prescribe any particular minimum, it was open to the High Court to supplement the Rule with a view to implement them by prescribing relevant standards in the advertisement for selection. Reference may be made to the decision of this Court in State of Gujarat vs. Akhilesh C. Bhargav & Ors., (1987) 4 SCC 482.

51. It was brought to our notice that there was a diversion of views in **Salam Samarjeet Singh Vs. High Court of Manipur at Imphal and another, (2016) 10 SCC 484** regarding the fixation of 40% as pass marks benchmark for the viva voce, which had been adopted only a few

days before interviewing the lone candidate on 12.01.2015. The said judgment would go on to show that the recommendations of the Shetty Commission were also taken into consideration and that the judgment of the Apex Court in **All India Judges' Association (supra)** was silent on the recommendations regarding the principle of no cut-off marks for viva voce. The fact that various High Courts had prescribed the minimum cut-off marks for interview had also been noticed.

52. If one has to keep in mind the principles as laid down by the Apex Court, the State Government in its effort wants to stress upon the seniority of the individuals, which in its opinion has been affected by selecting meritorious and raising the bar by the process of an interview which examined the suitability of the candidates as per the position envisaged in the statutory rules**.** In **KH Siraj (supra)** the reference was made as such to the power of the High Court to prescribe a minimum pass marks for the subordinate judiciary and it was held that the High Court was best judge in the matter and vested with the entire administration for the subordinate judiciary under Articles 233 to 235 for high traditions and standards to be maintained. The interview was best mode of assessing the suitability of the candidates. Relevant portion of the said judgment reads as under:-

> "49. So far as the first submission is concerned, we have already extracted Rule 7 in paragraph supra. Rule 7 has to be read in this background and High Court's power conferred under Rule 7 has to be adjudged in this basis. The said Rule requires the High Court firstly to hold examinations written and oral. Secondly the mandate is to prepare a select list of candidates suitable for appointment as Munsif Magistrates. The very use of the word 'suitable' gives the nature and extent

of the power conferred upon the High Court and the duty that it has to perform in the matter of selection of candidates. The High Court alone knows what are the requirements of the subordinate judiciary, what qualities the Judicial Officer should possess both on the judicial side and on the administrative side since the performance of duties as a Munsif or in the higher categories of subordinate Judge. Chief Judicial Magistrate or District Judge to which the candidates may get promoted require administrative abilities as well. Since the High Court is the best Judge of what should be the proper mode of selection, Rule 7 has left it to the High Court to follow such procedure as it deems fit. The High Court has to exercise its powers in the light of the constitutional scheme so that the best available talent, suitable for manning the judiciary may get selected.

50. What the High Court has done by the Notification dated 26.3.2001 is to evolve a procedure to choose the best available talent. It cannot for a moment be stated that prescription of minimum pass marks for the written examination or for the oral examination is in any manner irrelevant or not having any nexus to the object sought to be achieved. The merit of a candidate and his suitability are always assessed with reference to his performance at the examination and it is a well accepted norm to adjudge the merit and suitability of any candidate for any service, whether it be the Public Service Commission (I.A.S., I.A.F. etc.) or any other. Therefore, the powers conferred by Rule 7 fully justified the prescription of the minimum eligibility condition in Rule 10 of the Notification dated 26.3.2001. The very concept of examination envisaged by Rule 7 is a concept justifying prescription of a minimum as bench mark for passing the same. In addition, further requirements are necessary for assessment of suitability of the candidate and that is why power is vested in a high powered body like High Court to evolve its own procedure as it is the best Judge in the matter. It will not be proper in any other authority to confine the High Court within any limits and it is, therefore, that the evolution

of the procedure has been left to the High Court itself. When a high powered constitutional authority is left with such power and it has evolved the procedure which is germane and best suited to achieve the object, it is not proper to scuttle the same as beyond its powers. Reference in this connection may be made to the decision of this Court in 2006(1) SCC 779 wherein an action of the Chief Justice of India was sought to be questioned before the High Court and it was held to be improper.

51. The very scheme and amplitude of Rule 7 under which the selection is made is sufficient answer to the contention of the appellants. Under the scheme of the Indian Constitution, the High Court is vested with the entire administration of the subordinate judiciary under Arts. 233, 234 and 235 of the Constitution of India. The High Court is vested with the power to see that the high traditions and standards of the judiciary are maintained by the selection of proper persons to man the subordinate judiciary.

52. The place of the High Court in the matter of administration of justice was very elaborately and poignantly delineated by S.B.Majmudar,J., speaking for the Constitution Bench in (2000) 4 SCC 640, said that the very responsible and onerous duty is cast on the High Court under the Constitutional scheme and it has been given a prime and paramount position in this mater, with the necessity of choosing the best available talent for manning the subordinate judiciary. The repercussions of wrongful choice is also pointed out in the said judgment.

53. It is significant to note that the appellants/petitioners themselves have not challenged the prescription of minimum cut off marks for the written examination though if their contention is to be accepted, the prescription of such minimum cut off will also be equally invalid. Their contention, in our view, is without any substance and merit.

54. In our opinion, the interview is the best mode of assessing the suitability of a candidate for a particular position. While the written examination will testify the candidates' academic

> knowledge, the oral test alone can bring out or disclose his overall intellectual and personal qualities like alertness, resourcefulness, dependability, capacity for discussion, ability to take decisions, qualities of leadership etc. which are also essential for a judicial officer."

53. In such circumstances, for the State now to hold out that the it is not for this Court that what are the qualities the judicial officer should possess for promotion to the post of Additional District Judge and on account of representation filed by a person not even affected by the said issue, it would seek opinion from a third party namely the Union of India would amount to a serious assault on the independence of the functioning of the High Court which has been ordained with the selection process, which was sought to be done from the pool of three time the number of candidates called.

54. In **Dheeraj Mor (supra)** a Three Judges Bench went on to hold that equal opportunities to be given and seniority and competence are criteria for promotion and in merit based promotion, seniority is not to be considered. Once the said principle had been settled across the board for both the States, we do not find any tangible reason for the State of Haryana to hold out a different stance for the set of officers who remain unselected and did not make the cut in the interview. Thus, the question is decided against the State that the action of the High Court was not in any manner arbitrary.

Question No.(iii):

> Whether the writ petitions filed by the unselected candidates are liable to be maintained there being no violation of Article 14 in as much as 39 candidates each from both the States of Haryana and Punjab had been

interviewed on the basis of the criteria fixing 50% marks to be obtained in the interview?

55. It is also a matter of fact that the candidates having participated in the process and having accepted the same cannot now turn around and object to the criteria fixed in view of the law laid down by the Apex Court in **Madan Lal Vs. State of Jammu & Kashimir, 1995 (2) SCT 880,** on the ground that they are unsuccessful. Even otherwise once the criteria was fixed for both the States and 39 candidates each had appeared from both the States for 13 posts in both the States, we do not see any tangible reason as to how the unselected petitioners can now file the writ petitions challenging the recommendations of this Court bolstered by the fact that the State has passed the impugned order. There is only right of consideration which has been duly done as per the rules and as per the benchmarks duly adopted by the Full Court. Merely because they are not successful now they cannot turn around, as the rules of games had already been laid down a year earlier specifically and the High Court had proceeded for the finalization of the promotion on that basis and, therefore, it is not their case that at any point thereafter the promotion process has been modified. The communication dated 24.08.2022 informing that the posts were being filled up by way of promotion on the principle of merit–cum-seniority and passing of suitability test did not mention any fact that what would be the cut-off prescribed both for the suitability test and the interview and neither there was any legal requirement.

56. Reliance was also placed upon the judgment in **Dr. (Major) Meeta Sahai Vs. State of Bihar and others, 2020 (1) SCT 469** to contend that the principle of estoppel would only apply if there was no

illegality in the selection process. If there was any violation of the constitutional scheme the right to assail the same could not be denied merely on account of the fact that he/she participated in the selection process. While referring to the judgment in **Rajesh Kumar Gupta and others Vs. State of U.P. and others (2005) 5 SCC 172** it was argued that the Apex Court had upheld the right to the maintainability of the writ petitions since the State Government as such had changed the criteria abruptly which had also been done by the High Court. A closer reading of the said judgment would go on to show that the change in criteria as such had been done on 31.10.2001 by a Government order whereby the merit list had to be prepared at the district level, which was contrary to the earlier position wherein merit list was to be done at the State level and it was in such circumstances the judgment had been upheld of the learned Single Judge and the Division Bench by the Apex Court.

57. Similarly, reliance was placed upon **Ramjit Singh Kardam & others Vs. Sanjeev Kumar & others, 2020 (2) SCT 491.** A perusal of the said judgment would go on to show that the Apex Court had permitted the candidates to challenge the selection process though having participated in the same on the ground that the criteria had been changed from the time after the selection process had started which initially had provided a written examination to be conducted which had been duly done but the same was cancelled. The second written examination was never held and, thereafter decision had been taken to shortlist eight times candidates of the advertised posts with minimum weightage in each category, which process had also been given up. In the absence of any criteria having been published, the interviews were held on a decision

taken by the Chairman of the Commission which was also held to be a decision not permissible to be taken by the Chairman alone and it was taken as a multi-member body would could take all decisions. In such circumstances, it was held that mere participating in the process of the selection would not take away the right to challenge the arbitrary change and there were allegations of malice in law, which had affected the merit selection and, thus, the judgment would not take the counsel for the un-selected candidates much distance.

58. Reliance had also been placed upon the judgment in **Krishna Rai (Dead) through L.Rs and others Vs. Banaras Hindu University through Registrar and others, 2022 AIR SC 2924** A perusal of the said judgment would go on to show that it was a case where Board of Examiners constituted had changed the rules during the selection process and, prepared the merit list over and above the statutory rules. Therefore, the criteria laid down by the rule making authority had been upset and on account of the violation of the same the order of the learned Single Judge had been upheld which had set aside the promotion which had been interfered with by the Division Bench which judgment was accordingly set aside by the Apex Court.

59. The defence raised was that the recommended candidates have no indefeasible right and even in their absence the matter could be decided while placing reliance upon the judgment in **State of Haryana Vs. Subash Chander Marwaha, AIR 1973 SC 2216.** It was submitted that some of the recommendees were here and therefore, it is not necessary to implead one and all while challenging the recommendations of the High

Court. A perusal of the said judgment would go on to show that the issue as such was whether directions could be issued to the High Court once the State Government had selected the names of the candidates in accordance with the list prepared by the Public Service Commission.

60. Mr. Sanjay Kaushal, Senior Advocate has supplemented the arguments by referring to various annexures from CWP No.26217 of 2023 **Dr. Kavita Kamboj Vs. High Court of Punjab & Haryana and others** that the information had been supplied under the RTI Act that on an earlier occasion also the result of the written objective test and the viva voce had been considered in an aggregate manner. He accordingly contended that in the year 2014 also the said procedure had been followed, while referring to the information supplied by the High Court on 10.08.2023 (Annexure P-16). Reliance is again placed upon the judgment passed in **Sivanandan C.T. (supra)** to contend that the legitimacy of the expectations from the High Court was to be inferred and was rooted in established procedure. The departure as such was a unlawful action and, therefore non-consistent practices had been deprecated and the predictability in the procedure prescribed and the legitimate expectations of the candidate not recommended were stressed upon. Reliance was placed upon the advertisement issued for Direct Recruitment of Additional District District Judge (Annexure P-14) on 15.11.2023 to point out that as per Clause 8 (iv) there was no such condition for fixing the minimum marks in the interview and the marks had to be counted in aggregate. It was, however, admitted that the direct recruits had to undergo a competitive test i.e. written test of 750 marks and viva voce of 250 marks whereas in the present selection process merely a suitability test had to be passed. It was, accordingly,

contended that they were serving judicial officers and, therefore, their rights could not be nipped in the bud. Mr. Kaushal has accordingly referred to the letter dated 31.05.2019 (Annexure P-9) wherein on an earlier occasion when the process of promotion was initiated by the High Court, there was reference to the written test of 75% marks, but there was no reference as such to the marks which were required to be obtained in the interview. It is submitted that since there was no change of criteria there was no need of any communication, but the action of the High Court was opaque and, thus, fault could be found in it on account of being arbitrary. Once a fresh criteria had been laid down in suppression of the earlier criteria, the candidate should have been put to notice.

61. Another interesting fact which is to be noticed that the unselected candidates had never challenged the said recommendations initially at any stage. Only when the State Government rejected the case of the recommended candidates on 12.09.2023 after passing the interim order on 06.09.2023, they chose to challenge the resolution of the Full Court. The Apex Court relegated them to the remedy on the judicial before this Court vide order dated 25.09.2023 and resultantly the matters were tagged alongwith the connected cases. The petitioners chose not even to implead the persons whose names were mentioned in the communication addressed by the High Court dated 23.02.2023 and, therefore, by not impleading them as necessary parties the writ petitions would not be maintainable, though an argument is raised that said persons only have a right of consideration as even the petitioners are in the same category and were

given their due share of interview time but apparently failed to impress the Interview Board.

62. It is not their case that they were not aware of the persons who had been recommended. Apparently, the non-recommendees have been pushing for their cases and for rejection of the ones' recommended through persons like Prem Pal and the State has been obliging the non-recommendees even though said persons did not find favour with the interview committee. However, keeping in view the facts and circumstances of the case we are of the considered opinion that since the right of the petitioners/unsuccessful candidates would be adversely affected they cannot be shut out on this ground that they had appeared in the interview and, therefore, they are not entitled to question the issue whether the criteria had been rightly fixed or wrongly fixed. It has been held by the Apex Court that this Court is to decide in a detached manner as to whether procedure followed was correct or not. The issue in principle was to have a uniformity by the High Court as how to assess the merit of the candidate who would be promoted to the post of Additional District & Sessions Judges and in near future thereafter hold the important assignment of District Judge. The fact that many of them would make it to the High Court would be also an issue which had been kept in mind, when the issue of merit had been given primacy by the decision by the Full Court on 30.11.2021 while accepting the recommendations of the Committee dated 11.11.2021. In **Sivanandan C.T. (supra)** the Constitutional Bench had held that the decision of the Administrative Committee could supplement the statutory rules which were as silent in a

manner to be consistent with the object and spirit of the rules by an administrative order. Relevant paragraph of the said judgment reads as under:-

> "15. For the above reasons, we have come to the conclusion that the broader constitutional issue which has been referred in **Tej Prakash Pathak (supra)** would not merit decision on the facts of the present case. Clearly, the decision which was taken by the High Court was ultra vires Rule 2(c)(iii) as it stands. As a matter of fact, during the course of the hearing we have been apprised of the fact that the Rules have been subsequently amended in 2017 so as to prescribe a cut off of 35% marks in the viva-voce examination which however was not the prevailing legal position when the present process of selection was initiated on 30 September 2015. The Administrative Committee of the High Court decided to impose a cut off for the viva-voce examination actuated by the bona fide reason of ensuring that candidates with requisite personality assume judicial office. However laudable that approach of the Administrative Committee may have been, such a change would be required to be brought in by a substantive amendment to the Rules which came in much later as noticed above. This is not a case where the rules or the scheme of the High Court were silent. Where the statutory rules are silent, they can be supplemented in a manner consistent with the object and spirit of the Rules by an administrative order."

63. The decision of the Full Court cannot be wished away at the hands of the non-recommendees, especially moreso when it had been done much prior to the selection process which was set in motion only on 24.08.2022 for both the States. One State having implemented the same, the unreasonable demand of candidates who are not selected is not liable to be accepted. Reliance upon the judgment of the Apex Court in **Sujata**

Kohli (supra) was made to point out that the eligibility criteria could not be questioned once the officers had been given fair and reasonable consideration for promotion. It was rightly pointed out that merit could not be forsaken at any level and only since the results had not been notified the unselected candidates as such could not claim any vested right. Relevant portion of the said judgment reads as under:-

> "14. As noticed, the principal grievance of the appellant is that she has been denied fair and reasonable consideration of her case for promotion. It has been contended on behalf of the appellant that the respondent High Court evolved new criteria for promotion to the posts of District and Sessions Judge and Principal Judge, Family Court by way of the impugned resolutions but the same was not notified and she was not made aware of the new criteria that required 'A' gradings in the ACRs of five years preceding the base year of consideration. It has also been contended on behalf of the appellant that the respondent High Court had acted illegally and unfairly in putting the new criteria in operation with retrospective effect that has caused her serious prejudice. An ancillary aspect has also been put into contention that the High Court had not been right in fixing the criteria for promotion of the judicial officers on the basis of the norms applicable to the executive officers while disregarding the law that the members of other services cannot be placed at par with the members of the judiciary.
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> 15. In order to examine as to whether the appellant has been able to make out a valid case of legal grievance, a brief reference to the basic legal provisions and principles having application to the case at hand shall be apposite."

64. A perusal of the said judgment would go on to show that again in no unsettled terms it has been held that the principle of merit-

cum-seniority has to be given primacy for the selection to the post of the District Judge. However, as we have gone into the issue in detail, we hold that they have no locus-standi to question the criteria fixed by the Full Court.

Question No.(iv):

> If Question No.(ii) is found in favour of the High Court and against the State Government, whether a writ of mandamus is liable to be issued directing it to act upon the recommendation of the High Court dated 23.02.2023 which was in consonance with the provisions of the rule?

65. The issue of mandamus is on the question of a legal right which is enforceable is a thorny issue. Once this Court has come to the conclusion that the consultation as such has been vitiated under the Constitution by introducing a third party by placing reliance upon the legal opinion of the Union of India which was not permitted under Article 233 of the Constitution, keeping in view the law laid down by the Apex Court. The reasoning of the State Government is vitiated *per se* and has to be treated as void. The State had never been denied the opportunity to further consult by the High Court. The mandamus can be issued once the law is settled to reach out to injustice when it is found that the technicalities are coming in the way while granting the relief. Reliance can be placed upon the judgment of the Apex Court in **Anandi Mukta Sadguru Shree Mukta Jeevandasswasi Suvarna Jaya Vs. V.R. Rudani and others, AIR 1989 SC 1607.** Relevant portion of the said judgment reads as under:-

> "22. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development

> of this law, Professor De Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." (Judicial Review of Administrative 'Act 4th Ed. p. 540). We share this view. The judicial control over the fast expanding maze of bodies effecting the rights of the people should not be put into water-tight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition."

66. It is a matter of record that inaction of the State in holding back of the recommendations has led to the pendency of case before the Additional District Judges to increase from March, 2023 to December, 2023 in the State of Haryana. At present as per the figures pointed out by the counsel for the High Court 2,80,287 cases are pending before the Superior Judicial Courts in the State of Haryana. It has also brought to our notice that the pendency in the State of Punjab has gone down since the said State accepted the recommendations of the High Court and effectively had put the officers in place by April, 2023 which had led to the litigation being reduced. The total pendency of cases in both the State as on 01.04.2023 and 01.11.2023 read as under:-

State	Pendency as on 01.04.2023	Institution from 01.04.2023 to 31.10.2023	R.B.T	Disposal from 01.04.2023 to 31.10.2023	Transfer	Pendency as on 01.11.2023	Inc/Dec
Punjab	266881	149250	1073	148732	1641	266831	(-)50
Haryana	271175	155405	426	146478	241	280287	(+) 9112

67. It is also to be noticed from the judicial side in view of the various courts being set up and in view of the new statues being on the anvil the Additional District Judges are now the Courts trying the cases at the first instance and are no longer only appellate courts. The pendency, thus, has increased in the middle tier on account of the original jurisdiction which is now vested with the said Courts. For the efficient functioning of the system wherein in the State of Haryana at present 41 vacancies are there, it is the moral/legal and constitutional obligation of the State to comply with the recommendations of the High Court in view of the settled principles of law that the view of the High Court to adjudge its own officers is not liable to be interfered with except in extra-ordinary circumstances. It is the duty of the State Government to accept the recommendations and to ensure there is no erosion of public interest in the judicial system and it is for the High Court to step in and uphold the sanctity of the judiciary and ensure that the delivery system is not adversely affected and it would be failing in its duty if the encroachment upon the judicial system is allowed and the aberration is not corrected through the issuance of mandamus. In **M.M. Gupta (supra)** it has already been noticed by the Apex Court that persons interested to be appointed directly or by way of promotion will try to lobby with the executive and curry favour with the Government for getting these appointments. The letter of Prem Pal is a classic example showing how one of the judicial officer's case is being vouched apparently for the purposes of seeking promotion which the High Court had denied to him. It is in such circumstances being primarily entrusted with the judicial administration in the State and for efficient and due discharge of its responsibilities, the High Court had acted to have proper officers in places being the best judge of its requirements. Thus, it cannot be compelled to accept the recommendation on

the requisition of the Government projecting the principle of seniority dehors the rules.

68. In **S.P. Gupta Vs. Union of India and others, 1981 Supp. (1) SCC 87,** the dissenting opinion of the Justice E.S. Venkatarmiah is to be noticed. It was held that though the power of mandamus is qualified and ordinarily the Court would be reluctant but keeping in view the inadequacy of strength of judges, the same has to be issued to take steps to fill up the vacancies. It being the constitutional and statutory duty of the Governor or the President, who can be asked to exercise their discretion by issuing such mandamus. The only caveat was that the manner in which the duty is to be done cannot be dictated. Thus, the direction is liable to be issued that the recommendations be accepted, since the rejection is against misconceived notion that there was any amendment of the rules. Relevant portion of the said judgment reads as under:-

> "1251. Notwithstanding the principle of separation of powers found entrenched in the Constitution of the United Stated of America, as can be seen from the last part of para 141 of Volume 52 of the American Jurisprudence 2d under the title 'Mandamus', if it is the constitutional or statutory duty of a Governor or the President to exercise his discretion with respect to a certain matter he may be required by mandamus to do so but the manner in which he has to discharge that duty cannot be directed by the courts. As observed in the English decision referred to above it is manifest that a statutory discretion is not necessarily or indeed usually absolute, it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision is taken, whether to act and how to act. I am of the view that the power conferred on the President by Article 216 of the Constitution to appoint sufficient number of Judges is a power coupled

> with a duty and is not merely a political function. In the instant case ordinarily the court would have been reluctant to issue any mandamus to the Government to comply with the duty of determination of the strength of Judges of High Courts. But having regard to the undisputed total inadequacy of the strength of Judges in many High Courts, it appears to be inevitable that the Union Government should be directed to determine within a reasonable time the strength of permanent Judges required for the disposal of cases instituted in them and to take steps to fill up the vacancies after making such determination."

69. In the judgment of **Supreme Court Advocates-on-Record Association and others Vs. Union of India, (1993) 4 SCC 441,** the said aspect of dissent was noted and even the Attorney General in his submission had admitted that the undue delay in making the appointment of Judges can be rectified and remedied by issuance of mandamus. Relevant portion of the said judgment reads as under:-

> "122. The learned Attorney General in addition to his general submission urged that the opinion of the CJI had received the utmost acceptance in the actual working of the system except on one occasion during the last decade, and undue delay, if any, in making the appointment of Judges, can be rectified and remedied by issue of mandamus to the appointing constitutional functionary and ultimately requested acceptance of the view of Pathak, J (as the learned Chief Justice then was) in Gupta's case.
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> 350. The learned Judge, therefore, ruled that mandamus could be issued to the Government to review the strength of permanent Judges to be appointed in each High Court on the basis of the work-load.
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> 368……..The controversy continued to simmer and the events that followed the decision in S.P. Gupta's case in regard

to judicial appointments to superior courts were being closely monitored. Three Writ Petitions Nos. 13003 of 1985,1303 of 1987 and 302 of 1989 came to be filed under Article 32 of the Constitution by Shri Subhash Sharma, a practising Advocate of this Court, the Supreme Court Advocates on Record Association and Honorary Secretary, Bombay Bar Association, respectively, seeking a mandamus commanding the Union of India to fill up the vacancies in the Supreme Court and several High Courts and certain other incidental reliefs. These writ petitions were clubbed together as common pleas were raised and the reliefs sought were more or less similar in nature. In response to the rule issued, the Union of India entered an appearance and contended that the petitions were not maintainable as the question of filling up the vacancies in the superior courts was not justiciable as held in S.P. Gupta's case. This objection raised by the learned Attorney General was repelled by the Court drawing a distinction between fixing of Judges strength or selection of judges and filling up of existing vacancies. Since the relief claimed belonged to the latter issue the matter in issue was not concluded by the ratio in S.P. Gupta's case. With the Change in Government at the Centre, the succeeding Attorney General Shri Soli Sorabjee withdrew the objection and stated that in his view it was the constitutional obligation of the Union of India to provide the sanctioned Judge strength in the superior courts and default, it any, could be remedied by a court's directive. The two-Judge Bench which heard the submissions felt that not sufficient attention was paid to filling up of vacancies in good time and instead in Kerala Judge strength was actually reduced by two posts without proper justification. Their Lordship also doubted the correctness of the majority view in S.P. Gupta's case in this behalf and felt that it required reconsideration. Pointing to the fact that an independent non-political judiciary is crucial to the sustenance of our chosen system, their Lordships prima facie felt that the majority view in S.P. Gupta's case not only seriously detracts from but also denudes the primacy of the Chief Justice of India's opinion which is implicit in our

constitutional scheme. Consistent with the constitutional purpose and process, it is imperative that the role of the institution of the Chief Justice of India be recognised as crucial. So observing, their Lordships directed as under :

The view which the four learned Judges shared in Gupta's case, in our opinion, does not recognise the special and pivotal position of the Institution of the Chief Justice of India.

The correctness of the opinion of the majority in S.P. Gupta's case relating to the status and importance of consultation, the primacy of the position of the Chief Justice of India and the view that the fixation of Judge strength is not justiciable should be reconsidered by a larger bench.

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409……..Venkataramiah, J. struck a different note when he observed :

the power conferred on the President by Article 216 of the Constitution to appoint sufficient number of Judges is a power coupled with a duty and is not merely a political function. In the instant case ordinarily the court would have been reluctant to issue any mandamus to the Government to comply with the duty of determination of the strength of Judges of High Courts. But having regard to the undisputed total in adequacy of the strength of Judges in many High Courts, it appears to be inevitable that the Union Government should be directed to determine within a reasonable time the strength of permanent Judges required for the disposal of cases instituted in them and to take steps to fill up the vacancies after making such determination.

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412. In the above background the question must still be answered on legal principle whether the issue is or is not justiciable i.e. is it beyond the purview of the court or is it merely not proper to give any direction or issue a writ, though justiciable. This in essence raises the question of the ambit of judicial review. Under this doctrine High Courts and the Apex Court exercise supervisory jurisdiction over persons who are charged with the performance of public acts and duties. This

jurisdiction was derived by courts though common law and was exercised by the issuance of an appropriate writ. What is generally reviewed is not the merits of the action but the decision making process itself. The court's duty normally is to confine itself to question of legality i.e. has the authority exceeded its powers or abused them, did it act in violation of the principles of natural justice or has it acted in a irrational, unreasonable, and arbitrary manner or the like. Broadly speaking, administrative action is subject to judicial review on three grounds, namely (i) illegality; (ii) irrationality and (iii) processual impropriety. But this may be true of cases where the public authority has performed its public duty and the action is questioned. But where the allegation is that the public authority is guilty of non-performance of its public duty and it is shown that it has failed to perform its constitutional or statutory duty, can it be said that there is no remedy available through court and a mandamus cannot issue? In order, however, for a mandamus to issue to compel performance of a duty, it must clearly appear from the language of the statute that a duty is imposed, the performance or non- performance of which is not a matter of mere discretion. But even in cases where the duty is discretionary, as distinct from a statutory obligation, a limited mandamus could issue directing the public authority to exercise its discretion within a reasonable time on sound legal principles and not merely on whim. Therefore, if the executive which is charged with a duty under the Constitution to undertake a periodical review of the Judges-strength fails in the performance of that duty, an order of mandamus can lie to compel performance within a reasonable time. Therefore, in principle, it is not possible to say that the issue is wholly outside the Court's purview and the remedy is merely to knock the doors of the legislature. Albeit, a proper foundation must be laid because the Court will be extremely slow in exercising its extraordinary powers to issue a writ of mandamus compelling performance of a certain duty unless it is fully satisfied that the executive has totally omitted to pay attention to its constitutional obligation and needs to be awakened from its

> slumber. But in the guise of exercising the power of judicial review care must be taken to ensure, as pointed out by Tulzapurkar, J., that the judiciary does not usurp this executive function to itself. But as Tulzapurkar, J. warns no directive would be possible unless forced by glaring and compelling circumstances which would be possible only if full, complete and correct assessment of the requisite strength of each High Court is available and the court feels that the executive has been oblivious to the said facts. In the absence of judicially manageable standards this may not be possible, in which case the exercise of power would be in vain and normally a court does not act in vain. We are, therefore, of the opinion that if there is a wilful and deliberate failure on the part of the executive to perform its duty under Article 216, a writ can issue to the limited extent of merely directing the executive to perform its part but the court cannot usurp the function itself and direct the executive to raise the judge-strength to any particular level.
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> 413. The need for periodical revision of the judge-strength is essentially to ensure early disposal of court cases; the entire exercise would be meaningless if the existing vacancies and the new ones created by increase in the judge-strength are not filled in promptly. This has been emphasised time and again and even though a time bound programme for dealing with the proposals has been provided, delays continue on account of the functionaries involved in the process not abiding by the same…….
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> We, therefore, hold that the issue is justiciable only to the limited extent indicated above and as manifested by the limited writ issued by Venkataramiah, J. in S.P. Gupta's case and that too in the rarest of rare cases where glaring and compelling circumstances force the court to act."

70. Thus, it does not lie in the mouth of the State that the power to issue a mandamus is lacking in the facts and circumstances. The High Court being the constitutional authority and the recommendations being binding

having been consistently held by the Apex Court would give power to the High Court to direct that the recommendations be duly given primacy and State Government be directed to act upon it. It would frustrate the very purpose of this litigation if the State Government is again to insist that the promotion should be made on the basis that the cut-off in the interview be ignored, which was decided at an earlier point of time. It would be even more disastrous to the context that one of the States has already accepted the said recommendations and 13 judicial officers have already been promoted to the said post in Punjab. To permit the State of Haryana to the contrary would open a pandora box for the High Court which has jurisdiction over two States and was striving to follow a unified policy. Reliance can be placed upon the judgment of the Apex Court in **Anil Kumar Vs. Union of India and others, (2019) 5 SCC 91** wherein on account of the binding circular issued by the Union of India in the Ministry of Railways, it was held that grant of appointment was within the purview of the policy discretion and, therefore, the same could be enforced and rejection being for extraneous reasons would result in the violation of justice. Relevant portion of the said judgment reads as under:-

> "20. For the above reasons, we have come to the conclusion that the rejection of the claim of the appellant was contrary to the terms of the binding policy circular formulated by the Union of India in the Ministry of Railways. Undoubtedly, the grant of appointment to persons displaced as a result of acquisition is a matter which is within the purview of the policy discretion. No mandamus can lie in the absence of a policy. However, where a policy has been laid down by the Union government as in the present case, the terms of the policy can be enforced. The rejection of the claim of the Appellant was for extraneous

> reasons and based on irrelevant considerations. Government in the Ministry of Railways formulated a policy. The failure of implementation results in a failure of social justice. The policy circulars were substantive attempts to enhance social welfare. Denial of benefits to the appellant has led to a long and tortuous road to justice."

71. Thus, in this background we are of the considered opinion that in the peculiar facts and circumstances this Court is mandated to direct that the recommendations be implemented, once the rejection is based on the ground which has been done in violation to the provisions of the Constitution. Thus, in the above facts and circumstances, having answered question No.(ii) in favour of the High Court and against the State Government, we are of the considered opinion that a writ of mandamus is accordingly liable to be issued against the State Government to accept the recommendations of the High Court dated 23.02.2023 and give necessary effect to it within a period of two weeks from today. Accordingly, question No.(iv) is answered against the State Government.

72. Accordingly, CWP No.19775 of 2023 is allowed, whereas CWP Nos.22818, 23804 and 26217 of 2023 are dismissed. All pending civil miscellaneous applications also stand disposed of. Accordingly, the State shall take positive action to accept the recommendation of the High Court dated 23.02.2023 within a period of two weeks from today. Out of the seven writ petitioners in CWP No.19775 of 2023, only five have made the grade and been recommended by the High Court. Accordingly, they would be entitled for ₹50,000/- each as costs, to be paid by the State for unnecessary delaying the promotion and denying them their legitimate right to work on a higher post.

73. The original Government file be photocopied by the Registrar (Judicial) and be sealed and made part of the record of the writ petition and, thereafter returned to the Government counsel under proper receipt.

(G.S. SANDHAWALIA)
JUDGE

(LAPITA BANERJI)
JUDGE

20.12.2023
Naveen

Whether speaking/reasoned :	Yes	
Whether Reportable :	Yes	