

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6105 OF 2013

V. Venkata Prasad & Ors.

... Appellants

VERSUS

High Court of A.P. & Ors.

... Respondents

J U D G M E N T

Dipak Misra, J.

The appellants were appointed as District Munsifs in Andhra Pradesh Judicial Service in the years 1985-1987 through A.P. Public Service Commission and in due course were promoted as Sub-Judges. Later on their names were recommended for promotion to the post of District and Sessions Judge, Grade II vide letter dated 23.4.2002 by the Registrar General, High Court of A.P. and the said recommendations were approved by the Government in G.O.Ms. No. 64 (LA&J) (SC.F) Department dated 4.5.2002. Their temporary appointments were notified in the said Cadre in G.O.Rt. No. 542 dated 4.5.2002.

2. While the appellants were functioning as Sub-Judges, the Ministry of Law and Justice, Government of India on 27.3.2001 sanctioned 86 additional posts to be established as Fast Track Courts. Initially, the Registrar General, High Court of A.P. recommended for appointments of 41 Additional District and Sessions Courts and three Senior Civil Judge-cum-Assistant Sessions Court for a period of five years w.e.f. 1.4.2001. The proposal for establishing the rest of the Courts could not be fructified due to lack of accommodation. On the basis of communication made by the Registrar General, the Government accorded sanction of 44 additional courts with specific staffing pattern. Be it stated, 41 Additional District and Sessions Courts were sanctioned and three courts of Additional Senior Civil Judges court were sanctioned.

3. After the posts were sanctioned, the Andhra Pradesh State Higher Judicial Service Special Rules for Adhoc Appointments, 2001 (for short, '2001 Rules') were framed which came into force with effect from 1.3.2001. Rule 1 of 2001 Rules deals with the constitution of service which stipulates that it shall consist of District and Sessions

Judges on adhoc appointment. Rule 2 of 2001 Rules deals with appointment. It reads as follows:-

“Appointment:

Notwithstanding anything contained in the Special Rules for A.P. State Higher Judicial Service 1958, the appointment of District and Sessions Judges on ad hoc basis shall be made:

- (i) by direct recruitment from the members of the bar;
 - (ii) appointment by transfer from among Senior Civil Judges in the State Judicial Service;
 - (iii) by re-employment of retired District Judges provided that 33 1/3% of the total number of ad hoc posts shall be filled by direct recruitment.
1. In the determination of 33 1/3% of total number of ad hoc posts, fractions exceeding one half shall be counted as one and other fractions shall be disregarded.
 2. Appointments under Rule 2 (ii) shall be on grounds of merit and ability, seniority being considered only when merit and ability are approximately equal.
 3. Appointments under Rule 2 (iii) shall be made on grounds of merit, ability and fitness.
 4. All appointments made from time to time under Rule 2 shall cease on 31.03.2005.”

Rule 6 of 2001 Rules deals with seniority. It reads as follows:-

“Inter-se seniority of the promotees from senior Civil Judges to the cadre of District and Sessions Judges shall be as per the seniority fixed at the time of appointment”.

Rule 7 of 2001 Rules lays down the terms and conditions. Sub-rule 2 of Rule 7 of 2001 Rules provides that a person appointed under Rule 2(1) shall not be regarded as a Member of permanent cadre covered under Rule 2 of the 1958 Rules and shall not be entitled to any preferential right to any other appointment to this service or any other service and their service shall not be treated as regular or permanent under the State Government nor shall be a bar for appointment to the post covered by the 1958 Rules or the Andhra Pradesh State Judicial Service Rules, 1962.

4. After the posts were sanctioned, the Registrar, Vigilance communicated to the State Government for appointment of District & Sessions Judges Grade II by transfer. The letter referred to 36 names. It stated that under Rule 3 of the 1958 Rules appointment to Grade II (i.e. District & Sessions Judge, Grade II) shall be made by transfer from amongst the Senior Civil Judges in the Andhra Pradesh Judicial Service. The concerned communication further stated:-

“In this connection, I am to state that at present there are 6 vacancies in the Cadre of District & Sessions Judges and one more vacancy will also arise consequent upon the retirement of Sri K. Mahalakshmi Rao, District and Sessions Judge, Anantapur, on the AN of 30.04.2002 and 24 Fast Track Courts in the cadre of District and Sessions Judges, are also vacant. Thus there are 31 vacancies in the Cadre of District & Sessions Judges.”

5. The Government of Andhra Pradesh vide order dated 4.5.2002 approved 36 names for appointment as District & Sessions Judges, Grade II by transfer. After the approval was given by the State, the High Court of Andhra Pradesh vide order dated 14.6.2002 issued posting orders. The appellant nos. 1 to 5 were posted against vacancies in Fast Track Courts temporarily. Thereafter, appellant nos. 6 and 7 were posted against the vacancies to Fast Track Courts temporarily. The aforesaid narration reflects how the appellants had come to hold the post.

6. The respondent nos. 3 to 7 were appointed as District & Sessions Judge, Grade II by direct recruitment vide G.O.Ms. No. 108 (LA&J) (SC-F) Department dated 4.8.2002. Their posting orders were issued on 3.1.2003 and they were directed to undergo training in the Judicial Academy. On

completion of training, posting orders were issued vide ROC No. 73/2003 B.Spl dated 3.1.2003 and accordingly they took charge as District and Sessions Judge, Grade-II at their respective places of postings in January, 2003. As the facts would reveal, the said respondents submitted a representation on 13.11.2003 to the High Court, the first respondent herein, to fix their seniority over and above the District and Sessions Judges promoted by way of transfer from the cadre of Senior Civil Judge. The High Court, vide ROC No. 207/04-B.Spl dated 24.2.2004 communicated the seniority list fixing their seniority after one Sh. Mohan Gandhi whose name was at serial no.5. The final seniority list was published vide G.O.Rt. No. 1748 (LA&J SC.F) Department dated 18.9.2008.

7. At this juncture, a slight digression is necessary. After the High Court had prepared a draft seniority list, objections were received and thereafter a Sub-Committee of three Judges was constituted which considered the objections and found that there were six regular vacancies in the category of District & Sessions Judge, Grade II and one was to arise on the retirement of one Mr. K. Mahalakshmi Rao,

District & Sessions Judge, Ananthapur on 30.4.2002. The committee made a distinction about the incumbents who had been posted on the post that were created vide letter dated 4.5.2002. The relevant part of the report of the Sub-Committee is as follows:-

“F) On a true and fair construction of the provisions of the 2001 Ad Hoc Rules, the conclusion is irresistible that the ad hoc posts of District and Sessions judges to man the FTCs are direct posts outside the cadre of the AP Higher Judicial Services. These posts are not part of nor are composed within the AP Higher Judicial Services. The fixed tenure of the posts and of the appointments, the specification under Rule 7(3) that persons appointed as District and Sessions Judges under Rule 2 (ii) shall be eligible to salary and allowances as permissible to District and Sessions Judges Grade II and the scheme of the FTC being funded on an Adhoc basis apart from the title of the rules which specify the adhoc nature of the scheme of the FTC all at least to these positions.

G) The 2001 Adhoc rules came into force w.e.f. 5.3.2002. On that day 24 posts of District and Sessions Judges FTC were vacant. The registry should have proposed Adhoc appointments to these vacant posts by transfer from amongst the members of A.P. State Judicial Service (Senior Civil Judge) and under Rule 2(ii) of the 2001 Adhoc Rules. Erroneously however, it addressed a D.O. letter dated 23.04.2002 to the Government proposing temporary appointments of 30 Senior Civil Judges as District and Sessions Judges Grade II. This letter clearly shows that statistical position viz., that there are six regular vacancies in the category of District & Sessions Judge Grade

II (within the cadre of the AP State Higher Judicial Service) with one more vacancy to arise on the retirement of Sri. K. Mahalakshmi Rao, District & Sessions Judge, Anantapur, on the Afternoon of 30.04.2002. The D.O. letter dated 23.04.2002 clearly intimated to the State that 24 FTCs in the cadre of District & Sessions Judge were vacant, in all 31 vacancies. In conclusion, the letter addressed the Government to approve the panel and notify initial temporary appointments of the 30 Senior Civil Judges proposed as District & Sessions Judge, Grade II, by transfer. Proposal for 30 posts were made against the 31 vacancies set out, since there was an earlier recommendation for one Sri. K. David Wilson for temporary appointment as District & Sessions Judge, Grade II. The State Government equally oblivious of the legal position issued G.O. Ms. No. 64 approving 36 Senior Civil Judges starting from Sri.C. Vachaspathi to Sr. D. Prabhakara Rao for appointment as District & Sessions Judges Grade II by transfer, without stipulating the mandated distinction between appointments to posts within the cadre of the AP State Higher Judicial Service and the ad hoc posts in the FTC stream.”

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“J. Pursuant to the recommendation of the High Court, orders were issued in GO Rt No. 542 dated 04.05.2002 for initial temporary appointments of 30 Senior Civil Judges and District & Sessions Judges Grade- II and 24 FTC were vacant. In the circumstances Sarvasri C V Vachiaspathi to G Mohan Gandhi (Serial No 1 to 6 in GO Rt No.542) were appointed to the cadre vacancies in the AP State Higher Judicial Services. The other 24 officers Sarvasri E Radhakrishna to T Pathabhi Ramarao were posted to FTC vacancies in the notification of the High Court No. 654 B. Special dated 14.06.2000.

K. In GO Rt No.1192 dated 3.08.2002 the remaining 6 officers Sarvasri G Chakradhara Rao to D Prabhkar Rao were issued initial temporary appointments as District & Sessions Judge Grade – II by transfer. By this date 4 cadre vacancies in the AP State Higher Judicial Services and 2 FTC vacancies were factually vacant. Therefore 4 officers working in the FTC's Savasri E Radhakrishna, L. Ravi Babu, M.A. Sharif & V. Venkat Prasad were posts to function in the cadre vacancies and the 6 officers specified in GO Rt No.1192 were posted to the available FTC vacancies, by the notification of High Court No.855 B- Special dated 08.08.2002.

L. After 04.01.2003 on completion of training the direct recruit officers (Smt T Rajani & four others) were given posting orders. At this point of time three cadre vacancies and two FTC vacancies were available. Therefore Sri M A Sharif and Sri V Venkata Prasad working in the cadre vacancies were posted to FTC vacancies and the five direct recruits were given posting orders in the cadre vacancies.

M. The Seniority of the five direct recruit officers will have to be reckoned w.e.f. 21.08.2002 the date they reported for training consequent on appointment.”

8. The aforesaid report was accepted by the full Court of the High Court and a final seniority list was published on 18.9.2008 which featured the names of respondent nos. 3 to 7 above the appellants.

9. After publication of the final seniority list, the same

was challenged before the High Court of Andhra Pradesh invoking the writ jurisdiction and the Division Bench analysing the rule position came to hold that they cannot be conferred the benefit of seniority on the basis of continuous length of service. The Court arrived at the said conclusion that the officers who were appointed by promotion/transfer from Civil Judges to the cadre of District and Sessions Judges, Grade – II cannot claim seniority from the date of initial appointment but can only claim so from the date when they were regularly appointed in the cadre vacancies as they could only be appointed in the said vacancies as and when the vacancies arose. Being of this view the Division Bench dismissed the writ petition. Hence, the present appeal by special leave.

10. Criticizing the judgment and order passed by the High Court it is submitted by Mr. P.P. Rao, learned senior counsel appearing for the appellants that appointments were made by the Governor under Rule 5(1) on the recommendations of the High Court and, therefore, they are to be treated as regular appointees. It is urged by him that the posting orders issued by the High Court under Rule 5(2)

of the 1958 Rules cannot take away the right conferred by the order of appointment issued by the Governor, for the nature of posting order has to be determined with reference to the terms and conditions mentioned in the order of appointment.

11. Learned senior counsel would submit that the order of approval of the Governor is a common order consisting of 36 names including the appellants herein and it does not mention that any one of them has been approved for appointment as an ad hoc Judge in a Fast Track Court. It is his further submission that the appellants were appointed by the Governor under the Rules to the post of District/Sessions Judges, Grade II of the service on transfer and posted by the High Court to Fast Track Courts. It is argued by Mr. Rao, that when orders are passed in exercise of statutory authority, it cannot be constituted otherwise in the light of the explanation subsequently given by the officer making the order of what he meant or of what was in his mind, or what he intended to do. For the said purpose, he has placed reliance on ***Commissioner of Bombay v. Goverdhandas Bhanji***¹ and ***M.S. Gill v. Chief Election***

Commissioner². It has been further argued that it was open to the appointing authority to appoint some of the Senior Civil Judges as ad hoc Additional District & Session Judges for the Fast Track Courts on a consolidated salary of Rs. 10,000/- per month as against the posts sanctioned vide the Govt. order dated 27.03.2001 read with 2001 rules on ad hoc basis. It was also open to the appointing authority to recruit by transfer Senior Civil Judges to regular cadre of District and Sessions Judges, Category II of the service and thereafter post some of them in the Fast Track Courts, but the appointing authority in its wisdom availed the second option of appointment of appellants to the cadre of District and Sessions Judges, Category II by transfer and posted some of them to regular posts in the cadre and others in the Fast Track Court and hence, they are entitled to the benefit of seniority of continuous service. In essence, the submission is that the nature of appointment is under the 1958 Rules and not under 2001 Rules as a result of which concept of ad hoc appointment does not arise.

(1952) SCR 135

² (1978) 1 SCC 405

12. Mr. Rao, would further submit that a stop-gap arrangement of this nature would not have been continued for such a long span and the material brought on record clearly show that it was not a temporary arrangement. For the said purpose he has commended us to the Constitution Bench decision in ***D.R. Nim v. Union of India***³. It is his further submission that if an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to the post due to any reason and it is not possible to leave the post vacant till then, and to meet this contingency an appointment is made then it can appropriately be called as a stop-gap arrangement and appointment in the post as ad hoc appointment. To substantiate the said stand he has placed reliance on ***Rudra Kumar Sain v. Union of India***⁴. Highlighting the language employed in Rule 6, learned senior counsel would contend that seniority has to be determined with reference to the date from which an officer is continuously in service in Category II and as the appellants have continued without any break prior to Respondent Nos. 3 to 7, the High Court has erred in not

³ (1967) 2 SCR 325

⁴ (2000) 8 SCC 25

granting the relief to the appellants. In this regard, he has drawn inspiration from **V. Bhasker Rao & Ors v. State of A.P. & Ors**⁵ and **Direct Recruitment Class II Engineering Officers' Association v. State of Maharashtra**⁶.

13. Mr. Parasaran, learned senior counsel appearing for the respondent no.1, would submit that the appellants are not entitled to seniority over the respondents who are direct recruits in regular vacancies because they were appointed in ad hoc capacity in respect of the vacancies created in Fast Track Courts. It is urged by him that the controversy is covered by the decision in **Direct Recruitment Class II Engineering Officers' Association** (supra) and **Debabrata Dash v. Jatindra Prasad Das**⁷ and the principle laid down in **V. Bhasker Rao** (supra) does not apply to the case at hand. It is because, submits Mr. Parasaran, the appellants were not substantially appointed against any vacancy in their cadre and hence, their case would be governed by the Constitution Bench decision in the **Direct Recruitment Class II Engineering Officers' Association** (supra) and the pronouncement in **Debabrata Dash** (supra). It is his

⁵ (1993) 3 SCC 307

⁶ (1990) 2 SCC 715

⁷ (2013) 3 SCC 658

submission that six vacancies came to be filled up by way of transfer/promotion from amongst Sub-Judges in the Andhra Pradesh State Judicial Service and the respondent nos. 3 to 7 were appointed as direct recruits when the vacancies had arisen in their quota but the appellants were never appointed in respect of a substantial post prior to the point in respect of the said vacancies and, therefore, the claim of seniority over them is misconceived. The learned senior counsel has seriously opposed the stand of the appellants to claim benefit under Rule 6 which postulates for seniority on the basis of continuous service. It has been argued that the Fast Track Courts were of a different character and were constituted for a specific purpose and appointments in respect of the said courts cannot confer the benefit of seniority on the appellants. He has supported the findings of the report of the sub-committee which has been brought on record and the judgment and order passed by the High Court.

14. Mr. Gurukrishna Kumar, learned senior counsel appearing for respondent nos. 3 to 7 has contended that if 2001 Rules are scrutinised in proper perspective, it is quite

vivid that the ad hoc posts of District & Sessions Judges to man the Fast Track Courts are posts outside the cadre of the A.P. Higher Judicial Services and are neither part of nor composed within the A.P. Higher Judicial Services and hence, the appellants cannot claim benefits of being appointed under the said rules. It is his further submission that assuming there as an erroneous proposal of the Registry of the High Court to fill up the posts on temporary basis from amongst the Senior Civil Judges as District & Sessions Judges, Grade-II, that really does not help, for the said proposal also clearly indicates that there are six regular vacancies in the category of District & Sessions Judge, Grade-II with one more vacancy to arise on retirement of another officer. Thus, submits Mr. Gurukrishna Kumar, the appellants were appointed on the Fast Track Courts under 2001 Rules and the respondents were appointed under the 1958 Rules and, therefore, the seniority of the respondents, who are direct recruits, has to be reckoned w.e.f. 21.8.2002, the date they reported for training consequent upon their appointment. It is canvassed by him that as per the authority in ***Brij Mohanlal – II v. Union of***

India⁸, the Fast Track Court Judges were appointed on ad hoc basis and they would not derive any benefit from such appointment. Lastly, it is submitted that the pronouncement in **Debabrata Dash** (supra) is the last nail in the coffin in the submission advanced by the appellants and, the judgment rendered by the High Court deserves to be accepted.

15. To appreciate the rivalised submissions raised at the Bar which have been astutely canvassed, it is extremely essential to project the real plinth of the litigation. The 11th Finance Commission allocated Rs.502.90 crores under Article 275 of the Constitution for the purpose of setting up 1734 courts in various States to deal with long pending cases, particularly sessions cases. The funds were to be allocated by the Finance Commission which stipulated a time-bound utilisation within a period of five years and the State Governments were required to take necessary steps to establish such courts. The Finance Commission had stated that States may consider re-employment of retired Judges for limited period since these courts were ad hoc in the sense that there would be no permanent addition of courts

⁸ (2012) 6 SCC 502

within a particular State. The High Courts framed Fast Track Courts Scheme for employment of retired Judges. Certain litigations were filed in various High Courts and eventually the matter travelled to this Court after cases being transferred and also otherwise in ***Brij Mohan Lal v. Union of India - I***⁹. It was highlighted before this Court that infrastructural facilities were not available so as to make the scheme a reality. It was also pleaded that instead of retired officers, eligible members of the Bar should be considered for appointment. Be it stated, the constitutional validity of the Fast Track Court Scheme was also challenged. The Court negated the said plea. After referring to the authorities in ***All India Judges' Assn. v. Union of India***¹⁰, ***P. Ramachandra Rao v. State of Karnataka***¹¹, ***All India Judges' Assn. v. Union of India***¹² and ***All India Judges' Assn. v. Union of India***¹³, the three-Judge Bench issued certain directions. Some of the relevant directions are necessitous to be reproduced:-

1. The first preference for appointment of judges of the Fast Track Courts is to be given by ad hoc

⁹ (2002) 5 SCC 1

¹⁰ (2002) 4 SCC 247

¹¹ (2002) 4 SCC 578

¹² (1992) 1 SCC 119

¹³ (1993) 4 SCC 288

promotions from amongst eligible judicial officers. While giving such promotion, the High Court shall follow the procedures in force in the matter of promotion to such posts in Superior/Higher Judicial Services.

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14. No right will be conferred on judicial officers in service for claiming any regular promotion on the basis of his/her appointment on ad hoc basis under the Scheme. The service rendered in Fast Track Courts will be deemed as service rendered in the parent cadre. In case any judicial officer is promoted to higher grade in the parent cadre during his tenure in Fast Track Courts, the service rendered in Fast Track Courts will be deemed to be service in such higher grade.

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18. The High Court and the State Government shall ensure that there exists no vacancy so far as the Fast Track Courts are concerned, and necessary steps in that regard shall be taken within three months from today. In other words, steps should be taken to set up all the Fast Track Courts within the stipulated time.

16. The directions given in the ***Brij Mohanlal -I*** (supra) were further analysed in ***Brij Mohanlal -II*** (supra). The two-Judge Bench scrutinising the directions observed that appointment to FTCs were to be made on ad hoc basis. It has been observed therein that there are three sources of recruitment. Firstly, by promotion from amongst the

eligible judicial officers, secondly by appointment of retired Judges with good service records and lastly by direct recruitment from amongst the members of the Bar between the age group of 35 to 45 years. In the last category, the selection was to be made in the manner similar to that of direct recruitment to the Higher Judicial Services. The Court further observed:-

“This Court had foreseen the possibility of the closure of the Fast Track Courts Scheme (FTC Scheme). It directed that the service in FTCs will be deemed as service of the promoted judicial officers rendered in the parent cadre. However, no right would accrue to such recruits promoted/posted on ad hoc basis from the lower judiciary for regular promotion on the basis of such appointment. For direct recruits, continuation in service will be dependent on review by the High Court and there could be possibility of absorption in the regular vacancy if their performance was found to be satisfactory. Besides these two aspects, the directions also dealt with the management of FTCs, timely and appropriate utilisation of funds and monitoring of smooth functioning of FTCs by the State-Level Empowered Committee headed by the Chief Secretary of the State; the disposal of cases was to be monitored by one Administrative Judge, nominated by the High Court. It was expected that each FTC will at least have one Public Prosecutor earmarked. This was the sum and substance of the directions issued by this Court in *Brij Mohan Lal case* while disposing of both these transferred cases”.

17. The basic prayer in the said case pertained to extension of FTC scheme. The Court adverting to various precedents and facets relating to scope of interference in policy matters in exercise of power of judicial review and many other aspects, came to hold that:-

“172. The prayer for regularisation of service and absorption of the petitioner appointees against the vacancies appearing in the regular cadre has been made not only in cases involving the case of the State of Orissa, but even in other States. Absorption in service is not a right. Regularisation also is not a statutory or a legal right enforceable by the persons appointed under different rules to different posts. Regularisation shall depend upon the facts and circumstances of a given case as well as the relevant rules applicable to such class of persons.

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175. The petitioners from the State of Andhra Pradesh have also prayed for identical relief claiming that the advertisement dated 28-5-2004 issued for filling up the vacancies in the regular cadre should be quashed and not processed any further and the petitioners instead should be absorbed against those vacancies. In view of the above discussion, we find no merit even in these submissions.

176. We have already noticed that the FTC Judges were appointed under a separate set of Rules than the Rules governing the regular appointment to the State Higher Judicial Services. It has been clearly stipulated that such appointments would be ad hoc and temporary and that the appointees shall not derive any benefit from such appointments”.

18. The two-Judge Bench issued certain directions for regularisation of the direct recruits from the Bar as Judges to preside over FTCs on certain terms and conditions. Certain directions were also given in respect of candidates who were promoted as FTC Judges from the post of Civil Judges (Senior Division) having requisite experience in service to be entitled to be absorbed and remain promoted to the Higher Judicial Service subject to the rule position and certain other conditions.

19. From the aforesaid two authorities, it is quite clear that the appointments in respect of Fast Track Courts are ad hoc in nature and no right is to accrue to such recruits promoted/posted on ad hoc basis from the lower judiciary for the regular promotion on the basis of such appointment. It has been categorically stated that FTC Judges were appointed under a separate set of rules than the rules governing the regular appointment in the State Higher Judicial Services.

20. Now we shall focus on the relevant Rules that governs the appointments to judicial service in the State of Andhra

Pradesh. The Andhra Pradesh Higher Judicial Service is governed by the Andhra Pradesh State Higher Judicial Service Rules, 1958 (for short, 'the 1958 Rules') framed by the Governor of Andhra Pradesh in consultation with the High Court and the said Rules have come into force w.e.f. 10.10.1958. According to Rule 1, the service shall consist of two categories. Category 1st deals with District & Sessions Judge, First Grade and category 2nd deals with District & Sessions Judge, Second Grade. Rule 2 provides for appointment. The said Rule which is required to be deliberated upon is reproduced below:-

“Rule 2 : Appointment:

(a) Appointment to Category I shall be made by promotion from Category II and appointment to Category II shall be made:-

(i) by transfer from among:

Sub-Judges in the Andhra State Judicial Service; or in the Hyderabad State Judicial Service; and

(ii) by direct recruitment from the Bar:

Provided that 33 1/3% of the total number of permanent posts shall be filled or reserved to be filled by direct recruitment.

Explanation: In the determination of 33 1/3% of the total number of permanent posts, fractions exceeding one-half shall be counted as one and other fractions shall be disregarded.

(b) All promotions shall be made of grounds of merit and ability, seniority being considered only

when merit and ability are approximately equal.”

21. Rule 3 provides for qualification. Rule 4 deals with probation. Rule 5(1) stipulates that all first appointments, and reappointments of persons under reversion to the category of District & Sessions Judge, Second Grade, shall be made by the Governor in consultation with the High Court. Rule 5(2) provides that all postings, other than first appointments or reappointments to the service, and transfers in the service shall be made by the High Court.

Rule 6 deals with seniority. It reads as follows:-

“The seniority of a person appointed to Category I or Category II shall be determined with reference to the dated from which he may continuously be on duty in that category”.

22. In the instant case, we are not concerned with any other Rule. The 2001 Rules are specific rules for ad hoc appointments. Rule 7(1)(b) of the 2001 Rules lays down as follows:-

“ A person appointed under Rule 2 (i) shall not be regarded as a Member of permanent cadre covered under Rule 2 of the Special Rules for Andhra Pradesh State Higher Judicial Service, 1958, and shall not be entitled to any preferential

right to any other appointment to this service or any other service and their service shall not be treated as regular or permanent under the State Government nor shall be a bar for appointment to the posts covered by the Special Rules for Andhra Pradesh Higher Judicial Service, 1958 or the Andhra Pradesh State Judicial Service Rules, 1962.”

As the fact situation would exposit, there were six vacancies in the regular cadre. Because of introduction of the Fast Track Court Scheme, the promotional avenues on ad hoc basis became available. The conditions in **Brij Mohanlal -I** (supra) and **Brij Mohanlal -II** (supra) make it absolutely clear. The submission of Mr. Rao, learned senior counsel for the appellants is that the appellants were appointed under the 1958 Rules as the letter of appointment would show and whole thing would depend upon the letter of appointment and not the posting orders issued by the High Court. According to the learned senior counsel, if a candidate is appointed on ad hoc basis in respect of a vacancy, he would be regarded as senior to the direct recruit. Both the submissions, as we perceive, are interwoven but the singular answer to the same would be “fundamentally fallacious”.

23. In ***Debabrata Dash*** (supra), almost in a similar situation, the three-Judge Bench reproduced a passage from ***O.P. Singla v. Union of India***¹⁴:-

“21. ... This Rule shows that two conditions must co-exist in order that a person can become a ‘Member of the Service’. Firstly, his appointment has to be in a substantive capacity and secondly, the appointment has to be to the Service, that is, to a post in the Service. Persons who hold posts bearing designations similar to the designations of posts comprised in the Service cannot, for that reason alone, become members of the Service. It is only when they are appointed in a substantive capacity to a post in the Service, that they become members of the Service.”

24. After referring to the said paragraph, the Court observed that:-

“Rules 3(d), 4, 5, 7, 8 and 9 of the 1963 Rules leave no manner of doubt that a person can become a member of the Senior Branch of the Superior Judicial Service only if his appointment has been made to a post in the service. If there is no vacancy to be filled in by promotion in the cadre of Senior Branch service, there is no question of any appointment being made to the service. The membership of service is limited to the persons who are appointed within the cadre strength by direct recruitment and by promotion”.

25. Thereafter, the Court referred to the Constitution

¹⁴ (1984) 4 SCC 450

Bench judgment in ***Direct Recruitment Class II Engineering Officers' Association*** (supra) and after adverting to the legal position (Clauses A, B and C) stated thus:-

“The essence of direction in Clause (A) is that the seniority of an appointee has to be counted from the date of his appointment and not according to the date of his confirmation once a recruit is appointed to a post according to the rules. In other words, where initial appointment is only ad hoc and not according to the rules and made as a stopgap arrangement, the officiation in such post cannot be taken into account for considering the seniority”.

26. Be it noted, the three-Judge Bench referred to the authority in ***Rudra Kumar Sain*** (supra), reproduced a passage therefrom and opined that though the High Court had quoted the relevant paragraph, yet had applied it wrongly.

27. Be it noted, in ***State of West Bengal v. Aghore Nath Dey***¹⁵ the Court perceived an apparent contradiction in Conclusions A and B and while clarifying stated thus:-

“19. The Constitution Bench in *Direct Recruit case*, while dealing with *Narender Chadha v. Union of India*¹⁶ emphasised the unusual fact that

¹⁵ (1993) 3 SCC 371

¹⁶ (1986) 2 SCC 157

the promotees in question had worked continuously for long periods of nearly fifteen to twenty years on the posts without being reverted, and then proceeded to state the principle thus:

‘13. ... We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service.’

20. *The Constitution Bench having dealt with Narender Chadha in this manner, to indicate the above principle, that decision cannot be construed to apply to cases where the initial appointment was not according to rules.*

* * *

22. There can be no doubt that these two conclusions have to be read harmoniously, and Conclusion (B) cannot cover cases which are expressly excluded by Conclusion (A). We may, therefore, first refer to Conclusion (A). It is clear from Conclusion (A) that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed ‘according to rules’. The corollary set out in Conclusion (A), then is, that ‘where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such posts cannot be taken into account for considering the seniority’. Thus, the corollary in Conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stopgap arrangement. The case of the writ petitioners squarely falls within this corollary in Conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority.”

* * *

“26. ... Admittedly, this express requirement in Rule 11 was not followed or fulfilled subse-

quently, and, therefore, the initial ad hoc appointments cannot be treated to have been made according to the applicable rules. These ad hoc appointments were clearly not in accordance with the rules, and were made only as a stopgap arrangement for fixed period, as expressly stated in the appointment order itself.”

28. In ***State of Haryana v. Vijay Singh***¹⁷, the issue emerged with regard to determination of seniority in the backdrop of ad hoc initial appointment made dehors the seniority rules which were regularised by the State Government. The Court appreciating the fact situation held that ad hoc period would not be counted for the purpose of fixation of seniority.

29. We will be failing in our duty if we do not refer to the authorities cited by Mr. Rao, learned senior counsel for the appellants. He has commended us to a passage from ***O.P. Singla*** (supra). It reads as follows:-

“It is however difficult to appreciate how, in the matter of seniority, any distinction can be made between direct recruits who are appointed to substantive vacancies in the Service on the recommendation of the High Court under Rule 5(2) and the promotees who are appointed in consultation with the High Court to posts in the Service under Rules 16 and 17. Rule 16 provides for the appointment of promotees to temporary posts in the

¹⁷ (2012) 8 SCC 633

Service, while Rule 17 provides for appointment of promotees to substantive vacancies in the Service on a temporary basis. Promotees who are appointed to the Service under either of these two Rules must be considered as belonging to the same class as direct recruits appointed under Rule 5(2). They perform similar functions, discharge identical duties and bear the same responsibilities as direct recruits. They are appointed on a regular basis to posts in the Service in the same manner as direct recruits are appointed, the only distinction being that whereas the latter are appointed on the recommendation of the High Court, promotees are appointed in consultation with the High Court. Therefore, no distinction can be made between direct recruits on one hand and promotees appointed to the Service on the other, in the matter of their placement in the seniority list. Exclusion from the seniority list of those promotees who are appointed to posts in the Service, whether such appointment is to temporary posts or to substantive vacancies in a temporary capacity, will amount to a violation of the equality rule since, thereby, persons who are situated similarly shall have been treated dissimilarly in a matter which constitutes an important facet of their career”.

30. The principle stated in the aforesaid paragraph, we are afraid, does not assist learned senior counsel for the appellants. It is simply so because the appellants were not appointed to substantive vacancies. That has also been clearly stated in the majority opinion in **O.P. Singla** (supra) which has been placed reliance upon by the three-Judge Bench in **Debabrata Dash** (supra). Learned senior counsel,

as has been indicated earlier, heavily relied on the decision in **Rudra Kumar Sain** (supra). On a perusal of the same, we do not find it to be remotely helpful to the issue that has arisen here. The appellants who are aspirant to structure the case solely on the basis of the words used in the letter of appointment ignoring the letter of posting, we are constrained to say, they are bound to remain in the realm of unnecessary undiminished hope. Their promotion came because of the introduction of the Fast Track Court Scheme and under the 2001 Rules framed by the High Court. They were the beneficiaries of a Scheme. While continuing in the post under the scheme, the regular posts in the cadre fell vacant and they were regularised but prior to that, the respondents were appointed as direct recruits in respect of substantive posts in their quota. The appellants, in our considered opinion, should have been in a position to accept the distinction. But the inter se dispute between the promotees and the direct recruits seems to be a ceaseless affair. In **O.P. Singla** (supra), Y.V. Chandrachud, C.J. had observed:-

“There are many decisions bearing upon the familiar controversy between promotees and

direct recruits and this will be one more. Perhaps, just another.”

31. We share the said fond hope.

32. Consequently, the appeal, being devoid of merit, stands dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

.....J.
(Dipak Misra)

.....J.
(Shiva Kirti Singh)

New Delhi.
June 29, 2016

ITEM NO.1A

COURT NO.4

SECTION XIIA

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s). 6105/2013

V. VENKATA PRASAD & ORS.

Appellant(s)

VERSUS

HIGH COURT OF A.P. & ORS.

Respondent(s)

Date : 29/06/2016 This appeal was called on for judgment today.

For Appellant(s) Mr. P.P. Rao, Sr. Adv.
Mr. G.V.R. Choudary, Adv.
Ms. Ananya Sarkar, Adv.
Mr. swarnendu Chatterjee, Adv.
Mr. K. Shivraj Choudhuri, AOR
Mr. A. Chandra Kumar, Adv.

For Respondent(s) Mr. Mohan Parasaran, Sr. Adv.
Mr. Anshuman Ashok, Adv.
Mr. Amit Pai, Adv.
Mr. Arival Shukla, Adv.
Mr. Nirmal Amabastha, Adv.
Mr. Ashwin Kumar, Adv.
Mr. Purushottam Sharma Tripathi, AOR
Mr. Mukesh Kumar Singh, Adv.
Mr. Luv Kumar, Adv.

Mr. Guru Krishnakumar, Sr. Adv.
Mr. Y. Raja Gopala Rao, AOR
Mr. Hiendra Nath Rath, Adv.
Mr. Sandeep Singh, Adv.
Mr. K. Sharat Kumar, Adv.
Mr. Guntur Prabhakar, AOR
Ms. Prerna Singh, Adv.

Hon'ble Mr. Justice Dipak Misra pronounced the judgment of the Bench consisting of His Lordship and Hon'ble Mr. Justice Shiva Kirti Singh, JJ.

The appeal being devoid of merit, stands dismissed in terms of the signed reportable judgment.

Interlocutory applications, if any, stand disposed of accordingly.

(Gulshan Kumar Arora)
Court Master

(H.S. Parasher)
Court Master

(Signed reportable judgment is placed on the file)