

C. Jayachandran vs State Of Kerala on 4 March, 2020

Equivalent citations: AIR 2020 SUPREME COURT 3846, AIR ONLINE 2020 SC 449

Author: Hemant Gupta

Bench: Uday Umesh Lalit, Indu Malhotra, Hemant Gupta

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 1993-1995 OF 2020
(ARISING OUT OF SLP (CIVIL) NOS. 22949-22951 OF 2019)

C. JAYACHANDRAN

VERSUS

STATE OF KERALA & ORS.ETC.

JUDGMENT

HEMANT GUPTA, J.

1. Leave granted.

2. The challenge in the present appeals is to a judgment and order passed by the Division Bench of the High Court of Kerala on 3rd September, 2019 whereby the order passed by the learned Single Bench of the High Court on 8th January, 2019 was set aside.

3. The facts leading rise to the present appeals are that an advertisement was published on 16th April, 2007 to fill up six posts in the Kerala Higher Judicial Service in terms of Kerala State Higher Judicial Services Special Rules, 1961. The selection process in pursuance of such advertisement was challenged by the appellant in respect of minimum age which was fixed as 35 years. The 1st for short, 'Rules' Kerala High Court struck down the eligibility in respect of minimum age vide order dated 12th November, 2009. The Special Leave Petition against the said order was dismissed on 15th December, 2009. After the said order, four candidates, namely, Babu, Kauser, Edappagath and

Badharudeen were selected against general merit vacancies whereas three others were selected against the posts meant for reserved category.

4. The appellant disputed such selection process before this Court.

Writ Petition No. 200 of 2010 filed by the appellant was disposed of by this Court on 14th May, 2010 granting liberty to the appellant to move the High Court after observing that the writ petition involves an important question of public importance. It is thereafter, the appellant filed Writ Petition No.16206 of 2010 before the High Court challenging the grant of moderation/grace marks to the candidates who were appointed on 30th March, 2009 and sought his appointment as District and Sessions Judge. The said writ petition was allowed by the Division Bench of the High Court on 13 th September, 2010. The grant of moderation marks was found to be unsustainable. The High Court directed to recast the select list. The relevant findings read as under:

“32. In the result, we are of the opinion that the decision of the Selection Committee to grant moderation is unsustainable in law. Therefore, all further steps pursuant to the said decision would be unsustainable. The resultant situation is that only the seven candidates who were initially found eligible on the basis of their having secured the cut off marks in the examination should have been subjected to the viva-voce examination and an appropriate decision regarding their suitability to fill up the originally advertised 6 posts should have been taken by the 1st respondent in accordance with law.

33. However, in view of the subsequent decision of the 1st respondent to fill up 10 posts, the 1 st respondent may now proceed with the selection from out of the 7 abovementioned candidates in accordance with law by recasting the select list.....”

5. The said order was challenged by three candidates who were appointed with the aid of grace marks before this Court by filing SLP Nos. 27701-27702 of 2010. The SLPs were dismissed on 8 th October, 2010.

6. The revised merit list of qualified candidates was prepared who were found eligible to be appointed as District Judges. The select list of candidates eligible for appointment as District Judges in the Kerala State Higher Judicial Service in the six notified vacancies was finalised as under:

Sl. No.	Turn No.	Roll No.	Name of candidate	Rank No.	Community
1.	37-Open competition	201	Babu K	1	Ezhava
2.	38-Nadars included in SIUC	--	N.C.A.	--	Nadirs included in SIUC
3.	39-Open competition	415	Kauser Edappagath	2	Muslim
4.	40-OBC	--	N.C.A.	--	OBC
5.	41-Open	355	Jayachandran C.	3	General

	competition				
6.	42-ETB Muslims	206	Badharudeen A.	5	Muslim

7. In pursuance of the said select list, the appellant was appointed in the cadre of District Judge vide order dated 22 nd December, 2010 issued by the Government of Kerala. The relevant extract from the order reads as under:

“4. Accordingly, proposal from the Chief Justice of the High Court has been received recasting the select list with the names of the following 4 candidates amongst the candidates who have qualified in the written examination without the aid of moderation, for appointment as District and Sessions Judges in the Kerala Higher Judicial Service, in the six notified vacancies, applying Rules 14 to 17 of KS & SSR, in turn numbers 37, 39, 41 and 42 respectively.

1. Shri Babu K.

2. Shri Kauser Edappagath

3. Shri Jayachandran C.

4. Shri Badharudeen A.

5. The above proposal further requests to issue necessary Government Orders allowing Shri Babu K, Shri Kauser Edappagath and Shri Badharudeen A, who were accommodated as per Government Order read as 1 st paper above to continue in service with effect from 21.05.2009 i.e. the date on which they assumed charge and appointing Shri Jayachandran C as District and Sessions Judge in the Kerala Higher Judicial Service with effect from the date he assumes charge.

	Xx	xx	xx
ii.	In the above circumstance, the Government are pleased to:		
(ii)	allow Shri Babu K, Shri Kauser Edappagath and Shri Badharudeen A who were appointed as District and Sessions Judges as per Government Order read as 1st paper above to		

continue in service with effect from 21 st May, 2009, i.e., the date on which they assumed charge in turn numbers 37, 39 and 42 respectively.

(ii) Appoint Shri Jayachandran C., Lakshmi Vilas, East Kadungallur U.C. College P.O., Aluva-683102 as District and Sessions Judge in turn No. 41 in the Kerala Higher Judicial Service

with effect from the date he assumes charge.”

8. The Government of Kerala published a notification dated 22 nd December, 2010 cancelling the appointment of Smt. Sulekha M and appointing the appellant in the cadre of District and Sessions Judge.

An Explanatory Note was appended in the notification wherein it was mentioned as under:

“Accordingly the proposal from the Chief Justice of the High Court has been received recasting the select list with the names of Shri Babu K., Shri Kauser Edappagath, Shri Jayachandran C. and Shri Badharudeen A., who have qualified in the written examination without the aid of moderation for appointment as District and Sessions Judges in the Higher Judicial Service, in the six notified vacancies applying Rules 14 to 17 of KS & SSR, in turn numbers 37, 39, 41 and 42 respectively. The above proposal further requests to issue necessary Government Orders (i) allowing Shri Babu K., Shri Kauser Edappagath and Shri Badharudeen A., who were appointed as per G.O. (Ms.) No. 39/2009/Home dated 30th March, 2009 to continue in service with effect from 21-5-2009 i.e., the date on which they assumed charge and (ii) appointing Shri Jayachandran C. as District and Sessions Judge in the Kerala Higher Judicial Service with effect from the date he assumes charge. It has also requested to cancel the appointment of Smt. Sulekha M., Shri Balakrishnan K. and Smt. Nazeera S. as District and Sessions Judges, as they are not qualified in the written examination. Since, out of the four persons recommended in the select list, three persons namely Shri Babu K., Shri Kauser Edappagath and Shri Badharudeen A., have already been appointed as per notification issued as G.O. (Ms.) No. 39/2009/Home dated 30th March, 2009 and published as S.R.O. No. 292/2009 in the Kerala Gazette Extraordinary No. 704 dated 30th March, 2009 and they are allowed to continue in service as per G.O. (Ms.) No. 280/2010/Home dated 22-12-2010 no fresh notification in respect of them is required. Accordingly, Shri Jayachandran C. is to be appointed as District and Sessions Judge and appointments in respect of other three persons referred to above, who are not qualified are to be cancelled.”

9. In pursuance of such an order, the appellant joined on 24 th February, 2011 in the cadre of District and Sessions Judge.

10. After the advertisement was published for direct recruitment, six officers were promoted by transfer to the cadre of District Judge including Shri John K. Illickadan on 29th May, 2007 but without prejudice to the claim of the candidates to be recruited directly from Bar. Subsequently, Smt. K.P. Indira was promoted by transfer on 16th May, 2008, wherein the Government Order specifically stated that these appointments were without prejudice to the claim of the direct recruits, which was already underway vide notification dated 16th April, 2007. On 2nd July, 2010, Shri Mohd. Vaseem and Smt. Sophy Thomas, respondent Nos. 11 and 12 were promoted and appointed by transfer to the cadre of District Judge. Their promotion was subject to the result of W.P. (C) Nos. 21094/09, 25168/09, 23647/09, 20683/09, 25561/09 and 25914/09 before the High Court. Such

writ petitions were disposed of on 12 th October, 2010 in the light of the order passed in the writ petition filed by the appellant which was decided on 13th September, 2010.

11. On 9th December, 2010, the Administrative Committee of the High Court resolved to fix the cadre strength of District Judges at 99.

12. The appellant submitted a representation on 11th April, 2012 claiming notional seniority with effect from the date of appointment of other candidates through the same selection i.e. w.e.f. 30 th March, 2009, as directed by the High Court. The appellant also submitted a reminder on 18th September, 2014.

13. The High Court issued notice to the Officers appointed by transfer on 2nd July, 2016 to consider the representation filed by four direct recruits including the appellant and Badharudeen claiming seniority over District Judges appointed by transfer from amongst Sub- Judges/ Chief Judicial Magistrates. The Administrative Committee in its meeting held on 19 th October, 2017 found that the total cadre strength of the District Judges was 96 whereas 24 posts were to be filled up by direct recruitment but only 18 officers were holding the posts of District Judges. The Administrative Committee noticed that appointment by transfer of six promotee officers on 29 th May, 2007 was in exigency of service pending direct recruitment. The Administrative Committee referred to Full Bench judgment of the said Court in P. K. Haneefa v. State of Kerala². As per Haneefa's judgment, the Administrative Committee found that the candidates appointed in excess of the quota were entitled to seniority from the date the such candidates were adjusted against the available vacancies within their quota.

14. Consequent to the order of the Administrative Committee, the High Court issued an Office Memorandum on 26 th October, 2017 assigning seniority to the appellant at Sl. No. 18 and that to Badharudeen at Sl. No. 19; Shri John K. Illikkadan at Sl. No. 21; Smt. K.P. Indira at Sl. No. 22; Mohd. Vaseem at Sl. No. 28 and Smt. Sophy Thomas at Sl. No. 30.

15. Such decision of the High Court was challenged by Shri John K. Illikkadan and Smt. K.P. Indira through Writ Petition (C) No. 40046/2017 whereas Smt. Sophy Thomas and Mohd. Vaseem filed 2 2012 (4) KLJ 673 (FB) Writ Petition (C) Nos. 40069/2017 and 40043/2017 respectively. The High Court in its counter affidavit has, inter alia, taken the following stand:

“12. The decision to initiate process of appointing the District Judges including the petitioner No. 1 was taken by the Administrative Committee as per Ex.R2 (f) meeting held on 29.08.2006. As on 31.07.2006, the cadre strength of the District and Sessions Judges was

96. At that time, only 18 direct recruits were in service as against their quota of 24.
126 promotee District Judges were in service as against their quota of 72.

Hence a total of 54 promotees were in the service outside their quota.....Resolution of the Administrative Committee dated 29.08.2006 and G.O. dated 29.05.2007 make it clear that

petitioner No. 1 in WP(C) No. 40046/2017 was appointed against the quota set apart for direct recruits and outside the quota fixed for promotion. Resolution dated 21.02.2008 of the Administrative Committee further makes it clear that petitioner No. 2 Smt. K.P. Indira was appointed outside the quota fixed for appointment by transfer but purely on ad-hoc basis. Moreover, in the G.Os. appointing petitioners, it has been clearly mentioned that the appointments made there under were appointments without prejudice to the claims of the candidates to be recruited directly from the Bar satisfying the provisions under Rule 2(b) of the Special Rules for Kerala State Higher Judicial Service. The period of service rendered by the petitioners against the posts within the quota of direct recruits and outside the quota fixed for promotion cannot be reckoned for the purpose of determining seniority in the category of District and Sessions Judges. The service based on substantive appointment within the quota alone can be counted for the purpose of seniority.

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24. The further claim of Sri. C. Jayachandran was that pursuant to the judgment of this Court in W.P. (C) No. 16206/2010 when the select list was recast, his name was included at Rank No. 3 in the merit list. According to him, based on the ranking assigned to him in the merit list, he was appointed against Turn No. 41 reserved for open merit candidates and Sri. Sadharudeen A., who was appointed against Turn No. 41, was shifted out and accommodated against Turn No. 42, a reservation vacancy earmarked for OBC candidates.”

16. All the writ petitions were dismissed by the learned Single Bench of the High Court on 8th January, 2019. The learned Single Bench of the High Court held as under:

“38. When the cadre strength was only 96 and the number of direct recruits necessary was found to be 24 in Ext.R2(f) minutes, the fact that promotees could continue without reversion because of the continuance of fast track courts would not mean that there were vacancies within the cadre, for promotees. Admittedly, when M/s. John Illickadan and K.P. Indira were appointed in 2007 and 2008 on ad-hoc basis and subject to the claims of direct recruits, M/s. Sophy and Mohamed Vaseem, who were appointed only in 2010, by transfer, cannot claim any right for regular appointment over and above them. Therefore, they will not have any special right or privilege just because their appointments were not made conditional.”

17. Aggrieved against the order passed by the learned Single Bench of the High Court, three intra-court appeals were preferred before the Division Bench of the High Court which came to be allowed on 3rd September, 2019. The Division Bench of the High Court has taken a view that the cadre strength has not been fixed by the Government as is necessitated by the rules any time before 2015 when the cadre strength was resolved by the Administrative Committee in the High Court at 99. The High Court found that direct recruits of the selection in question were appointed against the quota of 1/3rd of the permanent posts in categories (1) and (2) of the Rules prior to its amendment in the year 2008. The Division Bench of the High Court referring to para 49 of the judgment in Haneefa’s case held that there is a quota for direct recruitment but there is no quota for by-transfer and held as under:

“24. ... The Full Bench held so in Para 48: “ We have already interpreted Rule 2(b) of the Special Rules that it is intended to operate as a quota for direct recruitment .” (sic) There is also no quota for by-transfer appointments, which in no uncertain terms demonstrate that there is no ratio applicable as per the Special Rules read with the KS&SSR. Our decision turns on this crucial aspect of existence of quota only in the case of the direct recruits and that too confined to the permanent posts in category (1) & (2) of the Special Rules taken together and the absence of a rota and a ratio.

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30. Going back to the Full Bench decision in Haneefa P.K. (supra), it was specifically noticed in paragraph 22 that the Special Rules do not contain any rota provision.

It was held on an examination of Rule 2(b) of the Special Rules that the latter part of the Rules insofar as the direct recruits are concerned, by the language employed, provides a positive and mandatory quota of 1/3 rd of the permanent posts in the two categories as seen from the Special Rules. We also pertinently notice that the declaration of the Full Bench is only to that end and cannot be taken further to find a specific quota prescribed for the by-transfer appointments and it is so stated in paragraph 62 that “once separate quotas are prescribed for direct recruitment and for appointment by transfer from the subordinate judiciary, the ratio prescribed in the rules should be maintained against the cadre strength”. Here, we have to notice that the Full Bench has not found a ratio at all and the decision only leads to a quota being made mandatory for direct recruitment in the permanent posts in category (1) & (2) taken together.

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39. ... We are quite conscious of the fact that the peculiar situation, of the promotees having been continued for long years in that case, and there arising a breakdown of the “quota-rota” rule for reason of which an equitable principle for determining inter-se seniority was evolved therein; is not available here. But still the underlined portion is applicable as the rules stand here too, ie: the Special Rules read with KS&SSR.”

18. The Division Bench of the High Court further held that the Administrative Committee erred insofar as there is no quota prescribed for by-transfer appointees. The quota is only for direct recruits and confined to permanent posts in the cadre of District Judges. There is no reversion that has been affected to accommodate the direct recruits. The Division Bench also held that there is no break down of quota rule and that Haneefa’s case cannot be relied on to automatically confer seniority on direct recruits. The Court held as under:

“43. The issue as highlighted by the A.C. in Exhibit P2 is as to whether the direct recruits who commenced service subsequent to the officers appointed by-transfer are entitled to seniority above the promotees. Reliance was placed on Haneefa P.K. (supra) and it was noticed that the same was upheld in a Special Leave Petition by the

Hon'ble Supreme Court. The A.C. found that the Full Bench had considered whether those appointed in excess of the quota are entitled to seniority from the date of their appointment and it was held that such appointees will gain seniority only from the date their appointments are adjusted against the vacancies within the quota. Here, the A.C. erred insofar as there being no quota prescribed for by-transfer appointees. As we noticed, the quota is only for the direct recruits and that is confined to the permanent posts in the cadre of District Judges. The Full Bench judgment in Haneefa P.K. was elaborately quoted, which we have distinguished herein above on the facts available here of no reversion having been effected to accommodate the subject direct recruits. The A.C. then found that the by-transfer appointees were appointed to the vacancies in the direct recruitment quota; which is patently erroneous, since there was no reversion effected and all the six direct recruits so appointed on 30.03.2009 were appointed without disturbing any previous appointment in the category. The A.C. considering the issue of breakdown of quota, found that the judgment in Haneefa P.K. covers the issue as on 01.11.2012 and that there was no deliberate inaction or inertia on the part of the Government [read 'High Court'] in making appointments regularly to the post. Haneefa P.K., according to us, considered the facts of the recruitment of District Judges from the Bar, who were appointed in the year 2001 and the declaration is insofar as there being a definite quota available to the direct recruits in the relevant Special Rules, as against the permanent posts. We do not find any break down of quota rule but the Full Bench cannot be relied on to automatically confer seniority on direct recruits. All the same, the finding that by-transfer appointments made were to quota available to the direct recruit District Judges cannot be countenanced. There were sufficient vacancies in the cadre to accommodate the by-transfer appointees as also the direct recruits at the time when the direct recruits came into service. This amply demonstrates that there were enough permanent vacancies available for accommodating the direct recruits and none from the by-transfer appointees were occupying such permanent posts. We, hence, do not find any reason to uphold the decision of the A.C.”

19. The High Court further held that the Administrative Committee did not have the power to decide on the seniority dispute between by- transfer appointees and direct recruits. It was found that in the minutes of Judges’ meeting held on 12 th June, 1986, the seniority dispute is not delegated to the Administrative Committee. The High Court referred to Item No. 5 of Clause II which reads as under:

“II(5) Representation from judicial officers regarding service problems.”

20. It was held that inter se seniority disputes cannot be trivialized and have to be decided by the Full Court. The Division Bench held as under:

“48. ... Though the issue of seniority can also be literally termed as a service problem, we do not think that the intention was to delegate such disputes to be decided by the A.C. as a mere service problem. Inter-se seniority disputes cannot be trivialised and though a problem, in the literal sense, it falls for determination based on the

applicable rules and the evident facts, tested on the established legal principles; which require an assertion of a claim, hearing of affected parties and commend a judicious adjudication. Service problems would be many and varied and in every cause when a grievance is raised by a Judicial Officer it would be difficult for the Full Court to be convened; nor is it necessary. This is the power specifically granted to the A.C, but it cannot result in interference to the recommendations of the Full Court made to the Governor under Article 233. We would find the A.C, to be not conferred with the power to so adjudicate a seniority dispute and ideally the same should have been placed before the Full Court. We have answered the said question which is raised in the appeals, only for future guidance in such matters, which, it would be inappropriate to leave undecided. We have already held that the A.C's decision is not legally sustainable; we also find the A.C. to have no jurisdiction to decide the issue.”

21. While dealing with the assignment of seniority to the appellant, it was held that the order in the writ petition filed by the appellant that the direction to re-cast the select list is sufficient indication that any person newly selected would have to be assigned the seniority as on the date of the original selection. The Division Bench further noticed that it was not by appellant's fault that his appointment was delayed.

22. The Division Bench held that the appellant was appointed from the day he assumes charge though, the appellant had 3rd rank after Babu and Kauser, who were earlier appointed, while Badharudeen, one of the earlier appointees, was relegated to the 4th position. It was further held that the appellant should have been given notional seniority from the date of appointment of others though, he would not have any claim for pay and allowances, for the period when he had not discharged the duties but having returned such finding, the Division Bench found that the appellant assumed charge on 24th February, 2011 and that he joined without demur in pursuance of Government Order dated 22nd December, 2010 while the other three were allowed to continue from the date they joined. Therefore, the appellant waived his right of notional seniority. The appellant could have filed a contempt petition or a fresh writ petition to claim date of assuming charge as 30th March, 2009. It was further found that the appellant submitted representation after more than 1 year on 11th April, 2012 followed by a reminder representation on 18th September, 2014 i.e. more than 3½ years when Mohd. Vaseem and Sophy Thomas continued as seniors of the appellant. It was held that the appellant slept over his rights and has allowed the by-transfer appointees to continue with the seniority. It was also found that Mohd. Vaseem and Sophy Thomas were granted selection grade earlier than the appellant which order has not been challenged. The Division Bench of the High Court concluded that the appellant slept over his rights and rested contend with the memorials, to which the High Court responded very late; thus, interfering with the vested rights of the promotees. The by-transfer appointees continued on the basis of their seniority and also obtained further promotion in the cadre.

23. The delay of further promotions was made basis by the Division Bench to reject the claim of the appellant for seniority. The Division Bench further held that the appellant valiantly fought for his rights before the High Court and this Court. In the normal course, the High Court would have permitted him to be treated as appointed on the date on which the other direct recruits in the very

same selection were appointed; but for the delay. The High Court held as under:

“58. A like situation arises in the present case also. Sophy Thomas and Muhammed Vaseem were appointed earlier to Jayachandran. It is pertinent that both the appointment orders did not contain a condition that it is subject to appointment of direct recruits. But, however, as we earlier held, Jayachandran's recruitment was not delayed because of his fault. He had valiantly fought for his rights before this Court and the Hon'ble Supreme Court and obtained a decision in his favour. In the normal course we would have permitted him to be treated as appointed on the date on which the other direct recruits in the very same selection were appointed; but for the delay. Jayachandran's appointment order was on 22.12.2010 and he took charge on 24.02.2011. The appointment order, as earlier read, specifically provided that his appointment would be from the date on which he takes charge; which is in accordance with Rule 6 of the Special Rules. Muhammed Vaseem, Sophy Thomas and Jayachandran continued in service, the former two as seniors to the latter.

59. As we found, when the Division Bench in favour of Jayachandran directed re-casting of the select list, necessarily he should have been appointed from the date on which the others were appointed after selection;

though notionally. But, the order appointing Jayachandran specifically said otherwise. He should have taken appropriate proceedings to correct it, which he did not. He acquiesced and slept over his rights and filed a representation on 11.04.2012. The High Court did not act upon it; nor did Jayachandran approach any Court with his grievance...”

24. The Division Bench of the High Court concluded as under:

“64. ...The recommendation made by the Full Court to appoint Jayachandran from the day he assumes charge, however illegal or irregular it might be, cannot be rectified by the A.C. It can only be done by the Full Court or the Court exercising judicial functions; which essentially is the power of the State as conceded to the Courts. We, hence, are of the opinion that Jayachandran's claim is belated and has to be rejected. Our findings with respect to the other aspects of the decision of the A.C, would squarely apply in the case of Jayachandran also.

In the light of the findings above, we allow the appeals and direct seniority to be assigned to the parties to the lis from the date of their first appointment.”

25. The learned counsel for the appellant vehemently argued that the order passed by the Division Bench of the High Court in the earlier writ petition filed by the appellant has attained finality. The order was to re-cast the select list. Once the select list is re-casted, thereafter, the seniority has to be as per merit in the select list.

26. The learned Counsel for the appellant placed reliance on the judgments of this Court reported as *Sanjay Dhar v. J & K Public Service Commission & Anr.*³, *Sasidhar Reddy Sura v. State of Andhra Pradesh & Ors.*⁴, *Lakshmana Rao Yadavalli & Anr. v. State of Andhra Pradesh & Ors.*⁵, *Balwant Singh Narwal & Ors. v. State of Haryana & Ors.*⁶ and *Pilla Sitaram Patrudu & Ors. v. Union of India & Ors.*⁷ to contend that in case a candidate 3 (2000) 8 SCC 182 4 (2014) 2 SCC 158 5 (2014) 13 SCC 393 6 (2008) 7 SCC 728 7 (1996) 8 SCC 637 is wrongfully not appointed, he is entitled to notional seniority from the date he should have been appointed. It is argued that the process of non-selection of the appellant cannot defeat the law. It is further contended that the High Court has completely misread the order of appointment of the appellant dated 22 nd December, 2010. It is argued that the appellant could not be appointed w.e.f. 30th March, 2009 as he was not borne on the cadre. He was appointed on 22nd December, 2010. The Government on 22 nd December, 2010 cancelled the appointment of three District and Sessions Judges and assigned Sl. No. 41 to the appellant in the Kerala Higher Judicial Service, whereas Babu, Kauser and Badharudeen were assigned Sl. Nos. 37, 39 and 42 respectively. The notification published in the official gazette along with explanatory notes is to the effect that the three officers Babu, Kauser and Badharudeen were appointed as per notification dated 30th March, 2009. They were allowed to continue in service as per Government Order dated 22nd October, 2010, therefore, no fresh notification in respect of them is required. It is argued that once the appellant has been given seniority at Sl. No. 41 above Badharudeen, therefore, it leaves no manner of doubt that the appellant was assigned seniority above Badharudeen and which seniority position has not been challenged by Badharudeen.

27. It is also argued that the Administrative Committee has recorded a categorical finding regarding the cadre strength and also the fact that by-transfer appointees were beyond their quota. It is not the case of by-transfer appointees (promotee officers), the respondents herein, that they were within their quota for the promotion.

28. It is also contended that the High Court has gravely erred in holding that there is quota for direct recruitment but not for the Officers appointed by transfer. It is contended that 1/3 rd has to be of a specific number. Such number was 96 in the year 2007 resolved to be 99 in 2010. The Administrative Committee found that the quota for appointment by transfer would be 2/3 rd i.e. 72 in the year 2007. Since the judgment of the Full Bench in Haneefa's case has provided for such interpretation of the Rules wherein it was held as under:

“63. However, the question whether these appointments could prejudicially affect the direct recruits, is a separate issue, and has to be considered. We have already accepted the contention that Rule 2(b) of the Special Rules provides a quota for direct recruitment. Once separate quotas are prescribed for direct recruitment and for appointment by transfer from the subordinate judiciary, the ratio prescribed in the rules should be maintained against the cadre strength. In this context it is apposite to refer to the Apex Court judgment in *Prasad Kurien v. Augustin* (2008 (2) KLT 533 (SC)), in which, after making reference to Rule 5 of the KS & SSR, it was held that whenever a ratio or percentage is prescribed in the rules, it has to be computed on the cadre strength of the post to which recruitment is made and not on the basis of the vacancies existing at the time. Since the petitioners were appointed to posts

earmarked for direct recruitment from the Bar, the fact that Rule 6 of the Special Rules recognises seniority from the date of first appointment, will not be of any assistance to them in their claim for seniority.

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69. Since appointment is to be made from the two different sources and when the rule prescribes quotas for each of these sources and also the ratio to be maintained, seniority of appointees to each of these quotas, can be only from the respective dates of their appointment within the quota. It is to facilitate fixation of seniority on that basis and to avoid future disputes that the appointing authority and the High Court made the approval of the panel without prejudice to the claims of the direct recruits.

Since the purport of the Special Rules is as understood by us, we do not find anything illegal in the provision in the orders issued by of the Government of Kerala or the High Court, that the approval, appointment and the posting of the petitioners shall be without prejudice to the claims of the candidates to be recruited from the Bar.”

29. Mr. P.N. Ravindran, learned senior counsel appearing for the High Court argued that the finding of the High Court that Administrative Committee was not competent to decide the representation pertaining to seniority of direct recruits and promotees is clearly erroneous. The Full Court Resolution dated 12 th June, 1986 includes the Resolution regarding distribution of administrative work in the High Court. The representations from judicial officers regarding service problems fall within the jurisdiction of the Administrative Committee. The delegation to the Administrative Committee included the decision of representation from the Judicial Officers regarding service problems.

30. It is argued that Sl. No. 4 in category I of the Appendix A prescribes the matters which are within the jurisdiction of the Full Court. The matter of promotion of the Judicial Officers is retained by the Full Court. It is contended that the appellant stood promoted, therefore, the grievance of the appellant regarding seniority based upon representation of number of Officers was required to be decided by the Administrative Committee. Therefore, the Division Bench of the High Court has misread the delegation to hold that the Administrative Committee was not competent to decide the representation pertaining to seniority dispute.

31. On the other hand, Mr. Gaurav Agarwal, Advocate appearing for respondent Nos. 11 and 12 submitted that respondent Nos. 11 and 12 were within their quota, therefore, they have been rightly assigned seniority. It is also contended that such respondents have been granted selection grade on 17 th March, 2017 before the Administrative Committee decided to grant seniority to the appellant. Such rights of the appellant cannot be interfered with. It is also contended that seniority as per Rule 6 is from the date of appointment. Since the said respondents were appointed earlier in point of time than the appellant, therefore, they have been granted seniority in accordance with the Rules.

32. The learned counsel appearing for respondent Nos. 9 and 10 submitted that there was no condition in the letter of appointment of by transfer, that their transfer is subject to the rights of the direct recruits, therefore, the appellant cannot be granted seniority from the date of preparation of the select list. It is contended that Haneefa's case is distinguishable as it was dealing a case of reversion consequent to the finding that the transferred employees were in excess of quota. However, in the present case, no officer has been reverted, therefore, on facts, the judgment in Haneefa's case is distinguishable.

33. The learned counsel appearing for respondent No. 5 relied upon an order passed by this Court in K. Megachandra Singh & Ors. v. Ningam Siro & Ors.⁸ to contend that the appellant cannot claim seniority list from the date of availability of vacancy.

34. Before we consider the respective arguments of the learned counsel for the parties, some of the statutory rules are reproduced hereunder:

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

Category (1) Selection Grade District and Sessions Judge.

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

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

(b) Appointment to category (2) shall be made by transfer from the category 1 Subordinate Judges/C.J.M.s of the Kerala Judicial Service or by direct recruitment from the Bar, provided that the number of posts in category (2) to be filled up or reserved to be filled up by direct recruitment shall be one-third of the permanent posts in categories (1) and (2) taken together. Note. – The rules relating to reservation of appointments (Rules 14 to 17 in Part II of the Kerala State and Subordinate Services Rules, 1958) shall apply to appointments by direct recruitment to category (2).

(c) Appointment by promotion to category (1) and appointment by transfer to category (2) shall be made on the basis of merit and ability, seniority being considered only where merit and ability are approximately equal. 8 Civil Appeal No. 8833 of 2019 decided on 19th November, 2019 Note. – (i) Previous punishments shall be taken into account in determining the merit and ability of the candidate in the selection.

(ii) The District and Sessions Judges on other duty are also entitled to be considered for promotion to category (1) provided they are otherwise eligible.

xx xx xx

6. Seniority. – (1) The seniority of a person appointed either to category (1) or category (2) shall, unless he has been reduced to a lower rank as punishment, be determined with reference to the date of the order of his first appointment to the said category:

Provided that the seniority of a person appointed to category (2) prior to the 1st January, 1979 shall be determined with reference to the date from which he was appointed to the category otherwise than on a temporary basis, without being subsequently reverted from the post.

(2) If two or more persons are appointed by the very same order either to category (1) or to category (2), their inter se seniority shall be determined by the serial order in which their names appear in the appointment order.”

35. We have heard learned counsel for the parties and find that the order passed by the Division Bench of the High Court is not sustainable.

36. The earlier writ petition filed by the appellant was allowed on 13 th September, 2010. The Division Bench of the High Court has directed to re-cast the seniority amongst the seven shortlisted candidates. The appellant was one of them. The challenge to the said order by three affected candidates remained unsuccessful when SLP was dismissed by this Court on 8 th October, 2010. The SLP was filed by the candidates who were granted benefit of moderation of marks. Once the direction of the Division Bench has attained finality, the appellant was entitled to seniority as per the select list to be revised as per merit of the candidates. In terms of Rule 6(2), the seniority is to be determined by the serial order in which the name appeared in the appointment order. The argument of learned counsel appearing for respondent No. 5 that the appellant was not appointed by the same appointment order, therefore, the appellant cannot claim seniority is not tenable. The appellant was entitled to be appointed along with other three candidates but because of the action of the High Court in adopting moderation of marks, the appellant was excluded from appointment. The exclusion of appellant from appointment was on account of an illegal act by the High Court which has been so found by the judgment dated 13th September, 2010. Since the select list has to be revised, the appellant would be deemed to be the part of the appointment along with other candidates in the same select list. As the actual date of appointment was on 24 th February, 2011, the appellant cannot actually be treated to be appointed on 30 th March, 2009 but is entitled to notional appointment from that date and consequential seniority.

37. In Sanjay Dhar, a three-Judge Bench of this Court held as under:

“16. For the foregoing reasons the appeal is allowed. The judgment under appeal is set aside. It is directed that the appellant shall be deemed to have been appointed along with other appointees under the appointment order dated 6-3-1995 and assigned a place of seniority consistently with his placement in the order of merit in

the select list prepared by J&K PSC and later forwarded to the Law Department...”

38. In Lakshmana Rao Yadavalli, this Court held as under:

“13. For the reasons recorded in Lakshmana Rao Yadavalli v. State of A.P. [Set out in paras 1 to 13, above.] , the present appeals are allowed and it is directed that the High Court as well as the respondent State will do the needful for giving appointment to the appellant with retrospective effect i.e. from the date on which she ought to have been appointed, however, she shall not be paid salary for the period during which she has not worked as a District and Sessions Judge. We are sure that the respondents will do the needful for the appointment of the appellant at an early date.”

39. In view of the above, the appellant having been participated in the same selection process and in view of the direction of the Division Bench of the High Court, was rightly placed by the High Court by giving him revised select list placing him at Sl. No. 41 by pushing Badharudeen from general category candidate to OBC category candidate at Sl. No. 42.

40. The appellant was wrongfully excluded from the process of appointment on account of an illegal and arbitrary grant of moderation of marks. The Government in its Order dated 22 nd December, 2010 cancelled the appointment of three District and Sessions Judges who were granted benefit of moderation.

Badharudeen was earlier assigned general category seat but since the appellant was higher in merit, Badharudeen was pushed down and adjusted against OBC category seat at Sl. No. 42. Badharudeen has not challenged his pushing down at Sl. No. 42 either before the learned Single Bench of the High Court or before the Division Bench of the High Court or even before this Court. Therefore, as respondent, he cannot be permitted to dispute the grant of seniority to the appellant at Sl. No. 41. The judgment referred to by learned counsel is not helpful to the arguments raised as the appellant therein sought seniority as direct recruit from the time when the vacancies occurred. To raise such an argument, reliance was placed upon judgment of this Court reported in Union of India & Ors. v. N.R. Parmar & Ors. 9, wherein this Court held that a person is disentitled to claim seniority from the date he was not borne in the service. The said finding is in the context of the claim of the appellant to claim seniority from the date of availability of the vacancies; whereas in the present case, the appellant is claiming seniority from the date the other candidates in the same selection process were appointed but the appellant is excluded on account of an illegal act of the High Court of the moderation of marks. Therefore, the said judgment is not of any help to the arguments raised.

41. The Office Memorandum of Government of Kerala dated 22 nd December, 2010 and later notification of the State Government appointing the appellant is that of setting aside of selection of three candidates and appointing the appellant by assigning Sl. No. 41 and Sl. No. 42 to Badharudeen. It is in tune with the merit while 9 (2012) 13 SCC 340 preparing the select list. Therefore, such merit could not be disturbed only for the reason that the appellant has not disputed it for 1 year and 2 months after his appointment. Admittedly, a seniority list was circulated in the

year 2009 before the appointment of the appellant, thereafter, no seniority list was circulated. The appellant has already submitted representation claiming seniority which representation was accepted on 19 th October, 2017. An employee has no control over the employer to decide the representation or to finalise the seniority as per his wish. The High Court has taken long time to decide the seniority claim. That fact will not disentitle the appellant to claim seniority from the date the other candidates in the same selection process were appointed. The fact that some of the officers have been given selection grade will not debar the appellant to claim notional date of appointment as the appellant has asserted his right successfully before the Division Bench in an earlier round and reiterated such right by way of a representation. The delay in deciding the representation by the High Court cannot defeat the rights of the appellant to claim seniority from the date the other candidates selected in pursuance of the same selection process.

42. Still further, the Division Bench of the High Court has completely erred in law in holding that the appellant has delayed the challenge of his appointment vide order dated 22nd December, 2010. The appellant was appointed pursuant to a direction issued earlier by the Division Bench. The Division Bench has directed to re-cast the select list and in such select list, the name of the appellant appears at Sl. No. 3 and that of Badharudeen at Sl. No. 4. The appellant has submitted the representation on 11 th April, 2012 i.e. within 1 year and 2 months of his joining and submitted reminder on 18 th September, 2014. It is the High Court which has taken time to take a final call on the representation of the appellant and other direct recruits. The appellant was prosecuting his grievances in a legitimate manner of redressal of grievances. Therefore, it cannot be said that the claim of the appellant was delayed as he has not claimed the date of appointment as 30th March, 2009. The appellant having been factually appointed vide communication dated 22nd December, 2010, he could not assume or claim to assume charge prior to such offer of appointment. The appellant has to be granted notional seniority from the date the other candidates were appointed in pursuance of the same select list prepared on the basis of the common appointment process.

43. As per Mr. P.N. Ravindran, learned Senior Counsel appearing for the High Court, the appellant was assigned seniority at Sl. No. 18 pursuant to the order of the Administrative Committee but consequent to the order of the Division Bench, seniority list was revised and the appellant has been placed in seniority below the Officers appointed by transfer in excess of quota and even below Badharudeen who never disputed grant of seniority to him at Sl. No. 42. We also find merit in the argument raised by the learned counsel that in the year 2007, the cadre strength was 96 and out of which 24 posts fall to the quota of direct recruitment. Though, there is no clause that the remainder falls to the quota of in-service candidates, but 1/3rd has to be of a specific number. Since specific cadre strength is 96, therefore, 24 falls to the quota of direct recruits and 72 falls to the quota of appellant by in-service candidates. We are unable to agree with the findings recorded by the Division Bench of the High Court that there is no quota for the promotee candidates. The findings of the Administrative Committee or the assertion of the High Court in the counter affidavit has not been controverted by any Officer. Merely because the rule does not specifically say that 2/3 rd is the quota for in- service candidates, it will not mean that the promotions can be made irrespective of the cadre strength. The promotions may not be annulled, modified or reversed but a candidate will get seniority only if there is a quota meant for appointment of in-service candidates. As per the High Court, as against cadre strength of 96, 126 officers were working i.e. much more than the cadre

strength, therefore in the absence of any assertion or finding the respondent Nos. 9 and 10 or respondents Nos. 11 and 12 were within their quota. The finding of the Division Bench of the High Court that there is no quota for in-service candidates is clearly erroneous. The Full Bench in Haneefa's case has rightly held that the quota for direct recruitment is 1/3rd of the total cadre strength and as a consequence 2/3rd is the quota for in-service candidates. It may be a case of reversion of candidates appointed in excess of quota of in-service candidates but the fact remains that the quota is 1/3 rd for direct recruits and consequently, the 2/3 rd has to be for in-service candidates which quota has undergone change with amendment of Rules on 9th June, 2008. As per the amended Rules, 25% is the quota for direct recruits and 50% is for by-transfer from category I of Sub-Judges, Chief Judicial Magistrates in the Kerala State Judicial Services on the basis of merit and ability and 25% of the posts are contemplated to be filled up by transfer based upon limited competitive examination and viva voce. Therefore, the finding of the Division Bench of the High Court is clearly erroneous and contrary to the Full Bench judgment and, thus, not sustainable in law.

44. The argument that grant of selection grade to respondent Nos. 11 and 12 was earlier in point of time than the appellant will not confer any better, legal or equitable right. There was specific condition in the letter of appointment by transfer of respondent Nos. 9-10 that their appointment is without prejudice to the recruitment of direct recruits. Since the rights of the direct recruits were specifically mentioned, such respondents cannot claim any protection of their transfer in the cadre only for the reason that they were granted selection cadre earlier. The finding recorded by the High Court administratively and by the learned Single Judge is that the appointment of such candidates was beyond their quota meant for appointment by transfer. Therefore, they cannot claim any legal or equitable right. Similarly, respondent Nos. 11 -12 were appointed by transfer to the cadre subject to the condition of rights of the candidates in the writ petitions pending at that time. The said writ petitions were decided in the light of the order passed in the earlier writ petition filed by the appellant on 13.09.2010. The rights of the appellant to claim notional seniority thus cannot be said to be unjust which was wrongly interfered with by the Division Bench in an intra-Court appeal.

45. Consequently, the appeals are allowed and the order passed by the Division Bench is set aside and the writ petitions are ordered to be dismissed with no order as to costs.

.....J. (UDAY UMESH LALIT)J. (HEMANT GUPTA) NEW DELHI;

MARCH 04, 2020.