Prem Nath & Ors vs State Of Rajasthan & Ors on 15 March, 1967

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Author: J.M. Shelat

Bench: J.M. Shelat, K. Subba Rao, J.C. Shah, Vishishtha Bhargava, G.K. Mitter

PETITIONER:
PREM NATH & ORS.

Vs.

RESPONDENT:
STATE OF RAJASTHAN & ORS.

DATE OF JUDGMENT:
15/03/1967

BENCH:
SHELAT, J.M.
BENCH:
SHELAT, J.M.
RAO, K. SUBBA (CJ)
SHAH, J.C.
BHARGAVA, VISHISHTHA
MITTER, G.K.

CITATION:
1967 AIR 1599

ACT:
Constitution of India Art. 233-Selection Commissioner consisting of Chief Justice and two other Judges only-List of eligible candidates prepared by the Committee transmitted by the High Court-If proper consultation.
Art. 233A-Appointments of Civil and Additional Sessions Judge to the Rajasthan Higher judicial Service if validated.
Art. 236-Civil Judge appointed as Additional Sessions Judge under the Rajasthan Higher Judicial Service Rules, 1955-If "District Judge" within the definition of the Article.

HEADNOTE:

The Rajasthan Higher Judicial Service Rules, 1955, provided that recruitment to the Higher Judicial Service had to be made by the Governor from out of the lists of eligible candidates sent up by the High Court but prepared by a Selection Committee of the High Court consisting of the Chief Justice, the Administrative Judge and another Judge of the High Court nominated by the Chief Justice. When recruitments to the posts of Civil and Additional Sessions Judge were made in accordance with this procedure they were challenged on the ground that the Rules contravened Art. 233 of the Constitution. The High Court upheld the validity of the Rules and the appointments made thereunder. In this Court it was contended that (i) the Rules were ultra vires Art. 233, and (ii) the post of a Civil and Additional Sessions Judge is not included in the definition of a "District Judge" in Article 236 and therefore the appointments were not validated by Article 233A introduced by the Constitution (Twentieth Amendment) Act, 1966.

Held : The Rules contravened Article 233 and therefore the appointments were illegal; but the appointments were validated by Article 233A.

(i) Consultation as provided in Art. 233 is consultation with the High Court -and not with any other authority such as the Selection Committee appointed under the Rules. The Committee, though composed of Judges of the High Court, is not the High Court. The only function entrusted to the High Court under the Rules is to transmit the lists prepared by the Committee and there is nothing in the Rules empowering the High Court, before submitting the lists to vary those lists if the High Court were to disagree with the Committee. [190 A-C]

Chandra Mohan v. State of Uttar Pradesh, [1967] 1 S.C.R. 77, followed

(ii) When a Civil Judge is appointed as an Additional Sessions Judge, which is precisely what has happened in the instant case, such an appointment is made in exercise of the powers conferred by s. 9 of the Code of Criminal Procedure. The Civil Judge exercises the powers of an additional Sessions Judge not because he is a Civil Judge but because he is appointed as an Additional Sessions Judge. The two posts, therefore, cannot be said to have been clubbed together. So, when a person appointed as a Civil Judge is also intended to work as an Additional Sessions Judge an
187
appointment has to be made under s. 9 of the Code of Criminal Procedure as an Additional Sessions Judge. Such an appointment has to be considered as an appointment falling under the definition of "District Judge" within the meaning of Art. 236. Therefore Article 233 and the Rajasthan higher Judicial Service Rules 1955 apply to such a post and not Article 234 or the Rajasthan Judicial Service Rules, 1955. [195 E-H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 93 of 1966. Appeal from the judgment and order dated November 27, 1964 of the Rajasthan High Court in D. B. Writ Petition No. 803 of 1964.

M. B. L. Bhargava and Naunit Lal, for the appellant. S. V. Gupte, Solicitor-General, G. C. Kasliwal, Advocate General for the State of Rajasthan and K. Baldev Mehta, for respontents Nos. 1-5.

Sarjoo Prasad, S. N. Prasad, and 0. C. Mathur, for respon- dents Nos. 6 and 7 and Interveners Nos. 1 and 2. R. K. Garg, S. C. Agarwal and D. P. Singh, for intervener No. 3.

Santi Bhushan, Addl. Advocate-General, State of U.P. and

0. P. Rana, for intervener No. 4.

The Judgment of the Court was delivered by Shelat, J. This appeal, by certificate, raises two questions (1) whether the Rajasthan Higher Judicial Service Rules. 1955 are ultra vires Art. 233 and, therefore, the selections made by the Selection Committee appointed thereunder and appointments made on the basis of such selections are invalid, and (2) if so, whether the appointments are validated by the Constitution (Twentieth Amendment) Act, 1966 which introduces Art. 233A in the Constitution. On May 9, 1955, the Rajpramukh of the then (Part B) State of Rajasthan, in exercise of the powers conferred by the proviso to Art. 309 of the Constitution, promulgated the Rajasthan Higher Judicial Service Rules, 1955. In pursuance of the said Rules, the High Court of Rajasthan published a notice dated November 20, 1963, inviting applications for direct recruitment to four posts of Civil and Additional Sessions Judge. A number of applications were received by the High Court and after scrutiny thereof and interviews granted to the applicants, the Selection Committee, appointed under the said Rules and consisting of the Chief Justice. the Administrative Judge and another Judge of the High Court nominated by the Chief Justice, selected four candidates. Besides these four posts, there were fourteen posts to be filled up from amongst the members of the Rajasthan Judicial Service by promotion. The said Committee selected eligible candidates from amongst those members and prepared another list . The High Court submitted the two lists prepared by the Committee to the Governor for appointments.

The appellants who are members of the Rajasthan Judicial Service filed a writ petition in the High Court of Rajasthan challenging the validity of the selection done, the lists prepared by the Selection Committee and the appointments made on the basis of those lists on the (,round that they were done in contravention of Art. 233. The High Court dismissed the writ petition holding that the said Rules were valid, and, therefore, the proceedings of the said Committee, the lists prepared by it and submitted to the Governor by the High Court and the appointments made were all valid. Hence this appeal.

Rule 1(2) of the Rajasthan Higher Judicial Service Rules provides that the said Rules shall apply to the members of the Service consisting of District and Sessions Judges and Civil and Additional

Sessions Judges. Rule 6 provides that the strength of the Service and of each class of posts therein shall be determined by the Governor from time to time in consultation with the High Court and the permanent strength of the Service and of each class of posts therein shall be as specified in Schedule 1. Sub-rule (3) of Rule 6 empowers the Governor, from time to time and in consultation with the High Court, to leave unfilled or hold in abeyance any post in the Service or create such additional temporary or permanent posts in the Service as may be found necessary. Schedule I provides the strength of District and Sessions Judges at 18, i.e., 15 judgeships, one post of Legal Remembrance, one post of Registrar of the High Court, and one post of Joint Legal Remembrancer and that of the Civil and Additional District Judges at 20. Rule 7 provides sources of recruitment, viz., by promotion from among the members of the Rajasthan Judicial Service and by direct recruitment in consultation with the High Court. The persons eligible for direct recruitment are Advocates or Pleaders of more than seven years' standing. Rule 10 reads as under :-

> (1) Subject to the provisions of these rules, the number of persons to be recruited at each recruitment from each of the two sources specified in rule 7 and the -period (not exceeding three years) for which such recruitment is to be made shall be determined by the Governor.

Provided that the number of persons appointed to the Service by direct recruitment shall at no time exceed on---fourth of the total strength of the Service and the number of persons so appointed during any one period of recruitment shall not exceed one-fourth of the total number of vacancies occurring during that period".

Rule 13 provides that after a decision is taken under Rule 10 as of the number of persons to be recruited by promotion, selection hall be made from among the eligible members of the Rajasthan judicial Service by a Selection Committee consisting of the Chief justice, the Administrative Judge and a Judge of the High Court nominated by the Chief Justice. It also provides that the Committee shall select from among the eligible officers those whom they consider suitable for appointment to the Service. A list of the officers selected shall then be made in the order of their inter se seniority in the Rajasthan Judicial Service. As regards direct recruitment, Rule 17 provides that applications shall be invited by the High Court. Rule 21 provides that the Selection Committee shall scrutinise such applications and require such of the eligible candidates as seem best qualified for appointment to the Service under these Rules to appear before the Committee for interview. Under Rule 22 the Selection Committee have to prepare a list of candidates whom they consider suitable for appointment to the Service. Under Rule 23 the High Court has to submit to the Governor two copies each of the two lists of candidates considered suitable for appointment to the Service from the two sources of recruitment as prepared in accordance with Rules 13 and 22. Rule 24 provides that all appointments to posts in the Service shall be made by the Governor on the occurrence of substantive vacancies by taking candidates from the lists prepared under Rule 13 and Rule 22 in the order in which they stand in the respective lists. The first three vacancies shall be filled from the list prepared under Rule 13 and the fourth vacancy shall be filled from the list prepared under Rule 22 and so on.

It is clear from Rule 13(2) that the selection from amongst the eligible officers for appointment to the Higher Service is made by the Selection Committee and not by the High Court is a whole though

the list prepared thereunder by the Committee is forwarded by the High Court to the Governor. There is no provision in Rule 13 or in any other Rule empowering the High Court to modify the lists prepared by the Committee either by substituting others in the lists whom the High Court considers more suitable or by withdrawing or deleting any one of those selected by the Committee and named in the lists. So far is direct recruitment is concerned, under Rule 21 it is the Committee which scrutinise the applications and it is again the Committee which decide whom to reject and whom to call for interview. The High Court has nothing to do with the scrutiny of applications. It is again the Selection Committee which. interview the candidates considered eligible for appointment and not the High Court. It is also the Selection Committee which prepare the lists of eligible candidate selected by them. The only function entrusted to the High Court under the Rules is, therefore, to transmit the two lists prepare 'by the Committee under Rules 13 and

22. As aforesaid, there is no provision in the Rules empowering the High Court before submitting the lists to the Governor to vary those lists even if the High Court were to disagree with the selections made by the Committee. Obviously, the Committee is not the High Court The High Court thus is only a transmitting authority. The con- sultation as provided in Article 233 is consultation with th High Court and not with any other authority such as the Selection Committee appointed under the Rules. The Rules, therefore, and clearly inconsistent with the mandate provided for in Art. 23 and are, therefore, invalid. Consequently, the selections made by the Committee, the lists prepared by them and appointments made thereunder would be invalid.

Recently, the U.P. Higher Judicial Service Rules for recruitment of District Judges, which were similar, if not almost identical, with the Rules in this appeal, came up for consideration by this Court in Chandra Mohan V. State of Uttar Pradesh(1). After an analysis of the said Rules, this Court held that the said Rules were not in consonance with and contravened Art. 233 and further held that the appointments made thereunder were illegal. The Court observed :-

> "The Constitutional mandate of Art. 233 is clear. The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of District Judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, be- longing either to the Judicial Service or to the Bar, to be appointed as a District Judge. This mandate can be disobeyed by the Governor in two ways; directly, by not consulting the High Court at all, and indirectly by con- sulting the High Court and also other persons. That this constitutional mandate has both a negative and positive significance is made clear by the other provisions of the Constitution. See Articles 124(2) and 217(2) and 222. These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein".
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> (1) [1967] 1 S.C.R. 77.

The, Court also observed that :

> "the U.P. Higher Judicial Service Rules were constitutionally void as they clearly contravened the constitutional mandate of Art.
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> 233(1) and (2). Under the Rules the consultation of the High Court is an empty formality. The Governor prescribes the qualifications, the Selection Committee appointed by him selects the candidates and the High Court has to recommend from the lists prepared by the Committee. This is a travesty of the Constitutional provision. The Governor in effect and substance does neither consult the High Court nor act on its re-
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> commendations".

It is obvious that under the Rajasthan Higher Judicial Service Rules the entire work of scrutinising the applications, interviewing the applicants, selection of eligible candidates from both the sources and preparation of the two lists is done by the Selection Committee and not by the High Court. The only function entrusted under the Rules to the High Court is that of transmitting to the Governor the two lists prepared by the Committee. The Rules, therefore, do not provide for consultation of the High Court and, therefore, contravene Art. 233 which envisages con- sultation with the High Court and not with any other body such as the Selection Committee which cannot substitute the High Court even though the members thereof happen to be three Judges of the High Court. The learned Solicitor- General who appeared for the State frankly conceded that it was not possible for him to distinguish these Rules from the U.P. Higher Judicial Service Rules and, therefore, the decision in Chandra Mohan's case(1) would apply to the present Rules. Consequently, the said Rules cannot be sustained and have to be declared invalid. The proceedings taken by the Selection Committee and following them the action taken must also be held to be invalid. The next question is : whether appointments made by the Governor from amongst those in the said lists are validated by the Constitution (Twentieth Amendment) Act, 1966. Article 233A introduced by the said Act, inter alia, provides.

> "Notwithstanding any judgment, decree or order of any court (a)(i) no appointment of any person already in the judicial service of a State or of any person who has been for not less than seven years an Advocate or a Pleader, to be a District Judge in that State, and (ii) no posting, promotion or transfer of any such person as a District Judge, made at any time before the commencement of the Constitution (Twentieth Amendment) Act, (1) [1967] 1 S.C.R. 77.

1966, otherwise than in accordance with the provisions of Art. 233 or Art. 235 shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions".

The amendment thus validates the appointment, posting or pro motion of a person as a District Judge if such appointment, by reason of its not being in accordance with Art. 233 or Art. 235. would have been illegal or void. The question raised by counsel is whether appointment to the post of a Civil and Additional Sessions Judge can be said to be one of a District Judge.

Article 236(a) defines a 'District Judge' as including Judge of a City Civil Court, Additional District Judge, Joint District Judge, Assistant District Judge, Chief Judge of a Small Cause Court, Chief Presidency Magistrate, Additional Chief Presidency Magistrate Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge. A Civil and Additional Sessions Judge does not apparently find place in the different categories of judicial officers included in this definition. Mr. Bhargava for the appellants, therefore, argued that Art. 236, while defining a District Judge, does not include a Civil and Additional Sessions Judge; therefore, a person appointed as a Civil and Sessions Judge is not a District Judge and consequently Art. 233A does not validate the appointment of a person to the post of a Civil and Additional Sessions Judge if that appointment was invalid. In order to make good his submission, lie relied on tile Rajasthan Civil Courts Ordinance, 1950, section 6 of which provides for four categories of Civil Courts, viz., (1) the Court of the District Judge, (2) the Court of the Additional District Judge (3) the Court of the Civil Judge and (4) the Court of th e Munsif. Section 13 of the Ordinance provides that appointments of persons to be Civil Judges and Munsifs shall be made by the Rajpramukh in accordance with the Rules made by him in that behalf after consultation with the Rajasthan Public Service Commission and the High Court. Section 19 provides that the Court of a Civil Judge shall have jurisdiction to hear and determine all original suits and proceedings of a civil nature and the Court of a Munsif shall have jurisdiction to hear and determine all original suits and proceedings of a civil nature of which the value does not exceed five thousand rupees. Sections 1 6 and 1 7 provide for the place of sitting and seals of 'the Courts. On May 9, 1955. the Rajpramukh of Rajasthan promulgated the Rajasthan Judicial Service Rules in exercise of powers under Art. 234 read with Art. 238 and the proviso to Art. 309. Rule 4 defines a 'member of the service' is meaning a person appointed in a substantive capacity to a post in the cadre of the Service under the provisions of these Rules or of any Rules or orders superseded by Rule 2. Clause (f) of that Rule defines 'service' as meaning the Rajasthan Judicial Service. Rule 6 lays down the strength of the Service and provides that such strength of the Service and of each class of posts therein shall be determined by the Rajpramukh from time to time in consultation with the High Court. Sub-rule (2) provides that the permanent strength of the Service and of each class of posts therein shall be as specified in Schedule 1. According to that Schedule, the number of posts of Civil Judges was determined at 30 and that of the Munsifs at 80. Mr. Bhargava's contention was that neither under the Rajasthan Higher Judicial Service Rules nor under the Rajasthan Judicial Service Rules, there is any provision for appointment as an Additional Sessions Judge of a person who holds the post of a Civil Judge, that when respondents 6 and 7 were appointed they were appointed as Civil Judges with additional powers of an Additional Sessions Judge, that, therefore, as Civil Judges they would be amenable to the Rajasthan Judicial Service Rules, 1955 and not to the Rajasthan Higher Judicial Service Rules and consequently Art. 233A would not apply to their appointments. He also contended that before Art. 233A can apply, the appointment must be to the post of a District Judge and that it is not so as the post of a Civil and Additional Sessions Judge is not included in the detinition of a 'District Judge' in Art.

236. Mr. Garg appearing for the interveners argued that the appointments as Civil and Additional Sessions Judges club together the post of a Civil Judge and that of an Additional Sessions Judge, that though these, posts are so clubbed to other, such appointments would be governed by Art. 234 and not by Art. 233 and 'therefore Art. 233A would neither apply nor validate such appointments. Such appointments according to bull, would have to be made in accordance with the pro- visions of

Art. 234. He also sought to argue that since the Rajasthan Higher Judicial Service Rules were not distinguishable from those of Uttar Pradesh, the Rules are invalid, that Art. 233A does not validate such invalid Rules and that as the said appointments have been made under invalid Rules, they were not cured by Art. 233A. We may ,it this, stage make it clear that the question of constitutional validity of Art. 233A has not been raised in this appeal. The appointments are challenged as invalid, because they were made in contravention of Art. 233. The vires of Art. 233A not having been challenged we disallowed Mr. Garg appearing, for the interveners to go into that question in this appeal and we refrain, therefore, from deciding that question.

Mr. then referred to us tile Bengal . Agra and Assam Civil Courts Act, 1887, section 3 of which provides for the same four classes of Civil Courts as is done in section 6 of the Rajasthan Ordinance and contended, as did Mr. Bhargava, that the appoint-

ment of a person as a Civil and Additional Sessions Judge is substantially the appointment of such a person as a Civil Judge upon whom additional powers of an Additional Sessions Judge are conferred. Therefore, said he, such an appointment cannot be said to be an appointment of a District Judge within the meaning of Art. 236. The learned Solicitor-General, on the other hand, argued that the appointment of a person as a Civil and Additional Sessions Judge would not mean that he is only a Civil Judge or that he is not an Additional Sessions Judge included in the definition of a 'District Judge' by Art. 236. Such a Civil Judge when appointed also as an Additional Sessions Judge would have all the powers of a Sessions Judge and would possess jurisdiction in a Sessions Court of a Sessions division and all the _jurisdiction and powers which an Additional Sessions Judge would have under the Code of Criminal Procedure. The learned Deputy Advocate-General appearing for the State of Uttar Pradesh as an intervener supported the Solicitor-General and added that Judicial Service under Art. 236 falls into two parts: (1) a Service consisting exclusively of persons intended to fill the post of a District Judge and (2) other civil judicial posts inferior to the post of a District Judge. He relied on the words "appointments of persons to be District Judges" used in Art. 233. According to him, these two Articles apply to persons who are appointed in the first instance to Civil Judicial posts inferior to the post of a District Judge but who are intended to fill the post of a District Judge it some time in the future and, therefore, such persons also are District Judges and to whom Arts. 233 and 233A would apply. It is not necessary in the present case to go into the question of interpretation and scope of Arts. 233 and 236 as the question raised by Mr. Bhargava and Mr. Garg can well be resolved by a consideration of some of the provisions of the Code of Criminal Procedure. Section 6 of the Code provides for five classes of courts apart from the High Court, viz., (1) Courts of Sessions, (2) Presidency Magistrates, (3) Magistrates of the first class, (4) Magistrates of the second class, and (5) Magistrates of the third class. Section 7 provides that every State, excluding the Presidency Towns, shall be a sessions division or shall consist of sessions divisions; and every sessions division shall, for the purposes of this Code, be a district or consist of districts. Section 9 provides that the State Government shall establish a Court of Session for every sessions division, and appoint a Judge of such Court. Sub- section (3) of s. 9 empowers the State Government to appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts. Section 36 lays down that District Magistrates, Sub-Divisional Magistrates and Magistrates of the first, second and the third class shall have powers thereinafter respectively con- ferred upon them and specified in the third Schedule. Such powers are

called 'ordinary powers, Section 37 authorises the State Government or the District Magistrate, as the case may be, to invest any Sub-Divisional Magistrate or any Magistrate of the first, second or third class with what are called 'additional powers'. Under section 39 the State Government can confer such additional powers on persons by name or by virtue of their office or on classes of officials generally by their official titles. It is manifest that sections 36 to 39 cannot apply to the case of a Civil Judge appointed also as an Additional Sessions Judge, for these sections contemplate vesting of additional powers on District Magistrates, Sub-Divisional Magistrates and Magistrates of the first, second and third class. Therefore, the power to appoint a Civil Judge as an Additional Sessions Judge is to be found not in sections 36 to 39 but in section 9 which as aforesaid empowers the State Government to appoint Additional or Assistant Sessions Judges. That is precisely what appears to have been done in Rajasthan. By a notification dated June 2, 1950 the Rajasthan Government appointed with effect from July 1, 1950, Civil Judges therein mentioned by virtue of their office to be Additional Sessions Judges to exercise jurisdiction in courts of session mentioned in column 2 thereof. Therefore, when a Civil- Judge is also appointed as an Additional Sessions Judge or when a person is appointed both as a Civil Judge and also as an Additional Sessions Judge such appointment as an Additional Sessions Judge is made in exercise of power under s. 9 of the Code. When such a Civil Judge exercises the power of an Additional Sessions Judge, he does so not because he is a Civil Judge but because of his being appointed as an Additional Sessions Judge under S. 9 of the Code. The two posts, therefore, cannot be said to have been clubbed to-ether. Factually what happens is that a person who is or who is appointed a Civil Judge is also appointed an Additional Sessions Judge. It makes no difference whether he is first appointed as a Civil Judge and then as an Additional Sessions Judge or whether he is appointed both as a Civil Judge and an Additional Sessions Judge at the same time. When such an appointment is made, the appointee exercises both the powers of a Civil Judge and those of an Additional Sessions Judge. From such a combination of powers in the same person it does not follow that he is not an Additional Sessions Judge or that he is a Civil Judge and, therefore, does not fall under the definition of a 'District Judge' in Art. 236(a). Since such a post falls under that definition it would be Art. 233 and the Rajasthan Higher Judicial Service Rules which would apply to him and not Art. 234 or the Rajasthan Judicial Service Rules, 1955.

Articles 233 and 234 contemplate appointments falling under one or the other. It cannot be that an appointment would fall under both the Articles. If such a construction were to be adopted, it would render the two Articles unworkable. There fore, in deciding which of the two Articles applies in a particular case, what has to be determined is what was the intention when such appointment was made. Was the appointment to the post of a Civil Judge under s. 13 of the Rajasthan Civil Courts Ordinance or one under s. 9 of the Code of Criminal Procedure. If it is the latter, Art. 233 and not Art. 234 Would apply. Besides, there is no provision in the Code of Criminal Procedure under which a Civil judge can be invested with powers of an Additional Sessions Judge. Where, therefore, a person appointed as a Civil Judge is also intended to work as an Additional Sessions Judge, an appointment has to made under S. 9 of the Code of Criminal Procedure as an Additional Sessions Judge. Therefore,, such an appointment has to be considered as an appointment falling Linder the definition of 'District Judge within the meaning of Art. 236. Consequently, Art. 233 would apply to an appointment of a Civil Judge as an Additional Sessions Judge. Since the appointments in question were made in contravention of Art. 233 and were, therefore, illegal they must be held to

have been validated under the new Art. 233A.

Mr. Bhargava, however, contended that even assuiming that Art. 233A applies, the appointments in the present case were still invalid as in making them Rules 10 and 24 of the Rajasthan Higher Judicial Service Rules were infringed. As already stated, Rule 7 provides that recruitment to the Higher Service shall be made from two sources-, (1) by promotion from among the members of the Rajasthan Judicial Service, and (2) by direct recruitment. Rule 10 deals with the number of appointments to be made and provides that the number of persons to be recruited at each recruitment from each of the two sources and the period (not exceeding three years) for which the recruitment is to be made shall be first determined by the Governor. The first proviso to that Rule states that the number of persons appointed to the Service by direct recruitment shall at no time exceed one fourth of the total strength of the Service and the number of persons so appointed during my one period of recruitment shall not exceed one-fourth of the total number of vacancies occurring during that period. According to Rule 24, the Governor]its to make appointments on the occurrence of substantive vacancies by taking candidates from the two lists prepared under Rules 13 and 22 in the order in which the eligible candidates stand in the respective lists. The result is that given a certain number of appointments, the first three have to be filled in from the promoters and the fourth by the candidate selected by direct recruitment and so on.

It appears from the Government's letter dated December 8, 1962, that under Rule 10 the Governor fixed the number of appointments to be made as 18, 14 out of which were to be filled up by promotion and 4 by direct recruitment and the proposed recruitment for these vacancies was to be upto the period ending 1962. The contention was that under Rule 10, the period of recruitment is prospective and for a period not exceeding three years and, therefore, while determining the number of posts for which recruitment was to be made the Governor could not take into account vacancies remaining unfilled at the time. Therefore, it was urged that determination by the Governor of the number of appointments was contrary to Rule 10 and Rule 24 and consequently the proceedings of the Selection Committee based on such invalid determination were also invalid.

It is true that out of the 18 posts as determined by the Governor, there were 9 vacancies which were not filled up and were included in the number of appointments determined by the Governor. As a first step in the recruitment, Rule 10 no doubt provides that the number of appointments at each recruitment from each of the two sources shall be determined by the Governor. Rule 24 also provides that the appointments so determined have to be filled in from the two lists prepared by the Committee and submitted by the High Court, three from those selected from the Judicial Service and the fourth from those selected for direct recruitment and so on. But if certain posts intended to be filled up at the time of the last recruitment have remained vacant for one reason or the other, they would be vacancies which can be. filled up in the next recruitment. It is difficult to see why those unfilled posts cannot be regarded as vacancies to be filled up at the next recruitment. There is in fact nothing in Rule 10 or Rule 24 to preclude the Governor from including them in the number of appointments to be determined by him. Even if persons are appointed to officiate to such posts since their appointment would not be substantive appointment, they would not acquire a lien thereon and, therefore, those posts remain unfilled until substantive appointments in respect of them are made. They can, therefore, be included in the number of appointments determined by the Governor

under Rule 10.

Rule 6(3) in terms provides that the Governor, in consulta- tion with the High Court, can leave unfilled or hold in abeyance a post for the time being. If it is decided to fill up that post -At the next recruitment, there is no reason why that appointment cannot be included in the number of appointments determined by the Governor. . There is, in our view, therefore, no validity in the contention that the determination. of the number of appointments by the Governor was contrary to Rule 10 or that such determination rendered the subsequent proceedings of the Selection Committee bad in law. The contention, besides, is academic for it appears that on November 9, 1960, 9 Judicial Officers were confirmed in 9 out of the 18 posts with the result that only 9 posts remained to be filled up. In view of this fact the High Court held that there were only 9 posts for which recruitment had to be made and, therefore, only 2 out of these 9 posts would go to the direct recruitees instead of 4 if those 9 officers had not been confirmed. The contention that the determination of appointments under Rule 10 was bad in law has, therefore, to be rejected. We leave the question of the claim of seniority of Respondents 6 and 7, if any, open as it does not strictly arise in this appeal. These were the only contentions raised on behalf of the appellants. In our view, they cannot be sustained. The appeal is, therefore, dismissed. In the circumstances of the case we do not pass any order as to costs.

R.K.P.S. Appeal dismissed.