Supreme Court of India
P.K.Sarin vs State Of U.P on 16 December, 1994
Equivalent citations: 1995 SCC (1) 468, JT 1995 (1) 180
Author: M Punchhi
Bench: Punchhi, M.M.

PETITIONER:
P.K.SARIN

Vs.

RESPONDENT:
STATE OF U.P.

DATE OF JUDGMENT16/12/1994

BENCH:
PUNCHHI, M.M.
BENCH:
PUNCHHI, M.M.
AHMADI A.M. (CJ)

CITATION:
1995 SCC (1) 468 JT 1995 (1) 180
1994 SCALE (5)303

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by PUNCHHI, J.- This bunch of matters comprising a civil appeal and a few writ petitions under Article 32 of the Constitution, have a common aim and therefore can conveniently be disposed of by a common order. Necessary facts can be gathered from the civil appeal focussing the issue.

2.The appellants are members of the U.P. Civil Service (Judicial Branch "Nyayik. Sewa"). They were writ petitioners in one of the many writ petitions preferred before and disposed of by the Allahabad High Court, governing judgment of which is in Dinesh Chander Srivastava v. State of U.P.1 In sum that judgment is under appeal. The cause settled therein was the one which arose as an aftermath of Chandra Mohan v. State of U.p2 and the steps taken by the State of U.R in pursuance thereof.

3.Candidates for recruiting District Judges in the State of Uttar Pradesh, under the U.R Higher Judicial Service Rules, framed by the Government under Article 309 of the Constitution, could be

drawn from three sources i.e. members of the Bar, Judicial Officers (a misleading expression) who are members of the Executive Department discharging magisterial and some revenue duties, and by promotion from members of U.R Civil Services (Judicial Branch) under the control of the High Court. Six appointments from two of the afore-described services, i.e., three from the Bar and three 1 AIR 1977 All 3 1 0 2 (1967) 1 SCR 77 : AIR 1966 SC 1987 from the "Judicial Officers" were proposed to be made by the State, after Involving the High Court, when Chandra Mohan, a member of the U.P Civil Service (Judicial Branch) and others filed a writ petition in the High Court for the issuance of an appropriate writ directing the Government not to make the appointments pursuant to the proposal. Since the writ petition was dismissed and the matter was brought to this Court in appeal, the canvas of dispute, on account of many points involved, was widely spread, but for our purposes it would suffice to say that this Court ruled that the rules as such framed by the Governor empowering him to recruit Judges from the "Judicial Officers" source were unconstitutional and the recruitment of the "Judicial Officers" was bad. It was emphasised by this Court that the Indian Constitution had provided for an independent judiciary in the States and in order to put the independence of the subordinate judiciary beyond question, provision had been made in Article 50 of the Constitution in the Chapter of Directive Principles for the separation of the judiciary from the executive, and further in enacting Articles 233 to 237 in Part VI, Chapter VI of the Constitution, the appointment of District Judges in any State was envisaged to be made only from two sources i.e. (i) Service of the Union or of the State; and (ii) members of the Bar. This Court went on to rule that the Service of the Union or of the State mentioned in the first category did not mean each and every service of the Union or of the State but judicial service of the Union or of the State. "Judicial Service" as defined in Article 236(b) meant a service consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge.

4.Gathering the history of the Service, it was noticed that after India attained independence in 1947, there were, when the source of recruitment to Indian Civil Service had died out, only two sources from which District Judges had been recruited, i.e., either from the Judicial Service or from the Bar, and there was no case of a member of the executive having ever been promoted as a District Judge. In this backdrop, it was thought that recruitment of District Judges from the personnel available in the Executive Department could be deleterious to the good name of the judiciary, and an attempt to undermine it had to be frowned upon. In this backdrop, it was viewed by this Court that methodology under Article 237 of the Constitution was available where the Governor had the power to notify that Articles 223 to 226 could apply to Magistrates, subject to certain modifications or exceptions, if necessary, and then effect integration of the Magistrates in the Judicial Service, which is one of the sources of recruitment to the post of District Judge. It was emphasised that till such step is taken in the manner envisaged by Article 237, the Magistrates (Judicial Officers) were outside the scope of Articles 223 to 226 of the Constitution. In sum, under the rules then existing, the State of Uttar Pradesh could not justify the appointments of "Judicial Officers" as District Judges and attracted a mandamus issued by the Court for not making any appointment from the source of Magistrates/Judicial Officers. The Rules framed by the Governor, without resort to Article 237, empowering him to recruit District Judges from the "Judicial Officers" were thus declared unconstitutional and therefore the appointments of the "Judicial Officers" concerned were declared bad.

5.The State of Uttar Pradesh went about clearing the fall-out of Chandra Mohan case2 since the High Court on the administrative side was also anxious to do justice to the Magistrates/Judicial Officers. We would in the language of the High Court, say that the Governor of Uttar Pradesh issued the notification dated 12-3-1975, under Article 237 of the Constitution directing that the provisions of Chapter VI of Part VI of the Constitution and any rules made thereunder shall with effect from the date of notification apply to Judicial Magistrates (including Chief Judicial Magistrates) in the State who are members of the U.P. Judicial Officers Service as they apply in relation to persons appointed to the Judicial service of the State subject to two exceptions, namely, (1) the members of the U.P. Judicial Officers Service shall constitute a judicial service to fill in the post of Additional Sessions Judge only for purposes of Articles 233 and 236 of the Constitution and (2) the U.P Judicial Officers Service shall be a service distinct and separate from the U.P. Civil Service (Judicial Branch). By means of this if' notification the Judicial Magistrates who are members of the Judicial Officers Service have become eligible for appointment to the post of Additional Sessions Judge included within the definition of "District Judge" as defined by Article 236 of the Constitution. The notification further declares that the Judicial Officers Service shall be a judicial service.

6.By another notification dated 21-3-1975, the Governor of Uttar Pradesh in exercise of his powers under Article 309 read with Article 233 of the Constitution framed rules, namely, the U.P. Higher Judicial Service Rules, 1975, regulating recruitment and appointment to the U.P Higher Judicial Service. Under Rule 4 the Higher Judicial Service consists of a single cadre comprising the posts of District and Sessions Judges and Additional District and Sessions Judges. Rule 5 lays down the sources of recruitment to the service: According to it, recruitment to the service is to be made by two sources (a) by direct recruitment of pleaders and advocates of not less than seven years' standing and (b) by promotion of confirmed members of the U.P. Nyayik Sewa (Members of the U.P. Civil Service, Judicial Branch) who may have put in not less than seven years' service in that cadre. In addition to that Judicial Magistrates and Judicial Officers have also been made eligible for appointment but only to the post of Additional Sessions Judge. Rule 6 prescribes quota for recruitment to the service from the three sources prescribed by Rule 5. The rule lays down that 70% of the vacancies are to be filled in by promotion from the members of the Nyayik Sewa, while 15% of the vacancies are to be filled by direct recruitment of advocates and the remaining 15% of the vacancies are to be filled in by promotion from amongst the members of the U.P. Judicial Officers Service (Judicial Magistrates).

7.In Part VI of Chapter VI of the Constitution, the word 'Magistrate', though employed in Article 237, does not figure to be defined and thus inevitably resort has to be made to Section 3(32) of the General Clauses Act, 1897 to note that a 'Magistrate' shall include every person exercising all or any of the powers of the Magistrate under the Code of Criminal Procedure for the time being in force. Coming to the Code of Criminal Procedure, 1973, as now existing, we have courts and magistrates classified under Section 6 thereof, the latter as Judicial Magistrates and Executive Magistrates, and the Court of Session heading the classification. Section 9 provides that every Court of Session shall be presided over by a Judge to be appointed by the High Court. The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session. The Executive Magistrates have roles and functions assigned to them under the Code such as undertaking proceedings under Sections 107, 108, 109, 110, 111, 133 and 145 CrPC. Judicial

Magistrates, on the other hand, are assigned their roles under the Code primarily of trial of offences, as envisaged under Section 26 of the Code.

8.The High Court recorded its understanding of the new role of the magistracy after the 1973 Code in paragraph 9 of its judgment as follows:

" The Code of Criminal Procedure, 1973, conferred power on the High Court to appoint Sessions Judge, Magistrates, Chief' Judicial Magistrate and Special Magistrates and to confer Magisterial powers on any person or authority. Under the new Code, the Executive has nothing to do with the appointment of Magistrates. In pursuance of the provisions of the Code of Criminal Procedure, 1973, the High Court of Allahabad appointed Chief Judicial Magistrates and the Magistrates with effect from 1st April, 1974. The persons so appointed are the same persons who were earlier functioning as Judicial Magistrates who had been appointed by the Governor and were functioning as Judicial Officers. After their appointment by the High Court, control over the Magistrates vested in the High Court. The Governor in order to effectuate the policy underlying Article 50 of the Constitution issued the impugned notification dated 12th March, 1975 applying all the provisions of Chapter VI of Part VI of the Constitution to the existing class of Magistrates. The intention and purpose behind the issue of the notification is to make the Magistracy free from executive influence and to make them part of the Judicial Service of the State along with civil judiciary."

At this place, Articles 233, 234, 235, 236 and 237 from Part VI, Chapter VI of the Constitution may be read with advantage: "233. Appointment of district judges.- (1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

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

234. Recruitment of persons other than district judges to the judicial service.- Appointment of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

235. Control over subordinate courts.- The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

236. Interpretation.- In this Chapter-

(a) the expression 'district judge' includes 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;

(b) the expression 'judicial service' means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

237. Application of the provisions of this Chapter to certain class or classes of magistrates.- The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification."

9. Much before the issuance of the impugned notification the Government by notification dated 30-9-1967 issued under Article 237 of the Constitution, had directed separation of the Judicial Magistrates/Judicial Officers from the Executive who were thereafter placed under the administrative control and superintendence of the High Court with effect from 2-10-1967. The Government, it appears, stopped thereafter recruitment to the Judicial Officers Service. On the other hand they continued to remain ineligible for appointment to a post in the U.P Higher Judicial Service by the dictate of Chandra Mohan case2. The Judicial Officers Service thereupon became a suffocated and dying cadre, as members of that service were left with no avenues of promotion even though most of them had sufficient experience of criminal judicial work. The High Court appreciated their predicament and moved into the matter. The State Government on the recommendations of the High Court thought it prudent to utilise the experience of the Judicial Magistrates trying criminal cases and providing to them avenues of promotion. With that end in view, the State of U.P. issued the two notifications impugned before the High Court, as also here, the effect of which was that the Judicial Officers became eligible for appointment only to the post of Additional Sessions Judge, and the Judicial Officers Service was declared as a Judicial Service, becoming a third source for recruitment under Rule 6, getting a quota of 15 per cent. But, in the event of nonavailability of the prospective candidates or exhaustion of their members, the quota meant for Judicial Officers/Judicial Magistrates was to go to add to the quota of the U.P. Civil Services (Judicial Branch) vis-a-vis direct advocate recruits. Thus in the nature of things, it was a self-consuming measure, working itself out in the foreseeable future.

10.Article 237 of the Constitution enables the Governor to apply the provisions of Chapter VI of Part VI of the Constitution and any rules made thereunder, to certain class or classes of Magistrates and not to any other class or classes of officers. This is a ladder upon which a class or classes of Magistrates in the State can be made to climb and get transformed, with effect from a certain date, as persons appointed to a Judicial Service of the State, subject to such exceptions and modifications as may be specified in the notification. The Constitution recognises the judicial element permeating in the Magistracy, for they deal with the liberty and property of individuals, functioning as criminal courts. To put it tersely Magistracy alone is recognized as judge-material meant for such

transformation. Now in the impugned notification, it is clear that the promotional avenues of the Magistrates stop at the level of the Additional Sessions Judge, a court which is a creation of the Code of Criminal Procedure. In no way is this designation to be confused with that of the Additional District Judges. Under Article 236, which is the interpretation box for Chapter VI, the inclusive definition of the expression "District Judge" includes an Additional Sessions Judge but only for the purposes of the Chapter, and not for any other purpose. The Additional Sessions Judge is a "District Judge" for the limited purpose of his appointment as District Judge in terms of Article 233 of the Constitution.

11.As is evident the domain of the present litigation is confined to the members of the U.P. Judicial Officers Service, recruitment to which was stopped after 2-10-1967. The Service thenceforth became subject to all subtractions but no addition. The sweep of Article 237 covers Magistrates existing prior to the separation of judiciary from the executive, those who may not have been appointed in accordance with the rules framed under Article 234 or who might not have been under the control of the High Court under Article 235. It is towards achieving that end that the Governor stood empowered under Article 237 to act by means of a notification, with such exceptions or modifications, as he might consider fit. The powers thus conferred were unfettered by any restriction. The Governor could apply all or only some of the provisions of Chapter IV That here the Governor in exercising his power under Article 237, issued the notification of 12-3-1975, classifying Magistrates (including Chief Judicial Magistrates) in the State as those who belong to the Uttar Pradesh Judicial Officers Service and applying to them all the articles contained in Chapter VI of Part VI of the Constitution. barring of course Article 237, as they apply in relation to persons appointed to the Judicial Service of the State subject to the exceptions and modifications namely, (i) the members of the U.P. Judicial Service Officers shall constitute a Judicial Service to fill in the post of Additional Sessions Judge only for the purpose of Articles 233 and 235 of the Constitution; (ii) U.P Judicial Officers Service shall be a service distinct and separate from the U.P. Civil Service (Judicial Branch).

12. The point for consideration before the High Court as also here is whether the Governor could transform the existing U.P. Judicial Officers Service to be a Judicial Service of the State alongside the existing U.P. Civil Service (Judicial Branch). The following passage from Chandra Mohan case2 was put across to contend that a distinct service could not be created:

> "Article 237 enables the Governor to implement the separation of the judiciary from the executive. Under this Article, the Governor may notify that Articles 233, 234, 235 and 236 of the Constitution will apply to magistrates subject to certain modifications or exceptions; for instance, if the Governor s o notifies, the said magistrates will become members of the judicial service, they will have to be appointed in the manner prescribed in Article 234, they will be under the control of the High Court under Article 235 and they can be appointed as District Judges by the Governor under Article 233(1). To state it differently, they will then be integrated in
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> -the judicial service which is one of the sources of recruitment to the post of district judges. Indeed, Article 237 emphasises the fact that till such an integration is brought

about, the magistrates are outside the scope of the said provisions. The said view accords with the constitutional theme of independent judiciary and the contrary view accepts a retrograde step."

13. Reliance on Chandra Mohan case2 is misplaced as we view it. The above passage talks of an instance of action but is by no means exhaustive. The State is not bound to adopt the course of making Magistrates become members of the existing Judicial Service. They may obviate the procedure to be followed in making appointments in the manner prescribed under Article 234. The State is not bound to cause any integration so that the Magistrates may become members of the existing Judicial Service. No bar anywhere could be pointed out to us by learned counsel for the appellant/petitioners by which the State could be prohibited from creating a parallel judicial service in which the Magistracy of the kind involved herein was transformed. As said before, the Constitution recognises, and it is plain otherwise, that Magistrates perform judicial functions when trying offences under the Indian Penal Code and other statutes, empowered as they are under the Code of Criminal Procedure. There could thus be no bar to confining the promotional avenues of the Magistrates to be uptil the Court of the Additional Sessions Judge and none other. The grievance of the members of the U.P Civil Service (Judicial Branch) is highly overblown when it is scanned to discover that they without functioning as criminal courts and without gaining any experience in that field, go on to become Additional District and Session Judges merely on the experience gained on the civil side. This discloses that what is needed at that stage is judicial temper. Their attempt to thwart the promotional benefit given by the impugned notification to the Judicial Magistrates in becoming Additional Sessions Judges is on the face of it unequal in comparison to the service benefit obtained by the personnel of the U.P. Civil Service (Judicial Branch). The entire matter has to be viewed on the touchstone of Article 50 of the Constitution. In separating judiciary from the executive, the personnel of judicial service so retrieved by separation have to be given a place as a class as members of the judiciary, either- by integration in the existing judicial service or by transformation into a separate judicial service. There apparently is no other way to place them. Articles 233 to 237 would have to be viewed in this light. On doing so, we go to agree with the High Court that the impugned notification of 12-3-1975 and the other consequential notifications stood validly issued by tile Governor under Article 237 of the Constitution and that the erstwhile Magistrates, members of the U.P. Judicial Officers Service, became members of a separate Judicial Service of the same name intended to be promoted as Additional Sessions Judges only in the post meant for the Additional District and Sessions Judge and to stay apart alongside the U.P. Civil Service (Judicial Branch). We also view that the said service was validly created.

14.Before we conclude, we must notice a three-member Bench decision of this Court in M.L. Sharma v. Union of India3 wherein it was ruled that even if a particular person comes within the definition given under Article 236 of the Constitution, it is open to the State Government under appropriate rules to classify such officer included in the inclusive definition not to be a District Judge proper and to belong to a category different from that. That was a case in converse where a person claimed to have become a District Judge by means of the inclusive definition and to have become, by this logic, a member of the Haryana State Superior Judicial Service. This Court repelled the claim. This case is of no assistance to either side.

15.There is thus no merit either in the appeal or in the writ petitions. All of them fail and are dismissed but without any order as to costs.

3 1992 Supp (2) SCC 430