1962

State of Bombay
v.
Sardar Venkat Rao Krishna Rao Gujar

Mudholkar J.

to determine the precise area covered by the structures and the passages separating these various structures. We agree with him. It would be sufficient to direct the Government to settle with the respondent the whole of the land covered by the structures as well as land appurtenant to those structures from out of Khasra No. 61/1. What the area of that land would be is a matter to be determined during the settlement proceedings. With this modification we dismiss the appeal with costs.

Appeal dismissed.

1962

April 9.

THE HIGH COURT, CALCUTTA

v.

AMAL KUMAR ROY

(B. P. SINHA, C. J., K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J. R. MUDHOLKAR and T. L. VENKATARAMA AIYAR, JJ.)

State Judicial Service—Power of High Court—Supersession of seniority of Munsif in promotion—If punishment or penalty—Suit, if lies—Constitution of India, Arts. 235, 311(2), 320(3)(c), 14,16(1)—Civil Services (Classification, Control and Appeal) Rules rr. 49, 55A.

This was an appeal by special leave by the Judges of the Calcutta High Court against the decision of the City Civil Court at Calcutta decreeing the respondent 1's suit. That respondent was a Munsif in the West Bangal Civil Service (Judicial) and had issued an injunction in his own favour in a case where he was the plaintiff. That order of injunction was set aside in appeal by the appellate Court. When the cases of several Munsif came up for consideration before the High Court for inclusion of names in the panel officers to officiate as Subordinate Judges, the respondent 1's name was excluded. He was told by the Registrar of the Court on a representation made by him that the Court had decided to consider his case after a year. As the result of such exclusion respondent 1, who was then the seniormost in the list of Munsifs, lost eight places in the cadre of Subordinate Judges before he was

1962

The High Court, Calcutta
v.
Amel Kumar Roy

actually appointed to act as an Additional Subordinate Judge. His case in substance was that this exclusion by the High Court amounted in law to the penalty of "withholding of promotion" without giving him an opportunity to show cause and he prayed that a declaration might be made that he occupied the same position in respect of seniority in the cadre of Subordinate Judges as he would have done if no supersession had taken place and claimed arrears of salary payable to a Subordinate Judge. The trial Court decreed the suit. A preliminary objection was taken in this Court on behalf of the ppellants that the controversy raised was not justiciable.

Held, that there was no cause of action for the suit and the appeal must succeed.

There could be no doubt that under Art. 235 of the Constitution the High Court was the sole authority to decide the fitness of a Munsif to be appointed as a Subordinate Judge and the exercise of its power was not justiciable.

Article 235, read with the service rules, clearly showed that a Munsif had no right to promotion that could be enforced through court. Rule 55A of the Civil Services (Classification, Control and Appeal) Rules had no application to the State of West Bengal and r. 49 conferred no right to promotion but only a safeguard against imposition of any punishment by way of withholding of promotion without adequate opportunity to show cause and operated only when there was a disciplinary proceeding.

It was not correct to say that the High Court should have consulted the State Public Service Commission since Art. 320(3)(c) of the Constitution also contemplated disciplinary matters.

Nor was it correct to say that the respondent 1 was reduced in rank as a result of the High Court's action within the meaning of Art. 311(2) of the Constitution. The word 'rank' in Art. 311(2) referred to classification and not to a particular place in the same cadre in the hierarchy of a service. All Subordinate Judges were in the same cadre and held the same rank irrespective of seniority. Losing some places in the seniority list, therefore, did not amount to reduction in rank.

Nor were Arts. 14 and 16(1) violated. Equal opportunity did not mean getting the particular post for which a number of persons was considered. So long as one was equally considered along with others there could be no denial of equal opportunity if ultimately he was not selected in preference to the others.

1962

The High Court, Calcutta v. Amal Kumar Roy

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 193/1961.

Appeal by special leave from the judgment and decree dated February 17, 1960, of the City Civil Court, Calcutta, in Title Suit No. 409 of 1958.

A. C. Mitra, B. Das, B. Basak and *P. K. Bose*, for appellants Nos. 2 and 1(a) to 1(t).

M. C. Setalvad, Attorney General of India, B. Das, B. Basak and *P. K. Bose*, for appellant No. 2.

M. Adhikari, Advocate General, Madhya Pradesh and *I. N. Shroff*, for intervener No. 1.

P. D. Menon, for intervener No. 2.

S. M. Sikri, Advocate-General, Punjab and *P. D. Menon*, for the intervener No. 3.

G. C. Kasliwal, Advocate-General, Rajasthan, S. K. Kapur and *P. D. Menon*, for intervener No. 4.

G. R. Ethirajulu Naidu, Advocate-General, Mysore and *P. D. Menon*, for intervener No. 5.

C. P. Lal, for intervener No. 6.

1962. April 9. The Judgment of the Court was delivered by

Sinha C. J.

SINHA, C.J.—This appeal, by special leave, is directed against the judgment and decree dated February 17, 1960, of the City Civil Court at Calcutta, decreeing the plaintiff's suit for a declaration and consequential reliefs, to be hereinafter noticed. The appeal arises under very special circumstances, the most notable feature of the case being that it comes direct to this Court from the judgment and decree of the Trial Court, without having gone through the ordinary process of appeal to the High Court of Calcutta. The reason why this happened was that the High Court of Calcutta, and the sitting judges

1962

The High Court, Calcutta
v.
Amal Kumar Roy

Sinha C. J.

of that Court, were the appellants, having been the principal contesting defendants in the Trial Court, and, therefore, could not, in all propriety, have heard the appeal. That was the reason why special leave was granted to appeal from the judgment and decree of the Trial Court itself.

In order to bring out the points in controversy it is necessary to state the following facts. The plaintiff, who is now functioning as on Additional District and Sessions Judge, was, at the date of the suit filed on September 4, 1958, a member of the West Bengal Civil Service (Judicial). He joined the service on April 1, 1937, as a *Munsif*, and was duly confirmed on April 1, 1939. In the West Bengal Civil List, corrected up to January 1, 1954, his name appeared against serial No. 53, in the list of *Munsifs*. Just above him against serial No. 52 was Shri Bibhutosh Banerjee, and the name of Shri Jagadindranath Hore (Respondent No. 2) appeared against serial No. 54. In course of time, all *Munsifs* down to serial No. 52—Shri Bibhutosh Banerjee—in the Civil List aforesaid were appointed to the posts of Subordinate Judges, according to their seniority indicated in that list. In February 1955 the plaintiff was at the head of the list of *Munsifs*. In April 1955, the plaintiff noticed that the second respondent aforesaid had been appointed a Subordinate Judge, and the notification of his appointment appeared in the Calcutta Gazette dated April 28, 1955, although the plaintiff had not received any order of appointment as a Subordinate Judge. On representation being made by the plaintiff to the High Court, he was informed by the Registrar of the Court that "the Court decided to consider his case again in December 1955." In the meantime, several other *Munsifs*, whose names appeared below that of the plaintiff in the Civil List, were appointed as Subordinate Judges, one after another. The plaintiff then addressed a petition of appeal against

the action of the High Court in not appointing him as a Subordinate Judge, to the Governor of the State of West Bengal. That appeal was withheld by the High Court with the remarkes "that the action complained of not being diciplinary action, no such appeal lies." The plaintiff thereupon addressed a petition to the Governor, praying that the said petition of appeal withheld by the High Court, as aforesaid, be called for. This petition was also withheld by the High Court with the remarks that in the Court's opinion no such petition lay. In April 1956, the plaintiff was appointed to act as an Additional Subordinate Judge, by an order of the High Court. In the meantime, eight *Munsifs,* who occupied lower places in the Civil List (impleaded as proforma defendants in the suit) had been appointed and posted as Subordinate Judges, one after another in succession, in the order in which their names appeared in the Civil List. In May 1956, the plaintiff addressed a memorial to the Governor of West Bengal. This memorial was also withheld by the High Court on the ground that no such memorial lay. The plaintiff had sent a copy of the memorial to the Secretary to the Government of West Bengal (Judicial Department). He was informed by the Department that the Governor had declined to interfere. Thereupon the plaintiff instituted the suit, originally against the State of West Bengal, as the principal defendant, and the eight *Munsifs,* who had been appointed Subordinate Judges in preference to the plaintiff, as proforma defendants. But subsequently, on the plea of defect of parties, raised in the written statement of the State of West Bengal, the High Court of Calcutta, and the sitting Judges, were added as defendants 1(a) to 1(x) in the category of principal defendants. The cause of action alleged in the plaint was that the High Court had never declared the plaintiff as unfit to act as a Subordinate Judge; it had never called upon the plaintiff to show cause, under Art. 311(2) of the

1962

The High Court, Calcutta
v.
Amal Kumar Roy

Sinha C. J.

Constitution, or r. 55-A of the Civil Services (Classification, Control and Appeal) Rules, as to why his promotion should not be withheld. As a matter of fact, the High Court never declared, in terms, that it was going to withhold the plaintiff's appointment as a Subordinate Judge. On the contrary, the plaintiff was vested with special powers two months before April 1955, when the order complained of was passed by the High Court, conferring upon him pecuniary jurisdiction to try suits of the value upto Rs. 3500/-; and small cause court suits up to the value of Rs. 300/—powers which ordinarily are conferred by way of stepping-stones to subordinate judgeship. The plaintiff was also allowed to cross the efficiency bar at the higher level on due date, namely April 1956, and was recommended for appointment as an Assistant Sessions Judge, soon after he was posted as a Subordinate Judge. The plaintiff also made a point of the fact that though the High Court expressly declared that its action in not appointing him a Subordinate Judge in the ordinary course was not by way of disciplinary action, or of imposing a penalty, within the meaning of cl. (ii) of r. 49 of the Civil Services (Classification, Control and Appeal) Rules, the High Court actually withheld the plaintiff's promotion as Subordinate Judge, withheld his petition of appeal to the Governor, and did not consult the West Bengal State Public Service Commission. The plaint also added that the *Munsifs* and Subordinate Judges belong to one and the same service, namely, the West Bengal Service (Judicial), and that a number of the service is entitled to be considered for promotion according to seniority, to the West Bengal Judicial Service. In the premises, the plaintiff prayed that "a declaration be made that he occupies the same position, with the same privileges and benefits, as if he had been appointed as a Subordinate Judge immediately before the second respondent", and that "his name be inserted in the West Bengal Civil List, and in any other relevant gradation list maintained as a

Subordinate Judge immediately below that of Shri Bibhutosh Benerjee and immediately above that of Shri Jagadindra Nath Hore". Arrears of salary as Subordinate Judge, together with dearness allowance, with interest at 6% per annum, amounting to Rs. 1,090/- were also claimed, and a permanent injunction was also prayed for directing the principal defendants to place the plaintifi's name in the Civil List, in terms of the declaration sought, besides other reliefs, not necessary to be mentioned here. The suit was contested mainly by the added defendants, as the first defendant, the State of West Bengal, disclaimed any knowledge of the action taken by the High Court, or the reasons thereof, though it denied that the plaintiff had a cause of action, or that he was entitled to any relief. The substantial defence to the suit raised by the High Court was that in December 1954, the High Court considered the question of inclusion of names of certain *Munsifs* in the panel of officers to officiate as Subordinate Judges; the plaintifi's name was excluded from that panel, and it was decided that the High Court would consider his case a year later, after a special report from the District Judge concerned; and that the plaintiff was not thought fit, at that time, to act as a Subordinate Judge. On the question of plaintiff's fitness as a judicial officer, the High Court made reference to the plaintiff having issued an injunction in his own favour, in a case in which he himself was the plaintiff. The order of injunction was judicially considered, on appeal, and set aside. The matter came up before, a Full Court of the High Court for consideration administratively, as a result of which a Committee of three Judges of the High Court was appointed to consider the plaintiff's conduct. After considering the plaintiff's explanation, the High Court came to the conclusion that his explanation was unsatisfactory, and that his conduct should a total disregard of all judicial propriety. It was denied that the plaintiff's case

1962

The High Court, Calcutta v. Amal Kumar Roy

Sinha C. J.

came within the scope and ambit of Art. 311(2) of the Constitution, or r, 55-A of the Civil Services (Classification, Control and Appeal) Rules. It was claimed on behalf of the High Court that under the Constitution and otherwise the High Court was the sole administrative authority to determine questions of promotion of *Munsifs* to Subordinate Judge's grade; in exercise of that sole authority and discretion, the High Court considered the plaintiff's case for promotion as Subordinate Judge, and passed orders on a proper appreciation of the plaintiff's record of service, and in the best interests of the judicial administration of the State. It was also denied that the plaintiff's case should have been referred to the State Public Service Commission. It was affirmed that the suit, as framed, claiming the reliefs aforesaid, was not maintainable. The High Court relied upon the provisions of Art. 235 of the Constitution, as vesting complete control, authority, jurisdiction and discretion to consider and decide the question of fitness of a *Munsif* to be promoted as a Subordinate Judge, and its order in not promoting the plaintiff, after a proper consideration of his record of service, was neither a disciplinary action nor an imposition of a penalty, which would bring his case within the purview of the State Public Service Commission, and the plantiff had no right of appeal against the order of the High Court, complained of, as it was not governed by the Civil Services (Classfication, Control and Appeal) Rules, relied upon by the plaintifi. In the premises, it was contended that the Court had so jurisdiction to entertain the suit or to grant any of the reliefs claimed by the plaintiff.

On those pleadings, and after recording the plaintiff's and considering the documentary evidence adduced by the parties, the learned Judge below, of the City Court, observed at the outset that at the trial, the learned counsel for the plaintiff did not

rely upon the provisions of Art. 311(2) of the Constitution, though reference to it had been made in the plaint. He relied upon the provisions of Art. 235 of the Constitution, read with rr. 49, 55-A and 56 of the Civil Services (Classification, Control and Appeal) Rules, and came to the conclusion "that the High Court intentionally deferred consideration of the plaintiff's promotion with a view to penalising him for his conduct in the past...", and that the plaintiff was entitled to bring the suit inasmuch as the High Court was not authorised, under Art. 235 of the Constitution, to withhold the plaintiff's promotion as Subordinate Judge, without complying with the requirements of the Rules aforesaid. In the result, the suit was decreed with costs, giving the declaration sought for, as also a money decree for Rs, 1,060/-, as arrears of salary and dearness allowance. The judgment and decree of the Civil Court, is dated February 17, 1960. On April 12, 1960, application for special leave to appeal to this Court, directly from the judgment and decree aforesaid, was made, and the special leave was granted by this Court on April 26, 1960.

In this Court, at the very outset, the learned Standing Counsel for the Government of West Bengal very properly and candidly admitted before us that due to defective instructions he had not brought it to the notice of the learned Trial Judge that the r. 55-A, enacted in 1948 by the Governor-General, was not applicable to the Judicial Service in Bengal. The plaintiff-respondent, who argued his case in this Court in person, with singular ability and persistence, was not able to show to the contrary. We must, therefore, proceed on the footing that this Rule does not, in terms, apply to this case, and is wholly out of the way.

At the threshold of his arguments, the learned counsel for the appellants contended that the suit was not maintainable because the controversies raised

1962

The High Court, Calcutta
v.
Amal Kumar Roy

Sinha C.J.

by the plaintiff are not justiciable. We have, therefore to determine the question whether the issues raised in the pleadings of the parties were justiciable. The answer to this question must depend upon the answer to the questions whether the plaintiff had a right to promotion, which right had been withheld from him., thus giving him a cause of action. Was the plaintiff subjected to a penalty, without taking the necessary proceedings, as contemplated by Art. 311(2) of the Constitution, or the Service Rules? Was there any breach of procedure, laid down by law, in determining the plaintiff's right, if any. Was the action of the High Court postponing by a year the consideration of the plaintiff's promotion as Subordinate Judge without jurisdiction? Was there any delegation of powers under Art. 235 of the Constitution to the English Committee, as contended by the plaintiff respondent? Was there a breach of the provisions of Art. 320(3)(c) of the Constitution? Was the plaintiff "reduced in rank" within the meaning of Art. 311(2) of the Constitution? These are matters which are interconnected and will, therefore, have to be considered together. The question whether the plaintiff had a right to promotion has to be determined with reference to the provision of the Bengal, Agra and Assam Civil Courts Act (XII of 1887)—which may for the sake of brevity be called the Civil Courts Act—along with the Civil Service Rules governing the judicial branch of the Provincial Civil Service of West Bengal. The Civil Court Act consolidated the law relating to Civil Courts in Bengal, and other parts of India. By s. 3, it prescribed four classes of Civil Courts, namely; (1) the Court of the District Judge; (2) the Court of the Additional District Judge; (3) the Court of the Subordinate Judge; and (4) the Court of the *Munsif*. By s. 21 of the Act, appeals from a *Munsif* shall lie to the District Judge, who may assign the appeal to be heard by a Subordinate Judge. Hence, in the

hierarchy of the Courts in the district, the Court of a Subordinate Judge is higher in rank than the Court of a *Munsif* which stands at the bottom. But the Civil Courts Act does not make any provision about promotion from the rank of a *Munsif* to that of a Subordinate Judge, or the machinery or the process by which a *Munsif* may become a Subordinate Judge. Under s. 255 of the Government of India Act, 1935, the Governor of a Province, after consultation with the Provincial Public Service Commission, and with the High Court concerned, was authorised to make rules for recruitment to the Subordinate Civil Judicial Service, which expression meant civil judicial posts inferior to the post of a District Judge. By sub-s.(3) of that section, the High Court was vested with the power of posting, promotion, etc. of persons belonging to the service, subject to the conditions of service, laid down by the Governor. After the inauguration of the Consititution, Art. 235 vests the control over District Courts, and courts subordinate thereto, including the posting and promotion of persons belonging to the Judicial Service of a State, holding any post inferior to that of the District Judge, in the High Court. This power of the High Court is subject to any right of appeal, which a member of the service may have under the law regulating the conditions of his service, and to his other rights under that law. It is therefore, clear that after the coming into force of the Constitution, the High Court is the authority which has the power of promotion in respect of persons belonging to the State Judicial Service, holding any post inferior to that of a District Judge. It is not contended by the plaintiff-respondent that there is any other authority which could have dealt with him in the matter of promotion from the post of a *Munsif* to that of a Subordinate Judge. But it was contended that the authority of the High Court, derived as it is solely from Art. 235, is subject to the service

1963

The High Court, Calcutta
v.
Amal Kumar Roy

Sinha C. J.

rules governing the matter. Even so it was not claimed that there is anything in the rules, which categorically confers a right on the plaintiff to be promoted as a Subordinate Judge. What is claimed by the plaintiff is that r. 49(2) of the Civil Services (Classification Control and Appeal) Rules embodied his right in a negative way, namely that he shall not be withheld promotion except by recourse to proceedings contemplated by that rule, and the rules following that rule. In other words the plaintiff is not claiming an absolute right to promotion, irrespective of the question whether or not there is a vacancy in the higher cadre or that he must be promoted when he becomes the seniormost *Munsif*. He claims that, under the Rules aforesaid, if there is a vacancy in the cadre of Subordinate Judges, he should have been appointed in that vacancy of a Subordinate Judge, as he was the seniormost *Munsif* and that if a *Munsif* lower to him in the seniority list is appointed as a Subordinate Judge in that vacancy, without good or sufficient reasons being shown, and without giving him the right of appeal, then his right is infringed, and in that sense he claims that he has a right not to be withheld promotion from him, and that in the events that have happened, his supersession by a *Munsif* junior to him in the Civil List amounted to withholding promotion from him within the meaning of r. 49. That rule lays down several categories of penalties, which may for good and sufficient reasons be imposed upon a member of the service. One of those penalties is "withholding of increments or promotion, including stoppage at an efficiency bar", and r. 55-A lays down that a penalty like that of withholding promotion, as also some other penalties not relevant to our present purpose, shall not be imposed upon a member of the service unless he has been given adequate opportunity of making any representation that he may desire to make, and such representation, if any, has been taken into consideration before the order

imposing the penalty is passed. One thing is clear with reference to Art. 235, read with the service rules, that there is no right of promotion which the plaintiff could have claimed to enforce by action in a Court. Rule 49, on which reliance was placed by the plaintiff to make out his right to be considered for promotion as a Subordinate Judge, is in the first instance, not a right but only a safe guard to a public servant that punishment by way of withholding of promotion shall not be imposed upon him unless he has been given adequate opportunity of showing cause against the action proposed to be taken. It is also clear that r. 49 comes into play only when proceedings are taken by way of disciplinary action against a public servant. In such disciplinary proceedings, the Government servant proceeded against has a right to insist upon the procedure being strictly followed. But in this case there was no such disciplinary proceeding against the plaintiff, and therefore, r. 49 is wholly out of the way. If r. 49 is not available to the plaintiff, r. 55-A was equally not available to him, even assuming that the rule applied to the case of members of the State Judicial Service. It follows from what has been said that there was no question of a penalty being imposed upon the plaintiff. That being so, there could not be any breach of the procedure laid down by the rules for proceedings against a government servant, like the plaintiff.

But it was argued by the plaintiff that the action taken against him, namely, postponing consideration of his case for promotion as a Subordinate Judge, as aforesaid, was beyond the jurisdiction of the English Committee. This argument is advanced on the assumption that the High Court, as such, had delegated its powers, under Art. 235 of the Constitution, to the English Committee, which passed final orders against him. In our opinion, no foundation was laid in the plaint for any

1962

The High Court, Calcutta
v.
Amal Kumar Roy

Sinha C J.

such contention. It is not alleged in the plaint that the resolution of the English Committee of the Judges of the Calcutta High Court, dated December 16, 1954, was not adopted by the Full Court in accordance with the Rules of Business laid down by that Court. According to r. 1 of Ch. 1 of the High Court Rules, there shall be a Standing Committee, called the English Committee, composed of the Chief Justice and at least four other Judges, to be appointed from time to time by the Chief Justice. According to r. 2 this Committee shall be associated with the control and direction of the Subordinate Courts, and according to r. 3 the English Committee shall have power *inter alia* "to make recommendations for the appointment of Subordinate Judges..." The English Committee, therefore, by its resolution aforesaid, only made a recommendation, which recommendation has to be circulated to all the Judges as soon after each meeting as possible, according to r. 13. The relevant portion of r. 15 is in these terms:

> "On the following matters all the Judges shall be consulted:—
>
> .....
>
> (e) all appointments which by law are made by the High Court and which are not otherwise expressly provided by the rules in this Chapter."

It must therefore, be held that in accordance with the Rules of Business of the Court, the appointment of Subordinate Judges from amongst *Munsifs* has to be made by the High Court as a whole, on the recommendation of the English Committee. The resolution of the English Committee in connection with the selection of the plaintiff as a Subordinate Judge must have, in ordinary course, according to the Rules, been placed before all the Judges of the

Court, and presumably the Court as a whole accepted the recommendation of the English Committee. It is true that there is nothing in the record of this case to prove all this. But, as already indicated, as the plaintiff did not make any allegations that the High Court as such had not passed the orders complained of, the High Court did not think it necessary to place the other relevant documents on the record. Hence, there is no basis for the submission either the High Court and made unjustifiable delegation of its powers under Art. 235 of the Constitution, or that the High Court as a whole did not pass the order which was the plaintiff's alleged cause of action. What has happened with reference to his complaint made in the plaint has been thus stated by the High Court in paragraph 6 of the written statement:

> "With further reference to paragraph 4 of the plaint these defendants state that on or about 16th December, 1954, the cases of several Munshifs came up for consideration before this High Court for inclusion of names in the panel of officers to officiate as Subordinate Judges. The plaintiff's name was excluded and it was decided by this High Court that, after the special report from the District Judge was received, the case of the plaintiff would be considered a year later. The plaintiff was not thought fit at that time to act as a Subordinate Judge and these defendants will refer to the relevant records in connection therewith. Subsequently, the plaintiff was allowed to act as a Subordinate Judge under Order of this High Court and therefore, in the meantime and in due course and for good reasons the plaintiff had lost eight places and became a Subordinate Judge after Sri Anath Bandhu Syam. Ultimately, the plaintiff was confirmed as a Subordinate Judge and was included in

1962

The High Court, Calcutta v. Amal Kumar Roy

Sinha C.J.

the fit list to officiate in the West Bengal Higher Judicial Service, and has since been appointed to officiate as Additional District and Sessions Judge."

Thus, unfortunately for the plaintiff, the effect of the order of the High Court was that he was not selected as a Subordinate Judge when his turn in the ordinary course came, for certain reasons which need not be gone into, because we have held that the plaintiff had no right to promotion, and, therefore, no right of action in a Court. The plaintiff lost eight places in the cadre of Subordinate Judges of West Bengal, but that was a natural consequence of the order of the High Court deferring the consideration of his selection as Subordinate Judge by a year. But that is the normal incidence of public service. In this connection, we may notice the argument advanced by the plaintiff that before the High Court decided to pass him over in favour of those *Munsifs* who were lower in the Civil List, the Bengal Public Service Commission should have been consulted, in accordance with the provisions of Art.320(3)(c) of the Constitution. That has reference to "all disciplinary matters". As already pointed out no disciplinary proceedings had been started against the plaintiff. Hence, there could be no occasion for the State Public Service Commission being consulted. It is not, therefore, necessary for us to reconsider the question as to whether the provision in question is mandatory or only directory, as held by this Court previously.

But it was further contended that even though there may not have been any disciplinary proceedings taken against him, the effect of the High Court's order was that he was reduced by eight places in the list of Subordinate Judges, and that in law amounted to reduction in rank, within the meaning of Art. 311(2) of the Constitution. Though in the Trial Court the plaintiff's counsel (apparently

the plaintiff did not argue his case himself in that Court) had conceded that no reliance was placed on the provisions of that Article on behalf of the plaintiff, the plaintiff in this Court has tried to invoke those provisions in aid of his submission aforesaid. In our opinion, there is no substance in this contention because losing places in the same cadre, namely, of Subordinate Judges does not amount to re uction in rank, within the meaning of Art. 311(2). The plaintiff sought to argue that "rank", in accordance with dictionary meaning, signifies "relative position or status or place", according to Oxford English Dictionary. The word "rank" can be and has been used in different senses in different contexts. The expression "rank" in Art. 311(2) has reference to a person's classification and not his particular place in the same cadre in the hierarchy of the service to which he belongs. Hence, in the context of the Judicial Service of West Bengal, "reduction in rank" would imply that a person who is already holding the post of a Subordinate Judge has been reduced to the position of a *Munsif*, the rank of a Subordinate Judge being higher than that of a *Munsif*. But Subordinate Judge in the same cadre hold the same rank, though they have to be listed in order of seniority in the Civil List. Therefore, losing some places in the seniority list is not tantamount to reduction in rank. Hence, it must be held that the provisions of Art. 311(2) of the Constitution are not attracted to this case.

Lastly, it was submitted that the plaintiff has been discriminated against in the matter of his promotion, and, therefore, Arts. 14 and 16(1) of the Constitution have been violated. It is difficult to see how either of those Articles can be pressed in aid of the plaintiff's case. The plaintiff's case was considered along with that of the others, and the High Court, after a consideration of the relative

1962

The High Court, Calcutta
v.
Amal Kumar Roy

Sinha C. J.

fitness of the *Munsifs* chose to place a number of them on the panel for appointment as Subordinate Judges, as and when vacancies occurred. He had, therefore, along with others, equal opportunity. But equal opportunity does not mean getting the particular post for which a number of persons may have been considered. So long as the plaintiff, along with others under consideration, had been given his chance, it cannot be said that he had not equal opportunity along with others, who may have been selected in preference to him. Where the number of posts to be filled is less than the number of persons under consideration for those posts, it would be a case of many being called and few being chosen. The fact that the High Court made its choice in a particular way cannot be said to amount to discrimination against the plaintiff.

It must, therefore, be held that the plaintiff has failed to make out a cause of action for the suit. The High Court, being the sole authority to decide the question of appointment of a *Munsif* to the higher rank of a Subordinate Judge, had exercised its power, after fully considering the plaintiff's case for promotion, to pass him over for a year. His case was later considered and he was promoted to the higher rank of a Subordinate Judge and subsequently to the still higher rank of an Additional District and Sessions Judge. The exercise of the power vested in the High Court is not justiciable, and rightly so. The High Court, by Art. 226 of the Constitution, has been constituted, without in any way derogating from the powers of the Supreme Court in that behalf, the custodian of individual rights and liberties, guaranteed by part III of the Constitution, and has been further vested with the power to enforce those rights by issuing appropriate orders or writs. By Art. 235, the High Court has been vested with complete control over the subordinate courts. Naturally, therefore, not only as citizens but as members of the Judicial

Service, they look upon the High Court as the custodian of their rights in accordance with the rules prescribed by itself. It is a little surprising that the plaintiff should have convinced himself that the High Court had not given him his due, and should have taken recourse to the Courts to enforce such rights as the law gives him as a member of the State Judicial Service. The plaintiff, who argued his own case in this Court, though not in the Trial Court, gave a very good account of himself in arguing his case and placing all relevant considerations before the Court. But he seems to have more learning than wisdom. He has, without any justification, taken recourse to Courts instead of leaving his case to be dealt with by the High Court, which must be presumed to have acted in all fairness, in accordance with the established practice and rules of the Court, so as best to subserve the interests of efficient and impartial administration of justice. The plaintiff appears to have been a victim of circumstances, which were more or less his own creation. He tried to convince us that he had no alternative but, as a Court, to grant an injunction in his own favour as a plaintiff. We have not thought fit to go into that question because on the face of it, it appears to be rather wholly unarguable that a litigant should be the judge in his own cause, however just it may be. Instead of allowing some delay in obtaining the injunction, on account of circumstances beyond his control, and even taking the risk of judgment going against him in the Small Cause Court, he thought better to issue the injunction in his own favour, sitting as a Judge in his own case. That has been the cause of all his misfortunes in the service, and he has to thank himself for all that has happened. But however much one may sympathise with him, it has got to be held that in law he had no right which could be enforced through the machinery of the Courts. The appeal must, therefore, be allowed. But as the

1962

The High Court, Calcutta v. Amal Kumar Roy

Sinha C.J.

defendants-appellants allowed the case to be decided against them without placing all relevant considerations before the Trial Court, particularly the fact that r. 55-A did not apply to members of the State Judicial Service, we direct that each party will bear its own costs, here and below. The appeal is accordingly allowed, but without costs.

Appeal allowed.

1962

April 9.

MST. KHARBUJA KUER

v.

JANGBAHADUR RAI

(A. K. SARKAR, K. SUBBA RAO and J. R. MUDHOLKAR, JJ.)

Pardanashin lady—Execution of deed—Binding nature—Burden of proof.

R, the husband of the appellant, had separated from his uncle J. in 1924. After the death of R, J got a maintenance deed executed by the appellant containing recitals that there had been no separation between R. and J. The appellant filed a suit for a declaration of her title to the property and for a declaration that the deed having been got executed by fraud was not binding on her. The trial court decreed the suit holding that R and J had separated, that the appellant was an ignorant pardanashin lady and that she did not execute the deed after understanding the contents thereof. On appeal the first appellate court confirmed the findings and decree. In second appeal the High Court reversed the findings of facts on the ground that the onus was on the appellant to prove that the deed had been got executed by fraud. The appellant contended that the