

A D. GANESH RAO PATNAIK AND ORS.
v.
STATE OF JHARKHAND AND ORS.

OCTOBER 6, 2005

B [R.C. LAHOTI, C.J., G.P. MATHUR AND
P.K. BALASUBRAMANYAN, JJ.]

Service Law

C *Bihar Superior Judicial Service Rules, 1946—Rule 6—Seniority—Direct recruitments vis-a-vis promotees—Promotion in excess of allotted quota subject to court orders—Subsequently though quota found in excess regularised—Against subsequent vacancies—Held, direct recruits appointed as against allotted quota shall rank senior to promotees.*

D *Words and phrases—'Cadre'—Will mean and include entire cadre including temporary posts.*

Rule 6—Proviso—Deviation from allotted quota—Promotions in excess of quota—No material to show any conscious decision by State Government—

E *Held, promotions cannot be valid and legal.*

The appellants-direct recruits and the contesting respondents-promotees besides others were provisionally allocated to the State of Jharkhand and in the said provisional allocation order the names of the appellants were placed above the names of the contesting respondents in accordance with the administrative decision of the Patna High Court dated 4.9.1996. The Jharkhand High Court promoted the appellants to the posts of District and Sessions Judges in June, 2001, whereas the contesting respondents were promoted on or after August, 2001. Some time in January, 2002 two of the promotee officers, viz., respondent Nos. 9 and 11, filed representations on the administrative side of the Jharkhand High Court for treating them as senior to the direct recruits. This representation was referred to a committee of two Hon'ble Judges, which, after issuing notices and giving an opportunity of making representations to the appellant, gave a report on recommending that the promotee officers are entitled to be ranked senior to the direct recruits. The report of the

Committee was accepted by the High Court and the contesting respondents were declared senior to the appellants. The appellants then filed a writ petition before the Jharkhand High Court challenging the aforesaid decision on the administrative side wherein an interim order of stay was passed, but ultimately the writ petition was dismissed. A

Before this Court appellant contended that the decision of the High Court in the earlier round of litigation to the effect that the temporary posts had also to be taken into consideration for determining the quota of the direct recruits had neither been commented upon nor reversed by this Court and, therefore the said decision was binding upon the parties; that the observations made in paragraph 27 of the judgment in the case of *O.P. Garg* supports their case; that the appointment of the contesting respondents was not only contrary to Rules but was fortuitous in nature and they can get no advantage of such fortuitous appointment until a substantive vacancy was available in their quota, which in fact became available much later some time in the year 1993-94, which is long after the appointment of the appellants; that both the appellants and the contesting respondents were members of Bihar Superior Judicial Service and dispute of their *inter se* seniority had been settled by the Patna High Court on the administrative side vide its decision dated 4.9.1996 whereunder appellants were declared to be senior to the contesting respondents; and that in such circumstances it was not open to the Jharkhand High Court to reopen the issue and take a contrary view on 29.8.2002 whereunder the contesting respondents were declared to be senior to the appellants, more so when the decision taken by the Patna High Court on 4.9.1996 on the administrative side had already been challenged by filing a writ petition to which respondent Nos. 9 and 11 were parties and the writ petition was still pending. B C D E F

Respondents submitted that the mere fact that this Court did not specifically advert to the aforesaid part of the judgment of the High Court would not mean that it gave a seal of approval to the same, specially when the appeal preferred by the State of Bihar was allowed and the directions issued in the judgment of the High Court for making further appointments of direct recruits was set aside; that Rule 6 of the Rules, which says that out of the posts in the cadre of the service, two-thirds shall be filled by promotion and one-third by direct recruitment, is not in absolute terms but contains a proviso, which lays down that the State Government may in consultation with the High Court, deviate from the said proportion in G H

A either direction; that in view of the proviso appended to Rule 6 it was fully open to the State Government not to strictly adhere to the quota rule of one-third and two-third and the said quota could be exceeded or reduced; that any appointment made by promotion, which was beyond the two-third quota, would not be illegal and would be fully saved by the proviso to the Rule; that in the State of Bihar the quota rule had completely broken down as after 1979 no appointments by direct recruitment were made for almost 12 years and in such circumstances the dispute of *inter se* seniority between the appellants and the contesting respondents cannot be decided by applying the principle underlying Rule 6, which provides for quota in the matter of appointment to Bihar Superior Judicial Service.

C Allowing the appeal, the Court

HELD: 1. Rule 6 only says that of the posts in the cadre of the service, two-thirds shall be filled by promotion and one-third by direct recruitment. Cadre is defined in sub-rule (a) of Rule 2 and it means the cadre of the Bihar Superior Judicial Service. It is important to note here that the definition of "cadre", as given in the aforesaid Rule does not say that the temporary posts have not to be taken into consideration or have to be excluded nor there is any indication to that effect. The "cadre" means the entire cadre of Bihar Superior Judicial Service and, therefore, there is no warrant for excluding the temporary posts. It is not necessary to go into the question as to what extent the judgment of the Patna High Court rendered in *Madan Mohan Singh v. State of Bihar* remained intact and would consequently bind the parties. The question whether for the application of "quota rule" temporary posts have to be taken into consideration or not has been examined in several decisions of this Court.

D In view of the authoritative pronouncements of this Court there cannot be any doubt whatsoever that for determining the quota of direct recruits, both the temporary and permanent posts have to be counted and taken into consideration and their quota cannot be confined to permanent posts alone. [115-E, F; 116-D; 118-C]

G *A.K. Subraman v. Union of India*, AIR (1975) SC 483 (para 29); *P.S. Mahal v. Union of India*, [1984] 3 SCR 874; *Keshav Chandra Joshi and Ors. v. Union of India and Ors.*, [1992] Supp. 1 SCC 272 and *O. P. Garg and Ors. etc. v. State of U.P. and Ors.* AIR (1991) SC 1202, referred to.

H 2. After the decision in the case of *Madan Mohan Singh* by the High Court, which ruled that temporary posts have also to be counted for

determining the one-third quota of direct recruits, which decision is legally correct and sound, there was absolutely no scope for giving promotion to the contesting respondents in the vacancies, which did not fall in the quota of promotees but fell within the quota earmarked for direct recruits. The High Court had issued clear directions in the case of *K.P. Verma* that vacancies meant for recruitment from amongst advocates should never be filled up by promotees even on the ground that the posts are lying vacant due to the delay caused by the appointment procedure and further if any post out of that lying vacant from the quota of direct recruits had been filled up or is filled up by promotion, such promotee will revert immediately to its original position in the service from which he had been promoted. The promotion order passed in favour of the contesting respondents on 30.4.1991 was, therefore, liable to be cancelled. However, instead of taking this decision, which would have naturally meant reverting the contesting respondents back to their original position, they were allowed to continue treating them as promoted against subsequent quota of promotees. In such circumstances there is absolutely no scope for treating the contesting respondents as senior to the appellants who are all direct recruits. The observations in *O.P. Garg's* case certainly support the contention of the appellants that as no vacancy either permanent or temporary in the quota meant for promotees was available on 30.4.1991, the period of officiation/service rendered by the contesting respondents till a vacancy in their quota became available to them, cannot be counted towards their seniority. [120-C, D, E, F; 121-A-B]

K.P. Verma v. State of Bihar, AIR (1989) Patna 276 and *O.P. Garg and Ors. v. State of U.P. and Ors.*, AIR (1991) SC 1202, referred to.

3. It will not be proper to hold that the promotion of the contesting respondents was fortuitous as contended by the appellants. It cannot be said that the contesting respondents were promoted by accident or by chance. Their promotion order was passed as there were vacancies to the posts of Additional District and Sessions Judges, though in the quota of direct recruits, but as no recruitment from the said channel had been made for a long time and sufficient number of candidates were not available, the vacancies were filled in by giving promotion to members of Bihar Civil Service (Judicial Branch). If promotion orders had not been passed and the posts had not been filled in, the judicial work in the districts would have suffered. However, it is clear that having regard to the various orders passed on the judicial side by the Patna High Court and the legal position

A being well settled that the temporary posts have also to be counted for determining the one-third quota of direct recruits, the promotion given to the contesting respondents was not in accordance with law. Instead of taking the harsh step of rescinding their order of promotion the Patna High Court, on the administrative side, took the decision to treat them promoted against subsequent quota of promotees. Therefore, the
 B contesting respondents can under no circumstances claim seniority over the appellants and the view to the contrary taken by the Jharkhand High Court on 29.8.2002 on administrative side and also in the judgment and order dated 1.4.2003, which is the subject-matter of challenge in the present appeal, is wholly erroneous in law. [121-F, G, H; 122-A, B]

C *Rudra Kumar Sain v. Union of India*, [2000] 8 SCC 25, referred to.

Stroud's Judicial Dictionary; Black's Law Dictionary and Oxford Dictionary, referred to.

D 4. The proviso to Rule 6 does not give untrammelled power to the State Government to deviate from the substantive provisions of the Rule which fixes the quota. On the contrary it says that the State Government may, in consultation with the High Court, deviate from the said proportion in either direction. This is in tune with the constitutional mandate of Clause
 E (1) of Article 233 of the Constitution, which says that 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. The proviso contemplates a conscious decision taken by the State Government after having consultations with the High Court in this regard. The dictionary
 F meaning of the word "consultation" is a council or conference (as between two or more persons); deliberation of two or more persons on some matter. There is neither any pleading nor any material on record to show that at any point of time the State Government ever took a conscious decision for deviating from the quota rule after having made consultation with the High Court. In absence of any material to show that any such decision
 G was taken by the State Government it is not possible to assume that the promotions made beyond the two-third quota were legal or valid or that the notification issued on 30.4.1991 giving promotions to the contesting respondents was in accordance with law and was justified.

[122-E, F, G, H; 123-A]

H 5. It may be noted that the court did not strike down Rule 6 of the

Rules nor held it to be *ultra vires*. There is no direction in the judgment that henceforth quota rule should not be followed. That the quota rule had broken down is neither pleaded nor demonstrated. Similarly, no material has been placed on record to show that it had become impossible to adhere to the quota rule contained in Rule 6 of the Rules. If no direct recruitment had been made after the year 1979 in the State of Bihar, it was not on account of the fact that it was impossible to do so. At any rate after the decision in *K.P. Verma's* case necessary steps were taken for making appointment by direct recruitment. The contesting respondents were appointed long after the publication of the merit list of the examination conducted for making direct recruitment and it does not lie in their mouth to say that the quota rule had broken down or that their promotion though made beyond the quota fixed for promotees, yet the same should be treated not only perfectly valid but also in a manner so as to give them the benefit of seniority over the direct recruits.

[123-E, 124-A, B, C]

Rudra Kumar Sain v. Union of India, [2000] 8 SCC 25, distinguished.

Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra, [1990] 2 SCC 715, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9728 of 2003.

From the Judgment and Order dated 1.4.2003 of the Jharkhand High Court at Ranchi in W.P. (S) No. 5363 of 2002.

A. Sharan, Additional Solicitor General, S. Muralidhar, Somiran Sharma and Amit Anand Tiwari for the Appellants.

Vijay Hansaria, Anupam Lal Das and Rajan Raj for the Respondents Nos. 4-11.

M.L. Verma, Anil Kumar Jha and Satya Mitra for the Respondent No.1.

Ms. Pinky Anand, Standing Counsel for Jharkhand, (N.P. on 7.9.2005), D.N. Goburdhun and Rajesh Pathak for the Respondent Nos. 2-3.

The Judgment of the Court was delivered by

G.P. MATHUR, J. This appeal, by special leave, has been filed challenging the judgment and order dated 1.4.2003 of the High Court of

A Jharkhand by which the writ petition preferred by the appellants was dismissed and the issue raised is that of seniority between the direct recruits and the promotees in the Bihar Superior Judicial Service, who are currently serving in the State of Jharkhand.

B 2. The Bihar Superior Judicial Service Rules, 1946 (hereinafter referred to as the "Rules") provide for appointment to the post of Additional District and Sessions Judge by two sources, namely, by direct recruitment from amongst members of the Bar and by promotion from amongst members of the Bihar Civil Service (Judicial Branch), and they further provide that one-third posts in the cadre of service shall be filled in by direct recruitment and two-third shall be filled in by promotion. It appears that direct recruitment to Bihar Superior Judicial Service was not regularly made and often the posts of Additional District and Sessions Judges were filled in by promotion. After the year 1979 an advertisement was issued in the year 1985 inviting applications for making appointment to the posts of Additional District and Sessions Judges by direct recruitment. Even after the said advertisement had been issued, no action was taken for making the selection for a considerable period of time. One K.P. Verma then filed a writ petition in Patna High Court praying that a writ of *mandamus* be issued to the State Government and to the High Court on the administrative side to observe the constitutional mandate of Article 233 of the Constitution and to make appointments by making direct recruitment from amongst members of the Bar in order to comply with the requirement of the Rules whereunder one-third appointments to the posts of Additional District and Sessions Judges had to be made by direct recruitment. The writ petition was heard by a Full Bench of three learned Judges and the judgment is reported in *K.P. Verma v. State of Bihar*, AIR (1989) Patna 276. In the said judgment a direction was issued to the State Government and to the High Court on the administrative side to make appointments to the posts of Additional District and Sessions Judges by direct recruitment of members of the Bar within a period of six months from the date of the judgment and a further direction was issued that in no case the vacancies meant for direct recruits shall be filled in by promotion or vice versa and the continuity and the parity shall be maintained until altered by due process of law. In compliance with the aforesaid direction a fresh advertisement was issued in the year 1989 inviting applications from eligible members of the Bar for the purpose of making direct recruitment to the posts of Additional District and Sessions Judges. A written examination was thereafter held, which was followed by interview and a merit list containing names of 129 candidates was declared on 24.11.1990, which was to remain

valid till November, 1991. Out of this merit list the High Court recommended names of 32 candidates, in order of merit, for appointment as Additional District and Sessions Judges in the quota of direct recruits. The appellants, who are nine in number, were amongst those 32 candidates, whose names had been recommended to the State Government for appointment. A

3. Around the same time the High Court also recommended names of 23 Subordinate Judges, including respondent Nos. 4 to 11 in the present appeal (hereinafter referred to as contesting respondents), for promotion to the temporary posts of Additional District and Sessions Judges. The State Government did not take immediate steps to issue the appointment orders in favour of the persons whose names had been recommended by the High Court. At the time when the advertisement was issued in the year 1989 the total number of permanent and temporary posts of Additional District and Sessions Judges was 251. If the quota for the direct recruits was to be worked out for all the posts, including temporary posts, it came to 83 and the remaining 168 posts fell in the quota for the promotees. However, the number of promotees, who were working as Additional District and Sessions Judges by April, 1991, far exceeded their quota of 168. The State Government, it appears, was proceeding on the basis that the cadre of Additional District and Sessions Judges would consist only of permanent posts and, therefore, the temporary posts could not be taken into consideration for making appointment by direct recruitment and such temporary posts had to be excluded while determining the quota of the direct recruits. One Madan Mohan Singh then filed a writ petition before the Patna High Court being C.W.J.C. No. 945 of 1991 wherein several prayers were made and one of the prayers was that direct recruitment should also be made to temporary posts and the quota of direct recruits should be determined by also taking into account the temporary posts of Additional District and Sessions Judges. An interim order was passed in the writ petition on 25.4.1991, which has some relevance and, therefore, it is being reproduced below: - B
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“Meanwhile as this matter cannot be heard and disposed of before the summer vacation, to safe guard the interest of all concerned, including the members of the subordinate judiciary as such, we direct that the state government shall be entitled to make appointment to the superior judicial service by promotion in accordance with law, but such promotion and the question of seniority of the persons so promoted shall abide by the final result of this writ petition and/or any other order of this Court. It is further directed that this direction shall be G
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A incorporated in each letter/order relating to such appointment/promotion as one of the conditions of such appointment/ promotion and unless such condition is accepted by the person concerned no such appointment/promotion is to be given effect to.”

B The State Government thereafter issued two separate notifications on the same date, i.e., on 30.4.1991. By one notification 32 persons, including the appellants herein, were appointed to the posts of Additional District and Sessions Judges against the quota of direct recruits and by another notification several persons, including the contesting respondents in the present appeal, were promoted to the Bihar Superior Judicial Service and were appointed as Additional District and Sessions Judges. In the notification, which related to
C the promotees, following two conditions were mentioned: -

“2 (ka) The promotion of the above said officers can be cancelled/ modified in the light of the decision of Writ No. 945/1991;

D (kha) In the case of promoted officers, their promotion will become effective only in the event of their furnishing consent letters accepting the abovesaid condition. In other words, those officers who do not submit such written consent letters accepting such condition shall not be deemed to have been promoted and their joining to the promoted post will not be accepted.”

E The promotee officers, including respondent No. 4 and Nos. 6 to 11, duly submitted their consent letters/undertakings to be bound by the above conditions and joined at their respective places of postings some time after the appellants had joined. The respondent No. 5 did not submit any consent letter/undertaking but he was allowed to join as Additional District and Sessions
F Judge. Factually, thus the promotion of respondent Nos. 4 to 11 came into effect much after 30.4.1991.

4. The writ petition filed by Madan Mohan Singh (C.W.J.C. No. 945 of 1991) was decided by a Division Bench of the Patna High Court on 16.12.1991 and it was held that the cadre of Superior Judicial Service included
G both permanent and temporary posts and consequently the one-third quota of direct recruitment from the Bar had to be calculated by taking into account permanent as well as temporary posts. The Division Bench issued a further direction that apart from those 32 persons, who had already been appointed, further appointments should be made from the same merit list, which was
H declared on 24.11.1990 so as to fill in the complete quota of direct recruits

and the validity of the merit list prepared, which was for a period of one year, A
i.e., up to November, 1991, was extended for a further period of six months
with effect from 24.11.1991. The State Government preferred an appeal against
the aforesaid decision of the Patna High Court before this Court and the
judgment of this Court is reported in *State of Bihar v. Madan Mohan Singh*,
[1994] Supp. 3 SCC 308. This Court decided only one question in the appeal, B
namely, having regard to the fact that the advertisement had been issued to
fill in only 32 vacancies and 129 candidates having been called for interview
in the ratio of 1:4, whether the said selection process could be availed of for
making further appointments. After examining the original record this Court
held that the Full Court of the Patna High Court had approved the selection C
of 32 candidates only and had sent a list of the said candidates in order of
merit to the State Government for making appointments, and, therefore, the
merit list prepared could not be utilized for making any further appointment
as the same got exhausted and came to an end. It was observed that if the
same merit list had to be kept subsisting for the purpose of filling up other
vacancies also, it would naturally amount to deprivation of rights of other D
candidates, who had become eligible subsequent to the advertisement and
selection process. The appeals were accordingly allowed, the direction of the
Division Bench of the High Court to fill in other vacancies from the same
merit list was set aside and the State Government was directed to issue a
fresh advertisement calling for applications and completing the selection E
process as early as possible. In the judgment no opinion was expressed on the
question whether for the purpose of calculating the quota of direct recruits
the temporary posts of Additional District & Sessions Judges had to be taken
into consideration or not.

5. It is relevant to note here that respondent No. 4 Shri Ram Nath F
Mahto was confirmed on 23.5.1994, respondent No. 5 Shri Ram Bilas Gupta
was confirmed on 1.1.1995 and respondent No. 6 Shri Krishna Murari was
confirmed on 1.2.1995 as Additional District and Sessions Judges consequence
upon occurrence of a substantive vacancy. Some of the appellants (direct
recruits) preferred a representation before the Patna High Court claiming G
seniority over 24 promotee officers, including the contesting respondents.
The High Court, after issuing notices and giving an opportunity of making
representations to the direct recruits as well as promotee officers, declared by
order dated 4.9.1996 that "32 directly recruited Additional District and Sessions
Judges appointed vide notification dated 30.4.1991 shall be treated as senior
to the 23 appointees by promotion (of the same date) to the Bihar Superior
Judicial Service". Thus, all the appellants herein were declared senior to the H

A contesting respondents (respondents 4 to 11 in the present appeal) in terms of the aforesaid order. Feeling aggrieved by the aforesaid decision on the administrative side some of the promotee officers, including respondent Nos. 4, 5, 8, 9 and 11 herein, filed a writ petition being C.W.J.C. No. 11620 of 1996 before the Patna High Court, which, according to the learned counsel for the parties, is still pending. In the said writ petition a counter affidavit was filed by the High Court through the Registrar General wherein the proceedings of the meeting of the Standing Committee dated 24.8.1996 were extensively quoted and in paragraph 9 thereof it was stated that in view of the condition imposed in the promotion order of all the promotees their notification of promotion was liable to be cancelled after the decision in the writ petition. However, the High Court did not take such harsh step to cancel their promotion but instead the promotees were allowed to continue treating them as promoted against subsequent quota of promotees. A copy of the aforesaid counter affidavit has been filed as Annexure P/2 to the special leave petition giving rise to the present appeal.

D 6. The State of Bihar was bifurcated under the provisions of the Bihar Reorganization Act, 2000 and the State of Jharkhand was carved out with effect from 15.11.2000. The appellants and the contesting respondents besides others were provisionally allocated to the State of Jharkhand and in the said provisional allocation order the names of the appellants were placed above the names of the contesting respondents in accordance with the administrative decision of the Patna High Court dated 4.9.1996. The Jharkhand High Court promoted the appellants to the posts of District and Sessions Judges in June, 2001, whereas the contesting respondents were promoted on or after August, 2001.

F 7. Some time in January, 2002 two of the promotee officers, viz., respondent Nos. 9 and 11, filed representations on the administrative side of the Jharkhand High Court for treating them as senior to the direct recruits. This representation was referred to a Committee of two Hon'ble Judges, which, after issuing notices and giving an opportunity of making representations to the appellants, gave a report on 26.7.2002 recommending that the promotee officers are entitled to be ranked senior to the direct recruits. The report of the Committee was accepted by the High Court vide order dated 29.8.2002 and the contesting respondents were declared senior to the appellants. The appellants then filed a writ petition on 20.9.2002 before the Jharkhand High Court challenging the aforesaid decision on the administrative side dated 29.8.2002 wherein an interim order of stay was passed on 3.10.2002,

but ultimately the writ petition was dismissed on 1.4.2003, which order is the subject-matter of challenge in the present appeal. A

8. Before adverting to the contentions raised by learned counsel for the parties it will be convenient to reproduce the relevant provisions of the Bihar Superior Judicial Service Rules, 1946, which have been made by Governor of Bihar in exercise of powers conferred by the proviso to Article 309, read with Article 233 of the Constitution of India and in supersession of all existing rules and orders on the subject. The Rules were published by notification dated 31.7.1951 but in view of Rule 1(2) they are deemed to have come into force on 21.10.1946. Rules 2, 3, 5, 6, 15 and 16, which are relevant for the decision of the present case, are being reproduced below: - B C

“2. Definitions — In these rules, unless there is anything repugnant in the subject or context.—

- (a) “cadre” means the cadre of the Bihar Superior Judicial Service;
- (b) “direct recruit” means an officer appointed to the Service in accordance with clause (a) of rule 5; D
- (c) “promoted officer” means an officer appointed to the Service from the Bihar Civil Service (Judicial Branch) by promotion in accordance with clause (b) of rule 5; and
- (d) “Service” means the Bihar Superior Judicial Service. E

3. (1) The strength of the Service and the number and character of the posts shall be as specified in the schedule to these rules.

(2) The State Government may, from time to time, after consultation with the High Court amend the said schedule. F

5. Appointment to the Bihar Superior Judicial Service, which shall, in the first instance, ordinarily be to the post of Additional District and Sessions Judge, shall be made by the Government in consultation with the High Court- G

- (a) by direct recruitment, from among persons qualified and recommended by the High Court for appointment under clause (2) of Article 233 of the Constitution; or
- (b) by promotion, from among members of the Bihar Civil Service (Judicial Branch). H

A 6. Of the posts in cadre of the Service, two-third shall be filled by promotion and one-third by direct recruitment;

Provided that the State Government may in consultation with the High Court deviate from the said proportion in either direction.

B 15.(1) (a) A member of the Service appointed under clause (a) of rule 5 shall be on probation for a period of one year and shall not be confirmed unless he is found to be suitable in every respect for appointment to the Service:

C Provided that the period of probation may be extended by the State Government, in consultation with the High Court.

(b) When such a member is confirmed in the Service, the period spent on probation shall be counted towards leave, pension or increments in the relevant time scale.

D (2) Promoted officers appointed against substantive vacancies in the cadre shall forthwith be confirmed in the Service.

16. (a) Seniority *inter se* of direct recruits shall be determined in accordance with the date of their substantive appointments to the Service:

E Provided that a direct recruit appointed to the post of an Additional District Judge shall be junior to a direct recruit appointed to any other post in the schedule.

F (b) Seniority *inter se* of promoted officers shall also be determined in accordance with the dates of their substantive appointments to the Service.

(c) When more than one direct recruit is appointed at one time, the seniority *inter se* will be determined in accordance with the order given in the notification making their appointments.

G (d) When more than one appointment is made by promotion at one time the seniority *inter se* of the officers promoted shall be in accordance with their respective seniority in the Bihar Civil Service (Judicial Branch).

H (e) Seniority of direct recruit *vis-a-vis* promoted officer shall be determined with reference to the dates from which they may have

been allowed to officiate continuously, in posts in the cadre of the Service or in, posts outside the cadre or identical time-scale of pay and of equal status and responsibility or in posts of higher scale of pay and of higher responsibility in or outside the cadre: A

Provided that when a direct recruit and promoted officer are appointed on the same date, the promoted officer shall be senior to the direct recruits.” B

Rule 5 gives the source of recruitment to the Bihar Superior Judicial Service, which is by direct recruitment from among persons qualified and recommended by the High Court for appointment and by promotion from among members of Bihar Civil Service (Judicial Branch). Rule 6 provides that of the posts in the cadre of the service, two-thirds shall be filled by promotion and one-third by direct recruitment. Rule 16 deals with *inter se* seniority of direct recruits and promotees and sub-Rule (e) thereof gives the procedure for determining the seniority of direct recruits *vis-a-vis* promotee officers. C

9. Before dealing with the main issue raised in the appeal, namely, the *inter se* seniority of direct recruits and the promotees, the first and foremost question which requires consideration is whether for calculating the one-third quota of direct recruits as provided in Rule 6, the temporary posts of Additional District and Sessions Judges have to be included or not. Rule 6 only says that of the posts in the cadre of the service, two-thirds shall be filled by promotion and one-third by direct recruitment. Cadre is defined in sub-rule (a) of Rule 2 and it means the cadre of the Bihar Superior Judicial Service. It is important to note here that the definition of “cadre”, as given in the aforesaid Rule does not say that the temporary posts have not to be taken into consideration or have to be excluded nor there is any indication to that effect. The “cadre” means the entire cadre of Bihar Superior Judicial Service and, therefore, there is no warrant for excluding the temporary posts. D E F

10. Shri Amarendra Sharan, learned senior counsel for the appellants, has submitted that in C.W.J.C. No. 945 of 1991 (*Madan Mohan Singh v. State of Bihar*) the Division Bench of the Patna High Court had clearly held that the cadre will include both temporary and permanent posts and for the purposes of Rule 6 all such posts have to be taken into consideration for determining the one-third quota of direct recruits. According to the learned counsel this part of the judgment of the Patna High Court in the case of Madan Mohan Singh had not been reversed by this Court as in the appeal preferred by the State of Bihar this Court only set aside the direction given H

A by the High Court whereunder the same merit list of 129 candidates was to be utilized for filling in all the vacancies in the quota of direct recruits, even though the advertisement had been issued for filling in only 32 vacancies on which appointments had already been made and also the further direction extending the validity of the merit list for a further period of six months.

B According to the learned counsel the decision of the High Court to the effect that the temporary posts had also to be taken into consideration for determining the quota of the direct recruits had neither been commented upon nor reversed by this Court and, therefore, the said decision was binding upon the parties.

C 11. Shri Vijay Hansaria, learned senior counsel for the contesting respondents, has, on the other hand, submitted that the mere fact that this Court did not specifically advert to the aforesaid part of the judgment of the High Court would not mean that it gave a seal of approval to the same, specially when the appeal preferred by the State of Bihar was allowed and the directions issued in the judgment of the High Court for making further appointments of direct recruits was set aside.

D 12. In our opinion, it is not necessary to go into the question as to what extent the judgment of the Patna High Court rendered in *Madan Mohan Singh v. State of Bihar* remained intact and would consequently bind the parties. The question whether for the application of "quota rule" temporary posts have to be taken into consideration or not has been examined in several

E decisions of this Court. In *A.K. Subraman v. Union of India*, AIR (1975) SC 483 (para 29), it was held as under: -

F "The quota rule will be enforced with reference to vacancies in all posts, whether permanent or temporary included in the sanctioned strength of the cadre (except such vacancies as are purely of a fortuitous or adventitious nature)....."

In *P.S. Mahal v. Union of India*, [1984] 3 SCR 847, it was held as under: -

G "It is therefore obvious that if a vacancy arises on account of an incumbent going on leave or for training or on deputation for a short period, it would be a fortuitous or adventitious vacancy and the quota rule would not be attracted in case of such a vacancy. But where a vacancy arises on account of the incumbent going on deputation for a reasonably long period and there is no reasonable likelihood of the persons promoted to fill such vacancy having to revert, the vacancy

H would be subject to the quota rule."

“It is, therefore, apparent that what has to be considered for the applicability of the quota rule is a vacancy in a post included in the sanctioned strength of the cadre.....”

“It is thus clear that the vacancies in the posts of Executive Engineer arising on account of deputation of Executive Engineers to other departments, organizations and public undertakings for a period of one or more years were long term vacancies and they could not be regarded as fortuitous or adventitious in character and hence they were subject to the quota rule.”

13. The same question was considered in *Keshav Chandra Joshi and Ors. v. Union of India and Ors.*, [1992] Supp. 1, SCC 272, with reference to U.P. Forest Service Rules, 1952, which provide for recruitment to the posts of Assistant Conservator of Forest by direct recruitment and by promotion. In paragraph 24 of the report it was held that the rule of quota being a statutory one it must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. It was further held that the result of pushing down the promotees appointed in excess of the quota may work out hardship but it is unavoidable and any construction otherwise would be illegal, nullifying the force of statutory rules and would offend Article 14 of the Constitution.

14. An identical question was examined in considerable detail with reference to U.P. Higher Judicial Service Rules, 1975 in *O.P. Garg and Ors. etc. v. State of U.P. and Ors.*, AIR (1991) SC 1202. Rule 6 of these Rules provides quota for recruitment from three sources, viz., (i) direct recruitment from the Bar, (ii) Uttar Pradesh Nyayik Sewa and (iii) U.P. Judicial Officers Service (Judicial Magistrates). After a thorough examination of the question, it was held as under: -

“.....The service having comprised of three sources including the direct recruitment there is no justification to deprive the direct recruits of their share in the temporary posts in the service. Unless the direct recruits are given their due quota in the temporary posts the seniority rule cannot operate equitably. We see no justification whatsoever in having Rr. 22(3) and 22(4) of the 1975 rules which deprive one of the sources of recruitment the benefit of appointment to the temporary posts. The rules on the face of it are discriminatory. There is no nexus with the object sought to be achieved by framing the above-said rules. We, therefore, strike down rules 22(3) and 22(4)

A of the 1975 rules being discriminatory and violative of Arts. 14 and 16 of the Constitution of India. We, however, direct that the appointments already made under these Rr. 22(3) and 22(4) shall not be invalidated on this ground. We further direct that while selecting candidates under R. 18 the Committee shall prepare a merit list of candidates twice the number of vacancies and the said list shall remain operative till the next recruitment. We further direct that the appointments under Rr. 22(1) and 22(2) of the Rules shall be made to permanent as well as temporary posts from all the three sources in accordance with the quota provided under the 1975 rules.”

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C In view of these authoritative pronouncements of this Court there cannot be any doubt whatsoever that for determining the quota of direct recruits, both the temporary and permanent posts have to be counted and taken into consideration and their quota cannot be confined to permanent posts alone.

D 15. As mentioned earlier no appointments by direct recruitment to Bihar Superior Judicial Service were made after 1979. Even though the advertisement was issued in 1985, but no follow-up action was taken. It was under these circumstances that K.P. Verma filed a writ petition, which was heard and decided by a Full Bench of three learned Judges of Patna High Court, who wrote separate but concurring opinions and the judgment is reported in *K.P. Verma v. State of Bihar* AIR (1989) Patna 276. Shamsul Hasan, J., who authored the main judgment, while disposing of the writ petition, issued several directions and direction No. (i) which is of vital significance is being reproduced below: -

F “(i) The 30 vacancies that are now being filled up were available earlier and they would ordinarily have been treated to be the vacancy of the year 1985. This cannot be done now but it is now to be ensured that the vacancies meant for direct recruits are filled up in due time. Though, those who are appointed directly will rank junior to those who are promoted in the vacancy of the same year but the direct appointees will rank senior to those who are promoted after the appointment of direct recruits, i.e. after the direct appointees of the earlier year though the Direct recruits might have been actually appointed later due to official delay. The candidates appointed against the vacancy of a particular year will in future be treated as appointees of that particular year. Further, the vacancies meant for recruitment from amongst the Advocates should never be filled up by promotees even on the ground that the posts are lying vacant due to the delay

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caused by the appointment procedure. If any post out of the 30 lying vacant from the quota of direct recruits has been filled up or is filled up by promotion, such promotee will revert immediately to his original position in the service from which he has been promoted and on being promoted in the future will rank below those who fill up the 30 vacancies by direct recruitment.”

P.S. Mishra, J. directed that all the existing vacancies should be filled up within six months from the date of delivery of the judgment and in no case the State or the High Court shall fill up the vacancies meant for direct recruits by promotion or *vice versa* and continue the parity until altered by due process of law. S.B. Sinha, J., issued a similar direction that the State Government and the High Court should see to it that the quota rule is not violated and recruitment be made from amongst the members of the Bar in terms of Clause (2) of Article 233 of the Constitution with utmost expedition and not beyond a period of six months from the date of the judgment. The judgment in the case of *K.P. Verma* attained finality and the directions issued therein by all the learned Judges were binding upon the State Government and the High Court on the administrative side. Therefore, as a result of this decision a complete prohibition was imposed upon the State Government on filling in vacancies of the quota of direct recruits by giving promotion to members of Bihar Civil Service (Judicial Branch) and no appointment in the quota of direct recruits in Bihar Superior Judicial Service could be made by promotion.

16. Before the notification dated 30.4.1991 promoting the contesting respondents to the posts of Additional District and Sessions Judges had been issued, the total number of permanent and temporary posts in the said cadre was 251 in which the quota of direct recruits was 83 and that of promotee officers was 168. However, the complete quota meant for the promotee officers had already been filled up much before 30.4.1991 and there was absolutely no scope for any further promotion. When steps were being taken to make appointments by promotion of the contesting respondents and some others, C.W.J.C. No. 945 of 1991 (*Madan Mohan Singh v. State of Bihar*) was filed in the High Court wherein an interim order was passed on 25.4.1991 to the effect that such promotion and the question of seniority of the persons so promoted shall abide by the final results of the writ petition. It was further directed that in the appointment/promotion order the said condition shall be incorporated and the promotees will have to give a written consent for accepting such a condition. It is not in dispute that the appointment/promotion

- A order of the contesting respondents contained such a condition and respondent Nos. 4 and 6 to 11 joined at their respective places of posting after they had submitted their consent letters/undertakings. The contesting respondents having been promoted in the vacancies which in fact were in the quota of direct recruits, in normal circumstances, their promotion was liable to be rescinded after the decision of the writ petition. However, as mentioned in the counter affidavit filed by the Registrar General on behalf of the High Court in C.W.J.C. No. 11620 of 1996 filed in the Patna High Court, this step was not taken on sympathetic consideration. Instead the promotees were allowed to continue treating them as having been promoted against subsequent quota of promotees.
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- C 17. After the decision in the case of *Madan Mohan Singh* by the High Court, which ruled that temporary posts have also to be counted for determining the one-third quota of direct recruits, which decision, in our opinion, is legally correct and sound, there was absolutely no scope for giving promotion to the contesting respondents in the vacancies, which did not fall in the quota of promotees but fell within the quota earmarked for direct recruits. The High Court had issued clear directions in the case of *K.P. Verma* that vacancies meant for recruitment from amongst advocates should never be filled up by promotees even on the ground that the posts are lying vacant due to the delay caused by the appointment procedure and further if any post out of that lying vacant from the quota of direct recruits had been filled up or is filled up by promotion, such promotee will revert immediately to its original position in the service from which he had been promoted. The promotion order passed in favour of the contesting respondents on 30.4.1991 was, therefore, liable to be cancelled. However, instead of taking this decision, which would have naturally meant reverting the contesting respondents back to their original position, they were allowed to continue treating them as promoted against subsequent quota of promotees. In such circumstances there is absolutely no scope for treating the contesting respondents as senior to the appellants who are all direct recruits.
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- G 18. Shri Amarendra Sharan, learned senior counsel for the appellants, has also drawn the attention of the Court to following observations made in paragraph 27 of the judgment in *O.P. Garg v. State of U.P.*, (Supra): -

H “.....Since the recruitment to the service is from three sources the existence of a vacancy either permanent or temporary is the *sine qua non* for claiming benefit of continuous length of service towards seniority. The period of officiation/service which is not against a

substantive vacancy (permanent or temporary) cannot be counted towards seniority.....” A

The aforesaid observations certainly support the contention of the appellants that as no vacancy either permanent or temporary in the quota meant for promotees was available on 30.4.1991, the period of officiation/ service rendered by the contesting respondents till a vacancy in their quota became available to them, cannot be counted towards their seniority. B

19. The learned counsel for the appellants has also submitted that the appointment of the contesting respondents was not only contrary to Rules but was fortuitous in nature and they can get no advantage of such fortuitous appointment until a substantive vacancy was available in their quota, which in fact became available much later some time in the year 1993-94, which is long after the appointment of the appellants. What is a fortuitous appointment has been explained in a Constitution Bench decision of this Court in *Rudra Kumar Sain v. Union of India*, [2000] 8 SCC 25. After observing that the Rules in question did not define the terms “ad hoc”, “stopgap” and “fortuitous”, which are in frequent use in service jurisprudence, the Court referred to several dictionaries. The meaning given to the expression “fortuitous” in Stroud’s Judicial Dictionary is “accident or fortuitous casualty”. This should obviously connote that if an appointment is made accidentally, because of a particular emergent situation, such appointment obviously would not continue for a reasonably long period. In Black’s Law Dictionary the expression “fortuitous” means “occurring by chance”, “a fortuitous event may be highly unfortunate”. It thus indicates that it occurs only by chance or accident, which could not have been reasonably foreseen. In Oxford dictionary the meaning given to the word “fortuitous” is happening by accident or chance rather than design. In our opinion it will not be proper to hold that the promotion of the contesting respondents was fortuitous as contended by learned counsel for the appellants. It cannot be said that the contesting respondents were promoted by accident or by chance. Their promotion order was passed as there were vacancies to the posts of Additional District and Sessions Judges, though in the quota or direct recruits, but as no recruitment from the said channel had been made for a long time and sufficient number of candidates were not available, the vacancies were filled in by giving promotion to members of Bihar Civil Service (Judicial Branch). If promotion orders had not been passed and the posts had not been filled in, the judicial work in the districts would have suffered. However, it is clear that having regard to the various orders passed on the judicial side by the Patna High C D E F G H

A Court and the legal position being well settled that the temporary posts have also to be counted for determining the one-third quota of direct recruits, the promotion given to the contesting respondents was not in accordance with law. Instead of taking the harsh step of rescinding their order of promotion the Patna High Court, on the administrative side, took the decision to treat them promoted against subsequent quota of promotees. Therefore, the contesting respondents can under no circumstances claim seniority over the appellants and the view to the contrary taken by the Jharkhand High Court on 29.8.2002 on administrative side and also in the judgment and order dated 1.4.2003, which is the subject-matter of challenge in the present appeal, is wholly erroneous in law.

C 20. Shri Vijay Hansaria, learned senior counsel for the contesting respondents, has submitted that Rule 6 of the Rules, which says that of the posts in the cadre of the service, two-thirds shall be filled by promotion and one-third by direct recruitment, is not in absolute terms but contains a proviso, which lays down that the State Government may in consultation with the High Court, deviate from the said proportion in either direction. Learned counsel has submitted that in view of the proviso appended to Rule 6 it was fully open to the State Government not to strictly adhere to the quota rule of one-third and two-third and the said quota could be exceeded or reduced. The submission is that any appointment made by promotion, which was beyond the two-third quota, would not be illegal and would be fully saved by the proviso to the Rule. It is difficult to accept the contention raised by the learned counsel for the contesting respondents. The proviso to Rule 6 does not give untrammelled power to the State Government to deviate from the substantive provisions of the Rule which fixes the quota. On the contrary it says that the State Government may, in consultation with the High Court, deviate from the said proportion in either direction. This is in tune with the constitutional mandate of Clause (1) of Article 233 of the Constitution, which says that 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. The proviso contemplates a conscious decision taken by the State Government after having consultations with the High Court in this regard. The dictionary meaning of the word "consultation" is a council or conference (as between two or more persons); deliberation of two or more persons on some matter. There is neither any pleading nor any material on record to show that at any point of time the State Government ever took a conscious decision for deviating from the quota rule after having made consultation

with the High Court. In absence of any material to show that any such decision was taken by the State Government it is not possible to assume that the promotions made beyond the two-third quota were legal or valid or that the notification issued on 30.4.1991 giving promotions to the contesting respondents was in accordance with law and was justified.

21. Shri Vijay Hansaria, learned senior counsel for the contesting respondents, has also submitted that in the State of Bihar the quota rule had completely broken down as after 1979 no appointments by direct recruitment were made for almost 12 years and in such circumstances the dispute of *inter se* seniority between the appellants and the contesting respondents cannot be decided by applying the principle underlying Rule 6, which provides for quota in the matter of appointment to Bihar Superior Judicial Service. In support of this contention learned counsel has referred to a Division Bench decision of Patna High Court rendered in *Bihar Judicial Services Association v. The State of Bihar*, (1998) 3 PLJR 21. After observing that unfortunately after the year 1979 direct recruits were not being appointed regularly with the result the number of posts to be filled up by direct recruits were accumulated and they were filled up in one year the Bench made a casual observation that the quota rule had broken down and to that extent the promotees benefited in the earlier years as they were promoted while no direct recruitment took place. It may be noted that the court did not strike down Rule 6 of the Rules nor held it to be *ultra vires*. There is no direction in the judgment that henceforth quota rule should not be followed. Learned counsel has also referred to a decision of this Court in *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra* [1990] 2 SCC 715 and in particular drawn our attention to the opening part of paragraph 23 of the report where it is said, "Mr. Tarkunde is right that the rules fixing the quota or the appointees from two sources are meant to be followed. But if it becomes impractical to act upon it, it is no use insisting that the authorities must continue to give effect to it. There is no sense in asking the performance of something which has become impossible....." Reference has also been made to subparagraphs (D), (E) and (F) of paragraph 47 of the reports, where it is said that when appointments are made from more than one source, it is permissible to fix the ratio for recruitment from different sources and if rules are framed in this regard, they must ordinarily be followed strictly. It is also said that if it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the interference is irresistible that the

A quota rule has broken down. We do not think that the authority cited by the learned counsel can render any assistance to him. That the quota rule had broken down is neither pleaded nor demonstrated. Similarly, no material has been placed on record to show that it had become impossible to adhere to the quota rule contained in Rule 6 of the Rules. If no direct recruitment had been made after the year 1979 in the State of Bihar, it was not on account of the fact that it was impossible to do so. At any rate after the decision in *K.P. Verma's* case necessary steps were taken for making appointment by direct recruitment. The contesting respondents were appointed long after the publication of the merit list of the examination conducted for making direct recruitment and it does not lie in their mouth to say that the quota rule had broken down or that their promotion though made beyond the quota fixed for promotees, yet the same should be treated not only perfectly valid but also in a manner so as to give them the benefit of seniority over the direct recruits. The other case cited by Shri Vijay Hansaria is *Rudra Kumar Singh v. Union of India*, [2000] 8 SCC 25, is clearly distinguishable on facts as the observations made here have to be seen in the light of the fact that direct recruits of the year 1980 were claiming seniority over those who had been given promotion four years earlier in the year 1976.

22. Shri Amarendra Sharan, learned senior counsel for the appellants, has also submitted that both the appellants and the contesting respondents were members of Bihar Superior Judicial Service and dispute of their inter se seniority had been settled by the Patna High Court on the administrative side vide its decision dated 4.9.1996 whereunder appellants were declared to be senior to the contesting respondents. In such circumstances it was not open to the Jharkhand High Court to reopen the issue and take a contrary view on 29.8.2002 whereunder the contesting respondents were declared to be senior to the appellants. More so when the decision taken by the Patna High Court on 4.9.1996 on the administrative side had already been challenged by filing a writ petition to which respondent Nos. 9 and 11 were parties and the writ petition was still pending. In our opinion, as a principle of law, there is no legal bar or prohibition against an administrative body in seeking to review its earlier decision provided the parties likely to be affected by such a decision are afforded an opportunity of hearing. In the present case the Jharkhand High Court did give notice to the appellants and they were given an opportunity to make representations. Therefore, as an abstract principle of law, it cannot be said that the decision taken by the Jharkhand High Court on 29.8.2002 suffers from any legal infirmity. However, having regard to the background of events and the legal position emerging from the fact that Rule

6 of the Rules prescribes a quota and for determining the quota the temporary posts have also to be counted and taken into consideration and further the orders passed on the judicial side by the Patna High Court prior to the appointment of the contesting respondents the inevitable conclusion is that the contesting respondents cannot claim seniority over the appellants. A

23. In the result the appeal is allowed with costs. The order dated 29.8.2002 passed on the administrative side by the Jharkhand High Court and also the judgment and order dated 1.4.2003, which is the subject-matter of challenge in the present appeal, are hereby set aside. The administrative decision taken by the Patna High Court on 4.9.1996 is restored and the appellants shall be treated as senior to the respondent Nos. 4 to 11. B C

V. Mohana

Appeal allowed.