[2024] 2 S.C.R. 1136 : 2024 INSC 192

Dr Kavita Kamboj
v.
High Court of Punjab and Haryana & Ors

(Civil Appeal Nos 2179-2180 of 2024)

13 February 2024

[Dr. Dhananjaya Y Chandrachud,* CJI, J B Pardiwala and Manoj Misra, JJ]

Issue for Consideration

The issue for consideration was a challenge to a decision of the High Court of Punjab & Haryana directing the State of Haryana to take positive action to accept its recommendation *vide* communication dated 23.02.2023, whereby the names of thirteen in-service judicial officers were recommended for appointment by way of promotion as Additional District and Sessions Judge.

The challenge before the High Court was *inter alia* to a decision of the State of Haryana *vide* Letter dated 12.03.2023, whereby the State had decided not to accept the aforesaid High Court recommendation dated 23.02.2023, on the ground that the "settled procedure" under Article 233 read with Article 309 of the Constitution of India and the Haryana Superior Judicial Service Rules 2007 had not been followed.

Headnotes

Service Law – Promotion – Eligibility Criteria – Haryana Superior Judicial Service Rules 2007 – Rule 6(1)(a) r/w. Rule 8 – Recommendation of the High Court that for a candidate seeking promotion on the basis of merit-cum-seniority, an aggregate of 50% marks for both, i.e. in the written test and in the *viva voce,* would be required so as to render a candidate eligible for promotion – Challenge to:

Held: The High Court was correct in prescribing that recruitment by promotion to the Higher Judicial Service should have a minimum of 50% both in the written test as well as in the *viva voce* independently, for those in-service candidates who were drawn for promotion in the 65% promotion quota – This is because the candidate should not just demonstrate the ability to reproduce their knowledge by answering questions in the suitability test, but must also demonstrate

* Author

both practical knowledge and the application of the substantive law in the course of the interview – In-service candidates seeking recruitment through promotions cannot be considered at par with candidates seeking direct recruitment or with candidates seeking accelerated promotion through a limited competitive test – The three modes of recruitment have been reasonably classified and different requirements have been prescribed for each – As such, what may or may not have been held in respect of the *viva voce* in direct recruitments may not necessarily apply to the *viva voce* requirement in recruitments through promotions [Paras 65, 37, 41]

Eligibility criteria for Higher Judicial Services:

Held: The Higher Judicial Services require the selection of judicial officers of mature personality and requisite professional experience – In-service judicial officers are expected to have a greater familiarity with the law and the procedure based on their experience as judicial officers – While an objective written examination can be the best gauge of the legal knowledge of a candidate, the *viva voce* offers the best mode of assessing the overall personality of a candidate – The purpose of the interview for officers in that class is to assess the officer in terms of the ability to meet the duties required for performing the role of an Additional District and Sessions Judge – Consequently, there would be a reasonable and valid basis, if the High Court were to do so, to impose a requirement of a minimum eligibility or cut-off both in the written test and in the *viva voce* separately. [Paras 42, 44]

Administrative directions can fill up the gaps and supplement the Rules, when they are silent on a particular point:

Held: When the Rules under Article 309 hold the field, these Rules have to be implemented – Where specific provisions are made in the Rules framed under Article 309, it would not be open to the High Court to issue administrative directions either in the form of the Full Court Resolution or otherwise, that are at inconsistent with the mandate of the Rules – On the other hand, in cases such as the one at hand, where the Rules were silent, it is open to the High Court to issue a Full Court Resolution – The Rules being silent, it was clearly open to the High Court to prescribe such a criterion as it did in 2013, when the 50% cut-off was prescribed on aggregate scores and also, in 2021, when the 50% cut-off was prescribed on the written test scores and the *viva voce* separately. [Paras 50, 52 and 65]

Constitution of India - Articles 233, 234 and 235 – Appointments to the District Judiciary to be in consultation with the High Court and any other exercise *de hors* such consultation would not be in accordance with the scheme of the Constitution:

Held: In matters of appointment of judicial officers, the opinion of the High Court is not a mere formality because the High Court is in the best position to know about the suitability of the candidates to the post of District Judge – The Constitution, therefore, expects the Governor to engage in constructive constitutional dialogue with the High Court before appointing persons to the post of District Judges under Article 233. [Para 62]

The State Government travelled beyond the remit of the consultation with the High Court by referring the matter to the Union Government. Any issue between the High Court and the State Government should have been ironed out in the course of the consultative process within the two entities – The State Government was bound to consult only the High Court – Any other exercise de hors such consultation would not be in accordance with the scheme of the Constitution. [Para 66]

Doctrines – Doctrine of Legitimate Expectation – Twin Test:

Held: An individual who claims the benefit or entitlement based on the doctrine of legitimate expectation has to establish: (i) the legitimacy of the expectation; and (ii) that the denial of the legitimate expectation led to a violation of Article 14. [Para 58]

Case Law Cited

All India Judges' Association v. Union of India, [2002] 2 SCR 712 : **(2002) 4 SCC 247**; *All India Judges' Association v. Union of India*, **(2010) 15 SCC 170**; *Dheeraj Mor v. High Court of Delhi*, [2020] 2 SCR 161 : **(2020) 7 SCC 401**; *Lila Dhar v. State of Rajasthan*, [1982] 1 SCR 320 : **(1981) 4 SCC 159**; *Taniya Malik v. Registrar General of the High Court of Delhi,* [2018] 10 SCR 348 : **(2018) 14 SCC 129** ; *B V Sivaiah v. K. Addanki Babu*, [1998] 3 SCR 782 : **(1998) 6 SCC 720** ; *P K Ramachandra Iyer v. Union of India*, [1984] 2 SCR 200 : **(1984) 2 SCC 141**; *Sant Ram Sharma v. State of Rajasthan,* [1968] 1 SCR 111 : **1967 SCC OnLine SC 16**; *State of Gujarat v Akhilesh C Bhargav*,

[1987] 3 SCR 1091 : (1987) 4 SCC 482; *State of Uttar Pradesh v. Chandra Mohan Nigam*, [1978] 1 SCR 521 : (1977) 4 SCC 345; *K H Siraj v. High Court of Kerala*, [2006] Supp. 2 SCR 790 : (2006) 6 SCC 395; *Chandra Mohan v. State of Uttar Pradesh*, [1967] 1 SCR 77; *Chandramouleshwar Prasad v. Patna High Court*, [1970] 2 SCR 666 : (1969) 3 SCC 56; *State of Haryana v Inder Prakash Anand HCS*, [1976] Supp. 1 SCR 603 : (1976) 2 SCC 977; *State of Bihar v Bal Mukund Sah*, [2000] 2 SCR 299 : (2000) 4 SCC 640 – **relied on.**

Sivanandan C T v High Court of Kerala, [2023] 11 SCR 674, **2023 SCC Online SC 994 – distinguished.**

State of West Bengal v. Nripendra Nath Bagchi, [1966] 1 SCR 771 : **1965 SCC OnLine SC 22;** *High Court of Punjab and Haryana v. State of Haryana*, [1975] 3 SCR 365 : (1975) 1 SCC 843; *High Court of Judicature for Rajasthan v. PP Singh*, [2003] 1 SCR 593 : (2003) 4 SCC 239 – **referred to.**

Books and Periodicals Cited

First National Judicial Pay Commission, 1999 (Shetty Commission Report)

List of Acts

Haryana Superior Judicial Service Rules 2007; Constitution of India

List of Keywords

Promotion; Eligibility Criteria; Service Rules, Recruitment; District Judiciary.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos.2179-2180 of 2024

With

Civil Appeal Nos.2181-82, 2183, 2184-85 and 2186 of 2024

From the Judgment and Order dated 20.12.2023 of the High Court of Punjab & Haryana at Chandigarh in CWP Nos.19775 and 26217 of 2023

Appearances for Parties

Tushar Mehta, Solicitor General, Vikramjit Banerjee, A.S.G., Lokesh Sinhal, Sr. A.A.G., B.K. Satija, A.A.G., Ms. Shristi Jain Goyal, D.A.G., P S Patwalia, Shyam Divan, Gopal Sankaranarayanan, Sr. Advs,, Samar Vijay Singh, Kanu Agrawal, Siddhartha Sinha, Bharat Sood, Ms. Sabarni Som, Nikunj Gupta, Udayaditya Arpith, Ms. Trisha Chandran, Nishant Singh, Udayaditya Banerjee, Arpith Jacob Varaprasad, Advs. for the Appellant.

Nidhesh Gupta, Rameshwar Singh Malik, Sr. Advs., Sidhant Awasthy, Mrs. Eliza Bar, Siddhant Saroha, Manav Bhalla, Abhimanyu Tewari, Jaspreet Singh Rai, Rohit Nagpal, Jitesh Malik, Jasdeep Singh Dhillon, Mrs. Sukhdeep Kaur Rai, Mrs. Vasudha Gupta, Mrs. Vasudha Nagpal, Linoy Varghese, Ravi Kumar, Ankur Singh, Shwetabh Kumar, Shyamal Kumar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Dr Dhananjaya Y Chandrachud, CJI

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1. Permission to file the Special Leave Petitions granted.

2. Leave granted.

3. This batch of appeals has arisen from a judgment delivered by a Division Bench of the High Court of Punjab and Haryana on 20

* Ed Note : Pagination as per original judgment.

December 2023. The controversy that arises before this Court pertains to the recommendations made by the High Court on its administrative side for the appointment of thirteen in-service candidates as Additional District and Sessions Judges. These candidates are seeking recruitment to the post through promotions from the post of Senior Civil Judges against the 65% promotional quota under the Haryana Superior Judicial Service Rules 2007.[1]

4. The Rules came into force on 10 January 2007 and regulate recruitment and service conditions of persons for appointment to the Haryana Superior Judicial Service. Part III of the Rules provides for the method of recruitment. Rule 2(b) defines "direct recruit" to mean a person who is appointed to the Service from the Bar. Likewise, "promoted officer" is defined under Rule 2(i) to mean a person who is appointed to the service by promotion from Haryana Civil Service (Judicial Branch). Rule 5 provides that recruitment to the Service shall be made by the Governor by:

   (i) promotion from amongst officers of the Haryana Civil Service (Judicial Branch) in consultation with the High Court; and

   (ii) direct recruitment from amongst eligible advocates on the recommendations of the High Court on the basis of a written and *viva voce* test conducted by the High Court.

5. In terms of Rule 6[2], recruitment to the service is to be made from three sources:

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1 "Rules"

2 "6 (1) Recruitment to the Service shall be made,-
(a) 65 percent by promotion from amongst the Civil Judges (Senior Division)/Chief Judicial Magistrates/ Additional Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test;
Provided that no person shall be promoted to the Service who is less than thirty- five years of age;
(b) 10 percent by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service as Civil Judges (Senior Division)/Chief Judicial Magistrates/Additional Civil Judges (Senior Division); and who are not less than thirty five years of age on the last date fixed for submission of applications for taking up the limited competitive examinations:
Provided that if candidates are not available for 10 percent seats, or are not able to qualify in the examination then vacant posts shall to be filled up by regular promotion in accordance with clause (a); and
(c) 25 percent of the posts shall be filled by direct recruitment from amongst the eligible advocates on the basis of the written and viva voce test, conducted by the High Court.
(2) The first and second post would go to category (a) (by promotion on the basis of merit-cum-seniority), third post would go to category (c) (direct recruitment from the bar), and fourth post would go to category (b) (by limited competitive examination) of rule 6, and so on."

(i) 65% by promotion from amongst the Civil Judges (Senior Division)/Chief Judicial Magistrates/Additional Civil Judges (Senior Division) "on the basis of principle of merit-cum-seniority and passing a suitability test";

(ii) 10% by promotion "strictly on the basis of merit" through a limited competitive examination from amongst persons holding the feeder posts; and

(iii) 25% on the basis of direct recruitment from amongst eligible advocates on the basis of a written and *viva voce* test conducted by the High Court.

6. Rule 7 prescribes the procedure for conducting direct recruitment. Rule 8 provides for the procedure for promotion for assessing and testing the merit and suitability of the judicial officers. Rule 9 provides for a limited competitive examination for the promotion of members of the Haryana Civil Service (Judicial Branch) pursuant to Rule 6(b). Rules 7, 8 and 9 are set out below:

"**Procedure for direct recruitment.**

7. The High Court shall before making recommendations to the Governor invite applications by advertisement and may require the applicants to give such particulars as it may specify and may further hold written examination and viva voce test for recruitment in terms of rule 6(c) above and the maximum marks shall be in the following manner:-

(i) Written Test 750 marks

(ii) Viva Voce 250 marks

Procedure for promotion.

8. Procedure for promotion for assessing and testing the merit and the suitability of a member of the Haryana Civil Service (Judicial Branch) for promotion under clause (a) of sub-rule (1) of rule 6, the High Court may-

(i) hold a written objective test of 75 marks and viva voce of 25 marks in order to ascertain and examine the legal knowledge and efficiency in legal field;

(ii) take into consideration Annual Confidential Reports of the preceding five years of the officer concerned:

Provided that any officer having grading as C (integrity doubtful) in any year shall not be eligible to be considered for promotion.

Limited competitive examination.

9. The High Court shall hold a limited written competitive examination for promotion of members of the Haryana Civil Service (Judicial Branch) as per rule 6(b) and the maximum marks shall be in the following manner:

(i)	Written Examination	600 marks
(ii)	Assessment of Record	150 marks
(iii)	Viva Voce	250 marks

Provided that the High Court shall in addition to the above competitive examination take into consideration any of the criteria as specified in rule 8 above:

Provided further that any officer having grading as C (integrity doubtful) in any year, shall not be eligible to appear in the limited competitive examination."

7. In terms of Rule 8, the High Court is required to hold a written objective test comprising 75 marks and a *viva voce* comprising 25 marks to ascertain and examine the legal knowledge and efficiency of the candidates in the legal field. In addition, the High Court is required to take into consideration the Annual Confidential Reports[3] of the preceding five years of each officer under consideration.

A. Background of the present dispute

8. On 29 January 2013, the High Court, on its administrative side, resolved that an aggregate of 50% marks in the written test and in the *viva voce* would be required so as to render a candidate eligible for promotion. The relevant part of the resolution is extracted below:

"i) In terms of Rule 8(a) of the Haryana Superior Judicial Service Rules, 2007, the suitability test shall consist

3 "ACRs"

> of written objective test of 75 marks and viva voce of 25 marks so as to assess legal knowledge and the efficiency in legal field for discharging higher duties and responsibilities. Obtaining of 50% marks in aggregate of the written test and in viva voce would make a candidate eligible for promotion."

9. On 11 November 2021, a meeting of the Recruitment and Promotion Committee[4] overseeing the Superior Judicial Service was held. The Minutes of the Meeting adverted to Rules 6 and 8 of the Rules and a corresponding provision contained in the Punjab Superior Judicial Service Rules 2007. Both sets of Rules were amended by the States of Haryana and Punjab in order to bring uniformity in promotions to the Superior Judicial Service. In both the States, the Committee, *inter alia*, resolved that:

> "ii. In terms of Rule 7(3)(a) of the Punjab Superior Judicial Service Rules, 2007 and Rule 6(1)(a) of Haryana Superior Judicial Service Rules, 2007, the suitability test shall consist of written objective test of 75 marks and viva voce of 25 marks so as to assess legal knowledge and efficiency in legal field for discharging higher duties and responsibilities. Securing, 50% marks in the written test and 50% marks in Viva voce individually would make a candidate eligible for promotion."

10. As a result of the above Resolution, the Committee decided that in order to be eligible for promotion, a candidate must secure 50% marks in the written test and 50% marks in the *viva voce*. In other words, while under the earlier Resolution of the Full Court dated 29 January 2013, a candidate was required to obtain at least 50% marks in the written test and *viva voce* combined, the proposal of the Recruitment and Promotion Committee of 11 November 2021 stipulated that a candidate must obtain at least 50% marks in the written test and at least 50% in the *viva voce*. This Resolution of the Committee was approved by the Full Court at a meeting which was held on 30 November 2021.

11. At the same time, it must also be noted that the Committee had proposed certain modifications in the benchmark for assessing the

4 "Committee"

ACRs of candidates under Rule 8. The Full Court, while deliberating on the recommendations of the Committee, resolved that:

> "...the report dated 11.11.2021 of Hon'ble Recruitment and Promotion Committee (Superior Judicial Service) be accepted with modification in para No. iii of the "Benchmark of the ACRs as per Rule 8". After modification, the said para be read as under:-
>
> "(iii)(a) A candidate should have obtained at least four "B+Good" or above grading in the Annual Confidential Reports in the preceding five years and
>
> (b) The candidate should not be having grading as C (integrity doubtful) in any year.
>
> Provided that for the purpose of assessing the benchmark, the ACRs of a candidate, yet to be approved by the Hon'ble Full court, would also be considered but his result would be kept in a sealed cover, subject to the final decision of the Hon'ble Full Court."

12. The Full Court also resolved that in order to settle the issue in a comprehensive manner the necessity, if any, to amend the Rules should be examined by the Committee overseeing the Superior Judicial Service and the Rule Committee.

13. Following the above resolution, the two committees convened on 11 February 2022. The Minutes of the Meeting of the two committees reflect the following decision:

> "Re:- Consideration of matter qua amendment in Rule 8 of Punjab Superior Judicial Service Rules, 2007 and Rule 8 of Haryana Superior Judicial Service Rules, 2007 in view of the report dated 11.11.2021 of the Hon'ble Recruitment and Promotion Committee (Superior Judicial Service) as well as modification in para no. (iii) of the 'Benchmark of the ACRs as per Rule 8', by the Hon'ble Full Court.
>
> Meeting note perused. After deliberating upon the matter at length, this Committee recommends that the word 'and' be inserted at the end of sub-rule (I) and before sub-rule (ii) of Rule 8 of Haryana Superior Judicial Service Rules 2007. This Committee also recommends that existing proviso

> to Rule 8 of Punjab Superior Judicial Service Rules 2007 as well as to Rule 8 of Haryana Superior Judicial Service Rules 2007 be substituted as under:-
>
> "Provided that an officer with an entry of integrity doubtful in any year shall not be eligible to be considered for promotion."
>
> This Committee has also perused Rule 9 of Punjab Superior Judicial Service Rules 2007 and Rule 9 of Haryana Superior Judicial Service Rules 2007 and recommends that existing second proviso to Rule 9 of Punjab Superior Judicial Service Rules 2007 and to Rule 9 of Haryana Superior Judicial Services Rules 2007 be substituted as under:-
>
> "Provided further that an officer with an entry of Integrity doubtful in any year shall not be eligible to appear in the said examination.''
>
> The matter be referred to the Hon'ble Full Court for approval."

14. On 24 August 2022, the process of filling up vacancies for the post of Additional District and Sessions Judges from amongst Civil Judges (Senior Division)/Chief Judicial Magistrates/Additional Civil Judges (Senior Division) was initiated and a communication was accordingly addressed to thirty-nine candidates. The High Court conducted a written test which was followed by a *viva voce*. On 23 February 2023, the Registrar (Judicial) addressed a communication to the State Government recommending the names of thirteen judicial officers for appointment by way of promotion as Additional District and Sessions Judges.

15. On 2 March 2023, a communication was addressed by the Chief Secretary to the Government of Haryana to the Registrar (Judicial) seeking a "justification/clarification" in regard to certain judicial officers of the 2007, 2009 and 2010 batches on the ground that they appeared to be senior than the last of the thirteen recommended officers. The communication noted that in spite of seniority, these judicial officers were not recommended for promotions. The High Court was also called upon to clarify "the criteria of merit and suitability test, on the basis of which principle of merit-cum-seniority has been affected (sic) and names of officers senior to the recommended officers have not been recommended".

16. The High Court of Punjab and Haryana responded to the communication of the State Government on 22 March 2023, indicating that the appointment to the thirteen posts of Additional District and Sessions Judges which was initiated by way of promotion was sought to be made strictly in terms of Rule 6(1)(a) of the Rules which prescribes merit-cum-seniority read with the criteria laid down by the High Court for assessing the suitability of a candidate for appointment. The High Court further stated that all appointments and promotions concerning the judiciary fall under the control and supervision of the High Court and since the recommendations have been approved by the Full Court, they were binding on the State Government under Article 235 of the Constitution.

17. On 29 March 2023, an advocate by the name of Mr Prem Pal submitted a representation to the Chief Secretary of Haryana seeking the intervention of the State Government in order to either reject the recommendations of the High Court or to initiate a fresh process of consultation. The representation stated that the recommendations of the High Court were not binding since the requirement of obtaining 50% marks in the *viva voce* had not been communicated to the candidates and no minimum cut-off in the *viva voce* had been prescribed. It is also stated that no criteria had been adopted for conducting the suitability test.

18. Following the receipt of this representation, the State Government sought the opinion of the Union Ministry of Law and Justice. The Union Ministry of Law and Justice tendered its opinion on 26 July 2023, stating that Article 233 of the Constitution which deals with appointments, postings and promotions of District Judges envisages consultation between the State Government and the High Court. The opinion of the Union Ministry was that the modification of the suitability criteria in terms of the Resolution dated 30 November 2021 of the High Court lacked the element of consultation with the State Government and, therefore, did not have a binding effect.

19. A writ petition under Articles 226 and 227 was filed by certain candidates working as Civil Judges (Senior Division) and Chief Judicial Magistrates in the State of Haryana for seeking a mandamus to the State Government to conclude the process of selection and to notify the appointments by way of promotion of candidates selected to the posts of Additional District and Sessions Judge.

20. The State of Haryana addressed a communication on 12 September 2023 to the Registrar General of the High Court stating that the State Government had decided not to accept the recommendations for promoting thirteen judicial officers on the ground that the "settled procedure" under Article 233 read with Article 309 and the Rules of 2007 had not been followed. The State of Haryana sought to support its decision on the basis of the legal opinion which was tendered on 26 July 2023 by the Union Ministry of Law and Justice. The relevant extract of the communication reads as follows:

> "Therefore, keeping in view the position explained above, the State Government has decided not to accept the present recommendation for promotion of 13 Haryana Civil Service (Judicial Branch) Officers to the post of Additional District and Sessions Judges (ADSJ), as the State Government as well as the Central Government (Ministry of Law and Justice) have observed that the settled procedure under Article 233 read with Article 309 of the Constitution of India, i.e., Haryana Superior Judicial Service Rules, 2007 has not been followed while sending names to the Government for promotion. Hence, you are requested to send revised recommendations by following set procedures as per law."

21. The petition before the High Court was amended so as to challenge the letter dated 12 September 2023. Other writ petitions were filed before the High Court by unsuccessful candidates, *inter alia*, seeking an order restraining the State from accepting the recommendations made by the High Court and for quashing the Resolution of 30 November 2021, along with the recommendations for promotion of the petitioners. These candidates who had not been selected also sought a direction to the High Court, on its administrative side, to recommend candidates for promotion to the post of the District and Sessions Judges under Rule 6(1)(a) without observing the requirement of obtaining 50% marks each in the written examination and in the *viva voce*. The High Court, by its impugned judgment dated 20 December 2023, disposed of the batch of petitions. The High Court directed the State of Haryana to take positive action to accept its recommendations which were made on 23 February 2023.

22. In the batch of appeals which have arisen before this Court, we have heard Mr P S Patwalia, Mr Shyan Divan and Mr Gopal

Sankaranarayanan, senior counsel, who have appeared on behalf of the candidates who have not been recommended for appointment by the High Court. Mr Tushar Mehta, Solicitor General, has appeared on behalf of the State of Haryana in urging that the State Government was justified in rejecting the recommendations of the High Court. Mr Nidhesh Gupta, senior counsel, appears on behalf of the High Court. Mr Rameshwar Singh Malik, senior counsel, has supported the plea of the High Court, while appearing on behalf of the candidates who have been recommended for appointment.

B. Submissions

23. Mr P S Patwalia, senior counsel, has basically urged the following submissions:

(i) In terms of the judgment of this Court in **All India Judges' Association v. Union of India**[5], the suitability of candidates for promotion as District Judges from amongst in-service candidates is required to be adjudged. Apart from the requirement of conducting a suitability test and a *viva voce*, Rule 6(1)(b) read with Rule 8 requires the ACRs of the preceding five years to be taken into consideration. The proforma of the ACRs contains an exhaustive elaboration of the criteria which are to be borne in mind while assessing a candidate. In other words, the suitability of a candidate has to be assessed on the basis of the track record, as reflected in the ACRs;

(ii) In the above backdrop, the Resolution of the Full Court dated 30 November 2021 which prescribed the requirement of obtaining 50% as a condition of eligibility in the suitability test and in the *viva voce* separately, is an evident act of discrimination against candidates seeking promotions in the 65% quota, compared to those seeking in-service promotions in the 10% quota. There is no requirement of obtaining the minimum cut-off individually in the suitability test and in the *viva voce* when appointments are made of inservice candidates through the limited competitive examination. There is no rational justification for the High Court to lay down a minimum cut-off of the nature which has been prescribed by the resolution dated 30 November 2021

5 [2002] 2 SCR 712 : (2002) 4 SCC 247

only for candidates seeking promotion in the 65% quota while there is no such requirement in the 10% quota for the limited competitive examination;

(iii) The element of discrimination is evident from the fact that no such cut-off as a condition of eligibility is prescribed for candidates who seek direct recruitment as Additional District and Sessions Judges; and

(iv) The imposition of a cut-off as a condition of eligibility prescribing a minimum of 50% of marks in the *viva voce* was disclosed, for the first time, in a response to a query under the Right to Information Act 2005 on 28 March 2023. Consequently, candidates were completely in the dark about the imposition of such a requirement as a condition of eligibility before the disclosure. Consequently, the High Court has acted with arbitrariness in recommending the appointments.

24. Mr Shyam Divan, senior counsel, submitted that:

(i) Candidates drawn for promotion in the 65% promotion quota and 10% from the in-service candidates appearing for a limited competitive examination are from the same pool. Consequently, a minimum cut-off cannot be logically justified for the 65% promotion quota when there is no such norm for the 10%, which is filled up on the basis of the limited competitive examination;

(ii) Rule 19 empowers the State Government to make regulations not inconsistent with the Rules to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the Rules. In the present case, there was a longstanding practice, following the earlier resolution of the Full Court dated 29 January 2013 of requiring a cut-off of 50% overall on the basis of the combined marks which were obtained in the written test and in the interview. A departure from a practice which had held the field for such a long period of time could have only been made either by amending the Rules or by the exercise of power under Rule 19 by the State Government to make regulations;

(iii) The principles of fairness and good governance which have been laid down in the judgment of the Constitution Bench of

this Court in **Sivanandan C T v High Court of Kerala**[6] apply independent of prejudice. Where a breach of the principles of natural justice is alleged for a failure to provide a hearing, an additional layer has been provided in decisions of this Court to the effect that such a breach will not necessarily invalidate the action in the absence of prejudice to the candidates. While a violation of the principles of natural justice may not be fatal in the absence of prejudice, in the present case, the candidates who have failed to be selected rely on an independent principle of administrative law which requires fairness in governance;

(iv) In any event, this Court may scrutinize the marksheets, for the purpose of analyzing the marks which were awarded in the course of the *viva voce* to determine as to whether there is an element of prejudice in the award of marks; and

(v) Based on the longstanding practice in the present case, all candidates were under a legitimate expectation of the continuance of the norms which were prescribed in the Resolution of the Full Court dated 29 January 2013 and any alteration of the position without due notice to the candidates has resulted in substantial injustice.

25. Mr Gopal Sankaranarayanan, senior counsel urged that:

(i) The absence of notice to candidates about the alteration in the criteria of eligibility results in a failure to satisfy the norms of consistency and predictability;

(ii) The requirement of obtaining minimum qualifying marks in the *viva voce* was introduced for the first time by the Resolution dated 30 November 2021 of which candidates had no notice;

(iii) In paragraph 10.97 of its recommendations, the Shetty Commission had stated that in matters of direct recruitment, it was not inclined to impose a minimum cut-off in the *viva voce* in order to obviate arbitrariness in the process. Though the recommendation deals with direct recruitment, there is no rational reason to exclude it in respect of the process which is followed in promoting in-service candidates in the 65% promotion quota; and

6 [2023] 11 SCR 674 : 2023 SCC Online SC 994

(iv) On 28 February 2023, this Court was informed of there being 38 vacancies in the Superior Judicial Service in Haryana. The High Court has made recommendations for appointing 13 candidates. This indicates the existence of a substantial number of vacancies. Consequently, public interest would not necessarily be subserved by affirming the view which has been taken by the High Court, both on its administrative side and on the judicial side.

26. Mr Tushar Mehta, Solicitor General submitted that:

(i) Bearing in mind the principles which are incorporated in Articles 233, 234 and 235 of the Constitution, the criteria for selection of District Judges should be fixed in consultation with the State Government;

(ii) A collaborative exercise must be followed by the two organs of the State - the Judiciary and the Executive;

(iii) There is an element of subjectivity and arbitrariness implicit in laying down minimum marks for the interview process since a candidate who has otherwise obtained high marks in the suitability test may be excluded for failure to meet the cut-off in the *viva voce*;

(iv) Article 233 would encompass the criteria for selection, whether by a rule or by a resolution. Hence, the High Court, while making a modification to its own Resolution, ought to have consulted the State Government; and

(v) The Government was not informed by the High Court of the change in the criteria requiring a minimum of 50% marks in both the suitability test and in the *viva voce*. On the other hand, where an amendment of the Rules was sought to be effected, the High Court has moved the State Government.

27. Mr Nidhesh Gupta, senior counsel appearing on behalf of the High Court, in support of the decision which was taken on the administrative side and ultimately as affirmed in the impugned judgment of the Division Bench, submitted:

(i) Properly construed, Rule 8 of the Rules provides the modalities for testing the merit and suitability of the members of the Judicial Branch for promotion under clause (a) of Rule 6(1). The purpose

of conducting the written test and the *viva voce* is to ascertain and examine the knowledge and efficiency of the officer under consideration in law;

(ii) Where the Rules are silent in regard to the details in the implementation process, it is a settled principle of law that they can be supplemented by administrative instructions;

(iii) The Rules, in the present case, being silent on the minimum qualifying marks required to be obtained in the written test and the *viva voce*, the administrative instructions which were issued by the High Court do not involve any amendment of a rule;

(iv) As a matter of fact, the Full Court Resolution dated 29 January 2013 was issued in terms of the administrative power which is vested in the High Court in regard to the appointment of District Judges under Article 233 and in relation to the control of the High Court over the District Judiciary under Article 235 and the High Court has invoked the very same power while modifying the terms of the earlier resolution on 30 November 2021;

(v) The plea of discrimination as between the requirements for direct recruits, the in-service candidates in a limited departmental examination and the promotional quota for in-service candidates has no valid basis in law. All three categories are distinct and constitute valid classifications;

(vi) The decision of this Court in **All India Judges' Association** (supra) distinguishes between all the three categories for appointment to the Higher Judicial Service. This distinction is exemplified by the Rules in question. For the promotional quota of 65%, the written test consists only of multiplechoice questions totaling to 75 marks, each candidate being given four options for every question. In the matter of direct recruitment, the written test consists of five papers totaling 750 marks comprising of three papers in law, each of 200 marks, a language paper of 100 marks and a general knowledge paper of 50 marks. In the limited competitive examination, the written examination has a weightage of 600 marks. As opposed to the detailed examination which is expected of candidates for direct recruitment and in the limited competitive examination, the in-service candidates who avail of the promotional quota of 65% have to appear for a suitability test of a different nature and

character. Consequently, all the three avenues for appointment to the Higher Judicial service are distinct and the High court was justified in imposing a minimum eligibility requirement of 50% in the written test and the *viva voce* independently;

(vii) Interviews in the present case were conducted by six of the senior-most Judges of the High Court, including the Chief Justice and there is no allegation of *mala fides* or an attribution of illegality to the interview. Marks in the written examination were disclosed only after the final results were declared. A candidate cannot contend that they were casual in the course of the interview only because they expected to do well in the written examination;

(viii) In consequence, no prejudice has been caused to any candidate by the High Court not having disclosed the minimum eligibility cut-off of 50% prior to the date of the interview. No prejudice is caused to any candidate because it cannot be contended that a candidate would have prepared differently if they were made aware of the eligibility requirement;

(ix) On the aspect of consultation with the State Government within the ambit of Articles 233 and 235, the High Court has relied on settled precedent, including the decisions of the Constitution Benches of this Court which emphasize that in matters of appointments to the District Judiciary, the High Court remains the sole repository of power;

(x) The consistent view of this Court has been that the requirement of minimum marks for interviews in the appointments of District Judges is necessary since the selection has to be made on the basis of merit-cum-seniority;

(xi) In the present case, the appellants have sought a mandamus before the High Court for the enforcement of the Resolution of the Full Court of 2013. That being the position, it is not open to them to challenge the ability of the High Court to frame a resolution for modifying the terms of the earlier Resolution dated 29 January 2013; and

(xii) As regards the conduct of the State of Haryana, it is apparent that initially the only objection of the State Government was in regard to the non-recommendation of more senior persons in

the Service. It is thereafter when an objection was raised by an advocate in a representation to the effect that the cut-off of 50% had not been communicated to the candidates, that this issue has been raised by the State Government.

28. Mr Rameshwar Singh Malik, senior counsel, has urged that:

(i) The Rules being silent, the High Court had the power to fill in the gap by the issuance of administrative directions;

(ii) Since no amendment of the Rules was being brought about, there was no requirement of consultation with the State Government; and

(iii) The criterion which was fixed by the Resolution of the Full Court dated 29 January 2013 is not under challenge and, in fact, the relief which was sought before the High Court was for the restoration of the criteria under the Resolution. Consequently, where the same power has been used by the High Court to make a selection subsequently in 2021, such an alteration is beyond the purview of judicial review.

29. The rival submissions would now need to be analyzed.

C. Analysis

i. All India Judges' Association

30. The genesis of the recruitment to the judicial service, particularly, in the context of the controversy before this Court, traces back to the judgment in the **All India Judges' Association (supra)**. In the course of the judgment, this Court noted that at the time, the recruitment to the Higher Judicial Service was being made from two sources: first**,** by promotion from amongst the members of the Subordinate Judicial Service; and second**,** by direct recruitment. The decision was preceded by the recommendations of the Shetty Commission,[7] particularly regarding the revision of the pay scales and conditions of service of the District Judiciary. While accepting the recommendations of the Shetty Commission, which resulted in a favourable modification of the pay scales of the District Judiciary, this Court underscored the need to ensure certain minimum standards,

7 First National Judicial Pay Commission, 1999 (Shetty Commission Report)

objectively assessed or fulfilled, by judicial officers who enter the Higher Judicial Service. This Court accepted the recommendation of the Shetty Commission that direct recruitment to the cadre of District Judges from amongst advocates should be 25%, by way of a competitive examination consisting of a written test and a *viva voce*. The decision enunciated that in-service judicial officers must be provided with the incentive to compete with each other in the process of obtaining expedited promotions. The object of doing so was to improve the caliber of persons recruited to the Higher Judicial Service. Consequently, as regards appointment by promotion, this Court held that 50% of the total posts in the Higher Judicial Service should be filled up by promotion based on merit-cum-seniority, while the remaining 25% of the posts in the Service should be filled up strictly based on merit through a limited departmental competitive examination with a stipulated qualifying service in the cadre of Civil Judge (Senior Division). The conclusions of this Court were formulated in the following terms:

> "28. As a result of the aforesaid, to recapitulate, we direct that recruitment to the Higher Judicial Service i.e. the cadre of District Judges will be:
>
> (1)(a) 50 per cent by promotion from amongst the Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test;
>
> (b) 25 per cent by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years' qualifying service; and
>
> (c) 25 per cent of the posts shall be filled by direct recruitment from amongst the eligible advocates on the basis of the written and viva voce test conducted by respective High Courts.
>
> (2) Appropriate rules shall be framed as above by the High Courts as early as possible."

31. Following the decision in **All India Judges' Association** (supra), rules were framed in various States to comply with the directions. Subsequently, many High Courts found it difficult to fill up 25 percent posts through the limited departmental competitive examination.

Therefore, in **All India Judges' Association** v. **Union of India**,[8] this Court reduced the quota of judicial officers from the limited competitive examination from 25 percent to 10 percent. As a consequence, three sources of recruitment to the Higher Judicial Service have come into being:

(i) 65% of seats by promotion from the cadre of Civil Judges (Senior Division) on the basis of the principle of merit-cum-seniority;

(ii) 10% by promotion on the basis of merit through a limited competitive examination for Civil Judges (Senior Division) fulfilling stipulated qualifying service; and

(iii) 25% seats by direct recruitment from amongst advocates who fulfill the eligibility requirements.

32. It has been argued that since the Shetty Commission held that no minimum cutoffs should be fixed for the viva voce for the route of direct appointments (under Rule 6(1)(c)), and the findings of the Shetty Commission were upheld by the Court in **All India Judges' Association** (supra), it would be unreasonable to prescribe minimum cutoffs for viva voce for another method of recruitment to the same post.

33. The Rules under consideration preserve the three sources of recruitment, in the ratio of 65% by promotion based on merit-cum-seniority, 10% strictly on the basis of merit by a limited competitive examination; and 25% by direct recruitment from amongst eligible candidates based on the written and *viva voce* test. Each of the three sources of recruitment is distinct in itself. Recruitment by promotion under Rule 6(1)(a) is based on the principle of merit-cum-seniority and passing of a suitability test, while recruitment by promotion under Rule 6(1)(b) is strictly based on merit through a limited competitive examination and 5 years of minimum qualifying service as Civil Judges. The purpose of three sources of recruitment is similarly distinct. Advocates with the requisite experience are permitted to compete for direct recruitment to the Superior Judicial Service. In-service judicial officers have two avenues for entering the Superior Judicial Service: they can either appear for a limited competitive examination where selection would be strictly based on

8 (2010) 15 SCC 170

merit or they can seek a promotion through the normal channel of promotion based on the merit-cum-seniority criterion.

34. In order to appreciate the classification between the three categories of recruitment to the Higher Judicial Service, it would be necessary to dwell on the modalities or the procedure for recruitment. Direct recruitment, for which a 25% quota is set apart by Rule 6(1)(c), is made on the basis of a written examination consisting of 750 marks and a *viva voce* of 250 marks. While recording the submissions of Mr Nidhesh Gupta, senior counsel appearing on behalf of the High Court, we have already adverted to the manner in which the written test comprising of 750 marks is conducted, comprising of three law papers, a language paper and a paper in general knowledge. The procedure for direct recruitment is spelt out in Rule 7. The procedure for regular promotion, on the other hand, is provided in Rule 8 which contemplates the assessment and testing of the merit and suitability of a member of the Judicial Branch in Rule 6(1)(a). The purpose of the objective test of 75 marks and the *viva voce* carrying 25 marks is to ascertain and examine legal knowledge and efficiency in the legal field. Besides this, the ACRs of the preceding five years of the officer are taken into reckoning. Since the candidates who are evaluated for promotion under Rule 6(1)(a) read with Rule 8 are in-service candidates, the selection is based on a test (comprising of the written and the *viva voce*) and due consideration of the service records as borne out by the ACRs.

35. Recruitment by promotion under Rule 6(1)(b) is "strictly on the basis of merit through the limited competitive examination" and a 5-year qualifying service requirement. Under Rule 6(1)(b), the limited competitive exam is of a competitive nature where members of the Service compete *inter se*, as opposed to the direct recruitment exam, which is open in nature. The limited competitive exam under Rule 6(1)(b), according to Rule 9, comprises of a 600-mark written examination. In addition, 150 marks are assigned to the assessment of the records and 250 marks are assigned to the *viva voce*. The proviso to Rule 9 indicates that the High Court shall, in addition to the competitive examination, take into account any of the criteria specified in Rule 8 which apply to the normal procedure for promotion. The limited competitive examination under Rule 6(1)(b) read with Rule 9 cannot be equated with the procedure for promotion for assessing merit and suitability under Rule 6(1)(a) read with Rule 8.

36. The scope of recruitment through regular promotion under Rule 6(1)(a) read with Rule 8 is different from recruitment through promotion based on limited competitive examination under Rule 6(1)(b) read with Rule 9. As we have already noted, the purpose of a limited competitive examination, as set out in the judgment of this Court in **All India Judges' Association** (supra), was to provide an avenue for in-service officers to compete *inter se* for accelerated promotion on fulfilling a higher benchmark of competition based on merit. Moreover, this Court also recognised that the criteria and method of testing the suitability of judicial officers should be different:

> "27. [...] Furthermore, there should also be an incentive amongst the relatively junior and other officers to improve and to compete with each other so as to excel and get quicker promotion. In this way, we expect that the calibre of the members of the Higher Judicial Service will further improve. In order to achieve this, while the ratio of 75 per cent appointment by promotion and 25 per cent by direct recruitment to the Higher Judicial Service is maintained, **we are, however, of the opinion that there should be two methods as far as appointment by promotion is concerned : 50 per cent of the total posts in the Higher Judicial Service must be filled by promotion on the basis of principle of merit-cum-seniority. For this purpose, the High Courts should devise and evolve a test in order to ascertain and examine the legal knowledge of those candidates and to assess their continued efficiency with adequate knowledge of case-law. The remaining 25 per cent of the posts in the service shall be filled by promotion strictly on the basis of merit through the limited departmental competitive examination for which the qualifying service as a Civil Judge (Senior Division) should be not less than five years.** The High Courts will have to frame a rule in this regard."
>
> (emphasis supplied)

37. The submission of the unsuccessful officers, that there is no valid basis in law to impose a minimum eligibility cut-off of obtaining 50% marks individually in the written test and the *viva voce*, when

such a requirement is not imposed either for direct recruitment or for the limited competitive examination cannot hold substance. This argument is premised on the fact that the three different modes of recruitment are meant for the same post. It is argued that since the purpose of all the three sources is to recruit persons for the same post, a different requirement such as the 50% cut-off requirement for the viva voce in one of the three modes, is arbitrary. Though the recruitment is meant to fill vacancies in the same post in the higher judicial service, the candidates taking the three routes to reach that post are placed differently and thus must be tested differently. In-service candidates seeking recruitment through promotions cannot be considered on par with the candidates seeking direct recruitment or for that matter with candidates seeking accelerated promotion through a limited competitive test.[9]

38. Even among the candidates seeking promotion, there is a clear distinction between those who are recruited under Rule 6(1)(a) based on merit-cum-seniority and those who are recruited under Rule 6(1)(b) based strictly on merit, in order to avail of a quicker promotion. This Court in **All India Judges' Association** (supra) clearly noted that the rationale for accelerated promotions was to afford an incentive to those who were relatively junior but desirous of promotion.[10] Similarly, in **Dheeraj Mor v. High Court of Delhi**,[11] a three-Judge Bench of this Court held that the purpose of promotion through a limited competitive examination is to ensure that in-service candidates are able to "take march to hold the post of District Judges on the basis of their merit."

39. The Rules prescribe different criteria for assessing the in-service judicial officers eligible for promotion - while one is based on merit-cum-seniority,[12] the other is based strictly on merit *de hors* seniority.[13] This difference justifies the distinct methods of evaluation prescribed under Rules 8 and 9. A comparison of Rules 8 and 9 would show that the written examination under Rule 9 carries 600 marks and is much more elaborate and rigorous, as opposed to the 75 marks' objective

9 Dheeraj Mor v. High Court of Delhi, [2020] 2 SCR 161 : (2020) 7 SCC 401

10 All India Judges' Association (supra), [27].

11 [2020] 2 SCR 161 : (2020) 7 SCC 401

12 Rule 6(1)(a)

13 Rule 6(1)(b)

test under Rule 8. The first proviso to Rule 9[14] mandates that the High Court shall, in addition to competitive examination mentioned in Rule 9, consider any criteria as specified under Rule 8. As we shall advert to later in this judgment, the ultimate discretion vests with the High Court regarding how they conduct the examinations under the Rules. The proviso while recognising the power of the High Court to import "any of the criteria" specified in Rule 8 to Rule 9, retains the other differences about the manner in which the two processes of promotion under Rule 8 and Rule 9 would operate. Thus, even though candidates seeking promotions under Rules 6(1)(a) and 6(1)(b) are drawn from in-service judicial officers, there is a rational basis of treating them differently - while some candidates among the in-service officers can seek regular promotions based on their seniority, those relatively junior have an incentive to opt for accelerated promotion by taking a limited competitive examination by demonstrating their merit. Bearing in mind the distinct nature of the test under Rule 8, it cannot be gainsaid that there is a valid basis for imposing a distinct requirement, in this case, of an eligibility cut-off both in the written test and the *viva voce* independently. The fundamental point is that each of the three avenues for appointment to the Higher Judicial Service are distinct and are based on classifications having a nexus to the object and purpose sought to be achieved. Whether such a requirement is violative of Articles 233 and 235 of the Constitution is a separate matter which would have to be adjudicated independently, which we will do in the subsequent part of this judgment.

40. It is true, as has been submitted on behalf of the unsuccessful candidates, that the Shetty Commission had declined to impose a minimum cut-off in the *viva voce* conducted for appointments to the Service by direct recruitment. The Shetty Commission appears to have been impelled to do so to avoid an element of subjectivity.[15] Based on this, the unsuccessful candidates sought to urge that the same rationale must apply to the *viva voce* which was held in the normal process of promotion.

41. Now, it is true that certain recommendations of the Shetty Commission in regard to the improvement of the pay scales of the judicial officers

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14 *"Provided that the High Court shall in addition to the above competitive examination take into consideration any of the criteria as specified in Rule 8 above.."*

15 Shetty Commission Report, [10.97]

were accepted by this Court in the decision of this Court in **All India Judges' Association** (supra). However, there was no specific finding in paragraphs 27 and 28 of the **All India Judges' Association** (supra) in regard to whether a cut-off should be imposed for recruitment by way of regular promotion. The Court had merely remarked that "there should be an objective method of testing the suitability of the subordinate judiciary"[16], without making any observation about the desirability or otherwise of minimum cutoffs for *viva voce* generally. We do not read the decision of this Court in **All India Judges' Association** (supra) as precluding the High Court from doing so based on the exigencies of the Service in the State. In any case, based on the discussion above, the three modes of recruitment have been reasonably classified and different requirements have been prescribed for each. As such, what may or may not have been held in respect of the *viva voce* in direct recruitments may not necessarily apply to the *viva voce* requirement in recruitments through promotions.

42. It is important to bear in mind that the Higher Judicial Services require the selection of judicial officers of mature personality and requisite professional experience. In-service judicial officers are expected to have a greater familiarity with the law and the procedure based on their experience as judicial officers. While an objective written examination can be the best gauge of the legal knowledge of a candidate, the viva voce offers the best mode of assessing the overall personality of a candidate. In **Lila Dhar v. State of Rajasthan**,[17] this Court noted the importance of giving necessary weightage to the interview test in the following words:

> **"6.** Thus, the written examination assesses the *man's* intellect and the interview test the man himself and "the twain shall meet" for a proper selection. If both written examination and interview test are to be essential features of proper selection, the question may arise as to the weight to be attached respectively to them. In the case of admission to a college, for instance, where the candidate's personality is yet to develop and it is too early to identify the personal qualities for which greater importance may

16 All India Judges' Association (supra), [27].

17 [1982] 1 SCR 320 : (1981) 4 SCC 159

have to be attached in later life, greater weight has per force to be given to performance in the written examination. The importance to be attached to the interview-test must be minimal. That was what was decided by this Court in *Periakaruppan* v. *State of Tamil Nadu* [(1971) 1 SCC 38 : (1971) 2 SCR 430] , *Ajay Hasia* v. *Khalid Mujib Sehravardi* [(1981) 1 SCC 722; 1981 SCC (L&S) 258 : AIR 1981 SC 487] and other cases. **On the other hand, in the case of services to which recruitment has necessarily to be made from persons of mature personality, interview test may be the only way, subject to basic and essential academic and professional requirements being satisfied. To subject such persons to a written examination may yield unfruitful and negative results, apart from its being an act of cruelty to those persons.** There are, of course, many services to which recruitment is made from younger candidates whose personalities are on the threshold of development and who show signs of great promise, and the discerning may in an interview-test, catch a glimpse of the future personality. In the case of such services, where sound selection must combine academic ability with personality promise, some weight has to be given, though not much too great a weight, to the interview-test. There cannot be any rule of thumb regarding the precise weight to be given. It must vary from service to service according to the requirements of the service, the minimum qualifications prescribed, the age group from which the selection is to be made, the body to which the task of holding the interview-test is proposed to be entrusted and a host of other factors. It is a matter for determination by experts. It is a matter for research. It is not for courts to pronounce upon it unless exaggerated weight has been given with proven or obvious oblique motives. The Kothari Committee also suggested that in view of the obvious importance of the subject, it may be examined in detail by the Research Unit of the Union Public Service Commission."

43. In Taniya Malik v. Registrar General of the High Court of Delhi,[18] the petitioners challenged the prescription of minimum cut-off marks for the viva voce during the selection process of the Delhi Judicial Service Examination 2015. A two-Judge Bench of this Court declined to accept the challenge of the petitioners on the ground that "it is desirable to have the interview and it is necessary to prescribe minimum passing marks for the same when the appointment in the higher judiciary to the post of District Judge is involved." The court further observed that the interview is the best method of judging "the performance, overall personality and the actual working knowledge and capacity to perform otherwise the standard of judiciary is likely to be compromised."

44. In the present case, the High Court has come to the conclusion that apart from seeking proficiency in the substantive knowledge of law, based on the written test, in-service judicial officers must possess communication and other skills which would emerge in the course of an interview. We must be mindful of the fact that the interview in such cases is not being held at the very threshold of the service, while making recruitments at the junior-most level. Rather, the interview is being held to fill up a senior position in the District Judiciary, that of an Additional District and Sessions Judge. Such officers, based on their prior experience, must be expected to demonstrate a proficiency in judicial work borne from their long years of service. The purpose of the interview for officers in that class is to assess the officer in terms of the ability to meet the duties required for performing the role of an Additional District and Sessions Judge. Consequently, there would be a reasonable and valid basis, if the High Court were to do so, to impose a requirement of a minimum eligibility or cut-off both in the written test and in the *viva voce* separately.

ii. The Rules can be supplemented to fill in gaps

45. That leads us to the analysis of the provisions of Rule 6, on the one hand, and Rule 8, on the other. As we have already noticed, Rule 6(1)(a) provides for promotion to 65% of the posts to the Higher Judicial Service on the basis of the principle of merit- cum-seniority and the passing of a suitability test. The principle of merit-cum- seniority is an approved method of selection where merit

18 [2018] 10 SCR 348 : (2018) 14 SCC 129

is the determinative factor and seniority plays a less significant role.[19] Where the principle of 'merit-cum- seniority' is the basis, the emphasis is primarily on the comparative merit of the judicial officers being considered for promotion. Resultantly, even a junior officer who demonstrates greater merit than a senior officer will be considered for promotion.

46. Through their letter dated 02 March 2023, the State Government raised an objection to the recommendations made by the High Court. The State requested the High Court to "clarify the non-recommendation" of certain officers who were higher in seniority to the officers recommended by the High Court. While as an abstract proposition, promotion of judicial officers on the basis of seniority alone may impart objectivity to the entire process, this Court has also cautioned against using seniority as the sole criterion for promotion in such cases. The Higher or Superior Judicial Service is a gateway to eventual appointments to the High Court. Steps may legitimately be taken by the High Court to ensure that appointments to the higher echelons of the judiciary does not become a parade of mediocrity.

47. In **Sant Ram Sharma v. State of Rajasthan**,[20] a Constitution Bench of this Court held that consideration of merit along with seniority in the procedure of promotion is not violative of Article 14 and 16 of the Constitution. It was also observed:

> "9. [...] The question of proper promotion policy depends on various conflicting factors. It is obvious that the only method in which absolute objectivity can be ensured is for all promotions to be made entirely on grounds of seniority. That means that if a post falls vacant it is filled by the person who has served longest in the post immediately below. **But the trouble with the seniority system is that it is so objective that it fails to take any account of personal merit. As a system it is fair to every official except the best ones**; an official has nothing to win or lose provided he does not actually become so inefficient that the disciplinary action has to be taken against him.

19 B V Sivaiah v. K. Addanki Babu, [1998] 3 SCR 782 : (1998) 6 SCC 720

20 [1968] 1 SCR 111 : 1967 SCC OnLine SC 16

> But, though the system is fair to the officials concerns, it is a heavy burden on the public and a great strain on the efficient handling of public business. [.]"
>
> (emphasis supplied)

48. According to Rule 6(1)(a), the inter-se merit of the judicial officers plays a greater role in making promotions. The passing of a suitability test is a measure of assessment of the merit of the judicial officers under consideration for promotion. The passing of a suitability test, in other words, is complemented by the requirement of observing the principle of merit-cum-seniority. Rule 8 particularly provides for the procedure for promotion for "assessing and testing the merit and suitability" of the judicial officers. It states that the High Court "may" hold a written objective test of 75 marks and viva voce of 25 marks in order to ascertain and examine the legal knowledge and efficiency in the legal field of the judicial officers. It is important to note that the use of the word "may" in Rule 8 confers discretion on the High Court with respect to the conduct of the written objective test and viva voce. In comparison, Rule 9, which lays down the procedure for a limited competitive examination while implementing Rule 6(1)(b), uses the word "shall" in a mandatory sense. The use of the word "may" in Rule 8 indicates that the High Court has certain discretion in terms of the conduct of the written objective test and viva voce for promotion of judicial officers in terms of Rule 6(1)(a).

49. Moreover, the Rules in the present case are entirely silent in regard to the prescription of a minimum eligibility for clearing a competitive test, on the one hand, and the *viva voce*, on the other hand. If the Rules were to specifically provide in a given case that the criterion for eligibility would be on the combined marks of both the written test and the *viva voce*, the matter would have been entirely different.[21] Rule 6(1)(a) and Rule 8 being silent as regards the manner in which merit and suitability would be determined, administrative instructions can supplement the Rules in that regard. This is not a case where the Rules have made a specific provision in which event the administrative instructions cannot transgress a rule which is being made in pursuance of the power conferred under Article 309 of the Constitution. For instance, if the Rules were to provide that there

21 P K Ramachandra Iyer v. Union of India, [1984] 2 SCR 200 : (1984) 2 SCC 141, [44]

would be a minimum eligibility requirement only in the written test, conceivably, it may not be open to prescribe a minimum eligibility requirement in the *viva voce* by an administrative instruction. Similarly, if the Rules were to provide that the eligibility cut-off would be taken on the basis of the overall marks which are obtained in both the written test and the *viva voce*, conceivably, it would not be open to the administrative instructions to modify the terms.

50. The appropriate authority cannot amend or supersede statutory rules by administrative actions. However, it is open to it to issue instructions to fill up the gaps and supplement the rules where they are silent on any particular point.[22] Such instructions have a binding force provided they are subservient to the statutory provisions and have been issued to fill up the gaps between the statutory provisions.[23]

51. In **K H Siraj v. High Court of Kerala**,[24] this Court was called upon to determine the validity of the decision of the High Court of Kerala in prescribing minimum marks for the oral examination as a condition of eligibility for selection as Munsif Magistrate. The relevant provision, that is, Rule 7 of the Kerala Judicial Service Rules 1991, mandated the High Court to hold written and oral examinations and prepare a list of candidates considered suitable for appointment to Category 2 posts. This Court held that even though Rule 7 was silent on the question of minimum marks for oral examination, it was open to the High Court to supplement the Rule:

> "**62.** Thus it is seen that apart from the amplitude of the power under Rule 7 it is clearly open for the High Court to prescribe benchmarks for the written test and oral test in order to achieve the purpose of getting the best available talent. There is nothing in the Rules barring such a procedure from being adopted. It may also be mentioned that executive instructions can always supplement the Rules which may not deal with every aspect of a matter. Even assuming that Rule 7 did not prescribe any particular minimum, it was open to the High Court to supplement the

22 Sant Ram Sharma v. State of Rajasthan, [1968] 1 SCR 111 : 1967 SCC OnLine SC 16 [7]; State of Gujarat v Akhilesh C Bhargav, [1987] 3 SCR 1091 : (1987) 4 SCC 482, [7]

23 State of Uttar Pradesh v. Chandra Mohan Nigam, [1978] 1 SCR 521 : (1977) 4 SCC 345 [26];

24 [2006] Supp. 2 SCR 790 : (2006) 6 SCC 395

rule with a view to implement them by prescribing relevant standards in the advertisement for selection."

52. In the present case, the Rules are silent in regard to the manner in which the merit or suitability would be determined. In view of the silence of the Rules, it is open to the High Court in the exercise of its administrative authority to provide the modalities in which merit or suitability would be determined.

iii. Sivanandan C T

53. Next, it would become necessary to dwell on a recent decision of the Constitution Bench of this Court in **Sivanandan C T** (supra). The issue in that case pertained to the validity of the selection process to the Higher Judicial Services through direct recruitment conducted by the High Court of Kerala. The Kerala State Higher Judicial Services Rules 1961 stipulated that the direct recruitment from the Bar shall be "on the basis of aggregate marks/grade obtained in a competitive examination and viva voce conducted by the High Court." Thereafter in 2012, the High Court of Kerala published its Scheme for the examination for recruitment of members of the Bar to the Kerala Higher Judicial Service. The Scheme specifically provided that there shall be no cut-off of marks in the *viva voce*. Following this, the High Court issued a notification in 2015 inviting applications from qualified candidates for appointment as District and Sessions Judges by direct recruitment from bar. The notification of the High Court indicated that candidates who secured a minimum of 50% marks in the written test (relaxed to 40% for SC/ST candidates) would qualify for the *viva voce*. The notification also specified that the aggregate of marks in the written examination and the *viva voce* would form the basis of the ultimate merit list. In view of the notification, the High Court conducted the written examination and viva voce of the qualified candidates. When the process of selection had commenced, all candidates were put on notice of the fact that:

(i) The merit list would be drawn up on the basis of the aggregate marks obtained in the written examination and *viva voce*;

(ii) Candidates whose marks were at least at the prescribed minimum in the written examination would qualify for the *viva voce*; and

(iii) No cut-off was applicable in respect of the marks to be obtained in the *viva voce* while drawing up the merit list in the aggregate.

54. After the conduct of the viva voce, the High Court decided to apply a minimum cut-off in the viva voce as a qualifying criterion. Subsequently, the final merit list of successful candidates was published. The decision of the High Court to prescribe a minimum cut-off for the viva voce was challenged for being contrary to the statutory rules which prescribed that the merit list shall be drawn up on the basis of the aggregate marks obtained in the written examination and viva voce.

55. In the backdrop of these facts, this Court held:

> "14. The decision of the High Court to prescribe a cut-off for the viva-voce examination was taken by the Administrative Committee on 27 February 2017 after the viva-voce was conducted between 16 and 24 January 2017. The process which has been adopted by the High Court suffers from several infirmities. Firstly, the decision of the High Court was contrary to Rule 2(c)(iii) which stipulated that the merit list would be drawn up on the basis of the marks obtained in the aggregate in the written examination and the viva-voce; secondly, the scheme which was notified by the High Court on 13 December 2012 clearly specified that there would be no cut off marks in respect of the viva-voce; thirdly, the notification of the High Court dated 30 September 2015 clarified that the process of short listing which would be carried out would be only on the basis of the length of practice of the members of the Bar, should the number of candidates be unduly large; and fourthly, the decision to prescribe cut off marks for the viva-voce was taken much after the viva-voce tests were conducted in the month of January 2017."

56. Moreover, this Court took note of the fact that subsequently the rules in the State of Kerala were amended in 2017 to prescribe a cut-off of 35% marks in the *viva voce* examination which was not the prevailing legal position when the process of selection was initiated in that case. The above extract from the decision of this Court in **Sivanandan C T** (supra) reveals that it was a cumulative set of factors set out in paragraph 14 which have led to the ultimate determination. The statutory rules had indicated in that case that the

merit list would be prepared on the basis of the aggregate marks in the written examination and the *viva voce*. The Scheme of the High Court had specified that there would be no separate cut-off for the *viva voce*. Moreover, the process of shortlisting, as prescribed, was to be on the basis of the length of the service. Finally, the decision to prescribe a cut-off in the *viva voce* was taken much after the test was conducted.

57. The facts as they stand in the present case are clearly in contrast to those contained in **Sivanandan C T** (supra). As opposed to the Rules having made a specific provision, the Rules were clearly silent in the present case. It is in this backdrop, in the face of the silence of the statutory rules that the High Court had, in its initial Full Court Resolution dated 29 January 2013, prescribed an overall cut-off of 50% of combined marks in the written test and in the *viva voce*. The High Court, while amending the text of its Full Court Resolution of 29 January 2013, had done so in the exercise of the same administrative capacity which it had wielded while formulating the original Resolution. Hence, the Resolution of the High Court dated 30 November 2021 cannot be faulted in that regard.

58. The unsuccessful candidates in the present case have further relied on **Sivanandan C T** (supra) to contend that the absence of notice to the candidates about the imposition of the minimum cut-off marks for the viva voce contravenes their legitimate expectation. In **Sivanandan C T** (supra), this Court held that an individual who claims a benefit or entitlement based on the doctrine of legitimate expectation has to establish: (i) the legitimacy of the expectation; and (ii) that the denial of the legitimate expectation led to a violation of Article 14. In **Sivanandan C T** (supra), the statutory rules coupled with the Scheme of the High Court generated a legitimate expectation that (i) the merit list would be drawn based on the aggregate of the total marks received in the written examination and viva voce; and (ii) there would be no minimum cut-off marks for the viva voce. However, in the present case neither the statutory Rules, nor the High Court committed that there would be no cut-off marks for the viva voce so as to give rise to such a legitimate expectation on behalf of the petitioners. Furthermore, the decision of the High Court to apply the minimum cut-off marks for the viva voce is grounded in legality, and therefore, cannot be faulted for contravening the established practice.

iv. Articles 233, 234 and 235 of the Constitution of India

59. That leads us to the analysis of the provisions of Articles 233, 234 and 235 of the Constitution. Clause (1) of Article 233 stipulates that appointment of persons to be District Judges in the State and their posting and promotion shall be made by the Governor in consultation with the High Court exercising jurisdiction in the State. According to Article 234, appointments of persons other than District Judges to the Judicial Service of a State are to be made by the Governor in accordance with the rules made in that behalf after consulting the State Public Service Commission and the High Court exercising jurisdiction in relation to the State. Control over the "Subordinate Courts" under Article 235 is vested in the High Court. Article 235 provides that:

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

60. These provisions have been dealt with in several decisions of this Court, including in decisions of Constitution Benches. In the course of its judgment, the High Court has elaborately dealt with several of these judgments.

61. In **Chandra Mohan v. State of Uttar Pradesh**[25], a Constitution Bench of this Court, speaking through Chief Justice K Subba Rao, held that the constitutional mandate under Article 233 is that the exercise of the power of appointment by the Governor is conditioned by consultation with the High Court. The object of consultation is that the High Court is expected to know better than the Governor the suitability of a person belonging either to the Judicial Service or

25 [1967] 1 SCR 77 : (1967) 1 SCR 77

to the Bar for appointment as a District Judge. The Court held that the mandate would stand disobeyed if the Governor either did not consult the High Court at all or if it were to consult the High Court or any other person in a manner not contemplated. The Court held that in case the Governor consults an authority other than the High Court, it would amount to indirect infringement of the mandate of the Constitution. In situations where the Constitution sought to provide for more than one consultant, it did so (for e.g. Articles 124 (2), 217(1)). Impliedly, this Court held that the duty of consultation is intertwined with the exercise of power itself, and such power can be exercised only in consultation with the person or persons designated under the relevant provisions of the Constitution. Hence, it was held that if the Rules empowered the Governor to appoint a person as District Judge in consultation with a person or authority other than the High Court, the appointment would not be in accordance with the provisions of Article 233. The Court observed as follows:

> "We are assuming for the purpose of these appeals that the "Governor" under Art. 233 shall act on the advice of the Ministers. So, the expression "Governor" used in the judgment means Governor acting on the advice of the Ministers. The constitutional mandate is clear. The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of district judge in consultation with the High Court. The object of consultation is apparent the High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the "judicial service" or to the Bar, to be appointed as a district judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him. This mandate can be disobeyed by the Governor in two ways, namely, (i) by not consulting the High Court at all, and (ii) by consulting the High Court and also other persons. In one case he directly infringes the mandate of the Constitution and in the other he indirectly does so, for his mind may be influenced by other persons not entitled to advise him. That this constitutional mandate has both a negative and

> positive significance is made clear by the other provisions of the Constitution. **Wherever the Constitution intended to provide more than one consultant, it has said so: see Arts. 124(2) and 217(1). Wherever the Constitution provided for consultation of a single body or individual it said so: see Art. 222. Art. 124(2) goes further and makes a distinction between persons who shall be consulted and persons who may be consulted. These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein.** To state it differently, if A is empowered to appoint B in consultation with C, he will not be exercising the power in the manner prescribed if he appoints B in consultation with C and D."
>
> (emphasis added)

62. In matters of appointment of judicial officers, the opinion of the High Court is not a mere formality because the High Court is in the best position to know about the suitability of candidates to the post of District Judge.[26] The Constitution therefore expects the Governor to engage in constructive constitutional dialogue with the High Court before appointing persons to the post of District Judges under Article 233. In **State of Haryana v Inder Prakash Anand HCS**[27], a Constitution Bench of this Court speaking through Chief Justice AN Ray observed that the High Court is acquainted with the capacity of work of the members already in service. Underlining the significance of the High Court's 'control' over the appointments under Article 235, it was held that the High Court's opinion will have a binding effect on the Governor according to the constitutional scheme. This Court noted as follows:

> "18. The control vested in the High Court is that if the High Court is of opinion that a particular judicial officer is not fit to be retained in service, the High Court will communicate that to the Governor because the Governor is the authority to dismiss, remove, reduce in rank or terminate the

26 Chandramouleshwar Prasad v. Patna High Court, [1970] 2 SCR 666 : (1969) 3 SCC 56

27 [1976] Supp. 1 SCR 603 : (1976) 2 SCC 977

> appointment. **In such cases it is the contemplation in the Constitution that the Governor as the head of the State will act in harmony with the recommendation of the High Court. If the recommendation of the High Court is not held to be binding on the State consequences will be unfortunate**. It is in public interest that the State will accept the recommendation of the High Court. **The vesting of complete control over the subordinate Judiciary in the High Court leads to this that the decision of the High Court in matters within its jurisdiction will bind the State.** "The Government will act on the recommendation of the High Court. That is the broad basis of Article 235.""
>
> (emphasis added)

63. In **State of Bihar v Bal Mukund Sah**[28], another Constitution Bench held that the constitutional scheme guaranteeing the independence of the Judiciary and the separation of power between the Executive and the Judiciary as basic features of the Constitution must be borne in mind. It was held that while Article 309 of the Constitution creates a permissible field of regulation by the Legislature, regarding conditions of service of already recruited judicial officers, it does not mean that the High Court's opinion can be overlooked. The process of appointments to the District Judiciary was held to be insulated from interference by way of the 'complete code' for the purpose laid down under Articles 233 and 234. This intention to insulate the process, the Court observed, is clear from the fact that these provisions are not subject to any other law enacted by the Legislature.[29] The Constitution intended to create a complete and insulated scheme of recruitment to the District Judiciary. Speaking in the context of the rules under Articles 234, 235 and 309 specifically, this Court observed that consultation with the High Court was indispensable.

64. The Court observed:

> "58... It is now time for us to take stock of the situation. In the light of the constitutional scheme guaranteeing independence of the Judiciary and separation of powers

28 [2000] 2 SCR. 299 : (2000) 4 SCC 640

29 ibid at para 35.

between the Executive and the Judiciary, the Constitution-makers have taken care to see by enacting relevant provisions for the recruitment of eligible persons to discharge judicial functions from the grass-root level of the Judiciary up to the apex level of the District Judiciary, **that rules made by the Governor in consultation with the High Court in case of recruitment at grass-root level and the recommendation of the High Court for appointments at the apex level of the District Judiciary under Article 233, remain the sole repository of power to effect such recruitments and appointments.** ...For judicial appointments the real and efficacious advice contemplated to be given to the Governor while framing rules under Article 234 or for making appointments on the recommendations of the High Court under Article 233 emanates only from the High Court which forms the bedrock and very soul of these exercises. **It is axiomatic that the High Court, which is the real expert body in the field in which vests the control over the Subordinate Judiciary, has a pivotal role to play in the recruitments of judicial officers whose working has to be thereafter controlled by it under Article 235 once they join the Judicial Service after undergoing filtering process at the relevant entry points. It is easy to visualise that when control over the District Judiciary under Article 235 is solely vested in the High Court, then the High Court must have a say as to what type of material should be made available to it both at the grass-root level of the District Judiciary as well as the apex level thereof so as to effectively ensure the dispensation of justice through such agencies with the ultimate object of securing efficient administration of justice for the suffering litigating humanity.** Under these circumstances, it is impossible to countenance bypassing of the High Court either at the level of appointment at the grass-root level or at the apex level of the District Judiciary. **The rules framed by the Governor as per Article 234 after following due procedure and the appointments to be made by him under Article 233 by way of direct recruitment**

> **to the District Judiciary solely on the basis of the recommendation of the High Court clearly project a complete and insulated scheme of recruitment to the Subordinate Judiciary.** This completely insulated scheme as envisaged by the Founders of the Constitution cannot be tinkered with by any outside agency dehors the permissible exercise envisaged by the twin Articles 233 and 234.
>
> (emphasis added)

65. In numerous decisions, this Court has emphasized the importance of the control which is wielded by the High Courts over the District Judiciary.[30] Undoubtedly, it is equally well-settled that when the Rules under Article 309 hold the field, these Rules have to be implemented. Where specific provisions are made in the Rules framed under Article 309, it would not be open to the High Court to issue administrative directions either in the form of the Full Court Resolution or otherwise, that are at inconsistent with the mandate of the Rules. On the other hand, in cases such as the one at hand, where the Rules were silent, it is open to the High Court to issue a Full Court Resolution. The High Court did so initially on 29 January 2013, but modified the Resolution on 30 November 2021 by prescribing that candidates for appointment to the Higher Judicial Service should have a minimum of 50% both in the written test as well as in the *viva voce* independently. The wisdom of the prescription is clear. A candidate should not just demonstrate the ability to reproduce their knowledge by answering questions in the suitability test, but must also demonstrate both practical knowledge and the application of the substantive law in the course of the interview. The Rules being silent, it was clearly open to the High Court to prescribe such a criterion as it did in 2013, when the 50% cutoff was prescribed on aggregate scores and also, in 2021, when the 50% cutoff was prescribed on the written test scores and the viva voce separately.

66. We are in agreement with the High Court that the State Government travelled beyond the remit of the consultation with the High Court by referring the matter to the Union Government. Any issue between the High Court and the State Government should have been ironed

30 State of West Bengal v. Nripendra Nath Bagchi, [1966] 1 SCR 771 : 1965 SCC OnLine SC 22; High Court of Punjab and Haryana v. State of Haryana, [1975] 3 SCR. 365 : (1975) 1 SCC 843, High Court of Judicature for Rajasthan v. PP Singh, [2003] 1 SCR 593 : (2003) 4 SCC 239.

out in the course of the consultative process within the two entities. The State Government was bound to consult only the High Court in the manner elaborated by the abovementioned judgements. Any other exercise *de hors* such consultation would not be in accordance with the scheme of the Constitution.

D. Conclusion

67. We have, therefore, come to the conclusion that the State Government was plainly in error in finding fault with the process which is being followed by the High Court and in concluding that the decision of the High Court amounted to an arbitrary exercise of power. Though the Solicitor General pointed out that the expressions "arbitrary" and "betrayal of trust" were used in the communication of the State Government placing reliance on an earlier judgment of this Court, we would leave the matter at that while affirming the conclusion of the High Court.

68. For the above reasons, we hold that the impugned judgment and order of the High Court dated 20 December 2023 does not suffer from any legal or other infirmity. The appeals shall accordingly stand dismissed.

69. Pending applications, if any, stand disposed of.

Headnotes prepared by:
Prastut Mahesh Dalvi, Hony. Associate Editor
(*Verified by:* Liz Mathew, Sr. Adv.)

Result of the case:
Appeals dismissed.