

Sophy Thomas vs State of Kerala

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Court : Kerala

Decided On : Sep-03-2019

Judge : Honourable Mr.Justice K.Vinod Chandran,Honourable Mr. Justice Anil K.Narendran

Appeal No. : WA/731/2019

Appellant : Sophy Thomas

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN TUESDAY, THE 03RD DAY OF SEPTEMBER 2019 / 12TH BHADRA, 1941 WA.No.846 OF 2019 AGAINST THE JUDGMENT IN WP(C) 40046/2017(R) DATED 08.01.2019 OF HIGH COURT OF KERALA APPELLANTS/ PETITIONERS: 1 JOHN.K.ILLIKKADAN, AGED 57 YEARS, S/O. KURUVILA, SELECTION GRADE DISTRICT JUDGE, PATHANAMTHITTA, RESIDING AT SOPANAM, VETTIPURAM, PATHANAMTHITTA. 2 K.P INDIRA, AGED 57 YEARS, W/O. GOPINANTH, SELECTION GRADE DISTRICT JUDGE , PALAKKAD,

RESIDING AT DISTRICT JUDGES BUNGLOW, NO XVII/18, THAREKKAD, PALAKKAD-1. BY ADVS. SRI.T.C.GOVINDA SWAMY SMT.KALA T.GOPI RESPONDENTS/ RESPONDENTS: 1 STATE OF KERALA, REPRESENTED BY THE CHIEF SECRETARY TO THE GOVERNMENT OF KERALA, STATE SECRETARIAT, THIRUVANANTHAPURAM 695 001. 2 THE REGISTRAR GENERAL, HIGH COURT OF KERALA, KOCHI 682 031. 3 SRI.K. BABU, DISTRICT JUDGE AND THE REGISTRAR, SUBORDINATE JUDICIARY, HIGH COURT OF KERALA, KOCHI 682 031. 4 SRI. KAUSER EDAPPAGATH, DISTRICT JUDGE, NIA COURT, 4475, BANERJI ROAD, KALOOR, KOCHI 682 017. W.A.No.846 of 2019 & - 2 -

5 SRI. A. BADHARUDEEN, DISTRICT JUDGE, COURT COMPLEX, MANJERI, MALAPPURAM 676 121. 6 SRI. C. JAYACHANDRAN, ADDITIONAL DISTRICT JUDGE, DISTRICT COURT, KOTTAYAM 686 004. 7 THE REGISTRAR (SUBORDINATE JUDICIALRY), HIGH COURT OF KERALA, KOCHI 682 031. 8 BALAKRISHNAN K.K, ADDITIONAL DISTRICT JUDGE/ MOTOR ACCIDENTS CLAIMS TRIBUNAL, TIRUR, MALAPPURAM DISTRICT, PIN 676 101. 9 THE HIGH COURT OF KERALA, KOCHI 682 031, REPRESENTED BY THE REGISTRAR GENERAL.

R1 BY SPL.GOV'T. PLEADER SRI.N.MANOJ KUMAR (B/O) R2, R7, R9 BY ADV. SRI.ELVIN PETER P.J. R3-R4 BY ADV. SRI.O.V.RADHAKRISHNAN (SR.) R3-R4 BY ADV. SMT.K.RADHAMANI AMMA R5 BY ADV. SRI.K.C.ELDHO R6 BY ADV. SMT.LAKSHMI RAMADAS THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 24-07-2019, ALONG WITH WA.730/2019, WA.731/2019, THE COURT ON 03-09-2019 DELIVERED THE FOLLOWING: W.A.No.846 of 2019 & - 3 -

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN TUESDAY, THE 03RD DAY OF SEPTEMBER 2019 / 2ND SRAVANA, 1941 WA.No.730 OF 2019 AGAINST THE JUDGMENT IN WP(C) 40043/2017(R) DATED 08.01.2019 OF HIGH COURT OF KERALA APPELLANT/ PETITIONER: MOHAMMED VASEEM, AGED 59 YEARS, FORMERLY FIRST ADDITIONAL DISTRICT JUDGE, THRISSUR, PRESENTLY WORKING AS DISTRICT AND SESSIONS JUDGE, THODUPUZHA. BY ADVS. SRI.S.P.ARAVINDAKSHAN PILLAY SMT.N.SANTHA SRI.V.VARGHESE SRI.PETER JOSE CHRISTO SRI.S.A.ANAND RESPONDENTS/ RESPONDENTS: 1 HIGH COURT OF KERALA, REPRESENTED BY ITS REGISTRAR GENERAL, HIGH COURT OF BUILDINGS, ERNAKULAM KOCHI - 682 031. 2 REGISTRAR GENERAL, HIGH COURT OF KERALA, ERNAKULAM, KOCHI - 682 031. 3 REGISTRAR (SUBORDIANTE JUDICIARY), HIGH COURT OF KERALA, ERNAKULAM, KOCHI - 582 031. W.A.No.846 of 2019 & - 4 - 4 STATE OF KERALA, REPRESENTED BY THE SECRETARY TO GOVERNMENT, HOME DEPARTMENT, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM, PIN-695 001. 5 C. JAYACHANDRAN, SECOND ADDITIONAL DISTRICT JUDGE, KOTTAYAM, PIN - 686 002. R1-R3 BY ADV. SRI.ELVIN PETER P.J. R4 BY SPL.GOV.T.PLEADER SRI.N.MANOJ KUMAR (B/O) R5 BY ADV. SRI.P.RAVINDRAN (SR.), R5 BY ADV. SRI.REJI GEORGE, R5 BY ADV. SRI.SREEDHAR RAVINDRAN. THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 24-07-2019, ALONG WITH WA.846/2019, WA.731/2019, THE COURT ON 03-09-2019 DELIVERED THE FOLLOWING: W.A.No.846 of 2019 & - 5 -

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN & THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN TUESDAY, THE 03RD DAY OF SEPTEMBER 2019 / 2ND SRAVANA, 1941 WA.No.731 OF 2019 AGAINST THE JUDGMENT IN WP(C)

40069/2017(R) DATED 08-01-2019 OF HIGH COURT OF KERALA
APPELLANT/ PETITIONER: SOPHY THOMAS, AGED 56 YEARS, MAC
TRIBUNAL, ALAPPUZHA, PERMANENTLY RESIDING AT
THANNIKOTTIL HOUSE (PRANNOY VILLA), MARKET ROAD,
THRIPUNITHURA, ERNAKULAM 682 301, PRESENTLY PRINCIPAL
DISTRICT AND SESSIONS JUDGE, THRISSUR BY ADVS. SRI.BECHU
KURIAN THOMAS (SR.) SRI.ENOCH DAVID SIMON JOEL SRI.LEO
LUKOSE RESPONDENTS/ RESPONDENTS: 1 STATE OF KERALA,
REPRESENTED BY THE SECRETARY, DEPARTMENT OF HOME
AFFAIRS, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM
695 001. 2 THE HIGH COURT OF KERALA, ERNAKULAM 682 031,
REPRESENTED BY ITS REGISTRAR GENERAL. W.A.No.846 of 2019
& - 6 - 3 C.JAYACHANDRAN, ADDITIONAL DISTRICT JUDGE,
ADDITIONAL DISTRICT COURT FOR TRIAL OF SURYANELLI CASES,
KOTTAYAM 686 001. PRESENTLY PRINCIPAL DISTRICT AND
SESSIONS JUDGE, KOTTAYAM R1 BY SPL.GOV'T. PLEADER
SRI.N.MANOJ KUMAR(B/O) R2 BY ADV. SRI.ELVIN PETER P.J. R3 BY
ADV. SRI.P.RAVINDRAN (SR.) R3 BY ADV. SRI.REJI GEORGE THIS
WRIT APPEAL HAVING BEEN FINALLY HEARD ON 24-07-2019,
ALONG WITH WA.846/2019, WA.730/2019, THE COURT ON 03-09-
2019 DELIVERED THE FOLLOWING: W.A.No.846 of 2019 & - 7 - C.R.
K. Vinod Chandran & Anil K. Narendran, JJ.
----- W.A.Nos.846/2019, 730/2019 &
731/2019 ----- Dated, this the 3rd day of
September, 2019

JUDGMENT

Vinod Chandran, J.

The essential comity ideally required within a common service, identified as a designated cadre comprised of both

"direct recruits" and "by-transfer appointees/promotees"; is often disturbed by inter se disputes of seniority, which the Courts have been resolving. Here, we find one of such disputes in the Higher Judicial Service of the State. There is no dearth of precedents, of the Hon'ble Supreme Court and the High Courts; which however has to be applied on the basis of the specific service rules. In the present case,

there are two aspects to be decided, which essentially

arise from the claim of the direct recruits that they should be assigned to the specific number of vacancies set apart for that category de hors any promotions made from by-transfer appointees, in excess of the category assigned for such promotions or by-transfer appointments, as is the description in the Special Rules.

W.A.No.846 of 2019 & - 8 -

2. The direct-recruits place heavy reliance on the

decision of a Full Bench of this Court in Haneefa P.K. & Others v. State of Kerala & Others, reported in 2012 (4) KHC 510, which resolved an identical dispute, between the by-transfer appointees and direct recruits, who were last recruited before the present direct recruits. They claim seniority over the persons appointed by-transfer after the

notification for their recruitment was issued; which by-transfer appointments were also 'subject to the claim of the direct recruits'. This is the first aspect. The second aspect to be decided arise as to the consequence of one of the direct recruits having been appointed later, by virtue of a decision of a Division Bench of this Court, which interfered with the select list as drawn up by the High Court. Three persons originally selected were sent out of service and the successful writ petitioner was accommodated along with three others, who were allowed to be continued.

He claims seniority at par with the three appointed earlier and also as per the re-drawn select list, which places him above one of the three. We refer to the parties by their names.

3. The three, who were originally recruited; Sri.K.Babu, Sri.Kauser Edappagath and Sri.A.Badharudeen, W.A.No.846 of 2019 & - 9 -

appointed on 21.05.2009; were given seniority in accordance with their date of appointment. When a draft seniority list was published, the three direct recruits filed objections, pointing out that they were entitled to seniority over some, who have been appointed by-transfer, for reason of the by-transfer appointments being in excess of the quota allotted for such category of promotions. Their claims were allowed by the Administrative Committee (herein after A.C), which was challenged by two of the officers who are

prejudicially affected by such assignment of seniority above them; Sri.John K. Illikkadan and Smt.K.P.Indira. The new direct recruit, Sri.C.Jayachandran who was recruited later, by virtue of a decision of this Court directing recasting of the select list, claims seniority along with the three others who were recruited and appointed earlier to him. Jayachandran seeks seniority on the basis of the select list re-cast by the High Court. Amongst the three recruited and appointed earlier, Badharudeen lost his place in the select list by reason of Jayachandran being assigned a position above him for reason of merit. On Jayachandran claiming seniority along with the other three it prejudices the claims of Sri. Mohammed Vaseem & Smt. Sophy Thomas who

were appointed, by-transfer before Jayachandran joined W.A.No.846 of 2019 & - 10 - service. The claims raised by the direct recruits were considered by the A.C on separate representations filed by them for reassignment of seniority.

4. We first heard the issue raised by all the direct recruits for seniority above the persons appointed prior to them on the ground of their right to be adjusted in the posts existing within the cadre available to direct recruits. This is on the ground that the by-transfer appointments were made in excess of the quota available to the officers of the subordinate judiciary. Sri.T.C.Govindaswamy, learned Counsel appearing for the appellants in W.A.No.846 of 2019 first assailed the manner in which the A.C re-assigned seniority of the direct recruits, above by-transfer appointees. It was contended

that the A.C passed the order at Exh

altered from that decided by the Full Court. It was on the Full Courts recommendation, the Governor had issued appointment orders. Exhibit P1 is cursory and non-speaking. Reliance is placed on MRDA Officers Association Kedarnath Rao Ghorpade v. Mumbai Metropolitan Regional Development W.A.No.846 of 2019 & - 11 - Authority and Another [(2005) SCC 235] to argue that even administrative orders require clear reasons to be shown especially when it causes prejudice to a person or group of persons.

5. It is also argued that the notice received by

the appellants as produced at Exhibit P5 also did not spell out the reasons for a hearing or the prima facie decision arrived at by the High Court so as to convene a hearing of the direct recruits and by-transfer promotees. Exhibit P5 merely referred to a seniority dispute and specified the time and date of hearing as also forwarded the objections to the seniority list as submitted by the direct recruits. A Special Committee of three judges was first convened,

which, however, did not hold a hearing. But a recommendation admittedly was given by the Special Committee to the A.C. The A.C then found that a hearing was not afforded to the affected parties and constituted yet

another Special Committee of three Judges. That Special Committee, heard the affected officers and is said to have given their recommendations to the A.C. The recommendations of both the Special Committees were never furnished to the affected officers. It is understood from Exhibit P2, in which is recorded the Minutes of the A.C meeting, that,

W.A.No.846 of 2019 & - 12 - both the Special Committees recommended for rejection of objections of the direct recruits, for reason of a break down of quota. The A.C neither thought it fit to supply a copy of the decision to the affected officers; nor did it hold a separate hearing before they decided to differ from the recommendations of the Special Committee. These admitted facts show a clear violation of principles of natural justice. The A.C also ought not to have interfered with the date of appointments as decided by the Full Court

or the date of the appointment orders

Article 233 of the Constitution.

6. It is further argued that the status of the

appellants, by-transfer appointees, on their taking charge as District Judges by virtue of the orders passed under Article 233 cannot be said to be ad hoc, fortuitous or a stop gap appointment. There is absolutely no suggestion in the appointment orders of the appellants, produced at Exhibits P3 and P4, that they have been appointed only as an ad hoc measure. The only reservation in the appointment orders is that it would be without any prejudice to the claim of the candidates to be directly recruited from the W.A.No.846 of 2019 & - 13 - Bar as provided under Rule 2(b) of the Kerala State Higher Judicial Service Rules, 1961. This does not necessarily indicate a valid claim being available to the direct recruits; which would arise for decision when a seniority dispute is raised on valid grounds.

7. As far as the appellants, John Illikkadan &

Indira, are concerned, they took charge in accordance with Exhibit P3 dated 29.05.2007 and Exhibit P4 dated 16.05.2008 respectively on 06.07.2007 and 30.05.2008. Their probation was declared respectively on 19.08.2009 and 21.06.2010; their period of probation commencing from their date of

first appointment. The decision in Baleshwar Dass and Others v. State of U.P. and Others [(1980) 4 SCC 226] is relied to contend that there is a clear distinction insofar as a person who is appointed to hold a temporary post and one who is appointed substantively to that temporary post. The learned Counsel would categorize the cadre strength of 96, as affirmed by the High Court in the counter affidavit, to be a magic number which has absolutely no relation to the posts available to be filled up by District Judges.

There are many number of positions of a

available, the like of which is the Fast Track Courts, to which promotions were made from the Subordinate Judiciary. Reference is made to Exhibits R2(f) decision of the A.C as distinguished from R2(g) decisions to contend that in the case of John Illikkadan there is no mention of an ad hoc promotion being granted. Even Indira was posted, continued and probation declared from the joining date.

8. Yet another contention taken by the appellants

in W.A.No.846 of 2019 is on Rule 6 of the The Kerala State Higher Judicial Services Special Rules, 1961 (referred to as "Special Rules", for brevity) [Exhibit P17] which is applicable to the appointment of the appellants herein. In fact, the amended Rules, as was the case in the pre-amended Rule, refers to seniority being determined with reference

to the date of the order of first appointment to the category of District and Sessions Judges. The seniority as per the Rules has to be determined in accordance with the date of first appointment in which case the appellants are to be assigned seniority above the direct recruits. Haneefa P.K. (supra) is sought to be distinguished specifically on

the ground that there, three persons promoted, were reverted to accommodate the direct recruits. There, a list of 15 officers from the Subordinate Judiciary were W.A.No.846 of 2019 & - 15 - identified for promotion "as and when vacancies arise". Ten from among these were promoted, out of which three were reverted to accommodate the direct recruits. There is no such contingency arising in the case of the appellants who

were included in a list of persons, whose date of appointment was long before the actual recruitment of the direct recruits. It is also contended that the A.C did not have the power to re-assign a seniority determined by the date of first appointment as per the Special Rules, which was made by the Governor under Article 233, in consultation with the High Court. This would not fall within the ambit

of the delegated powers of the A.C is the compelling argument.

9. Sri.Bechu Kurian Thomas, learned Senior

Counsel, appears for the appellant, Sophy Thomas, in W.A.No.731 of 2019, who admittedly is junior to the direct recruits appointed in 2009. The grievance of the appellant is against the seniority assigned to Jayachandran, who was appointed later, but pursuant to the very selection process in which the other 3 were appointed, by virtue of a decision of this Court. He has been granted seniority above the appellant, though the appellant was appointed to the Higher Judiciary earlier. The appellant took charge on W.A.No.846 of 2019 & - 16 -

04.08.2010 in accordance with Exhibit P5 appointment order

dated 02.07.2010, while the 3rd respondent took charge on

24.02.2011 in accordance with Exhibit P4 appointment order

dated 22.12.2010. The learned Senior Counsel specifically drew attention to the Explanatory Note in Exhibit P4, which speaks of the decision of the Full Court to continue in service, with effect from 21.05.2009, the 3 direct recruits who were appointed on that date. The 3rd respondent, however, was appointed with effect from the date on which he assumes charge, which was on 24.02.2011. The appellant's probation was declared on 04.08.2012 by Exhibit P6 and the 3rd respondent's probation was declared only on 01.03.2013. The appellant was also accommodated in the category of Selection Grade District Judge on 04.08.2015 while the 3rd respondent was so accommodated in that category only on 24.02.2016.

10. The learned Senior Counsel invites us to Rule 2 and the specific words employed therein "to be filled up or reserved to be filled up", which is also noticed by the

Full Bench in Haneefa P.K. (supra). When there was a specific provision available for reserving the vacancies to be filled up from a particular category and the same having not been done, there is no cause for the High Court to W.A.No.846 of 2019 & - 17 - address a claim of seniority on a day prior to the date of appointment. Even as per the Full Bench decision, there is no rota system available in the Higher Judicial Service and there could be no date assigned for the purpose of

seniority on the basis of the date on which the vacancy arises. The amendment brought in to Rule 6 is specifically

pointed out. Prior to 2008 the Higher

Sessions Judges (including Additional District & Sessions Judges). The amended regulations had three such categories ie: (i) Supertime Scale; (ii) Selection Grade; and (iii) District and Sessions Judge. The method of appointment and the percentage of vacancies earmarked for each category of officers in the Subordinate Judiciary also underwent a change. Rule 2(c) provided for appointment to the category of District and Sessions Judge from the Subordinate Judges/CJMs at 50% and by-transfer appointments by a limited competitive examination of persons having not less than five years service in the cadre of Subordinate Judge/CJM at 25% and 25% by direct recruitment. It is the compelling argument of the learned Senior Counsel that as the appellant is now informed, no appointments have been W.A.No.846 of 2019 & - 18 - made by way of competitive examination from the Subordinate

Judiciary and that itself would show

within the five year period. Reliance is placed on the Explanatory Note in Exhibit P4 appointment order of the 3rd respondent to emphasize conscious decision taken by the Full Court, which finds specific expression and articulation in the order of the Governor which cannot be varied by the A.C.

11. Sri.Bechu Kurian Thomas specifically refers to

the writ petition filed by the 3rd respondent [W.P.(C) No.16206 of 2010] against the selection of direct recruits to the cadre of District Judges carried out in the year 2009, which is produced at Exhibit P3. In addition to seeking setting aside of Exhibit P11 list of qualified candidates and Exhibit P12 select list produced therein, the 3rd respondent sought the select list to be re-cast in the order of merit including only those candidates who had secured the qualifying marks in the written examination without any moderation/grace marks. These reliefs were allowed by the Court, by virtue of which decision the 3rd respondent was appointed. The 3rd respondent, in fact, had W.A.No.846 of 2019 & - 19 -

as relief No.(iv) sought for appointment with effect from 30.03.2009, which is the date of original appointment of the other direct recruits, being respondents 9 to 12 in the said list. The said relief obviously was not granted and, hence, there is res judicata insofar as the 3rd respondent now raising such a plea. Even under Article 226 of the Constitution, the principle of res judicata has application and for this purpose reference is made to the decision of a Division Bench of this Court reported in Jayachandran v. High Court of Kerala [2010 (4) KLT 49].

12. Exhibit P4 is the appointment order of the 3rd

respondent, which is dated 22.12.2010, which was not challenged. Reference is also made to the counter affidavit of the 3rd respondent, wherein the 3rd respondent admits to have approached the Hon'ble Supreme Court in 2017 with a writ petition under Article 32 of the Constitution for the purpose of re-assignment of his date of appointment. This was rejected by the Hon'ble Supreme Court, finding that he has to approach the High Court first. No writ petition has been filed before the High Court. It is also submitted that the claim raised by the 3rd respondent is hit by delay. Exhibit P4 appointment order is on 22.12.2010 and the 3rd

respondent took charge on 24.02.2011. He filed a W.A.No.846 of 2019 & - 20 - representation for re-assignment of seniority before the High Court on 11.04.2012, Exhibit R3(h). He slept over the matter and again filed a second representation dated 18.09.2014 [Exhibit R3(i)]. There is gross delay insofar as

the claim raised and that too only by

judicially. The decision of the Hon'ble Supreme Court in P.S.Gopinathan v. State of Kerala [(2008) 7 SCC 70] is relied on to bring home the contention of delay.

13. Sri.S.P.Aravindakshan Pillay, learned Counsel appearing for the appellant in W.A.No.730 of 2019,

Sri.Mohammed Vaseem, specifically refers to Exhibit P1 appointment order of the appellant dated 02.07.2010. At the time of appointment of the appellant, it is pointed out that the six direct recruits who were appointed as per the

original select list were already occupying their positions. There can be no claim raised of the appointment of the appellant to be in a post in the cadre; which is actually due to a direct recruit. The appointment order at Exhibit P1 also only referred to pending writ petitions, subject to the result of which alone there was a rider insofar as the appellant being provisionally appointed. The

W.A.No.846 of 2019 & - 21 - writ petitions referred to were disposed of by Exhibit P2. The challenge also was to the selection of direct recruits and the learned Single Judge followed a Division Bench decision, which found that there could be no prescription of minimum age and no successful candidate could be avoided

from consideration for reason only of

argues that without an order under Article 233; on the recommendation made by the High Court, there cannot be any alteration made to the date of appointment or the date of first appointment, which power is exclusively conferred on the Governor under Article 233. Even if the decision of the

A.C was communicated to the Governor, it would be insufficient insofar as the Full Court having not taken the decision; which is imperative. Any reference to the High Court is a reference to the Full Court of the High Court. It is pointed out that at the time of appointment of the 5th respondent in this appeal [3rd respondent in W.A.No.731 of 2019], there was no want of vacancy and out of the six

direct recruits appointed in the year 2

appeals were promoted. The nature of vacancy within the cadre, whether it be that allotted to the direct recruits or the promotees, is irrelevant and there could be a reassignment of seniority only when there is a dearth of

vacancy to accommodate the direct recruits. When the method of appointment to any service is both by direct recruitment and by-transfer, Rule 5 of Part II of KS&SSR provides that while a direct recruit can only be appointed to a substantive vacancy in the permanent cadre, a promotee or by-transfer appointee can be recruited to any vacancy. The A.C has failed to take note of the proviso to Rule 27 of Part II KS&SSR, which speaks of the determination of seniority where the

method of appointment to a post is by promotion, by-transfer or by direct recruitment in a fixed ratio or percentage.

14. The learned Senior Counsel

Sri.O.V.Radhakrishnan appears for respondents 3 and 4 in W.A.No.846 of 2019, Babu and Kauser. The learned Senior Counsel first refers to Exhibit R2(b) the notification for direct recruitment dated 16.04.2007 and Exhibit R2(c), the original select list dated 30.03.2009. The notification was issued also on the basis of a decision taken by the Full Court in its meeting held on 29.08.2006, wherein it was

W.A.No.846 of 2019 & - 23 - decided to call for applications to fill up six vacancies available in the cadre of District Judges to be recruited by direct recruits from the Bar and also by promotion of Sub Judges/CJMs, as evidenced from Exhibit R2(f). Exhibits P3 and P4 orders, by which the two appellants were promoted, are referred to specifically to point out that

they were so promoted subject to the claim of the candidates recruited direct from the Bar as provided under Rule 2(b) of the Special Rules, 1961. The counter affidavit of the High Court at paragraphs 11 to 15 is read over to urge that the cadre strength was 96, in which there was not sufficient number of direct recruits while the number of

promotees together in the temporary posts, far exceeded their quota. The appointments made as per Exhibits P3 and P4 are stated to be ad hoc in the counter affidavit; to the Fast Track Courts, which were made permanent only by Exhibit R2(i) in the year 2012. The vacancies within the cadre, out of 25% vacancy only 18 were occupied by direct recruits and six remaining vacancies were occupied by promotees which can only be on ad hoc basis. Rule 2(1) of Part I KS&SSR is pointed out to contend that appointment to a service is only when the appointee discharges for the first time the duties of a post borne on the cadre of such W.A.No.846 of 2019 & - 24 - service. The by-transfer appointments made of the appellants were not to the vacancies available for by-transfer appointments within the cadre and the ad hoc appointment cannot enure to their benefit in determining the seniority. The tenor of Exhibits P3 and P4 appointments makes it

clear that the appellants were obliged to give way to direct recruits when they are appointed. Specific reference is made to the last paragraph of the Full Court Resolution, produced at Exhibit R2(g). Reliance is placed on State of U.P. v. Batuk Deo Pati Tripathi [(1978) 2 SCC 102] to support the A.C's decision. It is also submitted that despite producing the minutes of the A.C, no specific challenge is made to it or a relief sought to set aside the

same. Exhibit P1 challenged in the writ petition is a consequent decision taken by the A.C as per the minutes at Exhibit P2. Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi [(2010) 1 SCC 234] is relied on. Amarjeet Singh v. Devi Ratan [(2010) 1 SCC 417] is also relied on to buttress the argument that having accepted Exhibits P3 and P4, the appellants are estopped from challenging the same. State of Maharashtra v. Anita [(2016) 8 SCC 293] is also relied upon. Rule 18 of Part II KS&SSR is pointed out to contend that the declaration of probation would not enure to the

W.A.No.846 of 2019 & - 25 - benefit of the appellants for the purpose of determination of seniority especially since the Rule provides that such declaration of probation would be subject to determination of seniority. C.K.Antony v. B.Muraleedharan [(1998) 6 SCC 530] is relied on to advance the said contention.

15. Sri.P.Ravindran, learned Senior Counsel

appearing for the sole party respondent in W.A.Nos.730 of 2019 and 731 of 2019 who is also a respondent in the other appeals asserts, that the appointment of Jayachandran was delayed not because of any fault of his. The said respondent was first excluded from consideration on the ground of minimum age, which was not a condition in the notification, which was challenged successfully before this Court. Later, in the course of the said proceedings, it came out from the counter affidavit of the High Court itself that grace marks were awarded to all candidates who

appeared for written examination before v

pointed out to contend that the direction was to re-cast the select list. It was not an appointment to be made subsequent to the judgment and when a selection list is

W.A.No.846 of 2019 & - 26 - re-cast on the basis of the decision of this Court, necessarily seniority would have to be assigned from the date of initial appointment of the other three persons recruited earlier and there should also be made adjustments in the seniority as among the direct recruits. The Division Bench had specifically directed consideration from the 7 candidates, seen from Exhibit R3(e) produced along with the

counter in W.A.No.1731 of 2019. Only the candidates at serial Nos.1, 2, 3 and 5 were appointed ie: Babu, Kauser, Jayachandran and Badharudeen, in that order of merit and seniority. Jayachandran had the 3rd place in the merit list of candidates above the 5th place obtained by Badharudeen, who was adjusted in the quota available for Muslims. Hence,

though Badharudeen was appointed in 2009, in assigning seniority; Jayachandran has to be given seniority above the less meritorious candidate. The argument is further taken that the seniority of the respondent again has to be assigned, as assigned to the 3 candidates in the specific posts available to direct recruits from amongst the cadre strength.

16. On the arguments addressed as to delay in making a representation and not having challenged the date of first appointment judicially, it is pointed out W.A.No.846 of 2019 & - 27 - that there was never such an argument raised before the learned Single Judge nor was there any pleadings to that

effect. The learned Single Judge having affirmed the decision of the A.C, it does not call for an interference in an appeal, since there is nothing patently wrong or palpably illegal in the decision of the learned Single

Judge. Without conceding to the aspect of delay, the decision of the Hon'ble Supreme Court in R.S.Deodhar v. State of Maharashtra [AIR 1974 SC 259] is pointed out to argue that a person need not be non-suited on the bare ground of delay when there is a satisfactory explanation for the same. If the respondent, who was a member of the

Higher Judicial Service, subordinate to the High Court, waited for a decision from the administrative side of the High Court without asserting his claim before a Court of law, he cannot be faulted; nor can it stand against a valid claim being permitted. Unless there is a patent wrong committed by the learned Single Judge, there cannot be any interference in an appeal, asserts the Senior Counsel.

17. Sri.Elvin Peter appearing for the High Court

would seek to sustain the order of the Administrative Committee. In the course of hearing, we had a doubt as to the fixation of the cadre, which has to be done by the W.A.No.846 of 2019 & - 28 - Government as per Rule 2(18) of Part I KS&SSR. As per the

Rules, the permanent cadre of each se

before us the order of fixation of cadre. We see from the additional affidavit filed by the Registry that fixation of cadre has not been carried out by the Government at the relevant time. By an additional affidavit G.O.(MS) No.107/2015/Home dated 29.05.2015 [Annexure R2(g) in W.A.No.846 of 2019] is placed before us. This is the first time that the Government determines the cadre in the Higher Judicial Service of the State as evident from the following extract from the said document:

The Administrative Committee of the High Court comprising of the Hon'ble Chief Justice and Senior most Hon'ble Judges of High Court have been fixing the cadre strength of Kerala State Higher Judicial Service i.e., District Judges in the State. The present cadre strength has been fixed by the Committee at 99, in its meeting held on 09.12.2010.

Hence, obviously the cadre has not been fixed by the Government as is necessitated by the KS&SSR, at the time when the notification for the subject recruitment was made W.A.No.846 of 2019 & - 29 - and the appointments carried out after a due selection, or at any time before 2015. We raised a query especially since the brunt of the arguments were on the cadre fixed at 96 exclusively of the permanent posts available. However, the doubts raised by us are of no consequence especially looking at the Special Rules.

18. The Special Rules have undergone amendments

twice after the instant direct recruitment. The Special Rules as existing prior to 2008, the amended Rules in 2008 and 2017 are produced as Exhibits P17, P18 and P19 in W.P.

(C) No.40046 of 2017 [W.A.No.846 of 2019]. As argued by Sri.Elvin Peter, the number of posts in category (2), District & Sessions Judges, to be filled or reserved to be

filled up by direct recruitment shall be 1/3rd of the permanent posts in categories (1) and (2) taken together. Cadre hence, is not significant and the quota has to be applied to the permanent posts. Here, we deal with the contention of the appellants that in 2008, prior to the appointment of the direct recruits, there was an amendment brought out, as evident from Exhibit P18, which creates three categories and reduces the quota for direct recruits to 25% of the cadre strength of posts as distinguished from the earlier quota of 1/3rd of permanent posts in the two

W.A.No.846 of 2019 & - 30 - categories as per the unamended Rules. It was the argument that the cadre strength has to be taken insofar as the amended Rules at Exhibit P18 having come into force. In the context of there being no fixation of cadre by the Government, there should be found no quota available for the direct recruits.

19. We are unable to countenance the said

argument, though it has to be observed that even after Exhibit P18 Special Rules came into force there was no fixation of cadre by the Government as is required under the KS&SSR. However, for the subject appeals, we are of the opinion that the quota has to be found from Exhibit P17, the unamended Rules, which applied at the time of notification. The notification for direct recruitment was on 16.04.2007 and the selection process went through a series of litigation and eventually the select list was published on 30.03.2009. The decision to make appointments by direct recruitment which led to the notification, was taken by the Full Court on

29.08.2006. In such circumstance, the direct recruits in the subject selection are appointed to the quota of 1/3 rd of the permanent posts in categories (1) & (2) taken together, as spoken of in the Special Rules which stood unamended prior to 2008. W.A.No.846 of 2019 & - 31 -

20. Before proceeding further with the facts, we

have now to look at the binding precedent of a Full Bench in Haneefa P.K.(supra). Haneefa P.K. dealt with a similar inter se seniority dispute in the Higher Judicial Service pursuant to a direct recruitment made in 2001, of 8 candidates from the Bar, selected in accordance with the

Special Rules, to the 1/3rd of the permanent posts in categories (1) & (2) taken together. On facts, it has to be noticed that the writ petitioners therein, the by-transfer appointees, five in number, are available at serial Nos.40, 41, 42, 43 and 45 of Exhibit P6 seniority list produced in W.P.(C) No.40046 of 2017 [W.A.No.846 of 2019]. While they were continuing in the post of Sub Judges/CJMs, the High Court recommended the approval of a panel of 15 from the

said cadre, for appointment by-transfer, as District & Sessions Judges in the Higher Judicial Service. The Governor approved the panel for appointment, as and when vacancies arise, as per notification dated 16.02.2001 [Exhibit P1 therein]. The notification specifically provided that the approval of the panel of Sub Judges/CJMs is without prejudice to the claims of the candidates to be recruited from the Bar as provided in Rule 2(b) of the Special Rules. W.A.No.846 of 2019 & - 32 -

21. The by-transfer appointees therein were at

serial Nos.8, 10, 11, 13 and 15 [respectively at serial Nos.40, 41, 42, 43 and 45 in Exhibit P6 seniority list of W.A. 846/19]. Those at serial Nos.8,9 and 10 were promoted and posted as District Judges; Serial No.8 on 07.06.2001 and No.10 on 04.09.2001 respectively as Motor Accidents Claims Tribunal, Ottappalam and Labour Court, Kollam. We do

not refer to serial No.9 since he did

posting orders on 26.11.2001. Finding dearth of vacancies

in the permanent posts, serial Nos.8,

Nos.11, 13 and 15 though not posted as District Judges prior to the appointment of direct recruits, claimed their seniority from the date of notification issued by the Government (order of the Governor under Article 233) on 16.02.2001. The Full Bench found the direct recruits to be entitled to seniority above the petitioners de hors the fact that serial Nos.8, 9 and 10 from the panel approved by W.A.No.846 of 2019 & - 33 - the Governor, were posted to the post of District Judges prior to the appointment of the direct recruits.

22. The panel of 15 was approved and orders issued under Article 233, by the Governor on 16.02.2001, while the notification for direct recruitment was long prior on

28.10.2000. Here we have to pertinently observe that the seniority of the other persons (from the 15), promoted from the cadre of Sub Judges/CJMs, who were at Serial Nos.1 to 7, were not disturbed, since they were appointed to the posts prior to the appointment of direct recruits. We observe this because if the contention of the direct recruits is sustained, even as the High Court is now wont to argue, then the entire panel, even those appointed before the appointment of the direct recruits, should have been assigned seniority below the direct recruits; since the vacancies in the permanent posts were available

before the panel of Sub Judges/CJMs were recommended. We also notice that the persons at serial Nos.4,6 & 7 in the panel of 15 in the order dated 16.02.2001 were posted and joined duty respectively on 07.03.2001, 30.03.2001 & 16.04.2001. They were assigned seniority above the direct recruits at positions 29 to 31 and the 8 direct recruits at 32 to 39. At the outset we observe so, to emphasize that

W.A.No.846 of 2019 & - 34 - the facts are quite distinct in the subject case and there was no instance of reversion to make appointment of direct recruits, in the year 2009.

23. The Full Bench considered the claim of the

persons borne in the category of Sub Judges/CJMs who were not posted as District Judges prior to the appointment of the direct recruits and when posted, reversion having been effected of two, (actually 3, one of whom did not challenge the seniority), who were so posted prior to the appointment of direct recruits. This was also on account of there being no sufficient vacancies available in the permanent posts in categories (1) & (2) of the Special Rules, taken together. The Full Bench categorically found that there is a specific quota available to the direct recruits as per the Special Rules, negating the argument that what was provided was only a maximum of posts to which the direct recruits could

be appointed. We bow to the declaration and think it apposite that the provision be extracted here under: Method of appointment- (a) Appointment to category (1) shall be made by the High Court by promotion from category (2).

(b) Appointment to category (2) shall be made by transfer from the category (1) Subordinate Judges/C.J.Ms. of the Kerala Judicial Service or by direct recruitment from the Bar, provided W.A.No.846 of 2019 & - 35 -

that the number of posts in category (2) to be filled up or reserved to be filled up by direct recruitment shall be one-third of the permanent posts in categories (1) and (2) taken together.

(c) (underlining by us for emphasis)

24. The Full Bench placed heavy reliance on the

decision of the Hon'ble Supreme Court in O.P.Singla v. Union of India [(1984) 4 SCC 450], wherein the Special Rules applicable to the Delhi Higher Judicial Service was considered; to reverse a Division Bench judgment of this Court, the reference from which was considered by the Full Bench. The Rules applicable to the Delhi Higher Judicial

Service provided recruitment by promotion and by direct recruitment from the Bar. In the Delhi rules there existed a proviso that not more than 1/3rd of the

substantive posts

in the service shall be held by direct

prescribes a ceiling for direct recruits. This was found to be quite different from a usual quota provision, which does not use negative language; but provides a mere quota in the substantive post to be filled by direct recruitment. The W.A.No.846 of 2019 & - 36 -

Hon'ble Supreme Court then found, that the matter does not rest with the proviso. Though the rule does not prescribe a quota for direct recruits, reading the integral scheme of recruitment as a whole and specifically noticing the rota as provided for the purpose of seniority under Rule 8(2), it was found to be a specific quota earmarked for direct

recruits. Hence, when direct recruitment is made, the seniority of direct recruits vis-a-vis promotees ought to be determined in the order of vacancies based on the quota of vacancies as provided in Rule 8(2) adjusting each in their rotation vacancy. But however, in that case considering the fact that the promotees were continued for long in their officiating capacity a equitable principle was evolved to determine the inter-se seniority; which is not relevant for us. Here, we have to emphasize that there is no rota available in the Kerala State Higher Judicial Service Rules. The Full Bench held so in Para 48: We have already interpreted Rule 2(b) of the Special Rules that it is intended to operate as a quota for direct recruitment.(sic) There is also no quota for by-transfer appointments, which in no uncertain terms demonstrate that there is no ratio applicable as per the Special Rules read with the KS&SSR. Our decision turns on this crucial aspect W.A.No.846 of 2019 & - 37 - of existence of quota only in the case of the direct recruits and that too confined to the permanent posts in category (1) & (2) of the Special Rules taken together and the absence of a rota and a ratio.

25. Here we have to notice a few decisions as cited by the respondents on the inter-se seniority disputes. C.K.

Antony (supra) was a case in which there was a ratio prescribed of 3:2 between direct recruits and by-transfer promotees and the latter were appointed on an ad

hoc basis. It was held that though they were regularized in the posts to which they were appointed, at the time of regularization

the direct recruits were undergoing training and were available for appointment. In the instant case there is no ratio, as we found and the appointment was not ad hoc and were to substantive vacancies, though temporary, which were indefinitely continued and later made permanent as we will demonstrate a little later.(1993) 3 SCC 371 State of W.B. Vs. Aghore Nath Dey and (2006) 6 SCC 558 K.Madalaimuthu Vs. State of T.N are cases where appointments were made to temporary posts for specified periods without recourse to the procedure delineated in the recruitment rules. (2008) 2 KLT 533(SC) Prasad Kurien Vs. Augustin is applicable only

to the extent of its declaration that the ratio or W.A.No.846 of 2019 & - 38 - percentage prescribed has to be applied to the cadre strength and not to the vacancies. This has been applied in the instant recruitment, albeit to the permanent posts, which is the prescription in the Special Rules. There though the prescription was for every fourth vacancy to a

direct recruit, it was held to be a ratio of 3:1, applicable to the total cadre strength. (2012) 13 SCC 340 Union of India Vs. N.R. Parmar looked at the quota-rota principle and directed the inter-se seniority between the promotees and direct recruits to be inter-spaced in the rotational turns, even though the direct recruitment of the very same recruitment year got delayed.(2016 11 SCC 656 [Venkata Prasad Vs. High Court of A.P] was a case in which the relevant rules provided for ad hoc appointment, which

appointee would not be regarded as a member of the permanent cadre as per the rules itself; by virtue of which alone the subordinate officers were promoted to the post of District & Sessions Judges in Fast Track Courts. These decisions, cited at the Bar, have no application in the adjudication of the instant dispute.

26. On a reading of the provision as extracted herein above, the Full Bench of this Court found that in the Special Rules applicable, to the higher judicial W.A.No.846 of 2019 & - 39 -

service of the State, what is provided is not a maximum and is a definite quota as interpreted from the words employed in the provision. The word or had to be read as and and the mandate was available insofar as the words employed being shall be one-third. It was held that the number of posts in category (2) to be filled up and reserved to be filled by direct recruitment shall be 1/3rd of the permanent posts in categories (1) & (2) taken together. There can, hence, be no deviation from the principle laid down by the

Full Bench of this Court; nor do we have a different opinion. It is very clear that there is a definite quota available to the direct recruits, which is 1/3 rd of the permanent posts in categories (1) & (2) taken together. As on the date of notification or even the decision of the Full Court, the available permanent posts in the categories

(1) & (2) were 96, which is an admitted fact. Out of this

96, 1/3rd was available to the direct recruits. But, however, we notice that the resolution taken by the A.C was to fill up 25% of the vacancies, which obviously was by reason of the decision of the Hon'ble Supreme Court in All India Judge's Association Vs. Union of India [(2002) 4 SCC 247]. We pause here to take note that the quota available in the Higher Judicial Service had undergone changes by W.A.No.846 of 2019 & - 40 - reason of the subsequent amendments. For the subject appointments, the Special Rules as it existed prior to 2008 was applicable, which provided for a quota of 1/3rd of the permanent vacancies. We see from the resolutions placed before us of the A.C, constituted at various points, wherein decisions were taken to appoint direct recruits in the Higher Judicial Service, that the quota as understood by the A.C was 25%. Presumably this could have been by reason of the observations made by the Hon'ble Supreme Court in All India Judge's Association.

27. Noticing the constant discontentment among the members of the Higher Judicial Service in regard to their seniority in service, the Hon'ble Supreme Court, in All India Judge's Association case prescribed a quota for promotion at 50% by following the principle merit-cum-seniority and 25% strictly on merit by limited departmental competitive examination and 25% by direct recruitment. It was held:

We direct the High Courts to suitably amend and promulgate seniority rules on the basis of the roster principle as approved by this Court in R.K.Sabharwal case [(1995) 2 SCC 745] as early as possible. We hope that as a result thereof there would be no further dispute in the fixation of seniority. It is obvious that this system can

W.A.No.846 of 2019 & - 41 -

only apply prospectively except where under the relevant rules seniority is to be determined on the basis of quota and rotational system. The existing relative seniority of the members of the Higher Judicial Service has to be protected but the roster has to be evolved for the future. Appropriate rules and methods will be adopted by the High Courts and approved by the States, wherever necessary by 31-3-2003.

We notice that the Hon'ble Supreme Court had specifically

directed the High Courts to amend the rules and also held

that the same can only apply prospectively except where, under the relevant rules seniority has to be determined on the basis of quota and rotational system. The Rules have been amended only in the year 2008 and then in the year

2017. This does not affect the adjudication of the present case at all, since the Special Rules as existing at the

time of selection of the respondents, direct recruits, there was no rotational system available. The appellants have a contention that since only 25% of the vacancies were filled up, there should be found a break down of quota, since already many promotees were occupying the posts available to the direct recruits and this continued for a quite long period. We need not go into the issue of a quota break down as we would presently demonstrate. W.A.No.846 of 2019 & - 42 -

28. In this context, we have to notice the admitted

fact that two Special Committees were appointed, in the instant case, by the A.C for making recommendations as to the inter se seniority dispute. Both the said Committees found against the direct recruits and held that there is a quota break down. The recommendations of the Committees, however, were not supplied to the affected persons and this is one defect they pointed out insofar as the decision of the A.C, which went contrary to the recommendation. The by-transfer appointees also have a contention that in the context of the A.C having found against the recommendation, necessarily a further hearing should have been afforded.

29. We would first deal with the appellants'

contention regarding break down of quota. The Committee of Judges appointed by the A.C though comprises of Judges of this Court; were only aiding or assisting the A.C in coming to a decision on the administrative side. At the hearing as afforded, the Committee so appointed would have definitely taken note of the rival contentions raised and it would have found a place in their recommendations. If, the A.C has the power to decide on the issue; which is one of the grounds of challenge; which we assume for now but will

comprehensively deal with later, we are of the definite W.A.No.846 of 2019 & - 43 - opinion that there need be no further hearing carried out. Hence, there was also no necessity of the recommendation of the Committee of Judges being furnished to the affected parties. When we commenced hearing of the matter, we noticed that the learned Single Judge had gone into the recommendations of the Committee and we specifically told

the learned Counsel that if we feel that the recommendations of the Committee have to be looked into, we would first furnish it to them and hear arguments based on that. However, in the context of our finding on the role of the Special Committee, we are of the opinion that there is absolutely no necessity to furnish the recommendations of the Committee; which as implied is only a recommendation, not binding and capable of regulating the decision of the

A.C on the administrative side. We also did not feel compelled to look into such recommendations; and hence felt no requirement to furnish the same to the parties to the lis. On the question of quota break down as argued on the

basis of only 25% direct recruitment

since that alone would not lead to a finding of total break down of quota. The mere fact that some of the permanent W.A.No.846 of 2019 & - 44 - posts, in which direct recruitment was to be made, by-transfer appointees continued would not result in total break down of quota.

30. Going back to the Full Bench decision in

Haneefa P.K. (supra), it was specifically noticed in paragraph 22 that the Special Rules do not contain any rota provision. It was held on an examination of Rule 2(b) of the Special Rules that the latter part of the Rules insofar as the direct recruits are concerned, by the language employed, provides a positive and mandatory quota of 1/3 rd of the permanent posts in the two categories as seen from the Special Rules. We also pertinently notice that the

declaration of the Full Bench is only to that end and cannot be taken further to find a specific quota prescribed for the by-transfer appointments and it is so stated in paragraph 62 that once separate quotas are prescribed for direct recruitment and for appointment by transfer from the subordinate judiciary, the ratio prescribed in the rules should be maintained against the cadre strength. Here, we have to notice that the Full Bench has not found a ratio at

all and the decision only leads to a quota being made mandatory for direct recruitment in the permanent posts in category (1) & (2) taken together. W.A.No.846 of 2019 & - 45 -

31. Here, we have to take a slight deviation on the distinct facts available in the present case. Herein the decision of the A.C to take steps for direct recruitment of

District Judges was taken on 29.08.2006 [Exhi

inviting applications for appointment as District Judges was dated 16.04.2007 [Exhibit R2(a)]. The appointment of John Illikkadan was by order dated 29.05.2007 [Exhibit P3] and Indira by order dated 16.05.2008 [Exhibit P4]. They joined the post on 06.07.2007 and 30.05.2008 respectively. The appointment of six direct recruits as District Judges was by Exhibit R2(b) dated 30.03.2009. We would refer to the dates with respect to the other cases a little later, since if the claim of Jayachandran, for seniority along

with those appointed on 30.03.2009 is allowed, he also would be deemed to have been appointed on 30.03.2009 and the benefit of notional seniority available to direct recruits would enure to him also.

32. Evidently from the dates noticed herein above,

the decision to make direct recruitment was taken even before the two promotees joined the post of District Judge. The appointment orders also specifically indicated that the W.A.No.846 of 2019 & - 46 - promotions would be subject to the claim of the direct recruits. Much has been made out, of the said reservation, in affirming the claim of direct recruits in the appointment orders of promotees. We do not think that the reservation made, in any manner indicated that the direct recruits are senior to the promotees. It only indicated that, if they are found to be senior, then the promotees would not have any claim based on their date of appointment. There is also a ground urged that the promotees having not challenged their appointment orders cannot claim seniority as against the direct recruits. A decision was also placed reliance upon to canvass the position. In Anita (supra) the Government took a policy decision to make contractual appointments and those recruited had executed agreements specifying the nature of their appointment. They cannot raise any claim of permanency was the finding. Here the appointment orders merely made the appointments subject to the claim of direct recruits and unless the latter have a valid claim it cannot be pressed against the promotees, since if there is no valid claim the condition would not be of any consequence.

33. It is also very pertinent that in the present instance there was no reversion effected and there were W.A.No.846 of 2019 & - 47 -

available vacancies in the permanent posts of District Judges for accommodating all the direct recruits. In fact, six of them were originally appointed, out of which three lost their positions by reason of the judgment of this Court in a case filed by Jayachandran. Only one joined additionally, in the recast select list thus bringing the total direct recruits to four. It is pertinent that even

when six joined, originally, in 2009, there was no reversion of any by-transfer appointee.

34. We have to recall, at the risk of reiteration, the bare minimum facts in the earlier direct recruitment which resulted in the Full Bench judgment in Haneefa P.K. (supra). There, the decision of the A.C and the notification for direct recruitment came, as in the present case, before the promotion made by-transfer. The by-transfer appointees were included in a panel and the Governor under Article 233, issued appointment order by

G.O. dated 16.02.2001. There were 15 persons in the list and they were posted in the post of District Judge as and when vacancies arose. The notification for appointment of direct recruits was made by G.O. dated 29.10.2001, of 8 direct recruits. Before the direct recruits were appointed, 10 persons from the panel as per the G.O. dated 16.02.2001

W.A.No.846 of 2019 & - 48 - were posted as District Judges, of which serial Nos.8, 9 and 10 were reverted to accommodate the direct recruits. Those who were reverted, along with the persons in serial Nos.11 and 13, were the writ petitioners before the Full

Bench, challenging the seniority given to the direct recruits above the promotees. Here, we have to point out that the contention of the direct recruits was also only that they are senior to the person at serial No.8 of the panel as per G.O. dated 16.02.2001. We say this because the notification for appointment of direct recruits was prior to the G.O. dated 16.02.2001, the panel of Sub Judges/CJMs.

Necessarily there would have been a claim of seniority

raised above all the 15 persons in the panel, if the arguments addressed now were addressed then. The High Court even at that stage did not have such a ground and on a representation made by the direct recruits, assigned them seniority only as against the promotees who were appointed and posted, but reverted and those not posted from the panel. The contention of the by-transfer promotees was that their order under Article 233 dated 16.02.2001 being prior

to the appointment order of the direct recruits dated 29.10.2001, they ought to have been given seniority above the direct recruits, which was negated by the Full Bench.

W.A.No.846 of 2019 & - 49 - As noticed above the by-transfer appointees in the very same panel, upto Serial No.7 were assigned seniority above the direct recruits and they continued as seniors even after the direct recruits were appointed. They were appointed and posted as District Judges before the direct recruits joined service.

35. In this context the decision of one of us [Anil

K.Narendran,J.] in Sunilkumar V.S. v. State of Kerala & Others [2016 (2) KHC SN 40] assumes significance. We have to also observe that at that stage and in every previous litigation on this aspect, the different Benches, proceeded on the basis that there was a cadre determined by the Government as is provided in the KS&SSR. We have seen that there was no cadre determined at the time when the subject selections were initiated. However that does not efface the sheen of the decisions rendered nor does it loose the lustre it has as a binding precedent since the quota was not on the cadre. We specifically extract paragraphs 30 and 31 of the said decision: 30. Rule 12(4) of Part I KSR defines 'cadre' to mean the strength of a service or part of a service sanctioned as a separate unit. Rule 2(18) of Part I KS&SSR provides that, the permanent cadre of each service, class, category and grade shall be W.A.No.846 of 2019 & - 50 -

determined by the State Government. Rule 5 of Part II KS&SSR deals with method of recruitment. As per Rule 5, where the normal method of

recruitment to any service, class or category is neither solely by direct recruitment nor solely by transfer but is both by direct recruitment and by transfer, (a) the proportion or order in which the Special Rules concerned may require vacancies to be filled by persons recruited direct and by those recruited by transfer shall be applicable only to substantive vacancies in the permanent cadre; (b) a person shall be recruited direct only against a substantive vacancy in such permanent cadre, and only if the vacancy is one which should be filled by a direct recruit under the Special Rules referred to in clause (a); and (c) recruitment to all other vacancies shall be made by transfer.

31. Note 1 to Rule 5 of Part II KS&SSR

provides that, all permanent vacancies and temporary vacancies except those of short duration shall be treated as substantive vacancies. Note 2 to Rule 5 provides further that, the vacancies on account of leave and deputation with a duration of less than six months shall be treated as vacancies of short duration, provided, such vacancies with a duration of three months to six months should not be treated as vacancies of short duration, if the vacancies are likely to last long or new vacancies are likely to arise. Note 3 to Rule 5, added as per SRO No.194/93 published in Kerala Gazette on 2.2.1993, mandates that, whenever a ratio or

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percentage is fixed for different methods of recruitment/appointment to a post the number of vacancies to be filled up by candidates from each method shall be decided by applying the fixed ratio or percentage to the cadre strength of the post to which the recruitment/ transfer is made and not to the vacancies existing at that time".

The above decision has been upheld by a Division Bench by common judgment dated 10.02.2017 in W.A. No. 1986 of 2015 and connected cases. There the specific contention for the writ petitioners was that there should be more vacancies

to which direct recruitment is resorted, since the categories as spoken of in the Special Rules includes all the posts,

totalling about 146. The Division Bench noticed Section 2(c)(iii) as available in the Special Rules, as amended in 2008 (Ext.P18 in W.A. 846 of 2017). It was held so: 17. Apparently Rule 2(c)(iii) cannot be read in isolation. The words post in the category has to be read along with Rule 5 of KS&SSR, in which event there is no ambiguity in the Rules as the 25% posts have to be in the permanent cadre or on the basis of the cadre strength of the posts.

36. Obviously the reference to cadre was without realising that there was no cadre determined at that time. But that is of little significance since Rule 5(b) of the W.A.No.846 of 2019 & - 52 - KS&SSR makes it abundantly clear that direct recruitment can only be to a substantive vacancy in the permanent cadre; while Rule 5(c) provides for recruitment to all other vacancies by transfer. Note (1) also provides that

All permanent vacancies and temporary vacancies except those of short duration, shall be treated as substantive vacancies (sic). What emanates from the above extracts, both from the decisions of the Single and Division Bench, read with the provisions of the Special Rules and the KS&SSR, is that the quota prescribed for direct recruits is to be 1/3rd of the permanent posts available in category (1) & (2) of the Special Rules. Admittedly there are many

temporary vacancies available, which, though called temporary, are not for a specific period or for short duration. In this context, we have to notice that there were a number of Fast Track Courts in which there were District Judges appointed, which Courts continued without break, till they were made permanent in the year 2012. Rule

5 of Part II KS&SSR, provides that all permanent and temporary vacancies, except those of short duration, shall be treated as substantive vacancies. However, there can be no appointments made of direct recruits unless other than to permanent vacancies. This leads to a corollary that W.A.No.846 of 2019 & - 53 - temporary vacancies, not of a short duration, being a substantive vacancy, the same can be

filled up only from the Subordinate Judiciary, that too with by-transfer promotions.

37. In Balehwar Dass(supra) the distinction was held

to be one, holding a post in a substantive capacity for an indefinite period of a long duration in contradistinction to one who holds it for a definite or temporary period,

subject to confirmation in a regular post. Here, the appellants were admittedly appointed on probation, but their probation was declared within the two year period as available in the KS&SSR. They have also continued in the post, which definitely raises a presumption that the appointment was made to a substantive vacancy, that too in

accordance with the Rules after carrying out a due selection procedure delineated in the Rules. Those persons so appointed to substantive vacancies though categorized as a temporary one, but not of a short duration, continued thereat and their probation was declared from the date of

their initial appointment. They are

accommodating the direct recruits, necessarily the by-transfer appointees get seniority over the direct recruits. They, obviously were not appointed to the quota ear marked for the direct recruits and all of the direct

recruits were appointed without reversion

pertinently reiterate that the Special Rules applicable do not provide a rota nor even a ratio and confines to a quota to the direct recruits that too restricted to the permanent posts.

38. Here we garner support from (1990) 2 SCC 715 Direct Recruit Class II Engineering Officers Association Vs. State of Maharashtra, as was extracted by the Full Bench.

"(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not

according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority".

In the Full Bench case the three by-transfer appointees who were posted as District Judges were continuing in the W.A.No.846 of 2019 & - 55 - vacancy reserved for the direct recruits. This is why they were reverted from the posts, which were permanent posts and earmarked to the quota of direct recruits. However the mere fact that none of the direct recruits, in this recruitment were accommodated by reversion of a by-transfer appointee demonstrates that the vacancies in the quota against the permanent vacancy of 96 was remaining vacant as on the date of the appointment of direct recruits.

39. The inter-se seniority in the Delhi Higher Judicial Service, decided in O.P. Singlas case again came up for consideration in (2000) 8 SCC 25 Rudra Kumar Sain Vs. Union Of India; then by a Constitution Bench. We extract the following observation which is relevant to our case too.

"11. ... In fact, in Singla case, the Court on being confronted with a peculiar situation, had given the direction as to in what way, it will be equitable for all concerned to determine the inter se seniority, but notwithstanding the same, the High Court appears to have stuck to the idea of the principles engrafted in Rule 8(2) of the Rules and then decided the question of seniority on the basis of number of posts, available in the service. While doing so, the High Court obviously missed the findings of this Court that under the scheme of the Rules,

W.A.No.846 of 2019 & - 56 - service is a narrower body than the cadre and every temporary post, which carries the same designation as that of any of the posts in the Schedule is a cadre post, whether such post is comprised in the service or not. ..." We are quite conscious of the fact that the peculiar situation, of the promotees having been continued for long years in that case, and there arising a breakdown of the quota-rota rule for reason of which an equitable principle for determining

inter-se seniority was evolved therein; is not available here. But still the underlined portion is applicable as the rules stand here too, ie: the Special Rules read with KS&SSR.

40. The Constitution Bench also considered the

meaning of the terms *ad hoc*, *fortuitous* and *stopgap*, frequently used in service jurisprudence. Looking at the dictionary meanings these terms were found to denote an accident or occurrence by chance, which is unforeseen or to tide over an emergent situation. It was held so:

"19. The meaning to be assigned to these terms while interpreting provisions of a service rule will depend on the provisions of that rule and the context in and the purpose for which the expressions are used. The meaning of any of these terms in the context of computation of inter se seniority of officers holding cadre post will

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depend on the facts and circumstances in which the appointment came to be made. For that purpose it will be necessary to look into the purpose for which the post was created and the nature of the appointment of the officer as stated in the appointment order. If the appointment order itself indicates that the post is created to meet a particular temporary contingency and for a period specified in the order, then the appointment to such a post can be aptly described as *ad hoc* or *stopgap*. If a post is created to meet a situation which has suddenly arisen on account of happening of some event of a temporary nature then the appointment of such a post can aptly be described as *fortuitous* in nature. If an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to the post due to any reason and it is not possible to leave the post vacant till then, and to meet this contingency an appointment is made then it can appropriately be called as a *stopgap* arrangement and appointment in the post as *ad*

hoc appointment. It is not possible to lay down any strait-jacket formula nor give an exhaustive list of circumstances and situation in which such an appointment (ad hoc, fortuitous or stopgap) can be made. As such, this discussion is not intended to enumerate the circumstances or situations in which appointments of officers can be said to come within the scope of any of these terms. It is only

W.A.No.846 of 2019 & - 58 - to indicate how the matter should be approached while dealing with the questions of inter se seniority of officers in the cadre".

41. The appointments of the promotees, herein, were not stopgap, fortuitous or adhoc as these terms are

understood by the Constitution Bench.

consideration, even according to the Court was a departure from the normal service jurisprudence. There the rules were framed heavily in favour of direct recruits, even permitting their appointment to ex-cadre posts. Hence the dictum laid down there cannot have any application here. Reference however is relevant, to notice the normal rule as found by the Supreme Court in para 8:

"8. ... We may make it clear at this juncture that in normal service jurisprudence a direct recruit would always be recruited and appointed to a substantive vacancy and from the date he starts discharging the duty attached to the post he is a member of the service subject to his successfully completing the probation and declaration thereof at a later date and his appointment relates back to the date of initial appointment, subject to his being discharged from service on failure to complete the

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probation within or extended period or termination of the service according to rules. Equally it is settled law that a promotee would have initial officiating promotion to a temporary vacancy or substantive vacancy and on successful completion and declaration of the probation,

unless reverted to lower posts, he awaits appointment to a substantive vacancy. Only on appointment to a substantive vacancy he becomes a member of the service. But confirmation and appointment to a substantive vacancy are always an inglorious uncertainty and would take unduly long time. Therefore, the confirmation or appointment to a substantive capacity would not normally be a condition precedent to reckon the continuous length of service for the purpose of seniority. On the

facts of the case and the settled legal

position, at first blush the argument of Shri P.P. Rao carried weight that the appellants would get their seniority from the respective dates of the initial promotion as Executive Engineers. But we find that in the instant case the rules have made departure from the normal service jurisprudence as would appear from the scheme under the rules".
(underlining by us for emphasis)

This inglorious uncertainty was removed inter alia when the Fast Track Courts were made permanent. But all those W.A.No.846 of 2019 & - 60 - appointed continued uninterruptedly, without break and were borne in the higher judicial service and it does not affect the seniority of appointments made by-transfer to substantive vacancies in the cadre which comprises of both permanent and temporary vacancies as per Rule 5 of the KS&SSR. We have also been taken through the decision in High Court of Kerala Vs. Mohandas P.K. [2017(3) KHC 703],

which considered two questions: (i) whether

decide this case wherein the concept of cadre does not at all arise, since the Special Rules provide for a quota on the permanent posts; the number of which is clearly discernible, which number was inadvertently taken as the cadre in the various decisions.

42. On the above reasoning, we find it difficult to accept the impugned decision of the A.C, as is seen from the records. Here we have to notice that there is a contention that Exhibit P2 Minutes of the A.C has not been

challenged before this Court. Bharat Amratlal Kothari (supra) considered among others the question whether the High Court was correct in granting compensation. There the W.A.No.846 of 2019 & - 61 - Police had seized vehicles and the animals carried in it on charge of cruelty to the animals and the jurisdictional Magistrate rejected the application for release of animals, made by their owners. The animal owners moved the High Court against the FIR registered but did not make any specific prayer for compensation in which event the High Courts order granting it, was found to be improper.

Amarjeet Singh (supra) was a case in which without challenging the promotion, the consequential seniority list was challenged. Here we do not see any such infirmity. The writ petitioners were only issued with Exhibit P1 Official Memorandum dated 26.10.2017, which also did not contain any reasons as to how the direct recruits were given seniority

above the by-transfer appointees. The by-transfer appointees sought for the reasons behind the order; upon which Exhibit P2 was issued. The reasons in Exhibit P2 has to be read into Exhibit P1 and the challenge to Exhibit P1 would suffice.

43. The issue as highlighted by the A.C in Exhibit

P2 is as to whether the direct recruits who commenced service subsequent to the officers appointed by-transfer are entitled to seniority above the promotees. Reliance was placed on Haneefa P.K. (supra) and it was noticed that the W.A.No.846 of 2019 & - 62 - same was upheld in a Special Leave Petition by the Hon'ble Supreme Court. The A.C found that the Full Bench had considered whether those appointed in excess of the quota are entitled to seniority from the date of their appointment and it was held that such appointees will gain seniority only from the date their appointments are adjusted against the vacancies within the quota. Here, the A.C erred insofar as there being no quota prescribed for by-

transfer appointees. As we noticed, the quota is only for the direct recruits and that is confined to the permanent posts in the cadre of District Judges. The Full

Bench judgment in Haneefa P.K. was elabora

accommodate the subject direct recruits. The A.C then found that the by-transfer appointees were appointed to the vacancies in the direct recruitment quota; which is patently erroneous, since there was no reversion effected and all the six direct recruits so appointed on 30.03.2009 were appointed without disturbing any previous appointment in the category. The A.C considering the issue of break down of quota, found that the judgment in Haneefa P.K. covers the issue as on 01.11.2012 and that there was no W.A.No.846 of 2019 & - 63 -

deliberate inaction or inertia on

considered the facts of the recruitment of District Judges from the Bar, who were appointed in the year 2001 and the declaration is insofar as there being a definite quota available to the direct recruits in the relevant Special Rules, as against the permanent posts. We do not find any

break down of quota rule but the Fu

appointments made were to quota available to the direct recruit District Judges cannot be countenanced. There were sufficient vacancies in the cadre to accommodate the by-transfer appointees as also the direct recruits at the time when the direct recruits came into service. This amply demonstrates that there were enough permanent vacancies available for accommodating the direct recruits and none from the by-transfer appointees were occupying such permanent posts. We, hence, do not find any reason to uphold the decision of the A.C.

44. In this context, we also have to take note of the contention that the A.C did not have the power to W.A.No.846 of 2019 & - 64 -

decide on the seniority dispute between by-transfer appointees and direct recruits. Reliance placed by the High Court is on the delegation of the powers made by the High Court as produced at Exhibit R2(l) [Minutes of the Judges' Meeting on 12.06.1986]. There can be no dispute raised on the power to so delegate, for

which decisions are legion and we refer to just one. In *Batuk Deo Pati Tripathi* (supra) the Hon'ble Supreme Court upheld the power of the High Court to frame rules for regulating the manner in which the administrative control of the Subordinate Judiciary, vested

in it may be exercised; under Article 235.

Court. Therein the rules framed required the decision of the A.C to be communicated to the individual judges who could offer their comments and if no comment was offered within the stipulated time there was deemed an assent. It was found that though the Registry communicated the decision of the A.C to the Judges, the communication was after the recommendation was sent to the State Government. Even then the power exercised was found to be proper. W.A.No.846 of 2019 & - 65 -

45. The power under Article 235 was elaborated as seen from the following extracts from paragraph 10, 14 & 18:

"10. ... The relevant part of Article 235 of the Constitution provides that the control over District Courts and courts subordinate thereto shall be vested in the High Court. Since Article 216 provides that every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint, Article 235 has to be construed to mean that the control over District Courts and courts subordinate thereto is vested in the entire body of Judges who together constitute the High Court and not in the Chief Justice as representing the High Court or an Administrative Judge or a smaller body of Judges acting as an Administrative Committee. But though the control over subordinate courts is vested institutionally in the High Courts by Article 235, it does not follow that the High Courts have no power to prescribe the manner in which that control may in practice be exercised. In fact, the very circumstance that the power of control, which comprehends matters of a wide-ranging variety, vests in the entire body of Judges makes it imperative that rules must be framed to make the

exercise of control feasible, convenient and effective. The seeds of the jurisdiction to frame rules regulating the manner in which the control over subordinate courts is to be exercised are thus to be found in the very nature of the power and in the fact

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that the power vests in the entire body of Judges. The High Court has, therefore, the power under Article 235 itself to frame rules for regulating the manner in which the control vested in it may be exercised. The power to do a thing necessarily carries with it the power to regulate the manner in which the thing may be done. It is an incident of the power itself and indeed, without it, the exercise of the power may in practice be fraught with difficulties which will frustrate, rather than further, the object of the power. It is undoubtedly true that the rules framed for prescribing the manner in which a power may be exercised have to be truly regulatory in character. The reason is that under the guise of framing rules, the essence of the power cannot be permitted to be diluted. ... xxx xxx xxx

14. ... The ideal which inspired the provision that

the control over District Courts and courts subordinate thereto shall vest in the High Courts is that those wings of the judiciary should be independent of the executive. Tracing the history of

that concept, Hidayatullah, J., in *State of West Bengal v. Nripendra Nath Baghchi*(1966) 1 SCR 771 has highlighted the meaning and purpose of Article 235. It is in order to effectuate that high purpose that Article 235, as construed by this Court in various decisions, requires that all matters relating to the subordinate judiciary including compulsory retirement

W.A.No.846 of 2019 & - 67 - and disciplinary proceedings but excluding the imposition of punishments falling within the scope of Article 311 and the first appointments and promotions should be dealt with and decided upon by the High Courts in the exercise of the control vested in them. xxx xxx xxx

18. ... We have pointed out above that the amplitude of the power conferred by Article 235, the imperative need that the High Courts must be enabled

to transact their administrative business more conveniently and an awareness of the realities of the situation, particularly of the practical difficulties involved in a consideration by the whole court, even by circulation, of every day-to-day matter pertaining to control over the District and subordinate Courts, lead to the conclusion that by rules framed under Article 235 of the Constitution the High Courts ought

to be conceded the power to authorise an Administrative Judge or an Administrative Committee of Judges to act on behalf of the Court". (underlining by us for emphasis)

46. The Supreme Court drew a distinction between

dismissal, removal or reduction in rank and compulsory retirement to find that the latter power could be exercised by the A.C. We provided the underlining above, to emphasize that under the guise of framing rules the essence of the

power cannot be diluted and promotions

Resolving of seniority disputes is inextricably linked with the first appointment, and promotion is dependent upon such seniority at least when merit is equal.

47. We also look at whether there was an actual

delegation or not. In this context, we have to notice the Minutes of the meeting on 01.07.1986, wherein Appendix 'A' referred to the distribution of administrative work in the High Court. The High Court, as has been fairly established, is the Full Court. There are certain matters specifically enumerated as the exclusive premise of the Full Court, of which we specifically extract Clauses (3) and (4):

(3) Final decision on Committee's recommendations regarding direct recruitment of District Judges.

(4) Final decision on Committee's recommendations in regard to promotions of judicial officers.

Hence, the recommendation of the High Court to the Governor for appointment to the post of District Judges, whether it be by direct recruitment or promotion, has to be made by the Full Court. The order of the Governor under Article 233 is on the basis of the said recommendation; which for all purposes is the consultation as referred to in Article 233.

We would think that a seniority dispute, which is intrinsically linked with the date of appointment and the W.A.No.846 of 2019 & - 69 - recommendation so made by the Full Court on which the Governor acts under Article 233, would be a matter which has to be considered by the Full Court itself.

48. The High Court, however, relies on the powers

delegated to the A.C, which comprises of the Chief Justice and four senior-most Judges. The specific power referred to is in item No.5, which is extracted herein below: II(5) Representation from judicial officers regarding service problems.

Though the issue of seniority can also be literally termed as a service problem, we do not think that the intention was to delegate such disputes to be decided by the A.C as a mere service problem. Inter-se seniority disputes cannot be trivialised and though a problem, in the literal sense, it falls for determination based on the applicable rules and

the evident facts, tested on the established legal principles; which require an assertion of a claim, hearing of affected parties and commend a judicious adjudication. Service problems would be many and varied and in every cause when a grievance is raised by a Judicial Officer it would be difficult for the Full Court to be convened; nor is it necessary. This is the power specifically granted to

the A.C, but it cannot result in interference to the W.A.No.846 of 2019 & - 70 -

recommendations of the Full Court made

dispute and ideally the same should have been placed before the Full Court. We have answered the said question which is raised in the appeals, only for future guidance in such matters, which, it would be inappropriate to leave undecided. We have already held that the A.C's decision is not legally sustainable; we also find the A.C to have no jurisdiction to decide the issue.

49. The next question to be decided is whether

Jayachandran can claim seniority as on 30.03.2009 or even prior to that date by reason of the quota in the Special Rules. We have answered the latter question, against the direct recruits who were actually appointed on 30.03.2009 and this would regulate even Jayachandran, who was appointed much later. As to the facts which led to the later appointment, suffice it to notice that it was occasioned by reason of the Division Bench judgment of this Court in Jayachandran [2010 (4) KLT 49]. The decision was on 13.09.2010 and directed re-casting of the select list. It has been argued by the by-transfer appointees that the writ petitioner therein had specifically sought for W.A.No.846 of 2019 & - 71 - seniority from the date on which the other direct recruits

as per the select list were appointed, which was not permitted by the Division Bench. We are, however, inclined to accept the contention raised by learned Senior Counsel Sri.P.Ravindran that by directing re-casting of the select list what was intended was that the persons who are newly placed in the select list also should be given their due seniority from the date of the initial appointment of the others. We cannot find that, by not specifically referring to the prayer and allowing it, there has been a rejection of the said prayer made. We would think that the direction to re-cast the select list is sufficient indication that any person newly selected would have to be assigned the seniority as on the date of the original selection. We also notice that it was not by Jayachandran's fault that his appointment was delayed.

50. Be that as it may, obviously what was directed by the Division Bench, of recasting the select list was not

done and Jayachandran was appointed as District and Sessions Judge from the date he assumes charge. We refer to the counter affidavit filed by the 2nd respondent in W.P.(C) No.40046 of 2017. On re-casting the select list with the 7 candidates as referred to in Jayachandran (supra), Exhibit

W.A.No.846 of 2019 & - 72 - R2(c) indicates the position of Jayachandran to be at rank No.3. Only four persons were selected, though seven qualified; which was for reason of there being two reserved vacancies, to fill up which, there were 'No Candidates Available' [NCA]. As per the re-cast select list, Jayachandran had 3rd rank; after Babu and Kauser, who were earlier appointed; with Badharudeen, one of the earlier

appointees, being relegated to the 4 th position. Hence, obviously the appointment should have also been in that sequence with Jayachandran having the 3rd position among the 4 who were appointed directly. Jayachandran should have been given notional seniority from the date of appointment of the others though, he would not have any claim for pay and allowances, for the period when he had not discharged the duties in the post.

51. But, when the notification came under Article 233 of the Constitution, which is produced at Exhibit R2(d) in W.P.(C) No.40069 of 2017, appointing Jayachandran from the date he assumes charge, he joined without demur. Jayachandran was hence appointed as on the date he assumes

charge by G.O. dated 22.12.2010. The

evident from Exhibit R2(d) in W.P.(C).No.40046 of 2017, also indicated that the proposal of the High Court was to allow the three persons who were appointed as per G.O. dated 30.03.2009 to continue in service with effect from the date on which they assumed charge, being 30.03.2009 and C.Jayachandran as District and Sessions Judge in the Kerala Higher Judicial Service with effect from the date on which he assumes charge (sic). Jayachandran who was appointed from the date on which he assumed charge, took charge on 24.02.2011. He could have filed a contempt or a fresh writ petition; which was not done, raising a fair presumption that he waived his right to notional seniority.

52. There is a ground taken by Senior Counsel

Sri.P.Ravindran that the aspect of delay was not at all challenged by the appellants. We find the said submission to be incorrect. In W.P.(C)No.40069/17, the appellant has in Ground E, with specific reference to the date of joining of the respondent urged that the appointment order provided for his commencement of service from the date of joining and urged that he had acquiesced to the order and waived

his right to challenge the same. W.P.(C)No.40043/17 by Ground D contented that the 5th respondent cannot resurrect his stale claim for seniority after having not objected to W.A.No.846 of 2019 & - 74 - the date of his first appointment as indicated in the appointment order pursuant to the Division Bench decision of this Court. Citing the date of appointment as per the

order dated 22.10.2010, in Ground E it has also been urged

that the claim is hopelessly time barred.

53. Having taken charge on 24.02.2011, a representation before the High Court was filed on 11.04.2012 [Exhibit R3(h)], after more than one year. No

consideration was made of the representation, in which event, Jayachandran again filed a reminder to the earlier representation on 18.09.2014; more than three and a half years from his joining service and about two and a half years from his first representation. All this while the appellants, Mohammed Vaseem and Sophy Thomas continued as

seniors of Jayachandran, quite unaware of the representations. It is also to be noticed that the 3rd respondent had approached the Hon'ble Supreme Court with a Writ Petition numbered as W.P.(Civil) No.857 of 2017 which was withdrawn without prejudice to any other remedy on 22.09.2017. No other remedy was availed then.

54. In this context, we have to notice that Jayachandran, slept over his rights and has allowed the by-transfer appointees to continue with the seniority as

assigned to them, which seniors also

categorization brought in by the amendment of the Special Rules in the year 2008. The Higher Judicial Service as per Exhibit P18 has three categories:

1. Super-time Scale District and Sessions Judge,
2. Selection Grade District and Sessions Judge,
3. District and Sessions Judge including Additional District Judge. The posts in category (1) is limited to 10% and that in category (2) to 25% of the cadre strength of the posts in all the three categories put together. Both the writ petitioners Mohammed Vaseem and Sophy Thomas and Jayachandran have been promoted as Selection Grade District

Judges. The former two, from an earlier date, which order

has not been challenged.

55. Two aspects stare at the face of Jayachandran, insofar as the claim for seniority along with the three direct recruit District Judges appointed as on 30.03.2009.

(i) He slept over his rights and rested contend with unrepresented memorials, to which the High Court responded very late; thus seriously interfering with the vested rights of the promotees. (ii) The by-transfer appointees W.A.No.846 of 2019 & - 76 - continued on the basis of their seniority and also obtained

further promotion in the cadre. As per the proceedings issued by the High Court vide order dated 17.03.2017 the further promotions given to the 3 officers are as under:

18. Shri.Muhammed Vaseem, Additional District Judge-I, Mavelikkara is promoted as Selection Grade District Judge with effect from 10.08.2015

vice he completed five years in the category of District Judge on 10.08.2015 and Smt.Annie John, Selection Grade District Judge promoted as Supertime Scale District Judge on 29.05.2015. xxx xxx xxx

20. Smt.Sophy Thomas, MACT, Alappuzha is promoted

as Selection Grade District Judge with effect from 04.08.2015 vice she completed five years in the category of District Judge on 04.08.2015 and the demise of Shri.E.B.Rajan, Selection Grade District Judge on 10.06.2015. xxx xxx xxx

25. Shri.C.Jayachandran, Enquiry Commissioner and

Special Judge/Additional District Judge-II, Thrissur is promoted as Selection Grade District Judge with effect from 24.02.2016 vice he completed five years in the category of District Judge and Shri.K.Dharmajan, Selection Grade District Judge retired on 30.11.2015. The delay and the further promotions force us to reject the prayer of Jayachandran. In this context, we refer to the W.A.No.846 of 2019 & - 77 - decision of the Full Bench of this Court in M.P.Raghavan Nair v. State Insurance Officer [1971 KLT 583].

56. In M.P.Raghavan Nair, the writ petitioner and two respondents were appointed in the cadre of Lower Division Clerks (LDC) as per the advice of the Public Service Commission, the petitioner as senior to the other

two respondents being advised earlier. However, the petitioner was the last in passing the obligatory test for promotion; which resulted in his confirmation in the post of LDC, being later to the respondents. He was thus, by misconstruing the seniority rule, placed as junior to the other two respondents in the post of LDC. The other two persons were promoted to the post of UDC and only later the petitioner was promoted to that cadre. A further promotion to the post of Junior Superintendent also was in the same

fashion; the petitioner being placed the junior-most among the three parties to the lis. We need refer to the dates of promotion as Superintendents, which in the case of 3rd respondent was on 13.03.1962, 4th respondent on 25.04.1962 and the petitioner on 02.07.1963. The petitioner filed a representation before the

Government on 04.08.1962 challenging the gradation list published in the Gazette of 10.10.1961, which placed the petitioner as the junior-most

W.A.No.846 of 2019 & - 78 - in the cadre of LDCs. He, however, did not challenge the appointment of the respondents 3 and 4 to the Superintendents category which was earlier to his appointment. Even when the representation was submitted and later a writ petition was filed by him against the seniority fixed in the cadre of LDC, he was in the cadre of UDC and the other two were already promoted as

Superintendents. The Full Bench found that, placing the petitioner as junior-most for reason only of his having passed the obligatory test later to the other two and his confirmation being so delayed, was erroneous. But, however, the Full Bench, by a majority, refused to consider his claim for seniority since by the time he made a representation to re-assign his seniority in the cadre of LDCs, the other two had been promoted to the higher posts earlier to him, which remained unchallenged.

57. The majority decision held that the principles

underlying the Limitation Act and provisions restraining stale claims under the CPC, being principles of repose and peace, are equally applicable to petitions under Article 226 of the Constitution. Quoting from *A Court v Cross* 130 English Reports 540 it was noticed Long dormant claims have often more of cruelty than of justice in them. The W.A.No.846 of 2019 & - 79 - respondents having continued in their promoted post as senior to the petitioner without any challenge to their promotions, the petitioner cannot be allowed to raise his claim and thus upset the promotions also. It was held:

Seniority in the lower category is by no means the same as promotion to the higher category the moment a vacancy occurs in the latter, even if it be that promotion is governed solely by the pre-determined fact of seniority. Seniority, no doubt, furnishes a title to promotion, not, it is true in this case, a merely contingent title as would be the case, if the rule for promotion were merit, seniority counting only in cases where the merit of

the competing claimants is roughly equal. Nevertheless, it is no more than a title. There would still have to be the conferment of the promotion by the appointing authority, and the promotion would no more follow automatically from a declaration of seniority than would possession from the hands of a trespasser follow automatically from a decree merely declaring title.

58. A like situation arises in the present case also. Sophy Thomas and Muhammed Vaseem were appointed

earlier to Jayachandran. It is pertinent that both the appointment orders did not contain a condition that it is subject to appointment of direct recruits. But, however, as we earlier held, Jayachandrans recruitment was not delayed W.A.No.846 of 2019 & - 80 -

because of his fault. He had valiantly fought for his rights before this Court and the Honble Supreme Court and obtained a decision in his favour. In the normal course we would have permitted him to be treated as appointed on the date on which the other direct recruits in the very same selection were appointed; but for the delay. Jayachandrans appointment order was on 22.12.2010 and he took charge on

24.02.2011. The appointment order, as earlier read, specifically provided that his appointment would be from the date on which he takes charge; which is in accordance with Rule 6 of the Special Rules. Muhammed Vaseem, Sophy Thomas and Jayachandran continued in service, the former two as seniors to the latter.

59. As we found, when the Division Bench in favour of Jayachandran directed re-casting of the select list, necessarily he should have been appointed from the date on

which the others were appointed after select

appropriate proceedings to correct it, which he did not. He acquiesced and slept over his rights and filed a representation on 11.04.2012. The High Court did not act upon it; nor did Jayachandran approach any Court with his W.A.No.846 of

2019 & - 81 - grievance. Again in 2014 there was a further representation made regarding his seniority in the category of District and Sessions Judge. While so, the three were considered for promotion to the vacancies of Selection Grade District Judges and orders were issued on 17.03.2017, wherein, as noticed above, Muhammed Vaseem was promoted in the vacancy which arose on 29.05.2015, Sophy Thomas in the vacancy which arose on 10.06.2015 and Jayachandran in the vacancy which arose on 30.11.2015. Muhammed Vaseem and Sophy Thomas were treated as seniors to Jayachandran. It was later to that the A.C re-assigned the seniority by order dated 26.10.2017; which is impugned in the writ petitions.

60. As has been held by the Full Bench, promotion

would not automatically follow a declaration of seniority just as possession from the hands of a trespasser would not automatically follow from a decree of declaration of title. The re-assignment of seniority in category (3) is inconsequential insofar as their respective positions in category (2), wherein the position of seniority of the three District Judges remain unchallenged and is indelibly etched in the category of Selection Grade District Judges.

61. We also notice the judgment in P.S.Gopinathan v. State of Kerala [(2008) 7 SCC 70]. Therein, the appellant W.A.No.846 of 2019 & - 82 -

was appointed as District Judge on 14.01.1992 by order of the Governor; following which a posting order was issued on 29.02.1992. Later to this, three directly recruited persons were appointed as District Judges; two on 31.03.1992 and one on 30.05.1992, the first two of whom took charge on 02.04.1992 and the other on 01.06.1992. In January, 1992,

the Civil Judicial Service and the Criminal Judicial Service of the State were integrated and Service Rules, 1991 came into effect on 01.01.1992; based on which there was a fresh panel of Sub Judges/Chief Judicial Magistrates drawn up for promotion as District and Sessions Judges from the integrated seniority list. One another Sub Judge placed

as senior to the appellant in the new panel of Sub Judges/CJMs was approved by the Governor on 15.07.1992. The High Court, then, treated the earlier appointments to be temporary and the appellant was again included as serial No.2 in the integrated panel which came out on 15.07.1992. There was a further appointment order issued on 31.07.1992 posting the appellant again as District Judge. An Official

Memorandum was issued by the High Court on 29.09.1992 showing the appellant junior to the direct recruits as also

serial No.1 in the panel approved by t

28.10.1992 against the said seniority, within three months,

which was followed up with other representations as reminders. The learned Judges declined the prayer of the appellant for seniority relying on the law of equitable estoppel by acquiescence, as has been clearly stated in Willmott v. Barber (1880) 15 Ch D 96. It was held that when a fresh appointment order was issued on 15.07.1992 treating the earlier appointment order on 14.01.1992 as temporary, which was reiterated in the appellants 2nd posting order on 31.07.1992, the High Court had clearly committed a mistake. The first appointment order and the posting order did not have any such stipulation of the appointment or posting being temporary in nature. But, even then it was held that the appellant being aware of the same, did not object to it and he acquiesced to being treated as a temporary District Judge. Even though the representation was made three months thereafter, it was found that he has slept over his right

of having been appointed permanently in the post of District and Sessions Judge and he was rightly understood by the High Court to have waived or abandoned his rights.

62. Learned Senior Counsel, undeterred, strenuously argued for the delay to be ignored in view of the fact that the respondent, was one who had been denied selection and W.A.No.846 of 2019 & - 84 -

achieved it only by fighting for his rightful claim; who is also entitled to the fruits of the litigation to its full extent. Reliance, to urge that that aspect, was placed on R.S. Deodhar (supra). There the question was the promotion of Mamalatdars, in the Aurangabad Division of the newly created State Of Bombay, to the post of Deputy Collectors.

The issue also arose in the circumstance of the reorganization of States, by which inter-alia some portions of the erstwhile State of Hyderabad came to be included in Bombay. The petitioners were Tahasildars in Hyderabad, who were directly recruited to that post, with the next promotion being to the post of Deputy Tahasildars. Those coming from the other States also carried with them the respective conditions of service, they were entitled to by virtue of Section 115(7) of the States Reorganization Act,

1956. The preliminary objection raised was of delay, when

the divisional cadre of Mamalatdars was created in 1956, by a Government resolution. The procedure for promotion was in vogue for a number of years; at least from 1961, the Rules having been given effect in 1959. The petitioners chose to approach the Court with a petition under Article 32, only in 1969. The controversy also revolved around the treatment of Mamalatdars as a Divisional cadre as distinguished from

W.A.No.846 of 2019 & - 85 - a State Cadre. We first notice that the principles stated were on the peculiar facts therein and with respect to the delay in so far as invocation of Article 32.

63. The objection on delay was negated despite the observations of two former Chief Justices of India, in two decisions of Constitutional Benches; on the peculiar

facts arising there. The observations were:

(i) In AIR 1970 SC 898 Tilokchand Motichand Vs. H.M. Munshi Hidayatullah C.J stated so:

"The party claiming Fundamental Rights must move the Court before other rights come into existence. The action of courts cannot harm innocent parties if their rights emerge by reason of delay on the part of the person moving the Court. This principle is well-recognised and has been applied by Courts in England and America".

(ii) In AIR 1970 SC 470 [R.N. Bose Vs. Union of India] Sikri.J (as he then was stated so:

"It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years". W.A.No.846 of 2019 & - 86 - The Court found in R.S. Deodhar (supra) that the promotions were provisional and no rights crystallized on the respondents. There was also the fact that the petitioners who were from the Aurangabad Division were informed by the Commissioner of that Division that the rules for recruitment to the post of Deputy Collectors were not unified, that they would be regulated by the rules of the

Ex-Hyderabad State and that the Rules of 1959 had no application to them. Of course the State Government did not subscribe to the view of the Commissioner, which however came to be publicised in a writ petition filed before the High Court of Bombay; which view was accepted by the Court. It was on these compelling circumstances that the Court refused to shut its doors on the sole ground of delay.

64. The dictum in P.S.Gopinathan and M.P.Raghavan

Nair (both supra) squarely applies in the present case and the extracts from Tilokchand Motichand & R.N. Bose (both supra) considering the facts arising herein, stands against the respondent. There are also no compelling circumstances as in R.S. Deodhar (supra), to offer succour to the respondent and the said decision also cannot come to the rescue to save the delay arising herein. Jayachandran quite aware of the stipulation in the appointment order that it W.A.No.846 of 2019 & - 87 -

would only take effect from the date of his joining, joined and never challenged it, accepting the seniority of those persons appointed before him as per Rule 6 of the Special Rules. A representation was first submitted to the High Court, after more than one year on 11.04.2012. No attempt was made to redress his grievance before this Court or at

least motivate the Registry of the High Court to take action on his representation for more than four years. A reminder was sent in the year 2014. The Honble Supreme Court has categorically held that unrepresented memorials do not condone or save delay. The High Court, that too the A.C, considered the representation in the year 2017, after more than six years from his appointment and five years from his representation; during which period the appellants

continued in their posts as established seniors of Jayachandran and also was promoted to the higher category of Selection Grade District Judges and asserted their seniority in that category too, which, as has been noticed herein above, has not been challenged at any time. We have already held that inter-se seniority disputes cannot be resolved by the A.C. The recommendation made by the Full Court to appoint Jayachandran from the day he assumes charge, however illegal or irregular it might be, cannot be W.A.No.846 of 2019 & - 88 - rectified by the A.C. It can only be done by the Full Court

or the Court exercising judicial functions; which essentially is the power of the State as conceded to the Courts. We, hence, are of the opinion that Jayachandrans claim is belated and has to be rejected. Our findings with respect to the other aspects of the decision of the A.C, would squarely apply in the case of Jayachandran also.

In the light of the findings above, we allow the appeals and direct seniority to be assigned to the parties to the lis from the date of their first appointment. We set aside the impugned judgment, which upheld the decision of the Administrative Committee. We direct the parties to bear their respective costs.

Sd/- K.VINOD CHANDRAN JUDGE Sd/- ANIL K.NARENDRAN JUDGE Vku/-
W.A.No.846 of 2019 & - 89 - APPENDIX OF WA 846/2019 RESPONDENT'S/S

ANNEXURES: ANNEXURE R2(a) TRUE COPY OF THE MINUTES OF THE ADMINISTRATIVE COMMITTEE MEETING DATED ANNEXURE R2(b) TRUE COPY OF THE MINUTES OF THE ADMINISTRATIVE COMMITTEE DATED 27/07/2000. ANNEXURE R2(c) TRUE COPY OF THE MINUTES OF THE SPECIAL COMMITTEE DATED 12/07/2006. ANNEXURE R2(d) TRUE COPY OF THE MINUTES OF THE SPECIAL COMMITTEE DATED 31/07/2006. ANNEXURE R2(e) TRUE COPY OF THE MINUTES OF THE ADMINISTRATIVE COMMITTEE DATED 09/12/2010. ANNEXURE R2(f) TRUE COPY OF THE MINUTES OF THE ADMINISTRATIVE COMMITTEE DATED 11/06/2013. ANNEXURE R2(g) TRUE COPY OF THE GOVERNMENT ORDER GO(MS) NO.107/2015/HOME DATED 29/05/2015. ANNEXURE R2(h) TRUE COPY OF THE COMMON JUDGMENT DATED 14780 AND 14957/2015. ANNEXURE R2(i) TRUE COPY OF THE ORDER GO(MS) NO.226/2016 DATED 30/08/2016. ANNEXURE R2(j) TRUE COPY OF THE MINUTES OF THE ADMINISTRATIVE COMMITTEE DATED 24/10/2016. ANNEXURE R2(k) TRUE COPY OF COMMON JUDGMENT DATED ANNEXURE R2(l) TRUE COPY OF THE JUDGMEWNT IN WRIT APPEAL NOS.1224, 1245, 1246, 1348 AND 1349/2017.

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