In view of the above, we set aside the selection of respondent No. 3 in Civil Writ No. 4659 of 1974, and direct the respondent-State to treat the vacancy as an unreserved one and then proceed to fill it in accordance with law.

In Civil Writ No. 4597, annexure P. 3 appointing respondent No. 4 Dr. Charanjit Lal as an Assistant Professor, Ophthalmology, is hereby quashed and the respondent-State is directed to treat the vacancy as an unreserved one and proceed to fill the same in accordance with law.

Both the petitions are allowed, as above, with costs. Counsel's fee Rs. 100 in each case.

B.S.G.

MISCELLANEOUS CIVIL
FULL BENCH

Before S. S. Sandhawalia, M. S. Gujral and R. N. Mittal, JJ

AMAR SINGH, CLERK OF COURT,—*Petitioner.*

versus

THE CHIEF JUSTICE, PUNJAB and HARYANA HIGH COURT AND OTHERS,—*Respondents.*

Civil Writ No. 1075 of 1971.

February 17, 1976.

Constitution of India 1950—*Articles* 16(4), 229 *and* 235—*Clerks of Courts (now Superintendents) to the District and Sessions Judges (Appointment and Conditions of Service) Rules* 1940—*Rules* 3 *and* 4—*Control of High Court over District Courts and Courts Subordinate thereto—Whether extends to all the functionaries attached to such Courts—Promotion of such functionaries—Whether exclusively within the ambit of control of the High Court—Government instructions requiring reservation of higher posts to be filled up by promotion from amongst the members of Scheduled Castes—Whether equally applicable to the ministerial staff of subordinate Courts—Appointment to the post of Superintendent in the establishment of District and Sessions Judge—Whether by way of promotion—Governor—Whether has power to make rules regarding appointment and conditions of service of ministerial staff of subordinate Courts.*

Held, that in Article 235 of the Constitution of India 1950, the terminology used is "District Courts and the Courts Subordinate thereto" and their control has been squarely vested in the High Court. This terminology has been used compendiously to include within it both the presiding Judge and the functionaries and staff attached to him. On a plain grammatical construction of the words "District Officers and the Courts subordinate thereto". It follows that these include all persons attached thereto without any financial distinction between the Presiding Officer and the functionaries attached to him. The later part of Article 235 refers to persons belonging to the subordinate judicial service and holding posts inferior to that of a District Judge. If the control was to be limited only to this set of persons or the Presiding Officers of the Courts only, then any mention of the "District Courts" as a whole and the "Courts subordinate thereto" as such would be unnecessary. This apart such a construction would be patently subversive of the doctrine of the independence of judiciary, which is admittedly one of the cardinal principles of the Constitution. One cannot imagine a subordinate Court functioning effectively in which the Presiding Officer alone is under the control of the High Court, while all other functionaries and the administrative staff attached thereto are neither under the control of the High Court nor that of the Presiding Officer himself, but are wholly controlled and governed by the State Government. Such a situation would be wholly destructive of the harmonious and effective working of the Subordinate Courts. Thus, the control of the High Court under article 235 of the Constitution extends to all the functionaries attached to the District Courts and Courts Subordinate thereto.

(Paras 10, 11, 13 and 16).

Held, (per majority Sandhawalia and Mittal, JJ, Gujral, J. contra) that the word "including" in the opening part of article 235 was not in any way intended to cut down the ambit of control of the High Court as regards the functionaries attached to the Subordinate Courts or to draw any line of distinction between them and the Presiding Officers thereof. The nature and the ambit of control of the High Court over the Presiding Officers of the Subordinate Courts and the functionaries attached thereto is identical and no distinction and difference between the two is either intended or contemplated by the Constitution. If promotions were to be excluded from the ambit of control then a very substantial content thereof would be totally eroded. The real sanction behind control over a public servant is ultimately the power to promote or demote. If the substantial content of the power of promotion is substracted from control then the completeness thereof would be derogated from and indeed the power would be halved, if not rendered completely nugatory. Thus, the power of promotion of all functionaries attached to the District Courts and the Courts

Subordinate thereto is exclusively vested in the High Court and is within the ambit of its control.

(Paras 18, 19 and 21).

Held, (per majority Sandhawalia and Mittal, JJ, Gujral, J. contra), that a combined reading of rules 3 and 4 of the Clerks of Courts (now Superintendents) to the District and Sessions Judges (Appointment and Conditions of Service) Rules 1940 makes it evident that the persons eligible for promotion to the post of Superintendent in the establishment of District and Sessions Judge are the members of the clerical staff employed in the subordinate Courts whose names have been brought on the relevant list maintained under rule 3 as accepted candidates. These clerks are members of the same establishment or functionaries attached to the Subordinate Courts under the District and Sessions Judge. The appointment of any of these persons, hence, to the post of clerk of Court clearly and obvionsly implies promotion to a higher rank--both by virtue of status and emoluments attached to the post of the Superintendent to the District and Sessions Judge. It is not open to the appointing authority to appoint any person to the post of Superintendent directly however well-qualified or of exceptional merit he may be. Thus, the appointment to the post of Superintendent in the establishment of District and Sessions Judge is one by way of promotion and is not by way of first appointment.

(Paras 26 and 32).

Held, (per majority Sandhawalia and Mittal, JJ, Gujral, J. contra), that by virtue of Article 235 of the Constitution, the High Court is vested with the control over the functionaries and ministerial staff attached to the District Courts and Courts Subordinate thereto. This control includes the power of promotion to all such functionaries. The High Court alone is the best Judge as to which of these functionaries and the ministerial staff of the Subordinate Courts is fit or worthy for promotion to a higher rank. The power to issue instructions in this regard would, therefore, be vested in the High Court. The field of promotion of these functionaries being entirely and exclusively within the area of the High Court's control, any intrusion therein would be unwarranted in view of the provisions of the Constitution. Any instructions or rules framed by the State Government in regard to the promotion of its employees would, therefore, not be applicable to the functionaries attached to the Subordinate Courts because the sole control thereof vests in the High Court. If any such instructions are sought to be imposed upon the functionaries exclusively within the control of the High Court, it would tantamount to impunging on this control vested in it by Article 235 and, therefore, unconstitutional. Thus, Government instructions requiring reservation of higher posts to be filled

up by promotion from amongst the members of Scheduled castes are not applicable to the ministerial staff of Subordinate Courts.

(Para 34).

Held, (Per Gujral J, contra) that the rules were made by the High Court by virtue of the powers delegated to it by the Governor as the power to make these rules vested in him or his nominee. In making these rules the High Court acted as the nominee of the Governor as the power to make appointments of the ministerial establishment of the Courts subordinate to the High Court vested in the Governor under the Government of India Act 1935 and the High Court on its own could not either make these appointments or makes rules under which these appointments could be made. The Constitution of India has made no separate provision for the appointment of the ministerial staff of the Courts subordinate to the High Court and articles 309, 310 and 311 would be applicable to these appointments also. As no rules have been framed by the State Legislature or by the Governor or his nominee under the proviso to Article 310, the rules of 1940 framed by the High Court as nominee of the Governor would continue to be in force as these are saved by Article 372 of the Constitution and these rules can be altered or modified by executive instructions of the Governor. There is nothing in Article 235 of the Constitution which in any manner takes away the right of the Governor to make rules regarding appointment and conditions of service of the ministerial staff of the Courts subordinate to the High Court. Thus, the Governor has the power to make rules regarding appointment and conditions of service of the ministerial staff of the Courts subordinate to the High Court and the instructions issued by the State Government requiring reservation of higher posts to be filled up by promotion from amongst the scheduled castes would equally govern the appointment to the post of Superintendent as it is within the power of the State Government to issue these instructions which relate to the conditions of service of the ministerial staff of the District and Sessions Judge's Courts.

(Paras 47 and 48).

Held, (per Gujral, J. contra) that though the selection for the posts of superintendents is limited to the clerical staff employed in the Subordinate Courts, but these posts are filled by appointment and not by promotion and that these posts are on a provincial cadre as against the other posts which are on a district cadre. No doubt for a clerk working in a subordinate Court, the appointment as superintendent would amount to promotion in life in the sense that he would have better status and emoluments, but this would not amount to promotion in the sense in which the expression is used in Article 235. Thus the post of Superintendent to the District and Sessions Judge is filled by appointment and not by promotion

and the power to fill these posts rests with the High Court, not because of the power of control it has under Article 235, but because of the power delegated to it by the Governor.

(Paras 50 and 52).

Case referred by Hon'ble Mr. Justice S. S. Sandhawalia, on December 5, 1972 to the Division Bench for decision of an important question of law involved in the case. The Division Bench consisting of Hon'ble Mr. Justice Man Mohan Singh Gujral and Hon'ble Mr. Justice Rajendra Nath Mittal on October 10, 1974 again referred the case to a Full Bench and the Full Bench consisting of Hon'ble Mr. Justice S. S. Sandhawalia, Hon'ble Mr. Justice Man Mohan Singh Gujral and Hon'ble Mr. Justice Rajendra Nath Mittal, finally decided the case on 17th February, 1976.

Petition under Articles 226 and 227 of the Constitution of India praying that:—

(i) *a writ in the nature of certiorari quashing the order dated February 16, 1971 (Annexure B), and order dated February 11, 1971 (Annexure B-I) rejecting the representation and refusing to consider the petitioner for the post of Superintendent, be issued;*

(ii) *a writ in the nature of mandamus directing respondents to consider the petitioner for the post of Superintendent and to promote him to the post of Superintendent, in the office of District and Sessions Judges, Punjab, be issued;*

(iii) *any other writ, order or direction as this Hon'ble Court may deem fit and proper, under the circumstances of the case, be issued;*

Kuldip Singh, Advocate with R. S. Mongia, Advocate, *for the petitioner.*

Mohinderjit Singh Sethi, Advocate with Avtar Singh, Advocate, *for respondents.*

Sandhawalia, J.—(1) The two salient constitutional issues which arise in this reference to the Full Bench may be conveniently formulated in the following terms :—

(1) Whether the control of the High Court over District Courts and the Courts subordinate thereto, as envisaged by Article 235 of the Constitution, extends to all the functionaries attached to the said Courts.

(2) If so, whether the promotion of such functionaries is exclusively within the ambit of the control of the High Court.

(2) The facts giving rise to the above and also other legal issues are not in serious dispute. Amar Singh, petitioner, joined Government service in 1944, but on the separation of the Executive from the Judiciary, he was assigned to the latter, as a Clerk, on 28th February, 1965. He was later promoted as an Assistant and confirmed as such and, at present, is holding the post of Clerk of Court to the Senior Subordinate Judge, Amritsar. He is a graduate but his particular claim is that he belongs to the Kamboj community which has been declared as a backward class by the Government. Reliance is placed on Chapter 18-A of the High Court Rules and Orders, Volume I, for the averment that for promotion to the posts of Superintendents, the Clerks who are graduates are to be given preference and further that such promotion is to be made by way of selection from amongst the Assistants. It is averred that out of the 12 Assistants working in the District of Amritsar, the petitioner is the only one who belongs to the backward class and seniority-wise he ranks at No. 2, one Sampuran Singh being the only one ranking higher to him.

(3) It has been then averred that for promotion to one post of Superintendent which has fallen vacant, the District and Sessions Judge, Amritsar, has recommended the names of Sampuran Singh above-said and one Man Singh who is alleged to be junior to the petitioner. He claims that Sampuran Singh being only a matriculate, the petitioner is the only Assistant entitled to be considered for promotion to the post of Superintendent. However, for unknown reasons, the name of the petitioner has been excluded from the recommendation made to the Hon'ble High Court by the District and Sessions Judge. Consequently, the petitioner made a representation to the High Court through the Registrar, that his name should also be included in the panel of persons who are to be considered for promotion to the post of Superintendent, but this was rejected *vide* intimation Annexure 'B' conveyed to him. Particular reliance has been placed on behalf of the petitioner on the Punjab Government instructions dated the 12th September, 1963, and the 14th January, 1964, Annexures 'C' and 'C.1', to the effect that reservations for scheduled castes and backward classes should be made in accordance with the method prescribed therein. It is claimed that by virtue

of these instructions, the petitioner who belongs to the backward class has to be selected in preference to the other officials and consequently it was incumbent on the District and Sessions Judge to recommend the petitioner's name for appointment to the post. Indeed, it is the case that the petitioner is the only person who can be so promoted to the post of Superintendent in view of the instructions Annexures 'C' and 'C. 1' which have been issued under Article 16(4) of the Constitution of India and which confer a preferential right of promotion upon the petitioner for holding the higher post. To reiterate his claim for promotion, the petitioner made another representation *vide* Annexure 'D', dated 20th February, 1971, but the same had not even been replied to. The gravemen of the petitioner's claim is that by virtue of the Government instructions contained in Annexures 'C' and 'C. 1' he is not only entitled to be considered for promotion to the post of Superintendent but indeed he is the only eligible candidate for the same.

(4) The written statement has been filed on behalf of the respondents by the Registrar of this Court. Therein the factual averments in paras 1 to 3 of the petition are not controverted. However, as regards para 4 it is pointed out that directly the relevant provisions applicable to the case of the petitioner are the Rules for Appointment and Control of Clerks of Court, (now Superintendents) to the District and Sessions Judges. The said Rules have been reproduced *in extenso* in the return. It has been averred that there are in fact 10 posts of Assistants in the general line in Amritsar Sessions Division and the petitioner ranks at No. 5 in the seniority list. It is admitted that no other Assistant in that District belongs to the backward classes. The reason pleaded for the exclusion of the petitioner's name from the recommendations made for promotion to the post of Superintendent is that the District and Sessions Judge did not consider him fit for promotion and also because the official's knowledge in civil and criminal law was not considered to be adequate. It is admitted that the first representation of the petitioner on the subject was rejected *vide* orders of the Hon'ble the Chief Justice and the second application made by the petitioner was not replied to because by then the matter had become *sub judice* due to the filing of the present writ petition. In regard to the Punjab Government instructions on the point it is averred that the members of the backward classes whose yearly income exceeds Rs. 1,800 cease to enjoy the privileges granted in their favour. The

petitioner's income having now exceeded that amount he, therefore, is not entitled to claim any such preferential privilege.

(5) In the replication filed on behalf of the petitioner he has more or less reiterated his earlier stand. A short affidavit in reply thereto has been placed on the record by the Registrar which highlights the fact that the High Court had itself issued instructions dated the 20th November, 1969, to all District and Sessions Judges whereby it has been directed that the reservation of posts for the members of the scheduled castes and backward classes is to be made at the first stage of appointment only and not in the case of promotion to higher rank in the Services attached to the Civil and Sessions Courts within the State.

(6) It is evident from the aforesaid pleadings that the core of the matter here is whether the Government instructions Annexures 'C' and 'C. 1' (which provide for reservation in favour of the scheduled castes and backward classes even at the stage of promotion) are at all attracted to the case of the promotion of the petitioner to the post of a Superintendent. In case these instructions apply then what result will flow from their obvious conflict with the decision and direction given by this Court to the effect that such reservation is to be made only at the initial stage and not at the subsequent stages of promotion.

(7) To clear the ground at the very outset it may be mentioned that initially the learned counsel for the parties had raised some arguments on the assumption that Article 229 of the Constitution might be attracted or be applicable to the case of the petitioner as well. Ultimately it has become the common case of the parties that this Article had no application whatsoever and the directly relevant Constitutional provision was only Article 235.

(8) In order to exclude the case of the petitioner totally from the ambit of Article 235, his learned counsel Mr. Kuldip Singh had first contended that the control envisaged by this Article is limited and confined only to the members of the Subordinate Judicial Service of the State. In fact the argument is that the control of the High Court extends only to the Presiding Officers of the District Courts or the Courts subordinate thereto and not at all to the functionaries or the ministerial staff attached to them. It is the contention that whilst the Presiding Officers are amenable to the control

of the High Court yet their functionaries and the staff being the appointees of the State are entirely controlled and governed by the State Government and the High Court has no control over them. Counsel submits that the very opening part of Article 235 referring to the District Courts and the Courts subordinate thereto means only the Presiding Officer of the District Court and the Presiding Officers of the Courts inferior thereto.

(9) Since the controversy must inevitably revolve around the language of Article 235, it is first apt to set it down for ease of reference.

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

(10) What first meets the eye here is the fact that in the very opening part of the above quoted Article the terminology used is "District Courts and the Courts subordinate thereto" and their control has been squarely vested in the High Court. To my mind this terminology has been used compendiously to include within it both the Presiding Judge and the functionaries and staff attached to him. If the intention of the framers of the Constitution was to confine and constrict the control of the High Court only to the Presiding Officers of the District Courts and the other subordinate Courts then such wide ranging terminology would not have been used. Indeed, then the apt language would have been the "District Judge and Judges subordinate to him." It has to be kept in mind that the preceding Articles 233 and 234 had in terms used the word District Judge and it, therefore, follows that when in Article 235 the language was changed to use the expression "District Courts", it was not without meaning. On a plain grammatical construction of the words "District Courts and the Courts subordinate thereto" it seems to follow that this must compendiously include all persons attached

thereto without any finical distinction between the Presiding Officer and the functionaries attached to him.

(11) The conclusion abovesaid is further reinforced when reference is made to the later part of Article 235 of the Constitution as well. This, in terms, refers to persons belonging to the subordinate judicial service and holding posts inferior to that of a District Judge. If the control was to be limited only to this set of persons or the Presiding Officers of the Courts only, then any mention of the "District Courts" as a whole and the "Courts subordinate thereto" as such in the opening part of the section would be both unnecessary and misleading. If there was any such intention to be conveyed, Article 235 could have been plainly drafted in its opening part as : "The Control over persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge (including the posting and promotion of, and the grant of leave to such persons) shall be vested in the High Court, but nothing........." Indeed, on the construction which Mr. Kuldip Singh canvassed for, the use of the words "District Courts" and "Courts subordinate thereto" would become mere surplusage and a patent redundency. It is a settled canon of construction that no part of a statute is to be interpreted as mere surplusage or to render substantial portion thereof as *otiose* except for very compelling reasons. It is more so when construing the Constitution itself because the founding fathers would not have used these words without a meaningful purpose.

(12) Historically also, it is instructive to make a passing reference to sections 254 and 255 of the Government of India Act, 1935, which in a way appear to be the predecessor provisions and analogous to the present Articles 233, 234 and 235 of the Constitution. Reference in this context may be made to the majority judgment in the Full Bench case of *State of Punjab* v. *Om Parkash Dharwal and another,* (1). In the aforementioned sections, no reference was made to the control of the High Court over the Districts Courts and the Courts subordinate thereto. An express departure was made from the language and tenor of the sections of the Government of India Act, 1935, by introducing the control of the High Court with particular reference to the District Courts as such as also the Courts subordinate to them in the corresponding Articles of the Constitution. This was obviously designed to deviate from the earlier provisions and

(1) I.L.R. 1972(2) Pb. & Haryana 289.

the express change cannot be rendered virtually nugatory either by construing the words as a mere surplusage or so restricting and confining their meaning as to include nothing else but the Presiding Officers of these Courts within its ambit.

(13) On principle also, we find the argument that the control of the High Court is confined only to the Presiding Officers as one which would be patently subversive of the doctrine of the independence of judiciary which is admittedly one of the cardinal principles of the Constitution. One cannot imagine a subordinate Court functioning effectively in which the Presiding Officer alone is under the Control of the High Court while all other functionaries and the administrative staff attached thereto are neither under the control of the High Court nor that of the Presiding Officer himself but are wholly controlled and governed by the State Government. Such a situation appears to me in practice to be wholly destructive of the harmonious and effective working of the Subordinate Courts. The argument of the learned counsel for the petitioner postulates a duality of control within the same subordinate judicial Court. Such a situation has been disapproved and deprecated by their Lordships of the Supreme Court in the recent case of *The High Court of Punjab and Haryana etc.* v. *The State of Haryana and others* (2). A similar view in the following terms was expressed by the majority in the Full Bench judgment of *B. R. Guliani* v. *Punjab and Haryana High Court through the Registrar* (3),—

> "Disciplinary control cannot be divided between two authorities, viz., the High Court and the Governor."

Indeed, it needs no great erudition to hold that unless there is an effective control and power over its functionaries, no Court can effectively discharge the functions enjoined upon it by law.

(14) The analogy of Article 229 of the Constitution also necessarily comes to mind. In the context of the High Court itself the administrative staff thereof has been put entirely within the power and control of the Chief Justice including even the power of appointment and dismissal etc. and the prescription of their conditions of

(2) A.I.R. 1975 S.C. 613.
(3) A.I.R. 1975 Pb. & Haryana 265 (F.B.).

service. As regards the functionaries and the staff of the District Courts, and the Courts subordinate thereto, the Constitution did not go that far and instead vested the control over the same in the High Court by virtue of Article 235. It does not seem to stand to reason that the High Courts and through them the Presiding Officers of the subordinate Courts would be denuded of powers and control over their ministerial staff for the purpose of discharging their functions. I am of the view that apart from the clear language of the statute such an interpretation seems to be untenable on principle.

(15) Mr. Kuldip Singh had fairly conceded that he could cite no authority for the rather curious proposition which he had sought to advance. On the other hand, the view I am inclined to take against the contention raised on behalf of the petitioner finds support from precedent. In *Mohammad Ghouse* vs. *State of Andhra Pradesh* (4), Jaganmohan Reddy, J. speaking for the Bench has observed in the clearest terms as follows :—

> "The learned counsel for the petitioner says the word 'Court' used in Art. 235 does not signify the control over the person presiding over it. We must reject this argument as untenable. Both in Articles 227 and 235, the word 'Court' has been used and it cannot be said that framers of the Constitution had not used this word to include persons presiding over those Courts or other functionaries of those Courts. While the use of the word 'Judge' may denote only the person, the word 'Court' when used not only includes the person presiding over that Court, but also all the functionaries of that Court and any matters pertaining thereto. The ordinary meaning to be given to this word not only includes the building in which the Court is held, but also the Judges and officials who preside there."

The above-said view was, in terms, approved and followed by the Full Bench in the celebrated case *Nripendra Nath Bagchi* vs. *Chief Secretary of West Bengal* (5), with the following observations :—

> "This case then came back to the Andhra High Court and the further decision of the Andhra High Court is reported in

(4) A.I.R. 1959 A.P. 497.
(5) A.I.R. 1961 Calcutta 1.

Mohammed Ghousa v. *State of Andhra Pradesh* (6) holding that (1) the word "Courts" includes persons presiding over those Courts and other functionaries of those Courts and that (2) the High Court has certainly jurisdiction to hold enquiries into the conduct of judicial officers and it is clear that it is not confined merely to the holding of a preliminary enquiry for the purpose of ascertainment whether there is a *prima facie* case for answering the charge. We respectfully agree with these two decisions of the Andhra High Court."

As is well known, the aforementioned judgment of Calcutta High Court was later affirmed by their Lordships and is reported as *State of West Bengal and another* v. *Nripendra Nath Begchi* (7). Indeed, in that judgment also the following observations again seem to lend patent support to the view I am inclined to take :—

"In the case of the District Judges, appointment of persons to be and posting and promotion are to be made by the Governor but the control over the District Judge is of the High Court. We are not impressed by the argument that the word used is "District Court" because the rest of the article clearly indicates that the word "court" is used compendiously to denote not only the court proper but also the presiding Judge. The latter part of Article 235 talks of the man who holds the office."

(16) On principle and the weightage of precedent I conclude that the control vested in the High Court squarely extends to the Presiding Officers and also to the functionaries and ministerial staff attached to the District Courts and the Courts subordinate thereto.

Repelled on his first point, Mr. Kuldip Singh then lowered his sights and contended that even assuming that the control of the High Court extends over the functionaries of the subordinate Courts yet this control would not envisage within its ambit the promotion of these functionaries. It was argued that promotion was outside the field of control and not within it. Some support was sought

(6) A.I.R. 1959 Andhra Pradesh 497.
(7) A.I.R. 1966 S.C. 447.

from the use of the word "including" in the opening part of Article 235 to raise an argument that there existed distinction in this regard between the members of the judicial service on one hand and the functionaries attached to these Courts on the other. Counsel submitted that it was by virtue of express conferment of the power of promotion by Article 235 that the members of the judicial service of the State had been brought within its range. It was said that otherwise the power of promotion was not within the ambit of the control simplicitor.

(17) I am unable to subscribe to the contention advanced on behalf of the petitioner. The nature and ambit of control vested in the High Court by Article 235 has been elaborated in a number of decisions of their Lordships to which a detailed reference is unnecessary. It suffices to mention that even a decade ago in *Nripendra Nath Bagchi's case, Hidayatullah* J., (as his Lordship then was) speaking for the Bench observed as under :—

> "The word 'control' as we have seen, was used for the first time in the Constitution and it is accompanied by the word vest which is a strong word. It shows that the High Court is made the sole custodian of the control over the judiciary."

The soleness of the High Court's control and the exclusive jurisdiction which it exercises by virtue thereof over the Courts subordinate to it and the functionaries attached thereto is now virtually settled law.

(18) I am unable to find any substance in the submission that the word "including" in the opening part of Article 235 was in any way intended to cut down the ambit of control as regards the functionaries attached to the subordinate courts or to draw any line of distinction between them and the Presiding Officers thereof. This word has been obviously used for the purpose of elaboration and clarifying the ambit of control in order to put the matter beyond the pale of controversy. In particular it has to be noticed that the word had to be used because of the preceding provisions of Articles 233 and 234. Article 233 has vested the appointment and the posting and promotion of District Judges in the Governor of the State in consultation with the High Court. Article 234 had provided for the appointment of the subordinate judiciary by the Governor of the

State in accordance with the rules framed by him in consultation with the Public Service Commission and the High Court. In view of these preceding provisions, in Article 235 it was clarified that so far as the members of the subordinate judiciary holding any posts inferior to the post of District Judge were concerned, their postings, promotion and grant of leave were within the control of the High Court. I am inclined to hold that the nature and the ambit of control of the High Court over the Presiding Officers of the subordinate Courts and the functionaries attached thereto is identical and no distinction and difference between the two was either intended or contemplated by the framers of the Constitution.

(19) On behalf of the respondents Mr. Sethi has forcefully contended that Article 235 of the Constitution of India definitely includes within its scope the promotion of the functionaries either by way of higher emoluments or by assignment to a post of higher rank. On principle he submitted that if promotions were to be excluded from the ambit of control then a very substantial content thereof would be totally eroded. What in actual practice would be the content of control of an authority over a functionary subordinate thereto if it has no power or authority in regard to his promotion? It may be said that the real sanction behind control over a public servant is ultimately the power to promote or demote. If the substantial content of the power of promotion is, therefore, substracted from control then the completeness thereof, which has been so often reiterated by the Supreme Court would be derogated from and indeed in a sense the power would be halved, if not rendered completely nugatory.

(20) It may be mentioned that Mr. Kuldip Singh, the learned counsel for the petitioner had frankly conceded that he could cite no authority in support of his proposition that the control envisaged in Article 235 of the Constitution of India did not extend to the promotion of the functionaries attached to the subordinate Courts. On the contrary, Mr. Sethi is able to buttress his argument with the weighty observations of the Division Bench in *Sathya Kumar and others* v. *The State of Andhra Pradesh* (8), to the following effect :—

> * * * . It clearly means that the promotion of a District Munsif to the post of a Sub Judge vests in the High Court

(8) A.I.R. 1971 A.P. 320.

> because the term 'control' includes the promotion also. It is because of this Article that Rule 2(1) states that such promotion shall be given by the High Court."

In arriving at the abovesaid conclusion the learned Judges of the Bench had relied upon and derived support from the ratio and observations made in *The High Court, Calcutta and another* v. *Amal Kumar Roy and others* (9). I am of the view that further reinforcement of the above-said view is provided by the recent enunciation of the law in *The State of Assam and another* v. *S. K. Sen and another* (10). Therein the constitution Bench after adverting to the earlier cases of *Nripendra Nath Bagchi* (supra) and *The State of Assam* v. *Hange Mahammad* (11), has concluded in the following terms: —

> "* * *. The result is that we hold that the power of promotion of persons holding posts inferior to that of the District Judge being in the High Court, the power to confirm such promotion is also in the High Court. We also hold that insofar as Rule 5(iv) is in conflict with Article 235 of the Constitution, it must be held to be invalid.
>
> On the basis of the last part of Article 235, an argument was purported to be advanced that the power of the High Court as to promotions was limited. In view of the plain words of the first part of this article, this argument has no basis."

(21) In the light of the above-said authoritative enunciation, I would hold that the power of promotion of all functionaries attached to the District Courts and the Courts subordinate thereto is exclusively vested in the High Court.

(22) An ancillary constitutional issue, which is relevant in the present case may also be briefly adverted to. The instructions of the State Government, annexures 'C' and 'C-1' making reservations in favour of Scheduled Castes and Backwards Classes at the stage of promotion are admittedly issued under the power derived from sub-clause (4) of Article 16 of the Constitution of India . At the

(9) A.I.R. 1962 S.C. 1704.
(10) A.I.R. 1972 S.C. 1028.
(11) A.I.R. 1967 S.C. 908.

beginning of the argument, the learned counsel for the petitioner had raised a tenuous contention that the High Court was not empowered to issue any instructions as regards the matter of reservation in the services in favour of Scheduled Castes and Backward Classes, because it did not fall within the definition of a State for the purposes of Article 12 of the Constitution. However, be it said to the credit of Mr. Kuldip Singh that he unreservedly withdrew this argument and conceded that the High Court would certainly be included in the term 'State' for the purposes of Article 12 in Part III of the Constitution of India. I proceed, therefore, on the admitted assumption in the present case that the High Court being a State for the purposes of fundamental rights it could equally issue instructions for the reservation of appointments under Article 16(4) of the Constitution. The relevant instruction in this case dated 20th November, 1969, therefore, flows from and is made by virtue of the power conferred by the provision abovementioned. It has directed that the reservation for Scheduled Castes, Scheduled Tribes and other backward classes shall be only at the stage of initial recruitment and not at the stage of promotion. On behalf of the petitioner, it is, thus, conceded that the High Court would have the power to issue instructions of this nature within its area of authority.

(23) In fairness to Mr. Sethi, however, I deem it necessary to notice that he had forcefully contended that the question of High Court being a State or not for the purposes of Part III need not be based merely on the concession of the petitioner. He submitted that the proposition was well-established by high authority. Reference in this context was made by him to the categorical observations in (*Sarmatma Sharan and another* v. *Hon'ble the Chief Justice, Rajasthan High Court and others*) (12) and support by way of analogy was rightly sought from (*Rajasthan State Electricity Board, Jaipur* v. *Mohan Lal and others* (13) *and Sheikrivammada Nalla Kova* v. *Administrator, Union Territory of Laccadives, Minicoy and Amindivi Islands, Kozhikode and others*). (14). Though these cases lend considerable support to the proposition

(12) A.I.R. 1964 Rajasthan 13.
(13) A.I.R. 1967 S.C. 1857.
(14) A.I.R. 1967 Kerala 259.

canvassed by Mr. Sethi, I deem it unnecessary and perhaps unsafe to pronounce a considered opinion on the point in a Constitutional field where the opposite view has not been advanced before us. For the purposes of this case, it suffices to proceed on the concession and the admitted position that the High Court is a State and, thus, competent to issue instructions by virtue of clause (4) of Article 16.

(24) The Constitutional ground having been cleared, I may now proceed to examine the solitary legal issue which remains, namely, whether the appointment to the post of Superintendent in the establishment of the District & Sessions Judge is by way of promotion or not. Herein also at the ultimate stage a very large field is no longer in dispute. The firm position taken on behalf of the respondents by the Registrar of this Court was that the relevant provisions governing the matter are the Rules relating to the Appointment and Control of Clerks of Court (now Superintendents) to the District & Sessions Judges. These rules have been quoted in *extenso* in the return. At the initial stage of the arguments Mr. Kuldip Singh, the learned counsel for the petitioner, had assailed both the source and the validity of these rules. In view thereof, we directed the learned counsel for the respondents to put in an additional affidavit and accordingly the Deputy Registrar (Rules and General Administration) of this Court has sworn as regards the history and the application of these rules to the present case. The facts and the position taken in the said affidavit was thereafter not sought to be controverted on behalf of the petitioner. In particular, it deserves to be noticed that the validity of these rules was made the subject-matter of challenge by way of five service appeals by Mr. Ram Rang (now an Advocate of this Court) and others in the year 1947. Considering the significance of the issues and their complexity Teja Singh, J. (as his Lordship then was) referred the matter to a larger Bench. In a considered decision the Division Bench consisting of A. N. Bhandari, J. (as his Lordship then was) and Mohammed Munir, J., by their judgment dated 16th July, 1947, upheld the validity of these rules and repelled any challenge thereto on the basis of Government of India Act, 1935. The impeaceable reasoning of this judgment with which concur has not even been assailed on behalf of the petitioner by his learned counsel. Indeed in the abovementioned background, Mr. Kuldip Singh had frankly conceded that the rules abovesaid were now beyond the pale of controversy and as will be noticed hereafter he, in

fact, relied upon them in support of his contentions in this context. I, therefore, proceed to examine the issue whether the appointment to the post of Superintendent is by way of promotion or otherwise in the light of the statutory rules on the point.

(25) Now the relevant provisions of the Clerks of Courts (now Superintendents) to the District & Sessions Judges (Appointment and Conditions of Service) Rules for the present case are rules 3 and 4 thereof. These may hence be set down :—

Rule 3.—*Enrolment of candidates* :

> "A list of candidates accepted for appointment as Clerks of Court to District and Sessions Judges shall be maintained by the High Court. This list shall be confidential and it shall not be necessary to inform any person that his name has been added to or removed from it........".

Rule 4.—*Qualifications* :

> "Appointment to the post of Clerk of Court to a District and Sessions Judge shall be made only from the list of accepted candidates maintained under rule 3. These candidates shall be chosen by selection from the clerical staff employed in subordinate Courts in the proportion of 50% Muslim, 30% Hindus and others and 20% Sikhs"

In passing, it may be observed that perhaps the latter part of rule 4, fixing a communal reservation in the service may no longer be of validity in the post-Constitution era. However, so far as the present case is concerned the issue does not arise at all.

(26) A plain reading of the abovesaid provisions makes it evident that these rules specifically bar a direct appointment to the post of the Clerk of Court which has now been redesignated as Superintendent. It is, thus, not open to the appointing authority, that is the High Court alone, to appoint any person to the post of the Clerk of Court directly however well-qualified or of a exceptional merit he may be. In Service Law, there is a patent and well-established distinction of posts which are to be filled by direct appointment in sharp distinction to those which are to be filled in

by way of promotion. Direct appointment and appointment by way of promotion have, thus, a well understood distinction. Where the appointing authority has the right to appoint a person to the post directly from the open market such power would be a power of direct appointment. On the other hand, where any such right is barred and the appointment to a higher post is to be made only by a process of selection from persons holding lower posts, then such a power obviously falls in the second category of appointment by way of promotion. A combined reading of rules 3 and 4, therefore, makes it evident that the persons eligible for promotion to the post are the members of the clerical staff employed in the subordinate Courts whose names have been brought on the relevant list, maintained under rule 3, as accepted candidates. That these Clerks are members of the same establishment or functionaries attached to the subordinate Courts under the District & Sessions Judges is not a matter of dispute. The appointment of any of these persons, hence, to the post of a Clerk of Court clearly and obviously implies promotion to a higher rank—both by virtue of status and emoluments attached to the post of Superintendent to the District & Sessions Judge. I conclude from the relevant statutory provisions, therefore, that the appointment to the posf of the Superintendent by virtue of this rule is clearly by way of promotion and cannot possibly be termed as a direct or a first appointment to the same.

(27) Mr. Sethi on behalf of the respondents has then rightly highlighted the fact that the only case set up by the petitioner himself in categorical terms in his averments in the writ petition throughout was that he was entitled to the post of a Clerk of Court by way of promotion only. On the petitioner's own showing he had joined Government service as a Clerk well-nigh 30 years ago and in any case was allocated to the subordinate judicial establishment nearly a decade ago in 1965. A reference to the well-drafted writ petition filed through counsel makes it manifest that the case entirely set up was that the petitioner was entitled either to be promoted to the post of the Clerk of Court or alternatively was at least entitled to be considered for such promotion. In paragraph 4, it has been, in terms, averred that for promotion to the posts of Superintendents the Clerks who were Graduates were to be given preference and the petitioner claimed this right of promotion on the basis that he was a Graduate and already working as an Assistant. In para 6, again there are categorical averments that the

names of two other persons had been recommended for promotion to the post of a Superintendent which had fallen vacant and the claim was that the petitioner alone was entitled to be considered for promotion to the post of the Superintendent. In para 7 again, the grievance was that the petitioner's claim to his being promoted as a Superintendent had been prejudiced because his name had not been recommended by the District & Sessions Judge of the District for consideration as such. The averments in para 8 again are to the effect that the petitioner was entitled to be on the select list or the panel of persons who were to be considered for promotion to the post of the Superintendent. In this context he had made a representation, *vide* Annexure 'A' which again leaves no manner of doubt that the claim on behalf of the petitioner was to be promoted to the higher post of Superintendent. Similarly, identical averment claiming that as a member of the Backward Class he was entitled to have preferential promotion to the post, etc., were made in para 11 of the writ petition and even in the prayer clause the relief expressly claimed is that the petitioner be promoted to the said post.

(28) It is self-evident from the above that indeed the only case set up in the pleadings of the petitioner was that he was entitled to be promoted to the post of a Superintendent. This was the case which the respondents were called upon to meet. I do not see how it is now open for the petitioner to deviate entirely from his pleadings and make a complete *volte face* by suggesting that he does not claim the post by way of promotion but otherwise. Solemn proceedings in Court cannot be reduced to tantalising tricks wherein a party may jump from one position to another at his convenience to the surprise and prejudice of the opponent. In the present context, I would thus confine the petitioner to his pleadings.

(29) It has also to be borne in mind that the instructions by the State Government, annexures 'C' and 'C-1' relate primarily to the reservation at the stage of promotion. So far as the stage of the initial recruitment is concerned, the position of both the High Court and the State Government is identical and there is not a hint of a conflict. A divergence of the instructions is only on the point of reservations at the stage of promotion. It was because of this conflict that this reference to a larger Bench had become necessary. This is more than evident from my referring order dated the 5th of December, 1972, when the case had come up before me sitting

singly. The position is again identical as regards the referring order of the Division Bench dated the 15th of October, 1974. Therein, it is clearly noticed that in view of the conflict of instructions issued by the State Government and by this Court it was necessary to secure the determination of the question whether the Government instructions regarding reservation of posts to be filled by promotion from members of the backward classes were applicable to the staff of the Subordinate Courts also, by a larger Bench. To allow the learned counsel for the petitioner to now contend that the petitioner's claim to the post is not by way of promotion would be eroding the very foundation for this reference. On this consideration also, it is not open to the petitioner to raise any such contention at this stage.

(30) Apart from the fact that this argument is not open to the petitioner, I am otherwise clearly of the opinion that the case here is clearly one of promotion. In the relevant rules, the word 'promotion' has not been defined. Therefore, the concept of promotion is not being construed here under any definition of a specific service rule or instruction but indeed in its larger and generic sense. The dictionary meaning of the word 'promote' as given in the authoritative Webster's New International Dictionary of the English language is in these terms :—

> "To exalt in station, rank, or honour, to elevate; raise; prefer; advance; as, to promote an officer."

Now applying the plain meaning of the word, there is hardly any doubt that an assignment to the post of Superintendent from that of an Assistant, which the petitioner now holds, would certainly be an exaltation in rank for him within the class of functionaries attached to the Courts of District Judge. It would clearly connote an elevating rise in status and an advance for the petitioner. There is no manner of doubt that the emoluments of the post of Superintendent are relatively higher then those of Clerks and Assistants. The post of Superintendent otherwise also implies a measure of administrative control and superiority over the Clerks and Assistants in the establishment of the District Judge. Thus even adhering to the plain dictionary meaning, the case of the petitioner would clearly come within the ambit of the word 'promotion'.

(31) The ordinary and plain meaning apart, the position appears to be identical when the word is interpreted as a relative

term of art and further has the support of precedent. In the authoritative law-lexicon "Words and Phrases", the following is stated:—

> "To promote a civil service employee means to advance to a higher position an official or employee previously appointed to an office of an inferior degree."

The above conclusion has been derived from the decision in *Mc. Ardle* v. *City of Chicago* (15). A similar view has been expressed in the following terms of Justice Hooker in *Campbell* v. *Patridge* (16).

"Laws have been enacted to carry this section into effect (chapter 370, p. 795, Laws 1899), and the inquiry, so far as this case is concerned, resolves itself into the question, was the detail or designation of the relator as a member of the telegraph bureau a promotion ? It is provided that telegraph operators of the city of New York shall have the rank and receive the salary of sergeants of police. The term "promotion" is defined as "the advancement, or the act of exalting in rank or honor" (Webster's Dict.), and as "advancement to a higher position, grade, class, or rank; preferment in honor or dignity." (Standard Dict. 1898).

> "In the police department of the City of New York, a patrolman receives an annual compensation of $1,400 or less; those who rank as roundsmen receive an annual compensation of between $1,400 and $1,500; while those who rank as sergeants receive an annual compensation of not less than $1,500 nor more than $2,000. Patrolmen and roundsmen are not eligible to appointment as captains. The selection of those officers is made from the list of sergeants, or those who rank as sergeants, namely, detective sergeants and telegraph operators. The designation of the relator, a patrolman, as telegraph operator, was intended to be permanent, and was therefore, a promotion for it carried with it advancement in rank and class, together with an advancement in the salary to be received by him."

(15) 172 III APP 142.
(16) 85 New York Supplement 853.

(32 I conclude that under the relevant rules, the mode provided for the appointment to the post of Superintendent is one by way of promotion and is not by way of first appointment.

(33) In fairness to Mr. Sethi, I must notice that to counter the argument of the learned counsel for the petitioner that the present case was one of first appointment he had taken the firm stance that even a first appointment to the post of various functionaries attached to the Subordinate Courts may well fall within the ambit of the soleness of control vested in the High Court by Article 235 of the Constitution. However, as I have arrived at the conclusion that the mode of appointment to the post of Superintendent is clearly by way of prmotion. it is unnecessary to examine the contention on behalf of the respondent in this context because in strictness it does not arise.

(34) The rather complex legal question having been answered, the specific issue regarding the applicability or otherwise of the State instructions, annexures 'C' and 'C-1' to the case of the petitioner, resolves itself with relative case. By virtue of Article 235 of the Constitution, the High Court is vested with the control over the functionaries and ministerial staff attached to the District Courts and the Courts subordinate thereto. This control includes the power of promotion to all such functionaries. The High Court alone is the best judge as to which of these functionaries and the ministerial staff of the Subordinate Courts is fit or worthy for promotion to a higher rank. The power to issue instructions in this regard would. therefore, be vested in the High Court. This being within the province of the High Court, ayn impinging thereon by an external agency would be an intrusion into the field of control exclusively given to it and, therefore, unwarranted. It has been authoritatively held in *The State of Assam and another* v. *S. N. Sen and another* (17) that the power of promotion to the post of a Subordinate Judge vested exclusively in the High Court under Article 235 of the Constitution and therefore a rule framed by the State Government to the effect that the confirmation of Subordinate Judges would be made by the Governor was struck down as unconstitutional. The ratio of the case in regard to the members of

(17) A.I.R. 1972 S.C. 1028.

the Subordinate Judicial Service applies *mutatis mutandis* to the functionaries of the district Courts and the Courts subordinate thereto. If the promotion of the members of Subordinate Judicial Service and even their confirmation is wholly within the control of the High Court, then it follows *a fortiori* that the promotion and confirmation of the functionaries of the Courts abovesaid must also stand on an identical footing. Consequently the field of promotion of these functionaries is entirely and exclusively within the area of the High Court's control and any intrusion therein would be unwarranted in view of the provisions of the constitution. Any instructions or rules framed by the State Government in regard to the promotion of its employees would, therefore, not be applicable to the functionaries attached to the subordinate Courts because the sole control thereof vests in the High Court. The matter can at best be viewed from two angles. Viewed from one angle it may be either said that such instructions are *ipso facto* intended to apply only to those civil servants of the State who are directly under its control and not to the functionaries of the subordinate Courts whose control has been expressly placed under the High Court. In any case if any such instructions are sought to be imposed upon the functionaries exclusively within the control of the High Court, then this would be tantamount to impinging on the exclusive control of the High Court vested in it by Article 235 of the Constitution and, therefore, unconstitutional.

(35) At the cost of some repetition, the matter may be succinctly put in a syllogism. The control of the functionaries of the Subordinate Courts is vested in the High Court by Article 235 of the Constitution. This control envisages in its ambit the power of promotion to the exclusion of the State Government or any other authority. Therefore, any instructions issued by the State in this context are not applicable to such functionaries and the High Court alone is competent to issue such instructions.

(36) The writ petition is thus found to be without merit and is dismissed. In view of the ticklish question of law arising herein, I leave the parties to bear their own costs.

Mittal, J.—I agree.

Man Mohan Singh Gujral, J.

(37) I have had the advantage of reading the judgment of Sandhawalia, J. However, with all the respect for my learned brother, I have not been able to persuade myself that the interpretation sought to be placed on Article 235 of the Constitution and the rules relating to the appointment and control of the Clerks (now Superintendents) of Court to the District and Sessions Judges could be reached without doing violence to the language of the relevant rules and without disregarding the import and effect of the proviso to Article 235 and the notifications of the Punjab Government dated 23rd June, 1937, and 18th July, 1939, under which the relevant rules were framed. I have, therefore, found it necessary to write a separate judgment.

(38) The facts necessary for the decision of this petition are not in dispute and lie in a narrow compass. The petitioner is at present working as Clerk of Court to the Senior Subordinate Judge, Amritsar, and not only belongs to a backward class but is also a graduate. The post of Clerk (now Superintendent) of Court (hereinafter referred to as the post of the Superintendent) having fallen vacant, recommendations for this post were made by the District and Sessions Judge, Amritsar. On coming to know that he had been ignored for being recommended for this post and that the names of two other Assistants working in the office of the District and Sessions Judge were sent, the petitioner made a representation to the High Court through the Registrar praying that his name be included in the panel of the persons who were to be considered for the post of the Superintendent. This representation was rejected and intimation about this rejection was conveyed to the petitioner by the District and Sessions Judge by letter dated 16th February, 1971. Not satisfied with the earlier representation, the petitioner again approached the High Court through another representation on 20th February, 1971, but no action could be taken on the representation as while it was being proceessed, the present petition was filed in March, 1971.

(39) Besides basing his claim for preference over Sampuran Singh and Man Singh who had been recommended by the District and Sessions Judge on grounds of seniority and higher educational qualifications, the petitioner primarily based his claim on the instructions issued by the Government with regard to the reservation

of posts for Scheduled Castes and Backward Classes. Copies of these instructions have been placed on record and have been marked as Annexures C and C1. On the strength of these instructions it is asserted in the petition that being a member of the Backward Classes he was to be selected in preference to the other officials, as these instructions govern the case of the petitioner and are fully attracted to the matter of selection to be made by the High Court to the post of the Superintendent to the District and Sessions Judge.

(40) The petition is contested on behalf of the respondents through the affidavits filed by the Registrar. The first affidavit is dated 7th January, 1972, and was filed in reply to the main petition. The second affidavit was filed on 27th May, 1972, in reply to the replication filed by the petitioner. As the question of the rules applicable to the petitioner was not clear, another affidavit was filed by Mr. Lobana, Deputy Registrar (Rules), on 12th September, 1975.

(41) In these affidavits the factual position set up by the petitioner is not controverted and it was accepted that the petitioner's name had not been recommended. The reason set up for ignoring the petitioner is that he was not considered fit for promotion by the District and Sessions Judge, as his knowledge of civil and criminal law was not considered to be adequate. It was also stated that the case of the petitioner was not covered by the instructions issued by the Punjab Government. In the affidavit dated 27th May, 1972, it was further clarified that the instructions issued by the High Court on 20th November, 1969, regarding reservation of posts for members of the Scheduled Castes and Scheduled Tribes were in fact applicable to the case of the petitioner, and in view of these instructions reservation of posts could only be made in the matter of initial recruitment and not at the time of promotion. The implication of this averment is that the post of Superintendent to the Court of the District and Sessions Judge is filled by promotion and not by recruitment and reservation could, therefore, not be claimed in terms of the High Court's circular letter and further that the instructions issued by the Government through Annexures C and C1 regarding the reservation of posts for members of the Scheduled Castes and Tribes in respect of posts to be filled by promotion were not applicable to the ministerial establishment of the Courts subordinate to the High Court including the post of the Superintendent.

(42) The inflexible stand taken by both the sides, therefore, claims answer to the following questions :—

(1) Whether the control of the High Court envisaged in Article 235 extends to all the functionaries working in the District Courts and courts subordinate thereto and whether this control would debar the Government from making rules or issuing instructions regarding the basis on which the post of the Superintendent to the District and Sessions Judge is to be filled ?

(2) Whether the post of Superintendent to the District and Sessions Judge is filled by promotion or recruitment ?

(3) In case, it is held that these posts are filled by promotion, then whether the instructions contained in Annexures C and C1 are applicable or the instructions issued by the High Court are applicable ? On the other hand, if the conclusion is that these posts are filled by recruitment, which out of the two sets of instructions would be attracted

(43) Before embarking on the task of examining the problem from various angles, it would be fruitful to analyse the rules applicable to the appointment of Superintendent to the District and Sessions Judge in their historical perspective. Before the anactment of the Government of India Act, 1935, the appointment of the Superintendents to the District and Sessions Judges was governed by section 35 of the Punjab Courts Act, 1908, and the rules were framed by the High Court under sub-section (3) of section 35. These rules are contained in chapter 18-A, Volume I, High Court Rules and Orders. After the coming into force of the Government of India Act, 1935, under clause (b) of sub-section (1) of section 241 of this Act, the power to make appointments to the civil service and posts in connection with the affairs of a province vested in the Governor or his nominee and under sub-section (2) the Governor could make rules for regulating the conditions of service of a person serving in connection with the affairs of a province. Though section 35 of the Punjab Courts Act, 1918 was repealed by the Government of India (Adaptation of Indian Laws) Order, 1937, but the rules contained in Chapter 18-A, Volume 1, High Court Rules and Orders, were saved by article 10 of this Order till other provision in this behalf was made by the competent authority.

(44) In the exercise of the powers conferred by sub-sections (1) and (2) of section 241 of the Government of India Act, 1935, the Governor of Punjab issued the following notification on 23rd June, 1937:—

"In exercise of the powers conferred by sub-sections (1) and (2) of section 241 of the Government of India Act, 1935, the Governor of the Punjab is pleased to make the following delegations of his authority to make appointments in the Judicial Department of the province, and to prescribe conditions of service for persons serving His Majesty in that Department. The powers here delegated of creating new appointments are subject to the proviso that they shall not be so exercised as to cause the relevant provisions in the provincial budget to be exceeded, and to the provisions of paragraphs 20.3 and 19.9 of the Book of Financial Powers :—

DELEGATIONS

Serial No.	Nature of delegation	To whom delegated	Extent
1	To make rules prescribing the conditions of service of the ministerial establishment of the courts subordinate to the High Court of Judicature at Lahore, and of the process Servers in those courts.	The Honourable Judges of the High Court of Judicature at Lahore	Full powers subject to the conditions that the rules shall require the previous approval of the provincial Government.
2	To make appointments to the posts of ministerial establishment and process servers in the Courts subordinate to the High Court.	District and Sessions Judges	Full powers.

* * * * * "

From a plain reading of the above notification it would be clear that the High Court was given the power to make rules prescribing the conditions of service of the ministerial establishment of the courts subordinate to the High Court, which would include Superintendent to the District and Sessions Judge. The appointment of

ministerial establishment including that of the Superintendent was, however, left to the District and Sessions Judge. In making these rules the High Court and in making these appointments the District and Sessions Judges were to act as delegates of the Governor. In the exercise of the powers conferred by the above notification the High Court framed rules called the Rules relating to the appointment and control of Superintendents of Court to District and Sessions Judges. The approval of the Government to these rules was conveyed to the High Court by letter dated 21st November, 1940. By virtue of article 10 of the Government of India (Adaptation of Indian Laws) Order, 1937, these rules superseded the earlier rules contained in Chapter 18-A, Volume 1, High Court Rules and Orders, so far as the appointment of Superintendents was concerned, as the earlier rules were only to remain in force until other provision was made by the authority empowered to regulate the matter in question. Before the approval of the Government to these rules was given the Governor of Punjab amended the notification dated 23rd June, 1937, by notification, dated 18th July, 1939, bearing No. 4654-J-39/23984, whereby the power to make appointments of Superintendents to the District and Sessions Judges was taken away from the District and Sessions Judges and was given to the High Court. Consequential changes were made in the earlier notification, with the result that the High Court became the delegate of the Governor so far as the appointment of Superintendent to the District and Sessions Judge was concerned.

(45) At this stage it would be useful to set down the rules governing the Superintendent in extenso, as reference will have to be made to these rules subsequently.

> "Rules relating to the appointment and control of Clerks (now Superintendents) of Court to District and Sessions Judges to be incorporated in the Civil Courts Establishment (Appointment and Conditions of Service) Rules (As amended up to June, 1947).
>
> 1. Posts of Clerks of Court to District and Sessions Judge shall be classed as selection posts and shall be on a provincial cadre.
>
> 2. *Authority competent to appoint.*—Appointments to the post of Clerk of Court to the District and Sessions Judge,

whether permanent or officiating, shall be made by the Hon'ble Judges of the High Court.

Provided that the District and Sessions Judge concerned may make an officiating appointment to the post of C.O.C. in a leave vacancy for a period not exceeding three months, subject to the confirmation by the Hon'ble Judges of the High Court.

3. *Enrolment of Candidates.*—A list of candidates accepted for appointment as Clerks of Court to District and Sessions Judges shall be maintained by the High Court, This list shall contain only such number of candidates as can be absorbed within two or three years. The list shall be confidential and it shall not be necessary to inform any person that his name has been added to or removed from it. Before any person is considered for acceptance as a candidate he shall sign a declaration in the following terms:—

"If appointed C.O.C. to a District and Sessions Judge I shall be prepared to be posted anywhere in the Punjab and I recognise that if I shall protest against the transfer, I shall be liable to disciplinary action."

4. *Qualification.*—Appointment to the post of C.O.C. to a District and Sessions Judge shall be made only from the list of accepted candidates maintained under Rule 3. These candidates shall be chosen by selection from the clerical staff employed in Subordinate Courts in the proportion of 50 per cent Muslims, 30 per cent Hindus and others and 20 per cent Sikhs.

5. *Conditions of Service.*—Clerks of Court to District and Sessions Judges will be liable to transfer under the orders of the Hon'ble Judges of the High Court from one Sessions Division to another within the Punjab.

6. *Punishments.*—(i) A.C.O.C. to a District and Sessions Judge shall in matters relating to discipline, punishments and appeal be subject to the Punjab Subordinate Services (Punishment and Appeal) Rules, 1930, or such other

Rules, as the Punjab Government may hereafter make in this behalf, and shall also be subject to the punishment of fine under section 36 of the Punjab Courts Act, 1918.

(ii) A District and Sessions Judge may impose on his C.O.C. the punishment of fine, censure or stoppage of increment. All other punishments shall be imposed by order of the Hon'ble Judges of the High Court. The order of the Hon'ble Judges of High Court in this behalf shall be passed by the Judge in Charge of the administrative business of the High Court.

7. *Appeals.*—(i) An appeal shall lie to the Hon'ble Judges of the High Court against an order of a District and Sessions Judge imposing any penalty on his C.O.C. The orders of the Hon'ble Judges shall be passed by the Judge in Charge of the Administrative business of the High Court.

(ii) An appeal shall lie to a Bench of two Judges of the High Court against an order of the Judge in Charge of the Administrative business of the Court imposing any penalty on C.O.C. to a District and Sessions Judge."

(46) Taking up the points that arise for decision in this case, it is well settled that, in view of Article 235 of the Constitution of India, the control of the High Court extends to all the functionaries working in the district courts and courts subordinate thereto. In *Mohammad Ghouse* v. *State of Andhra Pradesh* (4), it was held that the word "court" occurring in Article 235 includes not only the persons presiding over the district courts and the courts subordinate thereto but also all the functionaries of these courts and matters pertaining to them. This view was also followed by the Full Bench in *Nripendra Nath Bagchi* v. *Chief Secretary of West Bengal* (5), and the conclusion is, therefore, obvious that the control of the High Court envisaged by Article 235 extends not only to the presiding officers but also to the functionaries and ministerial staff attached to the district courts and the courts subordinate thereto.

(47) The second leg of the problem relates to the making of rules for the appointment of Superintendents to the District and

Sessions Judges. Though these rules were made by the High Court but this was done by virtue of the powers conferred on it by the Governor through notification dated 23rd June, 1937, as the power to make these rules vested in the Governor or his nominee. In making these rules the High Court acted as the nominee of the Governor under sub-section (2) (b) of section 241 of the Government of India Act, 1935. Even otherwise under the Government of India Act, 1935, the appointments of the ministerial establishment of the courts subordinate to the High Court vested in the Governor under sub-section (1) (b) of section 241 and the High Court on its own could not either make these appointments or make rules under which these appointments could be made.

(48) To complete the consideration of the first question it has to be seen as to what change, if any, has been brought about in the situation by the coming into force of the Constitution of India. So far as the appointment of the ministerial staff of the courts subordinate to the High Court is concerned, no separate provision has been made in the Constitution and Articles 309, 310 and 311 would be applicable to these appointments also. The recruitment and conditions of service of Superintendents can be regulated by an appropriate Act of the legislature or, if no such provision is made, by the rules framed by the Governor or such person as he may direct. As no rules have so far been made by the State Legislature or by the Governor or his nominee, under the proviso to Article 310 the rules framed by the High Court under the authority conferred by section 241(2) (b) of the Government of India Act, 1935, would continue to be in force, as these rules are saved by Article 372 of the Constitution. The power, however, vests in the State Legislature and the Governor to substitute these rules by another set of rules regulating the recruitment and conditions of service of the ministerial staff of the courts subordinate to the High Court. It also cannot be disputed that by executive instructions the Governor can add to or modify the rules made by the High Court in 1940, as these rules were made by the High Court as nominee of the Governor. It is well settled that even if the rules have been made by the State Legislature executive instructions can be issued to cover the area which is not covered by the rules made by the legislature. In the case of the rules made by the High Court in 1940, these, having been made by the High Court as nominee of the Governor, can be altered or modified by executive instructions of the Governor. There is nothing in Article 235 of the Constitution, which

in any manner takes away the right of the Governor to make rules regarding appointment and conditions of service of the ministerial staff of the courts subordinate to the High Court including the post of the Superintendent to the District and Sessions Judge.

(49) The principal contention raised on behalf of the respondent is that the post of Superintendent to the District and Sessions Judge is filled by promotion and not by recruitment and, therefore, these appointments fall within the power of the High Court, as the control envisaged in Article 235 of the Constitution extends to the making of promotion of the judicial officers manning the district courts and their ministerial staff. This aspect of the case is covered by the second question and the answer to this would depend on the interpretation of the rules made by the High Court in 1940 under which the appointments are made and the authority under which these rules were made. The heading of the rules clearly highlights that these relate to the appointment and control of the Superintendents. Rule 2 then provides the manner in which such appointments are to be made and it is stated that, whether the appointments are permanent or officiating, these may be made by the High Court. The appointment is to be made out of the list of accepted candidates maintained by the High Court and the candidates on this list are to be selected from the clerical staff employed in the subordinate courts. Rule 4, which relates to the qualifications, provides for the method by which the list is to be prepared. Disciplinary action against Superintendents can be taken under rule 6 and, according to this rule, the Punjab Subordinate Services (Punishment and Appeal) Rules, 1930, are applicable in their case.

(50) From the above discussion of the rules, it would emerge that though the selection for the posts of Superintendents is limited to the clerical staff employed in the subordinate courts, but these posts are filled by appointment and not by promotion and that these posts are on a provincial cadre as against the other posts which are on a district cadre. No doubt for a Clerk working in a subordinate court the appointment as Superintendent would amount to promotion in life in the sense that he would have better status and emoluments, but this would not amount to promotion in the sense in which the expression is used in Article 235. The argument that as recruitment is limited to the employees of the subordinate courts and is not by open competition or from open market, these appointments should be considered a case of promotion falling only within

the jurisdiction of the High Court is not plausible, as the source of recruitment is not the only test to determine whether the filling of a post amounts to promotion within the meaning of Article 235 or is an appointment outside the purview of Article 235. Some of the other relevant considerations are whether the post to which appointment is to be made is from the same cadre from which the selection is to be made or is from a different cadre, whether both the posts are governed by the same rules regarding recruitment and conditions of service, whether the appointing authority in both the cases is the same or different, whether the posts fall in the same pay-scale or different pay-scales and whether the rules governing the appointment treat this appointment as recruitment or as promotion. Moreover, promotion ordinarily signifies that persons out of whom the selection is to be made are members of one cadre having *inter se* seniority. In the case of promotion the selective process is generally limited to consideration of the seniority, if otherwise the senior incumbent is fit to perform the duties of the post to which the promotion is to be made. On the other hand, if the persons out of whom the selection is to be made are members of different cadres having no *inter se* seniority, it would not be a case of promotion from a junior cadre but a case of initial appointment or recruitment. In the case of appointment the element of selection plays a predominant role, as a choice has to be made on the basis of various considerations including the educational qualifications the past record of service and exeperience, if any, the general level of intelligence and suitability for a post, the academic career and special or higher qualifications, if any. In taking the above view I find support from the decision of the Andhra Pradesh High Court in *Sathya Kumar and others* v. *The State of Andhra Pradesh and others* (8) wherein the question arose whether Article 234 is applicable to first appointment to the judicial service of a State or also to subsequent promotion and in this context the true import of the word "promotion" was considered. It was ruled that while the term 'selection' involves the consideration of merit and ability and not merely of seniority, the term 'promotion' would ordinarily mean promotion on the basis of seniority unless of course the record of the officer is too bad to consider him for promotion.

(51) Examining the position of the Superintendent from the stand-points mentioned above, it would emerge that the clerical staff out of which the selection is to be made belongs to different

cadres, as under the relevant rules there has to be a separate cadre for each revenue district and a separate cadre for each Court of Small Causes insofar as the ministerial establishment of the District and Sessions Judge is concerned. A Clerk from one district has no *inter se* seniority with his counterpart in another district and in the list of selected candidates maintained by the High Court the names cannot be placed in any order of seniority. Furthermore, the appointment of Superintendents is governed by separate set of rules and the appointing authority is different from the authority which appoints the other ministerial staff of the Courts of District and Sessions Judges. Even the rules relating to the Superintendents treat their selection as appointment, as rule 2 speaks of the authority competent to appoint and the heading shows that these rules relate to the appointment and control of Superintendents. Furthermore, the notification dated 18th July, 1939, whereby the earlier notification dated 23rd June. 1937, was amended shows that the power to make appointment of Superintendents which vested in the Governor of Punjab was delegated to the Judges of the High Court and in this respect the High Court was given full powers. If it was a case of promotion, this notification would have mentioned it so, and the rules would have treated it as promotion out of the Clerks working in the various Sessions Divisions. To make the matter further clear it would be relevant to examine by way of comparison the rules contained in Chapter 18-A, which relate to the ministerial and menial establishment of District and Sessions Judges excepting the post of Superintendent. From these rules it would appear that first appointments are ordinarily to be made at the lowest level and the appointment to the higher grades of ministerial establishment is ordinarily to be made by promotion from lower grades. This is so provided in rule 6. This rule further provides the method by which permanent vacancies in the higher grades are to be filled by promotion. All the ministerial officers in one district are treated as forming a joint cadre but the cadre is provided in two grades, the lower grade and the higher grade. As observed earlier, the posts in the higher grade are filled by promotion from the posts in the lower grade and not by fresh recruitment. The post of Superintendent is not included in the joint cadre and is treated as forming a separate cadre.

(52) The above discussion would, therefore, clearly bring out that, from whatever view-point the matter is looked at, the conclusion would be that the post of the Superintendent to the District

and Sessions Judge is filled by appointment and not by promotion and the power to fill these posts rests with the High Court, not because of the power of control it has under Article 235 but because of the power delegated to it by the Governor under notifications dated 23rd June, 1937, and 18th July, 1939. There is also another aspect of the matter. If appointments to the posts of Superintendents are to be treated as promotion falling within the purview of the High Court because of the power of control vesting in it by virtue of Article 235 of the Constitution, there was no occasion for the Governor to have conferred this authority on the High Court to make rules governing these appointments or to make these appointments and furthermore there would have been no occasion to seek the approval of the Government to the rules framed by the High Court, as the High Court alone would have been competent to make the rules or to make appointments by way of promotion from the subordinate clerical staff. The control of the High Court over the district courts and courts subordinate thereto being absolute and unfettered, the High Court alone could make rules and could further make appointments by virtue of this power and need not have derived this power from the power of the Governor to make rules or to make appointments.

(53) The apparent conflict in the powers of control vesting in the High Court under Article 235 which includes the power to make promotions and the authority of the State Legislature or the Governor to make rules relating to the appointment of Superintendents to District and Sessions Judges, can also be resolved if the matter is looked at from another stand-point. It has been held by the Supreme Court in *Mohd. Sujat Ali and others* v. *Union of India and others* (18), that the right to be considered for promotion is a condition of service and that a rule which relates to the right of actual promotion or the right to be considered for promotion is a rule prescribing the conditions of service. It would, therefore, follow that the rules relating to promotion are rules regulating the recruitment and conditions of service. Framing of these rules would, therefore, fall within the ambit of Article 309. The actual working of these rules insofar as these rules relate to promotion would fall within the powers of the High Court by virtue of Article 235 and it is the High Court alone which can operate those rules

(18) 1974 (2) S.L.R. 508.

and apply them in individual cases. As in the cases of other services or posts in connection with the affairs of any State the Government can make rules or issue instructions, so in the case of posts of Superintendents the rules can be made by the State Legislature or the Governor in terms of Article 309 and instructions can also be issued by the Governor in matters where the rules are silent. The effective operation of these rules in individual cases insofar as the matter of filling of the posts of Superintendents is concerned has to be left to the High Court because of the power of control vesting in it by virtue of Article 235.

(54) Proviso to Article 235 clearly highlights that the power of control which the High Court has over district courts and courts subordinate thereto is subject to any law regarding the conditions of service governing the persons presiding over the district courts and the courts subordinate thereto and also the functionaries of those courts. The necessary inference is that even in matters of promotion which falls within the ambit of control the High Court is to proceed in accordance with the conditions of service prescribed under the law governing the ministerial staff of the district courts The expression "law regulating the conditions of service" refers to the rules which govern the incumbents of the various posts mentioned in this Article. Though in this Article it is not clearly specified as to which authority is to make the rules or lay down the law regulating the conditions of service, but it is obvious that reference in this context is to the rules made under Article 234 in respect of the judicial service of a State other than District Judges and to the rules made under Article 309 in respect of the services covered by Chapter XIV. So long as there is a law regulating the conditions of service of a person control over whom vests in the High Court under Article 235, the High Court is bound to exercise the control in accordance with that law and not in disregard of that law. A similar question was examined in *Sathya Kumar's* case (supra) wherein the question of control of the High Court under Article 235 was considered in the following words:—

> "Whereas the Rules referred to in Article 235 although have to be made by the Governor under the proviso to Article 309 the said Rules need not be made in consultation with the Public Service Commission and the High Court. The control which vests in the High Court under Article 235 and which includes promotion is made subject to the condition that it does not thereby authorise the High Court

to deal with the persons belonging to the judicial service and holding posts inferior to the posts of District Judges otherwise than in accordance with the conditions of his service prescribed under the law regulating the conditions of his service. *The law regulating the conditions of service indisputably has a reference only to the law referred to in Article 309. It empowers the appropriate Legislature to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of any State. The proviso empowers the Governor to make Rules regarding the recruitment and the conditions of service of persons appointed to such service and posts until provision in that behalf is made by or under an Act of the appropriate Legislature.* (Emphasis supplied).

It is true that Article 309 is made subject to the other provisions of the Constitution and in so far as it is relevant for our purpose it is Article 234 which would govern Article 309, the result of which is that while the Rules in regard to the recruitment of the persons other than District Judges to the Judicial service are to be made by the Governor in accordance with Article 234 in consultation with the Public Service Commission and the High Court, control over subordinate courts including promotions vesting in the High Court would be exercised in accordance with the law regulating the conditions of such service and until such a law is made under Article 309 by the Rules made by the Governor regulating the conditions of such service. *What must follow is that the promotions in subordinate judicial service as above can be made by the High Court in accordance with Rules made by the Governor under the proviso to Article 309. Such Rules, according to Article 309, need not be made by the Governor in consultation with the Public Service Commission or the High Court.* "(Emphasis supplied)."

The ratio of the above decision and the discussion made earlier, therefore, clearly support the contention of the petitioner that the instructions issued by the State Government and contained in Annexures C and C1 would govern the appointment to the post of the Superintendent, as it is within the power of the State Government to issue these instructions which relate to the conditions of

service of the ministerial staff of the District and Sessions Judges' Courts. That the above conclusion is plausible emerges from the ratio of the decisions of the Full Bench in *Madan Mohan Prasad and another* v. *Government of Bihar* (19) and of the Supreme Court in *State of Bihar* v. *Madan Mohan Prasad and others* (20). In the above case the Patna High Court concluded that though the High Court has the power to determine seniority because of the power of control vesting in the High Court under Article 235 but the High Court will have to do so in accordance with the rules framed by the Governor under the proviso to Article 309 of the Constitution. In other words, the implication is that the seniority will have to be worked out by the High Court in terms of the rules framed by the Government. The Supreme Court upheld this view when the State of Bihar went up in appeal and ruled as follows :—

> "Since Article 235 of this Constitution vests the power of confirmation in the High Court, it stands to reason that the power of determining the seniority in the Service is also with the High Court. Of course, in determining the seniority the High Court is bound to act in accordance with the Rules validly made by the Governor under the proviso to Art. 309 of the Constitution."

(55) It would be pertinent at this stage to consider the scope of the instructions of the High Court contained in letter dated 20th November, 1969, addressed to all District and Sessions Judges in Punjab and Haryana and the District and Sessions Judge, Union Territory, Chandigarh, as the case of the respondents is based on this letter. This letter is the basis of the respondents' contention that the instructions of the Government contained in Annexure C and C1 are meant only to regulate the initial appointment and are not applicable to the appointment of Superintendents. In this letter there is no mention of the post of Superintendent to the District and Sessions Judge and all that is stated in this letter is that the Government instrucions relating to the reservation of certain percentage of posts for the members of the Scheduled Castes, Scheduled Tribes and other backward classes should be followed in making initial recruitment when making appointment to the establishment attached to the District and Sessions Judge. As this letter is addressed to the District and Sessions Judges, the obvious

(19) A.I.R. 1970 Patna 432.
(20) 1976 S.L. Weekly Reporter 30.

implication is that the reference is only to those posts to which appointments are to be made by the District and Sessions Judges and not to the posts in respect of which the power of appointment lies with the High Court. The decision of the High Court mentioned in this letter is, therefore, not applicable to the posts of Superintendents of Court to District and Sessions Judges.

(56) Assuming that the decision of the High Court to restrict the applicability of the instructions issued by the State Government for the reservation of certain percentage of posts for members of Scheduled Castes, Scheduled Tribes and other backward classes to matters of initial recruitment only also applies to the posts of Superintendents, the conclusion whether this decision would govern the question or the instructions of the State Government would be applicable would depend on the interpretation of Article 12 and clauses (1) and (4) of Article 16. Under Article 16 the State is prohibited from making any law or rule which would take away equality of opportunity for all citizens. This prohibition, however, is only in respect of employment or appointment to any office under the State. To this an exception has been carved out by clause (4) of Article 16 which enables the State to make a provision for reservation of appointments or posts in favour of any backward class of citizens which is not adequately represented in the services under the State. Both under clauses (1) and (4) the emphasis is on employment or appointment to any office under the State and, read with Article 12, these clauses show that service or employment under the State means service or appointment under the Government and Parliament of India, under the Government and legislatures of the States and under local or other authorities within the territory of India or under the control of the Government of India. The effect of the word "under" was considered in *Dattatraya Motiram* v. *State of Bombay* (21), and it was held that employment or appointment to any office under the State showed that the word "appointment" must be read *ejusdem generis* with the word "employment" and such appointment or employment indicated that the person so appointed or employed held a position of subordination to the State. In *Gazula Dasaratha Ram Rao* v. *State of Andhra Pradesh and others,* (22), it was ruled that the expression "office under the State" in clauses (1) and (2) of Article 16 is not confined to offices to which

(21) (1953) Bombay 842=35 Bom. L.R. 323.
(22) A.I.R. 1961 S.C. 564.

the provisions of Part XIV applies but is also applicable to offices to which Part XIV may not apply. From the ratio of these two decisions, therefore, it would follow that in respect of those offices to which Part XIV of the Constitution would apply Articles 16(1) is applicable and that persons holding positions of subordination to the State Government would be held to be holding office under the State and in respect of those persons the State Government can make provisions for the reservation of posts or posts in favour of backward classes or citizens.

(57) Examining the position in respect of the posts of Superintendents of Court to District and Sessions Judges in the light of the above, it would emerge that the power to make these appointments rests with the State Government and that the High Court while making these appointments acts as a delegate under the authority conferred by notifications dated 23rd June, 1937, and 18th July, 1939, and the rules framed under these notifications and approved by the State Government. From this it would of necessity follow that the posts of Superintendents of Court to District and Sessions Judges are positions of subordination to the State Government and the State Government is, therefore, the proper authority to make provision under clause (4) of Article 16. No doubt the judiciary and the High Court have been recognised as a State within the meaning of Article 12 in certain circumstances and situations, but it is within the power of the State Government to act under clause (4) of Article 16 in respect of those employees who are covered by Part XIV and who are in a position of subordination to it. The competency of the State Government to issue the instructions contained in Annexures C and C1, therefore, appears to be beyond challenge and the High Court while making appointments of the Superintendents of Courts to the District and Sessions Judges is required to follow them.

(58) This brings us to the argument raised by the respondents' counsel that the petitioner having treated the post of the Superintendent as a post of promotion from that of a Clerk in the petition cannot be allowed to take up the position that this post is filled by appointment and not by promotion. The argument is intended to create a bar to raising the plea that these posts are filled by appointment or recruitment by the High Court as a delegate of the State Government and that the State Government is, therefore, empowered to make rules in respect of these appointments or to issue insructions covering the area regarding which there are no rules. I am,

however, unable to find any merit in this contention, as it is based on the assumption that pleadings are to be construed strictly and that the petition should be interpreted as if it was a statute. No doubt in paras 4 and 6 and some other paras the petitioner has conveyed the impression as if the post of the Superintendent was a post of promotion from that of a clerk, but it appears that in these paras the word 'promotion' has been used to indicate higher status and emoluments and not in the sense it is understood in Article 235. In coming to this conclusion I also find support from the fact that in some other paras the petitioner has clearly stated that he was entitled to the post of the Superintendent and that refusal to consider him for this post amounted to a violation of Articles 16(1) and (4) and he has thus treated this post as a higher but separate post to be filled by appointment and not by promotion in the manner posts are filled under rule VI of Chapter 18-A, Volume 1, High Court Rules and Orders, which relates to other ministerial posts in the district Courts. I am, therefore, unable to hold that the petitioner is debarred from raising the contention that the State Government could under Article 16(1) and (4) issue the instructions contained in Annexures C and C1.

(59) As a result of the discussion made above, I find that the petitioner is entitled to succeed and I consequently allow this petition and quash Annexures P and P1 and direct that the case of the petitioner be considered for the post of the Superintendent in the light of the Government instructions contained in Annexure C and C1. The parties are, however, left to bear their own costs.

MAJORITY JUDGMENT

In view of the majority opinion, this writ petition is hereby dismissed. The parties are, however, left to bear their own costs.

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