DEBABRATA DASH AND ANR. A

v.

JATINDRA PRASAD DAS & ORS.

(Civil Appeal No. 2316 of 2013)

MARCH 11, 2013 B

[R.M. LODHA, J. CHELAMESWAR AND MADAN B. LOKUR, JJ.]

Orissa Judicial Service (Special Schemes) Rules 2001: C

rr. 3, 4, 5 and 7 – Member of Orissa Superior Judicial Service (Junior Branch) – Ad hoc promotion as Additional District Judge in Fast Track Court created in terms of 11th Finance Commission recommendations – Claim that such ad hoc service be treated for the purpose of seniority in Orissa Superior Judicial Service (Sr. Branch) – Held: Not tenable – In the absence of any vacancy in the Senior Branch cadre of Superior Judicial Service to be filled up by promotion, no appointment to the Senior Branch of service by way of promotion can be made – On the date of appointment of the officer to ad hoc post of Addl. District Judge in Fast Track Court or on the date he joined the said post, there was no cadre post available – Promotion of the officer as an ad hoc Addl. District Judge pursuant to which he joined the post is traceable wholly and squarely to 2001 Rules and not to 1963 Rules – Officer has been rightly given benefit from the date the vacancy occurred in the Senior Branch cadre – Orissa Superior Judicial Service Rules 1963. D E F

The instant appeal was filed by two officers of the Orissa Superior Judicial Service (Senior Branch) directly appointed from the bar, challenging the judgment of the High Court whereby it allowed the writ petition of respondent no. 1 (writ petitioner), and directed the High Court on administrative side to treat the period of service G

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A rendered by the writ petitioner as ad hoc Additional District Judge (Fast Tack Court) for the purpose of seniority from the date of his joining the said post. The question for consideration before the Court was: "whether promotion of the writ petitioner as an ad hoc
B Additional District Judge vide Notification dated 5.1.2002 to the Senior Branch of the Superior Judicial Service for being posted in the Fast Track Court established out of 11th Finance Commission recommendations can be said to be an appointment in the Senior Branch cadre of
C Superior Judicial Service."

Allowing the appeal, the Court

HELD: 1.1. It is not in dispute that immediately before writ petitioner's ad hoc promotion to the Senior Branch
D of Superior Judicial Service for being posted in the Fast Track Court, he was a member of the Junior Branch of the Superior Judicial Service. There is also no dispute that there was no cadre post available on 05.01.2002 (on the date of ad hoc promotion for the writ petitioner) or
E 26.04.2002 (the date of joining the post) under the Orissa Superior Judicial Service Rules 1963. In the absence of any vacancy in the Senior Branch cadre of Superior Judicial Service to be filled up by promotion, no appointment to the Senior Branch of service by way of
F promotion can be made. [para 32-33] [346-G-H; 348-D]

1.2. It is to be noted that 72 posts of ad hoc Additional District Judges (Fast Track Court) were created out of 11th Finance Commission recommendations and these posts were to be filled up
G under the Orissa Judicial Service (Special Schemes) Rules 2001. These Rules were made to regulate the recruitment of Judicial Officers in the State of Orissa on ad hoc and purely temporary basis exclusively for implementation of the recommendations of 11th Finance
H Commission for upgradation of Judicial Administration

under upgradation for elimination of old pending cases. Rules 3 and 4 make it clear that the appointment made under 2001 Rules is purely on ad hoc and temporary basis for implementation of the Scheme. Rule 7 makes the provision that inservice Judicial Officer shall not claim regular promotion in the regular cadre on the basis of appointment made under this scheme. [para 32 and 35] [346-H; 347-A; 348-G-H; 349-A, B, E]

1.3. The writ petitioner's promotion as an ad hoc Additional District Judge by Notification dated 05.01.2002 pursuant to which he joined the post of ad hoc Additional District Judge on 26.04.2002 is traceable wholly and squarely to the 2001 Rules and not to be the 1963 Rules. The simple reason leading to this consequence is that there was no vacancy available which was to be filled up by promotion on that date in Superior Judicial Service (Senior Branch). Merely because the writ petitioner was adjudged suitable on the touchstone of the 1963 Rules, it cannot be said that he was given appointment to the post of ad hoc Additional District Judge under the 1963 Rules. [para 36 and 43] [349-F-H; 353-D-E]

Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Others **1990 (2) SCR 900 = (1990) 2 SCC 715 – relied on.**

O.P Singla and Another v. Union of India and Others **1985 (1) SCR 351= (1984) 4 SCC 450,** *Rudra Kumar Sain and Others v. Union of India and Others* **2000 (2) Suppl. SCR 573 = (2000) 8 SC 25,** *Brij Mohan Lal v. Union of India and Others* **2002 (3) SCR 810 = (2002) 5 SCC 1** *[Brij Mohan Lal 1] and Brij Mohan Lal v. Union of India and Others* **2012 (5) SCR 305 = 2012 (6) SCC 502** *[Brij Mohan Lal 2]; S.B. Patwardhan v. State of Maharashtra* **1977 (3) SCR 775 = 1977 (3) SCC 399; and** *Baleshwar Dass v. State of U.P.* **1981 (1) SCR 449 = 1980 (4) SCC 226 – referred to.**

A **1.4. On 05.01.2002 or 26.04.2002, there was no vacancy in the cadre of Superior Judicial Service (Senior Branch) for being filled up by promotion. Such vacancy in the Senior Branch cadre of the service occurred on 15.12.2003 and from that date the writ petitioner has been** B **given benefit of his service rendered in the Fast Track Court. [para 51] [356-F-G]**

Case Law Reference:

1985 (1) SCR 351	**referred to**	**para 4**
C **1990 (2) SCR 900**	**relied on**	**para 4**
2000 (2) Suppl. SCR 573	**referred to**	**para 4**
2002 (3) SCR 810	**referred to**	**para 4**
D **2012 (5) SCR 305**	**referred to**	**para 4**
1977 (3) SCR 775	**referred to**	**para 4**
1981 (1) SCR 449	**referred to**	**para 4**

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2316 of 2013.

From the Judgment & Order dated 15.11.2011 of the High Court of Orissa at Cuttack in Writ Petition (Civil) No. 21449 of 2011.

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Gopal Subramaniam, Ashok Kr. Parija, R.M. Patnaik, Anand Verma, Dhananjay Mishra, Gaurav Kejriwal for the Appellants.

G P.S. Patwalia, Ajay Singh, Ashok K. Mahanjan, Kirti Renu Mishra, Apurva Upmanyu, Sibo Sankar Mishra, Adbhut Pathak for the Respondents.

The Judgment of the Court was delivered by

H **R.M. LODHA, J.** 1. Leave granted.

2. The inter se seniority between the appellants and respondent no. 1 in the Senior Branch cadre of Orissa Superior Judicial Service is the subject matter of this appeal. A

3. In the writ petition filed by the respondent no.1 before the High Court, the principal question under consideration was whether the service rendered by him (writ petitioner) in the Fast Track Court as Additional District Judge is to be taken into account while fixing his seniority after regularization of his service in the Senior Branch cadre under the Orissa Superior Judicial Service Rules, 1963 (for short, "1963 Rules"). The High Court in the impugned judgment dated 15.11.2011 has answered the above question in favour of the writ petitioner, allowed the writ petition and directed the Orissa High Court on administrative side to treat the period of service rendered by the writ petitioner in the Fast Track Court for the purpose of seniority from the date of his joining the post i.e., 26.04.2002 and re-fix his seniority in light of the judgment. B C D

4. The appellants, direct recruits, who were respondent nos. 3 and 4 in the writ petition, have challenged the above judgment principally on the ground that it is not consistent with the 1963 Rules, Orissa Judicial Service (Special Schemes) Rules, 2001 and Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007. The appellants contend that the High Court has not correctly applied the decisions of this Court in *O.P Singla and Another v. Union of India and Others*[1], *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Others*[2], *Rudra Kumar Sain and Others v. Union of India and Others*[3], *Brij Mohan Lal v. Union of India and Others*[4] *[Brij Mohan Lal 1] and Brij Mohan Lal v. Union of India and Others*[5] *[Brij Mohan Lal 2].* E F G

1. (1984) 4 SCC 450.
2. (1990) 2 SCC 715.
3. (2000) 8 SCC 25.
4. (2002) 5 SCC 1.
5. (2012) 6 SCC 502. H

A 5. The brief facts leading to the controversy are these: The writ petitioner joined the judicial service in the State of Orissa as Munsiff on probation on 15.07.1981 under the Orissa Judicial Service Rules, 1964. He was promoted to the Junior Branch of the Superior Judicial Service on 19.07.1999. On B 05.01.2002, the writ petitioner, who was continuing as a member of Superior Judicial Service (Junior Branch), was appointed, on ad hoc basis, as Additional District Judge in the Fast Track Court. Pursuant to the above order of appointment, on 11.04.2002 writ petitioner was posted as an ad hoc C Additional District Judge in the Fast Track Court at Bargarh where he joined on 26.04.2002.

6. On 13.01.2003, the appellants were appointed in the Senior Branch cadre of Orissa Superior Judicial Service by way of direct recruitment under the 1963 Rules. Pursuant to the D posting order dated 22.01.2003, they joined as Additional District and Sessions Judges at Cuttack and Behrampur on 03.02.2003 and 07.02.2003 respectively.

7. By an order dated 28.05.2003, the tenure of writ E petitioner as ad hoc Additional District Judge (Fast Track Court), Bargarh was extended for a further period of one year or 31.03.2004 (whichever was earlier).

8. By a notification dated 15.12.2003, the writ petitioner was allowed to officiate in the Senior Branch of the Superior F Judicial Service on regular basis on account of a vacancy that arose due to retirement of an officer of the Senior Branch on 31.07.2003. The writ petitioner was posted on 19.01.2004 as Additional District and Sessions Judge, Bargarh pursuant to the notification dated 15.12.2003 to which post the writ G petitioner joined on 03.02.2004.

9. Appellant no. 1 was confirmed in the cadre of Senior Branch, Superior Judicial Service with effect from 03.02.2004 while appellant no. 2 was confirmed with effect from H 07.02.2004. The appellants were conferred selection grade

with effect from 03.02.2008 and 07.02.2008 respectively. A

10. The writ petitioner was substantively appointed in the cadre of District Judge with effect from 17.01.2007 and he was granted selection grade with effect from 22.10.2009.

11. On 13.11.2009, the writ petitioner submitted a B representation to the High Court on administrative side seeking seniority in the cadre of District Judge with effect from 26.04.2002, i.e., the date of his joining as ad hoc Additional District Judge (Fast Track Court), Bargarh. The claim of C seniority by the writ petitioner over and above the appellants was based on the ground that the period of his service as an ad hoc Additional District Judge (Fast Track Court) should be included for the purpose of computing his length of service in the cadre of Senior Branch, Superior Judicial Service under the 1963 Rules. D

12. A committee to consider the representation of the writ petitioner was constituted. The committee by majority opined that the writ petitioner's representation was liable to be rejected. On 02.08.2011 the Full Court of the High Court considered the E report of the committee. The representation of the writ petitioner was rejected on 08.08.2011. It was this administrative decision of the High Court that was challenged by the writ petitioner before the High Court on the judicial side.

13. The writ petition was contested by the appellants as F well as the High Court on the administrative side and the State of Orissa.

14. Before we deal with the relevant rules, reference may be made to the various notifications concerning the G appointments of the writ petitioner and the appellants. As noted above, by a notification dated 05.01.2002, the writ petitioner was allowed ad hoc promotion to the Senior Branch of the service. To the extent it is relevant, the said notification reads as under: H

"GOVERNMENT OF ORISSA
HOME DEPARTMENT
NOTIFICATION
Bhubaneswar the 5th January 2002.

xxx xxx xxx

xxx xxx xxx

No. 993/Sri Jatindra Prasad Das, an officer of Orissa Superior Judicial Service (Junior Branch) at present Adviser, Orissa Electricity Regularity Commission Orissa, Bhubaneswar is allowed adhoc promotion to the Senior Branch of the said service in the scale of pay of Rs. 10,650-325-15,850/- with effect from the date he joins as such until further order in pursuance of Rule 3,4 & 5 of Orissa Judicial Service, (Special Scheme) Rules, 2001 for his appointment as adhoc Additional District Judge in the Fast & Track Court established out of 11th Finance Commission Award."

15. The notification dated 11.04.2002 whereby the writ petitioner was posted as an ad hoc Additional District Judge pursuant to the notification dated 05.01.2002 reads as under:

"ORISSA HIGH COURT : CUTTACK

NOTIFICATION

Dated, Cuttack the 11th April, 2002.

No. 150/A: On being reverted to the general line, Shri Jatindra Prasad Das, an officer of Orissa Superior Judicial Service (Junior Branch) at present Adviser, Orissa Electricity Regulatory Commission, Bhubaneswar, who has been allowed ad hoc promotion to the Senior Branch of the said service vide Home Department Notification No. 1933 dated 05.1.2002 is transferred and appointed to be the Ad hoc Additional District Judge in the Additional

District Judge Court established out of the 11th Finance Commission Award in the Judgeship and Sessions Division of Sambalpur Bargarh Deogarh Jharsuguda with headquarters at Bargarh Vice Shri Susanta Kumar Patnaik transferred on promotion."

16. The appellants were appointed as direct recruits in the cadre of Senior Branch, Superior Judicial Service by a notification dated 13.01.2003 which reads as follows:

"GOVERNMENT OF ORISSA
HOME DEPARTMENT
NOTIFICATION
Dated, Bhubaneswar, the 13.01.2003

No. 2495/SJS/1-13/2002/HS. In pursuance of Rule 8 of the Orissa Superior Judicial Service Rules, 1963 Sri Debabrata Dash, Advocate, Mayurbhanj, Baripada is hereby appointed on probation for a period of one year on the Orissa Superior Judicial Service (Senior Branch) in the scale of pay of Rs. 10,610-335-15,850/- by direct recruitment with effect from the date he joins the said service.

No.2496/HS. In pursuance of Rule 8 Orissa Superior Judicial Service Rules, 1963, Sri Satrughana Fujahari, Advocate, Sambalpur is hereby appointed in probation for a period one year in the Orissa Superior Judicial Service (Senior Branch) in the scale of pay of Rs. 10,650-325-15,850/- by direct recruitment with effect from the date he joins the said service."

17. We may now refer to the relevant rules. The 1963 Rules have been made by the Governor of Orissa under the proviso to Article 309 of the Constitution of India for the regulation of recruitment to posts in, and the conditions of service of persons appointed to the Orissa Superior Judicial Service.

A 18. Rule 3(d) provides that "Service" means the Orissa Superior Judicial Service. An officer appointed to the service in accordance with Rule 8 is called the "Direct Recruit" under rule 3(f), while an officer appointed to the service in accordance with Rule 9 is called the "Promoted Officer" under rule 3(g).

B 19. In Rule 4, it is provided that cadre of service shall consist of two branches, (i) Superior Judicial Service (Senior Branch) and (ii) Superior Judicial Service (Junior Branch). The cadre of Superior Judicial Service (Senior Branch) comprises of diverse posts, including District and Sessions Judges and C Additional District and Sessions Judges. Rule 4(3) provides that the cadre of the Superior Judicial Service, Junior Branch, shall consist of 13 Chief Judicial Magistrates and 06 Additional Chief Judicial Magistrates.

D 20. Part III of the 1963 Rules which deals with recruitment, is crucial to the controversy. Rule 5 thereof provides as follows:

> "5. Recruitment to the service shall be made by the following methods, namely :
>
> E (1) In respect of the Senior Branch—
>
> (a) by direct recruitment in accordance with Rule 8, and
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> F (b) by promotion of officers from the Junior Branch of the service.
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> (2) In respect of the Junior Branch by promotion of officers of the Orissa Judicial Service (Class-I) in accordance with the Rule 10."

G 21. Rule 7 enables the government to fill up the vacancy in Senior Branch of the service in consultation with the High Court by direct recruitment or promotion. It reads as under:

> "7. When a vacancy occurs in the Senior Branch of the
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service, Government shall decide in consultation with the High Court whether it may be filled up by direct recruitment or promotion: A

Provided that the number of direct recruits in the Senior Branch of the service shall not exceed twenty-five per cent of the cadre posts mentioned in Sub-rule (2) of Rule 4." B

22. Rule 9 lays down as follows:

"9. (1) Whenever a vacancy in the Senior Branch of the service is decided to be filled up by promotion the Government shall fill up the same after due consideration of the recommendation of the High Court in accordance with sub-rule (2). C

(2) The High Court shall recommend for appointment to such vacancy, an officer of the Junior Branch of the service, who in the opinion of the High Court is the most suitable for the purpose: D

Provided that if for any reason, Government are unable to accept the recommendation as aforesaid they may call for further recommendations from the High Court to fill up the vacancy." E

23. Rule 17 makes provision for seniority of officers in the following manner. F

"17. Seniority of officers in the service shall be determined in accordance with the dates of substantive appointment to the service.

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Provided that a promoted officer, who may have been allowed to continuously officiate from a date prior to the date of appointment of a direct recruit, shall, if he is subsequently substantively appointed in the service without

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A reversion to his parent service, take his seniority in the cadre over such direct recruit."

24. In exercise of the powers conferred by the proviso to Article 309 read with Articles 233 and 234 of the Constitution of India, the Governor of Orissa, after consultation with the High B Court of Orissa, framed the rules entitled, "Orissa Judicial Service (Special Scheme) Rules, 2001" which we shall refer to as "the 2001 Rules" hereinafter. 2001 Rules were made to regulate the recruitment of judicial officers in the State on ad hoc and purely on temporary basis exclusively for C implementation of the recommendations of 11th Finance Commission for upgradation of judicial administration under upgradation grant for elimination of old pending cases. The 2001 Rules define "service" in Rule 2(f) which means the judicial service of the State of Orissa. Rules 3 and 4 of these D rules make provision for appointment which read as under:

"3. Appointment – Notwithstanding anything contained in the Orissa Superior Judicial Service Rules, 1963 and Orissa Judicial Service Rules, 1994 the appointment of E Additional District Judges on ad hoc and purely temporary basis for implementation of the Scheme will be made under these rules.

4. (1) The appointment made under these rules shall be purely on ad hoc and temporary basis. F

(2) The appointment shall be made initially for a period of one year and shall be liable to be terminated at any time without any prior notice.

G (3) During the term of such appointment the appointees will be under the administrative and disciplinary control of the High Court."

25. Rule 5 of the 2001 Rules prescribes eligibility. Clause (c) of sub-rule (1) of Rule 5 is relevant which reads as follows: H

"5. Eligibility. – (1) The appointment of Additional District Judges on ad hoc and purely temporary basis shall be made by the Governor on recommendation of the High Court from amongst;

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) in-service Chief Judicial Magistrates/Additional Magistrates having three years of service as such."

26. Rule 6 of the 2001 Rules provides that the selection of in-service Judicial Officers for ad hoc appointment under the scheme shall be based on scrutiny of their judgments and their service record.

27. Rule 7 of 2001 Rules provides that inservice judicial officer shall not claim regular promotion in the regular cadre on the basis of his/her appointment made under this scheme.

28. The Division Bench in the impugned judgment has observed that though the promotion of the writ petitioner in Senior Branch cadre of Superior Judicial Service was initially ad hoc but that was given to him after the High Court adjudged his suitability for promotion by following the 1963 Rules. The Division Bench observed that such ad hoc promotion was regularized vide notification dated 15.12.2003 under the 1963 Rules as the writ petitioner had rendered uninterrupted service. The Division Bench has referred to and considered the minutes of the meeting of the Full Court held on 14.12.2001 against agenda no. 3 which concerned promotion of officers of Junior Branch to the cadre of Senior Branch for their posting as ad hoc Additional District Judges against Fast Track Courts. The relevant portion of the minutes of the meeting dated 14.12.2001 referred to and considered by the Division Bench, reads as follows:

A "Considered the Judicial and administrative capabilities along with C.C.Rs. of the following officers in the cadre of Orissa Superior Judicial Service (Jr. Br.) for the purpose of their promotion to the cadre of Orissa Superior Judicial Service for their posting as ad hoc Additional District
B Judges against Fast Track Courts (Sr. Branch).

1. Shri G.R. Purohit, Secretary, Consumer Disputes Redressal Commission, Cuttack.

2. Shri M.K. Panda, Deputy Secretary, Orissa Legal
C Services Authority, Cuttack.

3. Shri J.P. Das, Adviser, O.E.R.C., Bhubaneswar.

Resolved that all the above named officers are found suitable for promotion to the cadre of O.S.J.S. (Sr. Branch)
D and accordingly their names be recommended to the State Government for promotion to the cadre of O.S.J.S. (Sr. Branch) for their appointment against the Fast Track Courts on ad-hoc basis."

E 29. The Division Bench, thus, found that promotion of the writ petitioner along with two others was considered by the Full Court taking into account their judicial and administrative capabilities and the confidential reports and thereafter the name of the writ petitioner was recommended to the state government
F for promotion to the Senior Branch of the service and such promotion could have been granted only under the 1963 Rules. In the opinion of the Division Bench the resolution of the Full Court dated 14.12.2001 has left no ambiguity that writ petitioner was promoted to the Senior Branch cadre in Superior Judicial
G Service under the 1963 Rules and his promotion as ad hoc Additional District Judge cannot be treated under the 2001 Rules. The Division Bench has held that the promotion of the writ petitioner to the Senior Branch has to be counted with effect from 26.04.2002 when he joined the post initially and his
H subsequent regularization deserves to be considered to be

effective from that date. A

30. In the impugned judgment, the Division Bench has held that the view taken by the High Court on administrative side was in ignorance of the law laid down by this Court in *Brij Mohan Lal 1*[4]. In paragraph 17 of the impugned judgment, the consideration of the matter by the High Court with reference to the Brij Mohan Lal 14 is as follows : B

> "17. The aforesaid direction of the apex Court clearly lays down the mandate that the promotees' service in such Fast Track Courts shall be counted towards regular C service. Moreover, the appointment of the petitioner was never on officiating basis for any particular period, but was a final selection in accordance with the Rules, 1963 and Scheme Rules 2001 and that is why the apex Court directed for filling up all the consequential vacancies in the D lower cadre from which the promotions are given in Fast Track Courts simultaneously. Moreover, it was also made clear that the persons appointed under the Scheme shall get all service benefits which are applicable to the members of Judicial Service of the State on equivalent E status. The State Government took cognizance and promoted the incumbents like the petitioner from the cadre of Orissa Superior Judicial Service (Junior Branch) to Orissa Superior Judicial Service (Senior Branch) by following the prescribed procedure. The opposite parties F 3 and 4 joined in Orissa Superior Judicial Service (Senior Branch) as direct recruits as contemplated under Rules 5 and 8 of the Rules, 1963. They were appointed as Addl. District Judges vide Home Department Notification Nos. 2495 and 2496 dated 13.01.2003, copy of which is filed G as Annexure-8 to the writ petition and the High Court notifications dated 22.1.2003, filed as Annexure-9 and 9-A respectively. The opposite parties 3 and 4 joined in their respective posts on 3.2.2003 and 7.2.2003 respectively, meaning thereby they were born in the cadre of Orissa H

A Superior Judicial Service (Senior Branch) after about 10 months of the petitioner entering into such cadre on promotion to the post. But even then the opposite parties 3 and 4 were given selection grade with effect from 3.2.2008 and 7.2.2008 respectively vide Court's B notification no. 79 and 80 dated 22.2.2008, copy of which is annexed as Annexure-10, thereby ignoring the claim of the petitioner with regard to his seniority. All this clearly spells out that the petitioner and other officers were superseded by the opposite parties 3 and 4 and on the C other hand the petitioner was promoted to the cadre of Selection grade with effect from 22nd October, 2009 vide notification no. 899 dated 29.10.2009 of the High Court (Annexure-11) and in this manner the period of service as Addl. District Judge (Fast Track) was not taken into D consideration ignoring the settled law of the apex Court."

31. The crucial question that arises for consideration in this appeal is, whether promotion of the writ petitioner as an ad hoc Additional District Judge vide Notification dated 5.1.2002 to the Senior Branch of the Superior Judicial Service for being posted E in the Fast Track Court established out of 11th Finance Commission recommendations can be said to be an appointment in the Senior Branch cadre of Superior Judicial Service. The fate of the appeal depends upon answer to this question. If the answer to this question is found in the F affirmative, the appeal must fail. On the other hand, appeal must succeed if the answer is in the negative.

32. It is not in dispute that immediately before writ petitioner's ad hoc promotion to the Senior Branch of Superior G Judicial Service for being posted in the Fast Track Court, he was a member of the Junior Branch of the Superior Judicial Service. There is also no dispute before us that there was no cadre post available on 05.01.2002 or 26.04.2002 under the 1963 Rules. The fact of the matter is that 72 posts of ad hoc H Additional District Judges (Fast Track Court) were created out

of 11th Finance Commission recommendations and these posts were to be filled up under the 2001 Rules. A

33. In the backdrop of the above factual position, we shall now consider the scheme of the 1963 Rules. Rule 4 of the 1963 Rules provides that cadre of Superior Judicial Service shall consist of two branches; (i) Superior Judicial Service, Senior Branch and (ii) Superior Judicial Service, Junior Branch. There are two modes of recruitment to the Superior Judicial Service in respect of Senior Branch. These two modes prescribed in Rule 5, are, (a) by direct recruitment in accordance with Rule 8 and (b) by promotion of officers from the Junior Branch of the service. Rule 9(1) lays down that whenever a vacancy in the Senior Branch of the service is decided to be filled up by promotion, the government shall fill up the same after due consideration of the recommendation of the High Court in accordance with sub-rule (2). As per sub-rule (2) of Rule 9, the High Court shall recommend for appointment to such vacancy an officer of the Junior Branch of the service, who, in the opinion of the High Court, is the most suitable for the purpose. If the government is unable to accept the recommendation of the High Court, it may call for further recommendations from the High Court to fill up the vacancy. Rule 7 of the 1963 Rules, enables the government to fill up the vacancy in the Senior Branch of the service in consultation with the High Court either by direct recruitment or promotion. As regards the strength of direct recruits in the Senior Branch of the service, a cap is put that their number shall not exceed 25 per cent of the cadre posts mentioned in Rule 4 (2). The direct recruitment to the Senior Branch of the service is required to be made from the Bar. Rule 8 makes the complete provision about the eligibility of the candidates, reservation and the procedure for filling up the vacancies available to direct recruits to the Senior Branch of the service. Rules 7,8 and 9 of the 1963 Rules are quite significant. The position that emerges from these provisions is this : When a vacancy occurs in the Senior Branch of the service, first a decision is taken whether such vacancy is to be B C D E F G H

A filled up by promotion or direct recruitment. Obviously, while taking such decision, the cap on the number of the direct recruits has to be kept in view. If the vacancy is to be filled up by direct recruitment, Rule 8 comes into play. In case, such vacancy is decided to be filled by promotion, the procedure in B Rule 9 has to be followed. In other words, for a vacancy in the Senior Branch of service to be filled by promotion, the High Court makes recommendation for appointment to such vacancy an officer of the Junior Branch of the service, who in the opinion of High Court is the most suitable for the purpose. When such C recommendation is made by the High Court for filling the vacancy, either the government accepts the recommendation or if, for any reason the government is unable to accept the recommendation, it may call for further recommendations from the High Court. Thus, in the absence of any vacancy in the Senior Branch cadre of Superior Judicial Service to be filled D up by promotion, no appointment to the Senior Branch of service by way of promotion can be made. It is as fundamental as this.

34. The cadre strength in Orissa Superior Judicial Service, E Senior Branch has been fixed in the 1963 Rules. No ad hoc or temporary posts of Additional District Judges have been created under these Rules before 05.01.2002 or 26.04.2002. The cadre strength of Senior Branch of service has not been increased. In this view of the matter, the question of giving any F promotion to the Senior Branch of service in the absence of a vacancy in the cadre does not arise.

35. It is appropriate at this stage to consider the 2001 Rules and its scheme. 2001 Rules were made to regulate the recruitment of Judicial Officers in the State of Orissa on ad hoc G and purely temporary basis exclusively for implementation of the recommendations of 11th Finance Commission for upgradation of Judicial Administration under upgradation grant for elimination of old pending cases. Rule 2 of the 2001 Rules defines "service" to mean the Judicial Service of State of H

Orissa. Rule 3 thereof provides that notwithstanding anything contained in the 1963 Rules and Orissa Judicial Service Rules, 1994 the appointment of Additional District Judges on ad hoc and purely temporary basis shall be made for implementation of the scheme. Rule 4 again clarifies that the appointment made under 2001 Rules is purely on ad hoc and temporary basis. It also provides that appointment under these Rules shall be made initially for a period of one year and shall be liable to be terminated at any time without any prior notice. Rule 5 of the 2001 Rules lays down the eligibility for the appointment of Additional District Judges. The appointment of the Additional District Judges under this scheme can be made from 4 sources, one of such sources is in-service Chief Judicial Magistrates/Additional Magistrates having three years of service as such. Rule 6 of these Rules provides that the selection of in-service Judicial Officers for ad hoc appointment shall be based on scrutiny of their judgments and service record. The selection shall be made on the basis of seniority-cum-merit. Rule 7 makes the provision that inservice Judicial Officer shall not claim regular promotion in the regular cadre on the basis of appointment made under this scheme.

36. As noted earlier, 72 posts of ad hoc Additional District Judges were created under the 2001 Rules to meet its objectives. These posts were not part of cadre strength of Senior Branch Service in the 1963 Rules nor by creation of these posts under the 2001 Rules, the cadre strength of the Senior Branch of service got increased. The writ petitioner's promotion as an ad hoc Additional District Judge vide Notification dated 05.01.2002 pursuant to which he joined the post of ad hoc Additional District Judge, Bargarh on 26.04.2002 is traceable wholly and squarely to the 2001 Rules. Merely because the writ petitioner was adjudged suitable on the touchstone of the 1963 Rules, we are afraid, it cannot be said that he was given appointment to the post of ad hoc Additional District Judge under the 1963 Rules. As noted above, there was no vacancy to be filled by promotion in cadre

A strength of Senior Branch of the service under the 1963 Rules on that date.

37. As a matter of fact, on the representation made by the writ petitioner, the Committee advised to the Full Court of the B Orissa High Court to reject the representation, inter alia, for the following reason:

> "Shri Das claims seniority over and above Shri D. Dash and Shri S. Pujhari as he was appointed as Ad hoc Addl. Sessions Judge prior to them. Shri Dash and Shri Pujhari C were appointed in regular cadre vacancy of 44 against the available direct recruit quota of 2(11 being the total quota). When Shri Dash and Shri Pujhari were appointed, no quota to the promotees was available either in the cadre or in the ex-cadre (44+36). So no substantive vacancy was D available for being filled up from the promotion quota. When Shri Das was not born in the cadre of substantive vacancy of District Judge (which includes cadre + ex-cadre) and also even no vacancy was available to absorb him in the cadre then, his claim for seniority in the cadre by no stretch E of imagination be allowed".

38. The essence of the reason given by the Committee is that when appellants were appointed as Additional District Judges, no vacancy to be filled by way of promotion to the Senior Branch of the service was available either in the cadre F or in the ex-cadre. When no vacancy was available against which the writ petitioner could have been brought into the cadre then his claim for seniority in the cadre over the appellants did not arise. The above Report of the Committee was accepted by the Full Court and the writ petitioner's representation G claiming seniority over the appellants was rejected. There is no legal flaw at all in the decision of the Full Court which is founded on the above view of the Committee. In view of the admitted factual position, the proviso following the main provision in Rule 17 of the 1963 Rules does not help the writ petitioner at all.

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39. The Division Bench committed two fundamental errors, one, in holding that the promotion of the writ petitioner on 05.01.2002 as Additional District Judge is under the 1963 Rules and two, that the existence of substantive vacancy in the Senior Branch cadre of Superior Judicial Service on 05.01.2002 or for that matter 26.04.2002 is wholly academic. The Division Bench overlooked the true scope of Rules 7, 8 and 9 of the 1963 Rules. In the absence of vacancy in the Senior Branch cadre of service to be filled up by promotion on the relevant date, no promotion could have been accorded on ad hoc basis or otherwise under the 1963 Rules.

40. The question of inter se seniority between promotees and direct recruits has engaged the attention of this Court on more than one occasion. In the words of Y.V. Chandrachud, C.J. in *O.P. Singla*[1], "there are many decisions bearing upon the familiar controversy between promotees and direct recruits and this will be one more. Perhaps, just another." We do not think that anybody will dispute this apt description in respect of litigations between promotees and direct recruits. In O.P. Singla1, this Court was concerned with the question of inter se seniority between promotees and direct recruits in the Judicial Service of Delhi. This Court considered the above question in light of the provisions in Delhi Higher Judicial Service Rules, 1970. Having regard to the provisions contained in Rule 2(d), the majority decision in para 21 of the Report held as under:

> 21. ..... This Rule shows that two conditions must co-exist in order that a person can become a 'Member of the Service'. Firstly, his appointment has to be in a substantive capacity and secondly, the appointment has to be to the Service, that is, to a post in the Service. Persons who hold posts bearing designations similar to the designations of posts comprised in the Service cannot, for that reason alone, become members of the Service. It is only when they are appointed in a substantive capacity to a post in the Service, that they become members of the Service."
>
> *(emphasis supplied by us)*

A 41. Rules 3(d), 4, 5, 7, 8 and 9 of the 1963 Rules leave no manner of doubt that a person can become a member of the Senior Branch of the Superior Judicial Service only if his appointment has been made to a post in the service. If there is no vacancy to be filled in by promotion in the cadre of Senior B Branch service, there is no question of any appointment being made to the service. The membership of service is limited to the persons who are appointed within the cadre strength by direct recruitment and by promotion.

C 42. A five-Judge Bench of this Court in Direct Recruit Class II Engineering Officers' Association2 was concerned with a question of seniority in service between the direct recruits and promotees amongst Deputy Engineers in the State of Maharashtra. This Court considered previous decisions of this Court, including *S.B. Patwardhan v. State of Maharashtra*[6] and D *Baleshwar Dass v. State of U.P.*[7] and in paragraph 47 of the Report summed up the legal position. Clauses (A), (B) and (C) of paragraph 47 are relevant for the present purpose which read as follows:

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

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

G (B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee

6. 1977 (3) SCC 399.

H 7. 1980 (4) SCC 226.

continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

43. The essence of direction in clause (A) is that the seniority of an appointee has to be counted from the date of his appointment and not according to the date of his confirmation once a recruitee is appointed to a post according to rules. In other words, where initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority. The writ petitioner's appointment as an ad hoc Additional District Judge is not traceable to the 1963 Rules. The simple reason leading to this consequence is that there was no vacancy available which was to be filled up by promotion on that date in Superior Judicial Service (Senior Branch).

44. In *Rudra Kumar Sain*[3], a Five-Judge Bench of this Court was again concerned with the inter se seniority between the promotees and direct recruits in the Delhi Higher Judicial Service. The contention was whether the guidelines and directions given by this Court in *O.P. Singla*[1] have been followed or not. The Court considered the 3 terms "ad hoc", "stop-gap" and "fortuitous" in the context of the service jurisprudence and in para 20 of the Report held as under:

"20. In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc". In this view of the matter, the reasoning and basis on

A which the appointment of the promotees in the Delhi Higher Judicial Service in the case in hand was held by the High Court to be "fortuitous/ad hoc/stopgap" are wholly erroneous and, therefore, exclusion of those appointees to have their continuous length of service for seniority is
B erroneous."

45. The Division Bench in the impugned order has quoted the above paragraph from *Rudra Kumar Sain*[3] but applied it wrongly.

46. In *Brij Mohan Lal* 1[4], a three-Judge Bench of this Court,
C inter alia, considered the Fast Track Courts scheme. In paragraph 10 of the judgment, this Court gave various directions. Direction no. 14 in that para is relevant which can be paraphrased as follows:

D (i) No right will be conferred on judicial officers in service for claiming any regular promotion on the basis of his/her appointment on ad hoc basis under the scheme.

(ii) The service rendered in Fast Track Courts will be
E deemed as service rendered in the parent cadre.

(iii) In case any judicial officer is promoted to higher grade in the parent cadre during his tenure in Fast Track Courts, the service rendered in Fast Track Courts will be deemed to be service in such higher
F grade.

47. Learned senior counsel for the writ petitioner heavily relied upon the third part of direction no. 14. As a matter of fact, this part has been relied upon in the impugned judgment as well. It is submitted on behalf of the writ petitioner that on promotion
G to the Senior Branch cadre of Superior Judicial Service during his tenure in the Fast Track Courts, the writ petitioner is entitled to the counting of the service rendered by him in the Fast Track Court as a service in Superior Judicial Service (Senior Branch). The submission overlooks the first two parts of direction no. 14,
H one, no right will be conferred in judicial service for claiming

any regular promotion on the basis of his/her appointment on ad hoc basis under the scheme; and two, the service rendered in Fast Track Courts will be deemed as service rendered in the parent cadre. In our opinion, until the vacancy occurred in the cadre of Superior Judicial Service (Senior Branch) which was to be filled up by promotion, the service rendered by the writ petitioner in the Fast Track Court cannot be deemed to be service rendered in the Superior Judicial Service, Senior Branch. Rather until then, he continued to be a member of the parent cadre, i.e., Superior Judicial Service (Junior Branch). The third part of direction no. 14, in our view, does not deserve to be read in a manner that overrides the 1963 Rules.

48. In *Brij Mohan Lal 2*[5], inter alia, the controversy centered around the closure of Fast Track Courts Scheme and the appointment of retired district and sessions judges as ad hoc judges of the Fast Track Courts. In one of the writ petitions filed before this Court, the relief was intended to ensure that only the members of the Bar were appointed by direct recruitment to the post of ad hoc district and sessions judges under the Fast Track Courts Scheme. The Court considered the directions given by this Court in Brij Mohan Lal 14. The Court observed in Brij Mohan Lal 25, that this Court had foreseen the possibility of the closure of the Fast Track Courts Scheme. The Court noted the directions given in Brij Mohan Lal 14 , inter alia, in the following manner: ".... that the service in FTCs will be deemed as service of the promoted judicial officers rendered in the parent cadre. However, no right would accrue to such recruits promoted/ posted on ad hoc basis from the lower judiciary for regular promotion on the basis of such appointment. For direct recruits, continuation in service will be dependent on review by the High Court and there could be possibility of absorption in the regular vacancy if their performance was found to be satisfactory.....".

49. In *Brij Mohan Lal* 2[5], this Court with reference to the Superior Judicial Service in the State of Orissa, noted in paragraph 171 of the Report thus:

A "171. Similarly, we also find no merit in the contention that this Court should quash the advertisement issued by the State of Orissa for making selections to the Orissa Higher Judicial Services on the basis of the claims for regularisation of the petitioners against such posts. There B are two different sets of Rules, applicable in different situations, to these two different classes of officers and further they are governed by different conditions of service. They cannot be placed on a par. The process of their appointments is distinct and different. These petitioners C have no right to the post. Thus, it would neither be permissible nor proper for the Court to halt the regular process of selection on the plea that these petitioners have a right to be absorbed against the posts in the regular cadre."

D 50. Then, in paragraph 176 of the Report, the Court observed that the Fast Track Court Judges were appointed under a separate set of rules than the rules governing the regular appointment to the State Higher Judicial Service. The Court noted that while appointing Fast Track Court Judges, it was E clearly stipulated that such appointments would be ad hoc and temporary and that the appointees shall not derive any benefit from such appointments.

51. We have already indicated above that on 05.01.2002 or 26.04.2002, there was no vacancy in the cadre of Superior F Judicial Service (Senior Branch) for being filled up by promotion. Such vacancy in the Senior Branch cadre of the service occurred on 15.12.2003 and from that date the writ petitioner has been given benefit of his service rendered in the Fast Track Court. The administrative decision by the Full Court G is in accord with the 1963 Rules, the 2001 Rules and the legal position already indicated above. The view of the Division Bench in the impugned judgment is legally unsustainable. The impugned judgment is liable to be set aside and is set aside.

52. Appeal is allowed, as above, with no order as to costs.

H R.P. Appeal allowed.