

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 23.11.2017

% *Judgment pronounced on: 21.08.2018*

+ **W.P.(C) 3157/2015**

SUJATA KOHLI

..... Petitioner

Through: Mr. Sanjay Jain, Adv. along with
petitioner-in-person.

versus

REGISTRAR GENERAL, HIGH COURT OF DELHI & ORS

..... Respondents

Through: Mr. Sanjoy Ghose with Mr. Rhishabh
Jetley & Mr. Dhanjai Rana, Advs. for Delhi High
Court.

Mr. Anuj Aggarwal, ASC, GNCTD with

Ms. Deboshree Mukherjee, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SUNIL GAUR

J U D G M E N T

S.RAVINDRA BHAT, J.

1. The petitioner, a senior Delhi Higher Judicial service (“DHJS”) officer, has preferred these proceedings under Article 226 of the

Constitution, complaining violation of her fundamental right to equality before law by the adoption of a resolution by the Full Court of the Delhi High Court on 28.4.2009 evolving a new criteria for appointment to the position of District and Sessions Judge. The resolution (hereafter “the impugned resolution”) requires every eligible officer to have been graded 'A' grade in the annual confidential reports (ACRs) for the previous five years, as on the date when the consideration for filling the post is to take place. The Delhi High Court has been arrayed as respondent (hereafter referred to as “the establishment”). The Full Court resolution was modified twice: on 15.1.2010 and again on 27.1.2011. The petitioner also challenges the constitutional validity of Rule 27 of the Delhi Higher Judicial Service Rules, 1970 (the "Rules") as amended to date, which is a residuary provision enabling resort to the service rules applicable to the Indian Administrative Service in respect of whatever is not provided for in the Rules, and in the light of that the Full Court Resolutions impugned in this case.

2. The Petitioner joined Delhi Higher Judicial Services upon selection based on written examination and interview on 27th November 2002. She was ranked third in the merit list. With resignation of the candidate who stood second in the said merit list, she was ranked second in her batch. On 19th December 2005, the High Court confirmed the petitioners' appointment in substantive permanent capacity w.e.f. 25.11.2004. The petitioner urges that in 2009, the impugned Full Court resolution was adopted which mandated that a member of DHJS, to be considered for the post of District and Sessions Judge ought to possess at least 2A gradings in her ACRs and 3 B+ gradings, for the immediately preceding 5 years, in relation to the year

under consideration, following the criteria provided for posts equivalent to that of a District Judge in the Indian Administrative Service under the Residuary Rule 27 of the Delhi Higher Judicial Service Rules 1970. It is stated that in 2010, the system was again changed and the requirement, of an A in each of the previous 5 years was adopted, following the, revised criteria in the IAS service for promotion to a post equivalent to that of a District and Sessions Judge, thus adversely affecting the progression prospects of many Additional District Judges and now it had affected the petitioner too, who had otherwise been already granted the super time scale.

3. The Petitioner had been assessed "B+" (Good) in her ACRs for last several years. She submits that on 24 August 2013, High Court granted the Super time scale to the petitioner amongst other officers, w.e.f. 01.05.2013, (against one of the deputation vacancies). Later on the same was made against ex cadre vacancy. Between May 2011 and January 2014, the Petitioner was assigned the cases under Hindu Marriage Act and other matrimonial matters. During the course that tenure, she disposed of 2589 matters, out of which she with her initiative reconciled and settled as many as 478 disputes amicably. It is stated that in November 2014, the batch of 2002 DHJS officers entered the zone of consideration for appointment /selection as District and Sessions Judge/Principal Judge Family Court. The petitioner was second in her batch and is an honest and hard working officer was expecting to be appointed/selected. She was appreciated for her dedication and hard work during the interaction sessions held for ACR appraisals. Petitioner's judicial work done and the disposals speak for themselves. In this background, she urges that in November 2014, it came

to her knowledge that the impugned revised criteria of securing 'A' grade in the last 5 ACRs had been evolved as a pre-requisite for selection as District Judge. She alleges that she was in the dark about this development, as it was never communicated to her by any office letter or circular, or notification. It is alleged that that from time to time the criteria was even diluted or made stringent from time to time unilaterally and arbitrarily. The petitioner submits that such criterion has not been adopted by any other state. Even in Delhi, prior to 2009 there was no such criterion and many District Judges were appointed who were having only B+ or B. It is submitted that the petitioner was eagerly expecting her appointment/selection as District & Sessions Judge or Principal Judge Family Court but was taken aback to learn about the criterion and in anticipation and anxiety, she immediately represented to the Chief Justice and Companion Judges of the High Court on 12.11.20014 seeking reconsideration and review the criterion of 'A' or 5 'As' for promotion. She was not made aware of the outcome of her representation before she filed the writ petition.

4. In the meanwhile, in January 2015, four names (which was increased to five) of her colleagues, who were junior to her in the merit list (at the time of initial appointment) were recommended for the posts of Principal Judge Family Judge which is equivalent to the post of District Judge. At that stage too, the petitioner represented to the Chief Justice with respect to the pendency of her representation and to request to consider and decide it, and in the interregnum, to keep the appointment to the said posts on hold. While so, on 15 January, 2015, the Lt. Governor, with concurrence of the High Court, appointed five Judicial Officers as Principal Judges Family Courts,

out of whom, four officers were junior to the petitioner in the seniority list since the beginning. The petitioner alleges that going by the recent trends of appointments to the posts of Principal Judge, Family Courts and thereafter, the follow up appointment to the post of District Judge in a sequence and using the criterion of grades, if any, the High Court has given a color of promotion to both the posts making it appear as if the posts of Principal Judge, Family Court is promotion by one step in hierarchy for an Additional District Judge(ADJ) and the post of District Judge is a promotion by two steps in the hierarchy above the ADJ. Again on 22 January, 2015, another Judicial Officer junior to the petitioner was appointed as Principal Judge, Family Court. It is stated that the High Court while recommending the names of the officers to the Post of Principal Judge, Family Courts gave a go by to the selection criterion laid down specifically in the Section 4 of the Family Courts Act 1984 and completely ignored the petitioner and her representation.

5. Ms. Kohli, the petitioner argues that prescribing different criteria not communicated to the concerned officer, has seriously jeopardized the promotion prospects in the Higher Judicial services. Moreover, she alleges that the High Court has not given due weightage to the seniority which was a criterion at the time the Petitioner was appointed/selected to the cadre of District Judge. The impugned Full Court resolutions seriously undermine the legitimate expectations of a Judicial Officer for vertical mobility. It is urged, besides that the impugned resolutions violate Article 16 of the Constitution of India in as much as it is opposed to the reasonable expectations for selection and appointment as District Judge, in terms of the existing Rules.

6. The petitioner urges that the process adopted for selection and appointment, based on five A gradings is opaque and lacks transparency. It is submitted that applying the same criteria to Judges as are applicable to the Indian Administrative Service violates the letter and spirit of the judgment of the Supreme Court in *All India Judges Association v. Union of India* (1993) 4 SCC 288, whereby it was held that there cannot be any parity between the judges and the administrative executive. It was held that:

"[t]he Judges at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of the other services. The members of the other services, therefore, cannot be placed on a par with the members of the judiciary, either constitutionally or functionally".

The petitioner argues that even otherwise, it is necessary that Rules are framed in respect of selection of District Judges from among Additional District Judges so that members of the Delhi Higher Judicial Service may have some certainty about the basis and criteria for selection of District Judges which directly concerns their prospects of advancement and their consideration for elevation to the High Court. This is particularly important because Article 236 of the Constitution recognizes that the term "District Judge" includes Additional District Judges.

7. Ms.Kohli argues furthermore, that under Rule 18, the highest pay scale of Super Time Scale for District Judges is limited to 10% of the cadre strength with at least 3 years in selection grade and the assessment is based on merit-cum-seniority. It is therefore, argued that Additional District Judges who have achieved the highest Super Time Scale pay grade, based on merit-cum-seniority are not fundamentally different from District Judges in

terms of their functions. When the petitioner and others similarly situated entered the Cadre of District Judge in 2002 appointment/selection to the post of District Judge was based on selection from among the 5 senior most Additional District Judges on the basis of voting by the High Court in Full Court. However, over the last few years the High Court continuously altered the criteria for promotion to the post of District and Sessions Judge based on Full Court resolutions by resort to Rule 27, which are not communicated to the Additional District Judges. It is urged that the system overall has had a seriously demoralizing effect on the members of the Higher Judicial Service as they are no longer in a position to know or to adjust themselves in a manner that allows them to determine their future. In this context, it is stated that while the overall ACR grading is communicated the point wise grading is not made known to the judicial officers concerned. This hinders the ability of a judge to appreciate her weak points or to effectively appeal against an unfair grading. In any case, there is no formal system of appeal. Even the applicability of IAS cadre is not strictly followed, because in the civil services the ACR is written by the reporting officer, with a reviewing officer above the reporting officer who either confirms, or rejects or modifies the report of the reporting officer, giving reasons for variance of his views. A Judicial Officer on the other hand, who feels aggrieved can only represent before the same committee that grades her in the first place and which can reject the representation summarily without providing any substantive reasons.

8. The petitioner points out that from 2002 to 2009 appointment to the post of District and Sessions Judge used to be in Seniority in the ordinary

course except if there is any adverse entry. Since 2009 it was abruptly changed and the impugned criteria was adopted without any *rationale*. For the post of the Principle Judge Family Court also the same new criteria was adopted, thus treating it as a promotion even though denying the same to be a promotion. By adopting this kind of criteria, two more steps in the hierarchy have been created, whereas till 2009, it was not so, in as much as, even Additional District Judges used to be elevated as High Court Judges, without it being necessary for them, to first being appointed as Principal Judge Family Courts, and then as District and Sessions judge. After adoption of this new criteria the consistent pattern shows that Additional District Judges, who are due for any promotion as per seniority, are first appointed as Principal Judge, Family Court, and thereafter as District and Sessions Judge and for all of them the impugned criteria is adopted. It is argued that in case the Principal Judge Family Court is not treated as promotion, but as selection, the criteria prescribed in section 4 of the Family Courts Act has not been followed.

9. The petitioner relies on the judgment of the Supreme Court in *Devdutt v Union of India* 2008 (8) SCC 725. It is submitted that granting better grading of A to a set of junior officers and giving lower grading (B+) to seniors, in the given scenario, amounts to adverse ACR which compels the High Court to not disclose merely the concerned officer's grading, but also those of her juniors, so that she can have a fair and effective redress, by pointing out her strengths, which might well have been overlooked by the appraising authorities.

10. It is highlighted that definite Rules for promotion of the Additional District judges are to be framed instead of resort to the residuary powers under Rule 27 of DHJS Rules, currently being used, so as to avoid any injustice. The petitioner submits that Rule 27, to the extent it lends itself of such wide discretion, is arbitrary and unprincipled and therefore, cannot be sustained. It is stated that an honest and dedicated officer has been denied her due.

11. The High Court establishment, in response to these proceedings, explains that the Full Court in the meeting held on 28.04.2009 prescribed the criteria for selection to the post of Sessions Judge and District Judge. Later, the Full Court, in the meeting held on 15.01.2010, modified the criteria laid down by it in the meeting held on 28.04.2009. It is stated that representations of Delhi Judicial Services Association, and Delhi Higher Judicial Services Association, regarding the criteria for appointment as District Judge, were received and were duly considered by the Full Court of in its meeting held on 06.07.2010. It was resolved that a Committee be constituted by the Chief Justice to look into the issue of desirability of change of criteria appointment to the post of District Judge. The Chief Justice, by order dated 27.08.2010, constituted a committee comprising of four Hon'ble Judges which by report dated 08.10.2010 recommended that:

“We find that the post of District Judge is to be manned by officers of Delhi Higher Judicial Service in Super Time Scale of Rs. 22850-24850 (pre revised). Having regard to the revised guidelines as circulated vide Govt of India, DoPT OM No. 22011/3/2007-Estt (D) dated 18.02.2008 wherein it has been mentioned that the DPC

may ensure that for promotion to the scale of Rs 18,400-22,400 (pre revised) and above, the prescribed benchmark of 'Very Good' is invariably met in all ACRs of five years under consideration, we are of the opinion that the existing criteria for appointment to the post of District Judge requiring ACR gradings for each of the five years under consideration to be minimum 'A' (Very Good) for all categories, should be maintained. However, since the criteria of "at/least two ACR gradings of 'A' (Very Good) and remaining three ACR gradings of '8+' (Good)" fixed on 28.04.2009 was changed to "ACR gradings for each of the five years to be minimum 'A' (Very Good)" on 15.01.2010...we are of the opinion that the implementation of the said criteria should be in a phased manner as under:

(i) At least two ACR gradings of 'A' (Very Good) and remaining three ACR gradings of '8+' (Good) out of the ACR gradings for the last 5 years under consideration (2004-2008) for the year 2009;

(ii) At least three ACR gradings of 'A' (Very Good) and remaining two ACR gradings of '8+' (Good) out of the ACR gradings for the last 5 years under consideration (2005-2009) for the year 2010;

(iii) At least three ACR gradings of 'A' (Very good) and remaining two ACR gradings of '8+' (Good) out of the ACR gradings for the last 5 years under consideration (2006-2010) for the year 2011; and

(iv) ACR grading for each of the five years to be minimum 'A' (Very Good) for the last 5 years under consideration (2007-2011) for the year 2012 and onwards.

We recommend that the cases for appointment to the post of District Judge be considered/reviewed applying the aforesaid criteria as proposed."

12. The High Court explains that the Full Court in its meeting held on 27.01.2011 accepted the above report of the Committee. It is stated that the Petitioner was granted super time scale w.e.f. 01.07.2013. The High Court produced the relevant records pertaining to the Petitioner for the convenience of the Court. It submits that the Petitioner represented on 12.11.2014 for reconsideration of the criteria laid down for appointment as District Judge. The request was duly considered and rejected by the Full Court in the meeting held on 29.04.2015. The decision was communicated to the Petitioner by letter dated 13.05.2015.

13. The High Court denies that the criteria for promotion to the post of District and Sessions Judge adversely affected the progression of many Additional District Judges as alleged. It is submitted that the High Court can fix a criteria for appointment to a particular post as it is the best judge to evaluate the working of a particular officer to the said post. However, it is submitted that the appointment to the post of Principal Judge, Family Court does not amount to any promotion.

14. The High Court relies on *Har Prasad Gupta v. State of Uttar Pradesh* (AIR 1963 All 415) where it was held that the power of appointment, and posting and promotion of District Judges vest in the Governor of the State but such power has to be exercised in consultation with the High Court. The High Court also relies on the ruling of the Supreme Court in *Chandramouleshwar Prasad v Patna High Court* AIR 1970 SC 370 which

spelt out the primacy of the High Court in regard to recommendation of names of suitable officers for appointment as District Judges in the following manner:

“The High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as District Judges. The High Court alone knows their merits as also demerits. This does not mean that the Governor must accept whatever advice is given by the High Court but the Article does require that the Governor should obtain from the High Court its views on the merits or demerits of persons among whom the choice of promotion is to be limited. If the High Court recommends A while the Governor is of opinion that B's claim is superior to A's it is incumbent on the Governor to consult the High Court with regard to its proposal to appoint B and not A. If the Governor is to appoint B without getting the views of the High Court about B's claim vis-a-vis A's promotion, B's appointment cannot be said to be in compliance with Article 233 of the Constitution.”

A later judgment in *Renuka vs AP & Anr* (2002) 6 SCC 195 is relied on to say that the appointment of Family Court Judges cannot be made against the rules that have been laid down and furthermore no right accrued to a person merely because a person is selected and his/her name is put on panel and, therefore, the Petitioners have no right to claim for appointment. Furthermore, in essence the Petitioner is seeking a judicial intervention in the domain of administrative discretion failing to meet the threshold standard of perversity or error apparent on the face or serious infraction of fundamental rights or patent unreasonableness.

15. The High Court states that the criteria or eligibility condition in question was evolved objectively and the Petitioner failed to demonstrate why such criteria are flawed or unreasonable. It is also submitted that there is no legal requirement for publication of revision of promotional criteria as held by the Supreme Court. In the instant case, no prejudice has been caused inasmuch as the Petitioner to be eligible for promotion is not required to obtain any further qualification or secure any additional achievement which she could only have had she been apprised of the revision of the criteria (for example securing a further educational qualification or obtaining of any training). All that is stipulated in the revision is that the more meritorious would be given a preference. Surely no employee can be permitted to contend that she would have worked harder if only she was made aware that her promotion would be dependent on hard work. It is submitted that all judicial officers, the petitioner being no exception, are expected to perform optimally and to the best of their ability and professional competence. Therefore, complaining against evolution and prescription of a uniform criteria of A grading for five consecutive years, as a precondition for selection as District Judge, is meaningless, because as a superintending body, the High Court cannot be accused of behaving unreasonably when it chooses to reward merit and hard work, and not mere seniority and just about average functioning among members of the DHJS.

16. It is submitted that the ACR grading is dependent on a committee-based approach, to avoid subjectivity: three High Court judges, for the past decades or so, are supervising the functioning of several judicial officers; the parameters adopted are units awarded for judicial functioning, quality of

judgments, number of old cases disposed of in a given year, the initiative and creativity shown by the concerned officer, etc. In case a judicial officer's grading falls below the previous years' grading, she is communicated with the ACRs to enable representation. It is urged, in this context, that the petitioner's grouse that her juniors were graded better than her grading and stole a march over her for selection as District Judge, is unmerited. Highlighting that ACR gradings are made known only to the concerned individual, it is submitted that what the petitioner urges as a grievance is that she is kept in the dark about others' better performance. That cannot be considered as an adverse remark against her; it is only when the petitioner's grading undergoes adverse change, that the obligation to communicate the adverse ACR arises.

17. Counsel for the High Court lastly submitted that guidelines and criteria can and ought to be evolved having regard to the challenges faced by changing times; it is precisely for this purpose that Rule 27 is a part of the DHJS rules, providing that for all matters that are not expressly prescribed, the provisions applicable to members of the Indian Administrative Services should be adopted. It was submitted that such rules exist for members of the All India Services, because not all contingencies can be provided for and that for such purposes, the discretion of the competent authorities is reserved. Counsel submitted that given these compulsions, Rule 27 does not vest any arbitrary power. To the extent the impugned resolution created guidelines for uniform application, to promote greater efficiency, they too are reasonable and valid.

Analysis and Conclusions

18. The impugned Full Court resolution which required DHJS officers to fulfill the criteria of having achieved five A gradings in the immediately preceding five years, from the date of consideration (for selection as District Judge), reads *inter alia*, as follows:

2.	<i>To consider the matter regarding laying down of criteria for selection of officers to the posts of Sessions Judges and District Judges</i> <i>(Hon'ble Judges are requested to kindly bring along the papers circulated vide Agenda Item No. 1 of Full Court meeting dated 17.4.2009)</i>	<i>Discussed. It was resolved as under:</i> <i>(i) The following shall be adopted as the zone of consideration for selection of officers for the appointment of District Judges:</i> <table><tr><th><i>No. of vacancies</i></th><th><i>No. of officers within zone of consideration</i></th></tr><tr><td>1</td><td>5</td></tr><tr><td>2</td><td>8</td></tr><tr><td>3</td><td>10</td></tr><tr><td>4</td><td>12</td></tr><tr><td>5</td><td>14</td></tr><tr><td>6</td><td>16</td></tr><tr><td>7</td><td>18</td></tr><tr><td>8</td><td>20</td></tr><tr><td>9</td><td>22</td></tr></table> <i>In the case of Sessions Judge, the zone of consideration would be restricted to officers already appointed as District Judges including on proforma basis.</i> <i>(ii) The officers who would be, or are likely to be, in the zone of consideration for appointment/ selection to the post of District Judge in a particular year shall be under the control of the Committee of Inspecting Judges headed by Hon'ble the</i>	<i>No. of vacancies</i>	<i>No. of officers within zone of consideration</i>	1	5	2	8	3	10	4	12	5	14	6	16	7	18	8	20	9	22
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		<i>Chief Justice in the preceding year and in the year in question.</i> <i>(iii) For evaluation of such officers, as are mentioned in the preceding clause, detailed remarks shall be recorded in the ACRs by the Committee mentioned above.</i> <i>(iv) For evaluation of the officers within the zone of consideration for "selection by merit", the following criteria shall be taken into account:</i> <i>(a) ACR gradings for the last 5 years in which the gradings for at least 2 years (including the 5th year) must be minimum "A" (Very Good), the officer having secured in the remaining 3 years not less than "B+" (Good) grading. However, in the case of SC/ST officers, this criteria shall be relaxed so as to require minimum "B+" (Good) grading in each of the 5 years.</i> <i>(b) Vigilance report.</i> <i>(c) Disposal figures for the last 5 years.</i> <i>(d) Administrative capabilities.</i> <i>(e) General reputation for honesty & integrity and conduct.</i>
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The above criteria was modified by the Full Court resolution dated 15 January, 2010, which recorded that the requirement of having to possess five gradings in the preceding five years, for selection as District Judges, was applicable *to all categories of Delhi Higher Judicial Officers*. On 6 July 2010, a Committee was constituted by the Full Court to look into desirability of changing or modifying the criteria for selection as District Judges, because a large number of DHJS officials had expressed the need to review the criteria. This committee considered the matter again, and reported to the

Full Court on 8 October 2010. This report was accepted by the Full Court, through its resolution of 27 January 2011. The changed criteria meant that the requirement of having to possess five A gradings was modified somewhat, to ensure that serving officers were not made to suffer immediately through imposition of the new standard. The relevant part of the judge's committee report reads as follows:

“We have considered the matter. We held deliberations on 13th September also. We find that the Full Court in the meeting held on 28th April 2009, alia, decided that for selection to the post of District Judge the officers were required to have at least two gradings (including the 5th year) of 'A' (Very Good) the remaining three gradings of not less than 'B+' (Good) in the ACR gradings the last five years under consideration, and in the case of SC/ST officers this criteria shall be relaxed so as to require minimum 'B+' (Good;\) grading in each of five years. However, the Full Court vide decision dated 15th January 2010 deleted the clause regarding relaxation in ACR gradings for SC/ST officers and also modified the criteria so as to require ACR gradings for each of the five years under consideration to be minimum 'A' (Very Good) for all categories.

We find that the post of District Judge is to be manned by officers of Delhi Higher Judicial Service in Super Time Scale of Rs. 22850-24850 (pre-revised). Having regard to the revised guidelines as circulated vide Govt. of India, DoPT O.M. No. 2201113/2007-Estt(D) dated 18th February 2008 wherein it has been mentioned that the DPC may ensure that for promotion to the scale of Rs.18,400-22,400 (pre-revised) and above, the prescribed benchmark of 'Very Good' is invariably met in all ACRs

of five years under consideration, we are of the opinion that the existing criteria for appointment to the post of District Judge requiring ACR gradings for each of the five years under consideration to be minimum 'A' (Very Good) for all categories, should be maintained. However, since the criteria of "at least two ACR gradings of 'A' (Very Good) and remaining three ACR gradings of 'B+' (Good)" fixed on 28th April, 2009 was changed to "ACR gradings for each or the five years to be minimum 'A' (Very Good)" on 15th January 2010, we are of the opinion that the implementation of the said criteria should be in phased manner as under :

(i) At least two ACR gradings of 'A' (Very Good) and remaining three ACR gradings of 'B+' (Good) out of the ACR gradings for the last 5 years under consideration (2004-2008) for the year 2009;

(ii) At least three ACR gradings of 'A' (Very Good) and remaining two ACR gradings of 'B+' (Good) out of the ACR gradings for the last 5 years under consideration (2005-2009) for the year 2010;

(iii) At least four ACR gradings of 'A' (Very Good) and remaining one ACR grading of 'B+' (Good) out of the ACR gradings for the last 5 years under consideration (2006-2010) for the year 2011; and,

(iv) ACR grading for each of the five years to be minimum 'A' (Very Good) for the last 5 years under consideration (2007-2011) for the year 2012 onwards."

We recommend that the cases for appointment to the post of District Judge be considered/reviewed applying the aforesaid criteria as proposed."

19. The Full Court accepted the above recommendation on 27.01.2011. Thereafter, a large number of posts of District and Sessions Judges and Principal Judges, Family courts have been filled by applying the criteria evolved in that regard (i.e. five A gradings in the five years preceding the date of consideration, after 01.01.2012). The question therefore, is whether the petitioner's grievances in this regard are justified.

20. A Constitution Bench of the Supreme Court had occasion to deal with the power of the High Court in the context of the High Court's power to make binding recommendations for appointment of District Judges. The court emphasized upon the primacy of the High Court's power in this regard, and that rules framed under Article 309 have to also yield to the exercise of such power, in *State of Bihar v Bal Mukund Sah* 2000 (4) SCC 640. The Supreme Court stated as follows:

“Article 233 dealing with appointment of District Judges, on its own express terminology projects a complete scheme regarding the appointment of persons to District Judiciary as District Judges. In the present appeals, we are concerned with direct recruitment to the cadre of District Judges and hence sub- article (2) of Article 233 becomes relevant. Apart from laying down the eligibility criterion for candidates to be appointed from the Bar as direct District Judges the said provision is further hedged by the condition that only those recommended by the High Court for such appointment could be appointed by the Governor of the State. Similarly, for recruitment of judicial officers other than District Judges to the Judicial Service at lower level, complete scheme is provided by Article 234 wherein the

Governor of the State can make such appointments in accordance with the rules framed by him after consulting with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. So far as the Public Service Commission is concerned, as seen from Article 320, the procedure for recruitment to the advertised posts to be followed by it is earmarked therein. But the role of the Public Service Commission springs into action after the posts in a cadre are required to be filled in by direct recruitment and for that purpose due intimation is given to the Commission by the State authorities. They have obviously to act in consultation with the High Court so far as recruitment to posts in Subordinate Judiciary is concerned. Of course, it will be for the High Court to decide how many vacancies in the cadre of District Judges and Subordinate Judges are required to be filled in by direct recruitment so far as the District Judiciary is concerned and necessarily only by direct recruitment so far as Subordinate Judiciary is concerned. This prime role of the High Court becomes clearly discernible from Article 235 which deals with the control of the High Court over the Subordinate Judiciary and also of Subordinate Courts. The said Article provides as under:

235. Control over subordinate courts. 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.

In the light of the Constitutional scheme guaranteeing independence of Judiciary and separation of powers between the executive and the judiciary, the Constitutional makers have taken care to see by enacting relevant provisions for the recruitment of eligible persons to discharge judicial functions from grass-root level of the Judiciary up to the apex level of the District Judiciary, that rules made by the Governor in consultation with the High Court in case of recruitment at grass-root level and the recommendation of the High Court for appointments at the apex level of the District Judiciary under Article 233 remain the sole repository of power to effect such recruitments and appointments. It is easy to visualise that if suitable and competent candidates are not recruited at both these levels, the out turn of the judicial product would not be of that high level which is expected of judicial officers so as to meet the expectations of suffering humanity representing class of litigants who come for redressal of their legal grievances at the hands of competent, impartial and objective Judiciary. The Presiding Officer of the Court if not being fully equipped with legal grounding may not be able to deliver goods which the litigating public expects him to deliver. Thus, to ensure the recruitment of the best available talent both at grass-root level as well as at apex level of District Judiciary, Articles 233 and 234

have permitted full interaction between the High Court which is the expert body controlling the District Judiciary and the Governor who is the appointing authority and who almost carries out the ministerial function of appointing recommended candidates both by the Public Service Commission and the High Court at the grass-root level and also has to appoint only those candidates who are recommended by the High Court for appointment at the apex level of District Judiciary.”

This position had been highlighted earlier in a previous Constitution bench in *Chandramouleshwar Prasad (supra)* where it was held as follows:

“The question arises whether the action of the Government in issuing the notification of October 17, 1968 was in compliance with Article 233 of the Constitution. No doubt the appointment of a person to be a District Judge rests with the Governor but he cannot make the appointment on his own initiative and must do so in consultation with the High Court. The underlying idea of the Article is that the Governor should make up his mind after there has been a deliberation with the High Court. The High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as District Judges. The High Court alone knows their merits as also demerits. This does not mean that the Governor must accept whatever advice is given by the High Court but the Article does require that the Governor should obtain from the High Court its views on the merits or demerits of persons among whom the choice of promotion is to be limited. If the High Court recommends A while the Governor is of opinion that B's claim is superior to A's it is incumbent on the Governor to consult the High Court

with regard to its proposal to appoint B and not A. If the Governor is to appoint B without getting the views of the High Court about B's claim vis-a-vis A's Lo promotion, B's appointment cannot be said to be in compliance with Article 233 of the Constitution. The correspondence noted above which passed between the High Court and the Secretariat from 28th September 1968 to 7th October 1968, shows that whereas the High Court had definitely taken the view that Misra as the senior Additional District Sessions Judge should be directed to take charge from Chakravarty, the Government was not of the view that according to the records in its appointment department Misra was the senior officer at Shahabad among the Additional District and Sessions Judges. Government never suggested to the High Court that the petitioner was senior to Misra or that the petitioner had a better claim than Misra's and as such was the person fit to be appointed temporarily as District and Sessions Judge, Before the notification of October 17, 1968 Government never attempted to ascertain the views of the High Court with regard to the petitioner's claim to the temporary appointment or gave the High Court any indication of its own views with regard thereto excepting recording dissent about Misra's being the senior officer in the cadre of Additional District and Sessions Judges at Arrah. Consultation with the High Court under Article 233 is not an empty formality. So far as promotion of officers to the cadre of District Judges is concerned the High Court is best fitted to adjudge the claims and merits of persons to be considered for promotion. The Governor cannot discharge his function under Article 233 if he makes an appointment of a person without ascertaining the High Court's views in regard thereto. It was

strenuously contended on behalf of the State of Bihar the materials before the Court amply demonstrate that there had been consultation with the High Court before the issue of the notification of October 17, 1968. It was said that the High Court had given the Government its views in the matter; the Government was posted with all the facts and there was consultation sufficient for the purpose of Article 233. We cannot accept this. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his mind which is not communicated to the proposer the direction to give effect to the counter proposal without anything more, cannot be said to have been issued after consultation. In our opinion, the notification of October 17, 1968 was not in compliance with Article 233 of the Constitution. In the absence of consultation the validity of the notification of 17th October, 1968 cannot be sustained.”

21. In the present case, the first issue to be decided is whether the petitioner's grievance about her being kept in the dark about the Full Court resolution with respect to the requirement of every DHJS officer acquiring A grading for five years, immediately preceding consideration of names, for filling the post of District Judge, is justified. Now, it is a matter of record that prior to the impugned criteria, the Full Court had evolved another criteria for selecting District Judges (at least two A gradings and three B+ gradings in the preceding five years). This was later changed pursuant to recommendations of a committee that had recommended (through its report

of 14.12.2009) that any DHJS officer, to be selected and appointed as District Judge, ought to possess five 'A' gradings for the preceding five years. The Full Court accepted those recommendations on 15.01.2010. The criteria was somewhat changed, pursuant to representations of DHJS officers, who apparently felt that its abrupt introduction would have adverse consequences. The amended criteria (adopted on 27.01.2011) is as follows:

“(i) At least two ACR gradings of 'A' (Very Good) and remaining three ACR gradings of 'B+' (Good) out of the ACR gradings for the last 5 years under consideration (2004-2008) for the year 2009;

(ii) At least three ACR gradings of 'A' (Very Good) and remaining two ACR gradings of 'B+' (Good) out of the ACR gradings for the last 5 years under consideration (2005-2009) for the year 2010;

(iii) At least four ACR gradings of 'A' (Very Good) and remaining one

ACR grading of 'B+' (Good) out of the ACR gradings for the last 5 years under consideration (2006-2010) for the year 2011; and,

(iv) ACR grading for each of the five years to be minimum 'A' (Very Good) for the last 5 years under consideration (2007-2011) for the year 2012 onwards.”

22. The petitioner's grievance with respect to her lack of knowledge or not being aware of *the criteria* to be fulfilled by incumbent DHJS officers, in the opinion of this court, is not justified. Before 2008-09 there was *no criteria*, which meant that the High Court more or less had the absolute discretion to select and appoint anyone, on the *basis of seniority, or merit*.

This “no norm” period was sought to be rectified by structuring the discretion, and insisting that the concerned officers ought to score certain threshold gradings in their ACRs to be eligible for consideration. Such administrative criteria, *per se* cannot be characterized as arbitrary, given the prevailing “no norm” or “no rule” period. Though not a matter of record, it is a fact that around that time, the existing one District court’s territorial jurisdiction for the whole of Delhi was re-organized; nine District Courts were created, with resultant distribution of jurisdiction. That has now been further re-organized. The consequent need to fill nine posts was felt. The committee, which reported to the Full Court on 14.12.2009, took into account the identity of pay scales of District Judges and equivalent grade All India Service (IAS) officers and felt that since the former had to cross a threshold bar of five “Very good” ACR gradings for five years, preceding the date of consideration (for higher positions), a similar approach could be adopted. As was highlighted by *Chandramouleshwar Prasad* “*the High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as District Judges. The High Court alone knows their merits as also demerits.*” Likewise, *Bal Mukund Shah* (*supra*) emphasized the same theme:

“..rules made by the Governor in consultation with the High Court in case of recruitment at grass-root level and the recommendation of the High Court for appointments at the apex level of the District Judiciary under Article 233 remain the sole repository of power to effect such recruitments and appointments. It is easy to visualise that if suitable and competent candidates are not recruited at both these levels, the out turn of the judicial product

would not be of that high level which is expected of judicial officers so as to meet the expectations of suffering humanity representing class of litigants who come for redressal of their legal grievances at the hands of competent, impartial and objective Judiciary.”

23. Having regard to these imperatives, the petitioner’s grievance that no norm should have been evolved and implemented without prior notice, is insubstantial. A judicial officer – like any other public employee or official joins the service, hoping to make a difference, in terms of dealing with the workload, quality of output (i.e. the judgments delivered) and also the cases assigned to her. In a sense, service in the judicial department (though a public service) is a mission, given the solemn nature of judging. If this is the assumption on which every judge, at every level is appointed to the judicial system, the argument that if one is made aware that a higher threshold of performance is expected, she or he would work better (or have worked better) cannot be countenanced. All judges – District Judges being no exception – are expected to perform at their optimum levels, given the exploding dockets, which they have to handle. The primary role of anyone, when appointed as a judge is to perform as a judge, to the best of her ability and competence. An incumbent cannot be heard to say that her judicial work was not up to the mark, because she was involved in some other duties or more importantly, she was not aware that best performance would result in selection as District Judge. Every functionary- including judges shoulder those extra duties to varying degrees, at different points of time. Nor do those duties define the role of any incumbent in a judicial service or system. *If seen from this perspective, the work performed by every judicial officer is*

what is graded in the ACR. Therefore, to say that had any incumbent known that the highest or a better grading is essential she or he would have performed better is no grievance. The performance of every judge is expected to be her or his best, or what she or he was capable of, for the relevant period. Therefore, the nuancing of discretion (to appoint) from an absolute one, to one based on performance and merit, of DHJS officers, is neither arbitrary nor unreasonable. One more reason to reject the petitioner's argument in this regard is that the review which took place through the Full Court resolution of 27 January 2011, was *due to representation of DHJS officers that introduction of the five ACR norm was abrupt.* Therefore, there was a general awareness of this criteria, (put in place through the earlier resolution of 15-01-2010) which led to some disquiet and representation. The criteria which now stands challenged was therefore evolved as a measure to relax the rigors of their immediate application. It has been applied in the case of many instances of appointment; some of those appointees have since even retired; some were appointed as judges of this court. Even from that position, some appointees have retired. Therefore, it is too late in the day to say that the criteria should be set aside on the narrow ground that it was not made known. *As members of a judicial cadre, all officers were aware of its existence.* This ground therefore, is rejected.

24. The petitioner's second grievance is about the absence of any information that her juniors secured better ACR gradings. It was argued, here, that had the petitioner been made aware of her ACR gradings as well as those of her juniors and further informed the limitations and shortcomings, firstly she would have been able to correct herself and

secondly ensure that her performance was suitably geared up to match that of other officers. Now, the system of ACR gradings, based on performance and evaluation of public officials is patterned on individual assessments. The law declared by the Supreme Court in *Devdutt* (supra) and the later judgment in *Abhijit Ghosh Dastidar v Union of India & Ors* (2009) 16 SCC 146 is that every ACR grading, which is likely to affect the career prospects of an officer or employee, should be communicated. *Devdutt* stated that:

“14. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a 'good' or 'average' or 'fair' entry certainly has less chances of being selected than a person having a 'very good' or 'outstanding' entry.

15. In most services there is a gradation of entries, which is usually as follows:

(i) Outstanding (ii) Very Good (iii) Good (iv) Average (v) Fair (vi) Poor

A person getting any of the entries at items (ii) to (vi) should be communicated the entry so that he has an opportunity of making a representation praying for its upgradation, and such a representation must be decided

fairly and within a reasonable period by the concerned authority.

16. If we hold that only 'poor' entry is to be communicated, the consequences may be that persons getting 'fair', 'average', 'good' or 'very good' entries will not be able to represent for its upgradation, and this may subsequently adversely affect their chances of promotion (or get some other benefit)."

The petitioner's grievance however, is that the better or higher gradings given to her colleagues, particularly those junior to her were not known and that she could not articulate her objections to better her gradings, at the relevant time. This court is of the opinion that the method of appraisal of judicial officers is such that gradings given to each individual are treated as confidential. In such a system, it would not be permissible to publicize the gradings of all judicial officers, so that each one has information or knowledge of not only what she is graded, but also what others are graded. This grievance is therefore held to be without substance.

25. The above observations would have been dispositive of the writ petition. However, there is a salient and important aspect relating to the manner of grading judicial officers, which stood out during the proceedings. As at present, judicial officers' work and performance is supervised and graded by judges committees (comprising of three High Court judges). Each committee is assigned about 25-30 judicial officers. The gradings – based on appraisal of disposal figures and consideration of judgments of the concerned judges, are then considered by the Full Court. The Full Court can endorse or modify the gradings proposed by the committees. This system is

designed to eliminate any form of bias or partisanship and is based on the theory that one individual High Court judge should decide the career or fate of any given judicial officer. This system, though merited, has one drawback. There is no uniform set of rules or guidelines that all appraisal committees have to follow. Thus, each committee proceeds to evolve, based on *bona fide* understanding of what is essential, its own criteria and grades individual officers.

26. A method of career review, including one that administers judicial officers, should be geared to effectively evaluate the officers' performance. The risk of adopting *ad hoc* criteria is that there would be vast variations in the grading of officers- given that there are a multitude of judges in different appraisal committees. Some may place emphasis only on disposals; others may emphasize and grade officers, based on the "unit" criteria applicable for evaluation. Others may take units or disposals into account, and also lay considerable emphasis on the quality of judgments of the official, whereas some committees may consider, in addition to these, whether the judicial officer displayed any initiative or availed of excessive leave without justification.

27. Appraisal and recording of ACRs largely based on the "unit-based system" is not exactly the best method as it often overlooks the asymmetries of roster pressures and subject matter uniqueness of each jurisdiction. Those with crushing or very heavy work load (with heavy filing as in the case of Magistrates) may fare poorly in comparison with those assigned medium to lighter workloads. On the other end of the spectrum, those with special jurisdictions with unique problems, like in the case of CBI courts, where

Judges are dependent on the competencies of Public Prosecutors, the Agency and ability to produce witnesses according to schedule, might actually be unable to measure up to the unit requirements. The endeavor of every authority recording ACRs of judicial officers should be to mark the performance for visible achievements. The advantage here is that there is transparency in the methodology and some consistency; undue emphasis is not placed on units - at the same time not undermining it. The Central Government, through the Department of Personnel and Training had, in 2009 (by OM 21011/2/2009-Estt.(A) 16/02/2009 and OM of 14.05.2009) introduced the APAR (Annual Performance Appraisal Report) system which requires that “Numerical grading had to be awarded by reporting and reviewing authorities for quality of work output, personal attributes and functional competence of the officers reported upon. Those should on a scale of 1-10, where 1 refers to the lowest grade and 10 to the highest”. The annexures to the guidelines give out the details: the OM states that the 1-10 grading would be based on 40% weightage of output assessment and 30% each for personal attributes and functional competency. The guidelines further that grading of 8-10 is outstanding, and will be awarded 9; between 6 and short of 8 will be treated “very good” and awarded 7; those between 4 to 6 are “good” and awarded over all 5; and those below 4 would be awarded 0. While this kind of assessment cannot be adopted *per se*, nevertheless some important performance indicators (key performance indicators “KIP”) need to be factored by making a full assessment of ACRs of judicial officers.

28. This court is of opinion that to inject greater uniformity, objectivity and also some measure of transparency as well as predictability in ACR grading, the following should be kept in mind by the appraisal evaluation authorities:

- (1) (i) The concerned judicial officer should be award of marks/points for a maximum of 100.
- (ii) The 100 marks to be awarded shall be divided as follows:
 - (a) 20% shall be earmarked for quality of judgments (with sub-heads, if possible for clarity, analytical skills, and application of law etc). For appraisal of judgments, the committee/appraising judge should call for all the judgments in contested cases, and, depending on the jurisdiction or jurisdictions exercised by the judicial officer, select 5 randomly – having as great a spread, according to the period (i.e. in the one-year period) and jurisdictions as possible. Copies of such five judgments should be considered. The relevant attributes for consideration should be clarity, grasp of legal principles and their application.
 - (b) A maximum of 25% may be awarded for the institution/disposal ratio. Of this, 10 marks should be for quantum of achievement (i.e. whether disposals were greater than institutions, in a given year) and 15 maximum marks for the units achieved for the relevant period.
 - (c) A maximum of 20% may be awarded for the total number of final judgments delivered in contested matters. Such a benchmark would

interrogate and reveal in real terms the qualitative disposals, rather than relying on the achievement of statistical targets by judicial officer.

- (d) Every judicial officer claiming disposal targets, based on a maximum of 10% may be awarded for timeliness, promptness in delivery of judgments, disposal of old cases, not taking leave or clubbing leave with vacations, etc. (depending on the propensity or tendency of judicial officers to do so).
- (e) The balance 25% may be awarded by the appraising High Court judge/Committee on the basis of interaction/ inspection.

(2) Some allowance may be given wherever the judicial officer is assigned burdensome administrative tasks, such as membership of committees, co-ordination for events, conducting disciplinary enquiries if any of staff, etc. Likewise, where there are peculiarities of jurisdiction, such as where the judicial officer handles CBI courts, or other jurisdictions which have their special characteristics, separate criteria needs to be devised.

(3) No officer should ordinarily be subject to appraisal of any one judge or committee for more than two consecutive years. This would eliminate unconscious biases in favour and against the officers.

(4) Instructions may be also issued requesting all appraising judges/ committees to forward instances of outstanding judgments and extremely poor judgments of any given judicial officer, which they may come across in their normal judicial functioning to the High Court registry, with further instructions that such judgments may be placed before the concerned inspecting High

Court judge/committee for due consideration and input for the ACR appraisal of that judicial officer.

29. In view of the above discussion, the court holds that the Full Court resolutions of 28.4.2009 (modified on 15.01. 2010) and the later resolution 27.01.2011, inasmuch as they prescribe that for appointment to the post of District Judge, the concerned judicial officer should have been graded A in the preceding five years, is not arbitrary; the challenge to Rule 27 too has to fail. The petitioner's grievance that she was arbitrarily denied knowledge of the ACR gradings of other officers, is also without merit. This court hereby requires that the directions in the preceding para of this judgment with respect to formulation of criteria for uniform grading of judicial officers, be suitably incorporated in the form of guidelines, for future implementation; the Registrar General shall take appropriate action to place the papers before the Hon'ble Chief Justice, in this regard. The writ petition is disposed of in the above terms without order on costs.

S. RAVINDRA BHAT
(JUDGE)

SUNIL GAUR
(JUDGE)

AUGUST 21, 2018