IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CWP no. 5326 of 2023
Reserved on: 24.06.2024
Decided on: 11.07.2024

Sandeep Sharma **....Petitioner.**

Versus

Hon'ble High Court of Himachal Pradesh and others
...Respondents.

Coram
Hon'ble Mr. Justice M.S. Ramachandra Rao, Chief Justice
Hon'ble Mr. Justice Satyen Vaidya, Judge

Whether approved for reporting? [1]

For the petitioner: Mr. Sanjeev Bhushan, Senior Advocate with Mr. Sohail Khan, Advocate.

For the respondents: Mr. J.L Bhardwaj, Senior Advocate with Ms. Komal Chaudhary, Advocate, for respondent no.1.

Mr. Arsh Rattan, Deputy Advocate General, for respondents no.2 and 3/State.

Mr. Prateek Gupta, Mr. Praveen Chandel and Mr. Ashwani Sharma, Advocates, for respondent no.4.

M.S. Ramachandra Rao, Chief Justice

Respondent no.1 i.e. the High Court of Himachal Pradesh had advertised posts of Additional District and Sessions Judge on 20.11.2022 from members of the Advocate community for appointment as Additional District and Sessions Judge(s) in the Himachal Pradesh Judicial Services.

2) The said recruitment was initiated on the basis of Himachal Pradesh Judicial Service Rules, 2004 (Annexure P-1) amended up to 14.06.2016.

3) The petitioner appeared for the written test conducted by the High Court in the above quota of 25% meant for Advocates with Roll no.100229. He qualified for written test for the post in question and a letter

[1] *Whether reporters of Local Papers may be allowed to see the judgment?*

dt.12.03.2023 was issued showing the result of the written examination (Annexure P-3).

4) The 4th respondent and the petitioner both got 127 marks in the written examination.

5) Interview/*viva-voce* was held on 07.07.2023 and the 1st respondent issued Select list (Annexure P-4) of the persons selected for the post of Additional District and Sessions Judge by way of direct recruitment in the year 2023, indicating that the 4th respondent had been selected for the said post and that the 4th respondent stood at the 1st position and the petitioner was at Sr.no.2 in the list.

6) The 4th respondent had enrolled with the Bar Council of Punjab and Haryana on 24.07.2012 and joined active practice as an Advocate in the District and Sessions Court, Ambala.

7) In the year 2015, he appeared for the District Legal Aid Officer Exam, 2014 conducted by the High Court of Madhya Pradesh and was selected. He joined the service on 09.03.2015 as District Legal Aid Officer Morena, Madhya Pradesh. He resigned from the said post on 28.07.2015 after serving four months' and 20 days. He then resumed his practice at the Bar in Ambala, Haryana.

8) He later appeared for the Civil Judge Class-II Examination, 2015, conducted by the High Court of Madhya Pradesh. He was successful and selected as Civil Judge Class-II and joined in the said post on 11.04.2016. After serving two years' and one month, he resigned from the said post, which was accepted and he was relieved from the said post on 10.05.2018.

9) He joined active practice as an Advocate at Ambala, Haryana as well as at the Punjab and Haryana High Court and was continuing his active

practice as on the date of notification i.e. 20.11.2022, and on 10.12.2022, which was the last date for receipt of application and was the relevant date for assessment of eligibility criteria in terms of Rules 5 and 6 of the Himachal Pradesh Judicial Service Rules 2004.

Case of the petitioner

10) The petitioner contends that the above admitted facts indicate that respondent no.4 had a clear break in practice as Advocate in view of his employment as District Legal Officer and Civil Judge Class-II in the judicial service of Madhya Pradesh and he is therefore ineligible to be appointed as Additional District and Sessions Judge in the State of Himachal Pradesh.

11) Reliance is made by the petitioner on the judgment of the Supreme Court in ***Dheeraj Mor*** vs**. *Hon'ble High Court of Delhi*** [2] to contend that unless an Advocate possesses seven years' continuous practice in the Bar he is not eligible to be appointed against the 25% direct recruitment quota in the post of Additional and District Sessions Judge.

12) He also places reliance on Article 233(2) of the Constitution, which prescribes that a person not already in the service of the Union or of the State would be eligible to be appointed as District Judge *"if he has been for not less than seven years an Advocate or a pleader and is recommended by the High Court for appointment"*.

13) The petitioner also contends that the 4th respondent had previously applied to the Delhi Higher Judicial Service Examination in 2022, but he was disqualified on the ground that he did not have continuous practice of seven years as on the date of application for being eligible for appointment to the Delhi Higher Judicial Service; that the 4th respondent challenged the

[2] (2020) 7 SCC 401

same before the Delhi High Court, which rejected his challenge in ***Praveen Garg*** vs. ***High Court of Delhi and Others***[3]**.**

14) The petitioner contended that "Note" below the Clause (c) in Rule 5 of the Himachal Pradesh Judicial Service Rules, which permits period during which an Advocate had also held judicial Office to be computed towards the period from which a candidate had been an Advocate is contrary to the decision in ***Dheeraj Mor*** *(2 supra)* and therefore the 1st respondent erred in making the 4th respondent eligible for appointment to the post of Additional District and Sessions Judge on the basis of said "Note".

15) It is stated that the said judgment overrides Rule 5 of the Himachal Pradesh Judicial Service Rules to that extent and the 1st respondent ought to have rejected the candidature of 4th respondent on the said ground.

16) The petitioner prays that his candidature may be considered for the said post and contends that though he made a representation through e-mail on 20.07.2023 vide Annexure P-9, this was rejected vide Annexure P-10 on 25/26th July, 2023.

17) In this Writ petition, the petitioner questions the selection/appointment of respondent no.4 as Additional District and Sessions Judge.

He also seeks a Writ of mandamus directing the respondents to amend Rule 5 of the Himachal Pradesh Judicial Services Rules dt.16th March, 2004 (as amended upto 14th June, 2016), on the ground that the same is not in consonance with the decisions passed by the Supreme Court and to provide that seven years continuous practice as an Advocate in the Bar should be prescribed against 25% direct recruitment from amongst

[3] Judgment dt.15.12.2022 in W.P.(C) 17131 of 2022

eligible Advocates.

He also seeks setting aside of order dt.25/26th July, 2023, whereby his representation was rejected by the 1st respondent.

Reply of respondent no.1

18) The High Court of Himachal Pradesh (respondent no.1) filed its reply refuting the said contentions.

19) It is contended by the High Court that since the petitioner participated in the selection process and since he was unsuccessful, in view of certain decisions of the Supreme Court, he is estopped from laying challenge to the Rules/Policy of the selection, and so the Writ should be dismissed.

20) It is stated that the entire recruitment process was conducted strictly in accordance with Himachal Pradesh Judicial Service Rules, 2004 and in accordance with Rule 5 thereof, which the petitioner was fully aware from the very beginning.

21) The 1st respondent denied knowledge of the fact that the respondent no.4 had been disqualified from the Higher Judicial Selection process in Delhi and also in the State of Madhya Pradesh in the light of the decision in ***Dheerj Mor*** (2 supra).

22) It is denied that the "Note" indicated below the Rule permitting counting of the period during which a candidate had held judicial Office towards computing his period of practice as an Advocate had been framed before the judgment in ***Dheeraj Mor*** *(1 supra)*, but it is contended that it is not against the law settled by the Supreme Court.

23) It is reiterated that the 4th respondent had been an Advocate for seven years and was an Advocate at the time of applying for the said post and the

requirement of possessing 7 years' continuous practice was not provided either under the Constitution of India or under the Rules under which the selection had been made.

24) It is denied that a person who applies for the post of Additional District and Sessions Judge must have continues practice as an Advocate for seven years' as on the date of application.

25) It is stated that since the petitioner has secured lower merit than the 4th respondent, he was not offered appointment to the post of Additional District and Sessions Judge and his representation was rightly rejected.

26) The 1st respondent contends that Article 233(2) of Constitution of India prescribes that a candidate to be appointed as a District Judge should have not less than seven years as an Advocate as on the date of the application made for the said post and it does not require continuous practice as an Advocate for seven years as on the date of application.

Reply of respondents no.2 and 3

27) Respondents no.2 and 3 have filed reply stating that they have a limited role in the appointment of the 4th respondent as Additional District and Sessions Judge, that they merely issued a notification with regard to the appointment, and that on the basis of recommendation of the High Court, they appointed him and they have no role in any other aspect of the matter.

Reply of respondent no.4

28) Respondent no.4 contended that he had experience of more than 10 years, as required under the Himachal Pradesh Judicial Service Rules,2004 for participation in the ADJ Direct Recruitment Examination; that his practice as an Advocate is cumulatively of a period more than 8 years

alongwith 2 years 1 month of judicial service as on 10.12.2022; and therefore, he qualifies the eligibility criteria under Article 233(2) of the Constitution of India and also as per Rule 5 of Himachal Pradesh Judicial Service Rules, 2004. He contends that he fulfills all the eligible criteria including qualification/age limit and experience as required under clause 1(c) of Rule 5.

29) It is contended that the decision in ***Dheeraj Mor*** (2 supra) is not applicable at all, as the issue involved therein related to Officers who were in Judicial Service on the date of application. It is pointed out that the 4th respondent had already resigned from Judicial Service on 10.05.2018 much before the last date for making the application i.e. much before 10.12.2022.

30) It is also stated that Review petitions are pending in the Supreme Court of India and certain orders have been passed from time to time in the said petitions and protection had been granted by the Supreme Court to some of the petitioners, who had been appointed by respective High Courts, such as the High Court of Delhi.

31) It is further stated that candidate such as the petitioner is estopped from challenging Advertisement after participating in the selection process, thereby taking calculated risk in the event of being unsuccessful.

32) It is also contended that in ***Dheeraj Mor*** (2 *supra*), the Supreme Court had only restricted counting of the period of service as a member of judiciary towards computing the period of seven years' of practice and the 4th respondent even after excluding the period in which he held Judicial Office, has cumulative experience of more than seven years.

33) It is contended that the interpretation sought to set forth by the petitioner with respect to possession of seven years' continuous practice as

an Advocate does not fall from the decision in ***Dheeraj Mor*** *(1-supra)* case or from the decision of Supreme Court in ***Deepak Aggarwal*** vs. ***Keshav Kaushik and others***[4] and that the word "continuing as an Advocate" is with reference to the date of appointment, and the same cannot be interpreted to state that a candidate ought to have continuous seven years' of practice as on the cut-off-date.

34) It is also pointed out that the petitioner had not challenged the *vires* of Rule 5 and had instead sought a Writ of mandamus asking the respondent to amend the Rule. It is stated that Rule 5 is in consonance with the language contained in Article 233 of Constitution of India and interpretation sought by the petitioner is not reflected in the language of the Constitution.

35) The 4th respondent also contended that the petitioner had concealed certain facts in the Writ petition- in particular the fact that the petitioner had served as a guest faculty in the 5 year law course in the University Institute of Legal Studies, Punjab University, Chandigarh. The 4th respondent contends that in the letter dt.03.02.2023 listing the guest faculty for the academic session 2022-2023, the petitioner's name also finds mention at Sr. No.29, but he secured the certificate of practice from District and Sessions Judge, Kaithal, concealing said fact.

36) It is also stated that he is facing inquiry proceedings before the Internal Complaints Committee of the Punjab University, Chandigarh under the Sexual Harassment of Woman at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

37) As regards the contention of the petitioner that the 4th respondent had been treated as ineligible in the Delhi Higher Judicial Services Rules is

[4] (2013) 5 SCC 277

concerned, it is stated that in Rule 9(2) of the said Rules, there is a specific prescription that an applicant should be having continuous practice of at least seven years as on the date of application for being eligible for appointment in the Delhi High Court Judicial Services and because of said Rule, his candidature was rejected, and that such rejection was not on the basis of decision in ***Dheeraj Mor*** *(1supra).*

38) It is contended that Rule 5 (c) of the Himachal Pradesh Judicial Service Rules, 2004 does not contain such requirement of possession of continuous practice of at least seven years as on the date of application for being eligible for appointment as Additional District Judge and since he possesses cumulatively 7 years of practice as an Advocate and he was continuing as Advocate on the date of his application, he was qualified to be appointed as Additional District Judge.

39) It is stated that in view of the Review petitions pending in the Supreme Court seeking review of the decision in ***Dheeraj Mor*** *(2 supra)* the Writ petition of the petitioner is liable to be rejected.

Consideration by the Court.

40) Under Rule 5 of the Himachal Pradesh Judicial Service Rules, 2004, (i) 65% posts in the cadre of District Judges/Additional District Judges were to be filled by promotion from amongst Senior Civil Judges on the basis of the principle of merit-cum-seniority and also passing of a suitability test;

(ii) 10% of such posts were to be filled up by promotion from amongst Senior Civil Judges on the basis of merit through Limited Competitive Examination; and (iii) *25% were to be filled up by direct recruitment from amongst eligible Advocates on the basis of examination, written as well as*

oral (viva-voce) test as may be prescribed and conducted by the High Court.

41) It is *qua* this 25% quota that the present issue is raised by petitioner.

42) The eligibility criteria prescribed for direct recruitment to this 25% quota from amongst Advocates prescribed in the Rules are as under:-

(c) 25% by direct recruitment from amongst eligible Advocates, on the basis of examination, written as well as oral (viva voce) test as may be prescribed and conducted by the High Court in accordance with the regulations	*The following shall be the eligibility criteria, including qualification, age limit and experience etc.* *i) Citizen of India.* *ii) Holder of a degree in Law as recognized by the Bar Council of India.* *iii) Practicing Advocate at the Bar of a minimum period of seven years as on the last date fixed for receipt of the applications.* *iv) Must have attained the age of 35 (thirty Five) years and must not have attained the age of 45 years (forty five) years as on the last date prescribed for 7 receipt of application.* *Note: For the purpose of this clause, in computing the period during which a person has been an Advocate there shall be included any period during which he has held a Judicial Office.*

43) As can be seen from above, the Rule 5(c) requires practicing as Advocate at the Bar of a minimum period of seven years as on the last date fixed for receipt of the applications.

44) There is no requirement that such practice as an Advocate must be continuous as on the date of making application for the said post.

45) Admittedly the respondent no.4 was in active practice from 24.7.2012 to 8.3.2015 (2 years 7 months), 28.7.2015 to 10.4.2016 (9

months) and from 11.5.2018 to 20.11.2022 (4 years 6 months) even if the period he was in judicial service is excluded. He thus possesses cumulatively more than 7 years of active practice. Thus he is eligible to be considered for appointment to the post of Additional District Judge as per Rule 5 (c).

46) The issue which thus requires consideration in this case is:

> *" Whether the respondent no.4 is required to have 7 years continuous practice as Advocate to be eligible for appointment as Additional District Judge in the H.P. Judicial Service?"*

47) Art.233 of the Constitution of India states:

> *"**233. Appointment of District Judges**.—(1) Appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.*
>
> *(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an Advocate or a pleader and is recommended by the High Court for appointment."*
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> *(emphasis supplied)*

The Rameshwar Dayal case.

48) In ***Rameshwar Dayal v. State of Punjab***[5], a Constitution Bench of the Supreme Court was considering the validity of appointment of two district judges by name Hans Raj Khanna and P.R.Sawhney by the then Punjab High Court.

These two persons were enrolled as Advocates in the Lahore High Court. But after partition, they were not on the rolls of Advocates at the time of their appointment as District Judges because the Bar Council was not constituted till 28.4.1948, though they were recognised as Advocates entitled to practice in the Punjab High Court by virtue of the proviso to

[5] AIR 1961 SC 816

sub-section (2) of section 8 of the Bar Councils Act,1926 r/w clause 6 of the High Courts (Punjab) order,1947. The Court held that the practice of the appointees which spanned about two decades in pre-partition India has to be included for reckoning the 7 year period.

But the Supreme Court held that since they had the necessary standing of 7 years to be eligible under clause (2) of Art.233 of the Constitution of India, they were validly appointed. It held:

> *"14. We now turn to the other two respondents (Harbans Singh and P.R. Sawhney) whose names were not factually on the roll of Advocates at the time they were appointed as district judges. What is their position? We consider that they also fulfiled the requirements of Article 233 of the Constitution. Harbans Singh was in service of the State at the time of his appointment, and Mr Viswanantha Sastri appearing for him has submitted that clause (2) of Article 233 did not apply. We consider that even if we proceed on the footing that both these persons were recruited from the Bar and their appointment has to be tested by the requirements of clause (2), we must hold that they fulfilled those requirements. They were Advocates enrolled in the Lahore High Court; this is not disputed. Under clause 6 of the High Courts (Punjab) Order, 1947, they were recognised as Advocates entitled to practise in the Punjab High Court till the Bar Councils Act, 1926, came into force. Under Section 8(2)(a) of that Act it was the duty of the High Court to prepare and maintain a roll of Advocates in which their names should have been entered on the day on which Section 8 came into force, that is, on September 28, 1948. The proviso to sub-section (2) of Section 8 required them to deposit a fee of Rs 10 payable to the Bar Council. Obviously such payment could hardly be made before the Bar Council was constituted. We do not agree with learned counsel for the appellant and the interveners (B.D. Pathak and Om Dutt Sharma) that the proviso had the effect of taking away the right which these respondents had to come automatically on the roll of Advocates under Section 8(2)(a) of the Act. We consider that the combined effect of clause 6 of the High Courts (Punjab) Order, 1947, and Section 8(2)(a) of the Bar Councils Act 5 of 1926, was this : from August 15, 1947, to September 28, 1948, they were recognised as Advocates entitled to practise in the Punjab High Court and after September 28, 1948, they automatically came on the roll of Advocates of the Punjab High Court but had to pay a fee of Rs 10 to the Bar Council. They did not*

> *cease to be Advocates at any time or stage after August 15, 1947, and they continued to be Advocates of the Punjab High Court till they were appointed as District Judges. They also had the necessary standing of seven years to be eligible under clause (2) of Article 233 of the Constitution."*

The question whether the said two individuals should have had 7 years "continuous practice" as Advocate to be eligible for appointment as District judges did not arise in the case. The point was neither argued nor decided. What was decided was that the said individuals were eligible, though there names were not on the rolls of the Bar Council at the time of their appointment. The Supreme Court had no occasion to deal with any rules framed under Art.233 or Art.234 in relation to the appointment or promotion to the post of District Judge.

The Deepak Aggarwal case

49) In ***Deepak Aggarwal v. Keshav Kaushik***[6]**,** a notification inviting applications for recruitment to certain posts of additional District and Sessions Judge was issued by the Punjab and Haryana High Court. Pursuant thereto, a written test and an interview was conducted.

The High Court recommended 16 candidates by direct recruitment out of which 5 were appellants before the Supreme Court as the High Court had quashed their appointments.

Out of the 5 appellants, 3 were working as Asst.District Attorney, one as Public Prosecutor and other as Deputy Advocate General at the time of their appointment.

The question considered by the Supreme Court was "*whether these persons, who were full time employees, could have been appointed as District Judges*?" . The High Court had held that they were not eligible on

[6] (2013)5 SCC 277

the said ground.

The Supreme Court held that rendering service as a Public Prosecutor or an Asst.Public Prosecutor or a Government Pleader does not render a person ineligible for appointment as a District Judge if he has been for not less than seven years an Advocate. The Supreme Court held that :

> *"51. …. the expression, "the service" in Article 233(2) means the "judicial service". Other members of the service of the Union or State are as it is excluded because Article 233 contemplates only two sources from which the District Judges can be appointed. These sources are: (i) judicial service; and (ii) the Advocate/pleader or in other words from the Bar. The District Judges can, thus, be appointed from no source other than judicial service or from amongst Advocates. Article 233(2) excludes appointment of District Judges from the judicial service and restricts eligibility of appointment as District Judges from amongst the Advocates or pleaders having practice of not less than seven years and who have been recommended by the High Court as such.*
>
> ***52.** The question that has been raised before us is whether a Public Prosecutor/Assistant Public Prosecutor/District Attorney/Assistant District Attorney/Deputy Advocate General, who is in full-time employment of the Government, ceases to be an Advocate or pleader within the meaning of Article 233(2) of the Constitution."*
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> … …
>
> *89. We do not think there is any doubt about the meaning of the expression "Advocate or pleader" in Article 233(2) of the Constitution. This should bear the meaning it had in law preceding the Constitution and as the expression was generally understood. The expression "Advocate or pleader" refers to legal practitioner and, thus, it means a person who has a right to act and/or plead in court on behalf of his client. There is no indication in the context to the contrary. It refers to the members of the Bar practising law. In other words, the expression "Advocate or pleader" in Article 233(2) has been used for a member of the Bar who conducts cases in court or, in other words acts and/or pleads in court on behalf of his client. In **Sushma Suri**[7], a three-Judge Bench of this Court construed the expression "members of the Bar" to mean class of persons who were actually practising in courts of law as pleaders or Advocates. A Public Prosecutor or a Government Counsel on the rolls of the State Bar Council and entitled to practise under the 1961 Act*

[7] (1999) 1 SCC 330

was held to be covered by the expression "Advocate" under Article 233(2). We respectfully agree.

……

100. … … In our opinion, even though Public Prosecutor/Assistant Public Prosecutor is in full-time employ with the Government and is subject to disciplinary control of the employer, but once he appears in the court for conduct of a case or prosecution, he is guided by the norms consistent with the interest of justice. His acts always remain to serve and protect the public interest. He has to discharge his functions fairly, objectively and within the framework of the legal provisions. It may, therefore, not be correct to say that an Assistant Public Prosecutor is not an officer of the court.

……

101. The Division Bench has in respect of all the five private appellants —Assistant District Attorney, Public Prosecutor and Deputy Advocate General—recorded undisputed factual position that they were appearing on behalf of their respective States primarily in criminal/civil cases and their appointments were basically under the CPC or CrPC. That means their job has been to conduct cases on behalf of the State Government/CBI in courts. Each one of them continued to be enrolled with the respective State Bar Council. In view of this factual position and the legal position that we have discussed above, can it be said that these appellants were ineligible for appointment to the office of the Additional District and Sessions Judge? Our answer is in the negative. The Division Bench committed two fundamental errors, first, the Division Bench erred in holding that since these appellants were in full-time employment of the State Government/Central Government, they ceased to be "Advocate" under the 1961 Act and the BCI Rules, and second, that being a member of service, the first essential requirement under Article 233(2) of the Constitution that such person should not be in any service under the Union or the State was attracted. In our view, none of the five private appellants, on their appointment as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, ceased to be "Advocate" and since each one of them continued to be "Advocate", they cannot be considered to be in the service of the Union or the State within the meaning of Article 233(2). The view of the Division Bench is clearly erroneous and cannot be sustained.

102. As regards construction of the expression, "if he has been for not less than seven years an Advocate" in Article 233(2) of the Constitution, we think Mr Prashant Bhushan was right in his submission that this expression means seven years as an Advocate immediately preceding the application and not seven years any time in the past. This is clear by use of "has been".

> *The present perfect continuous tense is used for a position which began at sometime in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as an Advocate on the date of application."*

When the Supreme Court said in para 102 that the expression " if he has been for not less than seven years an Advocate" means "seven years as an Advocate immediately preceding the application", whether it has held that a candidate must have continuous seven years practice preceding the application?

The petitioner insists that that is what it meant, but respondent no.4 disputes it. This is the crux of the matter.

The decision in Dheeraj Mor

50) In ***Dheeraj Mor (2 supra),*** the issue again arose.

In that case the petitioners who were in judicial service applied for appointment to post of District Judge.

They claimed that before joining judicial service if a candidate has completed 7 years of practice as an Advocate, he/she shall be eligible to stake claim as against the direct recruitment quota from the Bar notwithstanding that on the date of application/appointment, he or she is in judicial service of the Union or State.

Yet another category was that of the persons having completed only 7 years of service as judicial service. They contend that experience as a Judge be treated on a par with the Bar service, and they should be permitted to stake their claim.

The third category was hybrid, consisting of candidates who have completed 7 years by combining the experience serving as a judicial officer

and as Advocate. They claimed to be eligible to stake their claim against the above quota.

The Supreme Court held that Article 233(2) starts with a negative stipulation that a person who is not already in the service of the Union or the State, shall be eligible only to be appointed as District Judge if he has been an Advocate or a pleader for not less than 7 years and is recommended by the High Court for appointment; that the expression "in the service of the Union or of the State" means judicial service; a person from judicial service can be appointed as a District Judge; however, *Article 233(2) provides that a person who is not in the service of the Union, shall be eligible only if he has been in practice, as an Advocate or a pleader for 7 years*; meaning thereby, persons who are in service are distinguished category from the incumbent who can be appointed as District Judge on 7 years' practice as an Advocate or a pleader.

It held that Article 233(2) nowhere provides eligibility of in-service candidates for consideration as a District Judge concerning a post requiring 7 years' practice as an Advocate or a pleader. Requirement of 7 years' experience for Advocate or pleader is qualified with a rider that he should not be in the service of the Union or the State; that *the members of the judicial service alone are eligible for appointment as against the post of District Judge as the only mode provided for the appointment of in-service candidates is by way of promotion. They can stake their claim as per rules for promotion or merit promotion as the case may be.*

It held :

> *"14. Article 233(2) provides that if an Advocate or a pleader has to be appointed, he must have completed 7 years of practice. It is coupled with the condition in the opening part that the person should not be in service of the*

Union or State, which is the judicial service of the State. The person in judicial service is not eligible for being appointed as against the quota reserved for Advocates. Once he has joined the stream of service, he ceases to be an Advocate. The requirement of 7 years of minimum experience has to be considered as the practising Advocate as on the cut-off date, the phrase used is a continuous state of affair from the past. The context "has been in practice" in which it has been used, it is apparent that the provisions refer to a person who has been an Advocate or pleader not only on the cut-off date but continues to be so at the time of appointment."

Thus this passage suggests that the requirement of 7 years of minimum experience has to be considered as the practising Advocate as on the cut-off date; and a candidate has to be an Advocate not only on the cut-off date, but should also continue to be so at the time of appointment.

After quoting para 102 of ***Deepak Aggarwal (4 supra),*** it was held at para 23 of ***Dheeraj Mor (2 supra)*** as under:

"*23. …. It is clear from the decision of* ***Deepak Aggarwal (4 supra)*** *that recruitment from the Bar is only from among practising Advocates and those continuing as Advocates on the date of appointment. The submission that the issue of eligibility of in-service candidates did not come up for consideration is of no consequence as provisions of Article 233(2) came up for consideration directly before this Court."*

The Supreme Court summed up the principles in paras 45-47.6 in the following terms:

"*45. …. …. we are of the opinion that for direct recruitment as District Judge as against the quota fixed for the Advocates/pleaders, incumbent has to be practising Advocate and must be in practice as on the cut-off date and at the time of appointment he must not be in judicial service or other services of the Union or State. For constituting experience of 7 years of practice as Advocate, experience obtained in judicial service cannot be equated/combined and Advocate/pleader should be in practice in the immediate past for 7 years and must be in practice while applying on the cut-off date fixed under the rules and should be in practice as an Advocate on the date of appointment. The purpose is recruitment from Bar of a practising Advocate having minimum 7 years' experience.*

46. In view of the aforesaid interpretation of Article 233, we find that rules debarring judicial officers from staking their claim as against the posts reserved for direct recruitment from Bar are not ultra vires as rules are subservient to the provisions of the Constitution.

47. We answer the reference as under:

47.1. The members in the judicial service of the State can be appointed as District Judges by way of promotion or limited competitive examination.

47.2. The Governor of a State is the authority for the purpose of appointment, promotion, posting and transfer, the eligibility is governed by the Rules framed under Articles 234 and 235.

47.3. Under Article 232(2), an Advocate or a pleader with 7 years of practice can be appointed as District Judge by way of direct recruitment in case he is not already in the judicial service of the Union or a State.

47.4. For the purpose of Article 233(2), an Advocate has to be continuing in practice for not less than 7 years as on the cut-off date and at the time of appointment as District Judge. Members of judicial service having 7 years' experience of practice before they have joined the service or having combined experience of 7 years as lawyer and member of judiciary, are not eligible to apply for direct recruitment as a District Judge.

47.5. The rules framed by the High Court prohibiting judicial service officers from staking claim to the post of District Judge against the posts reserved for Advocates by way of direct recruitment, cannot be said to be ultra vires and are in conformity with Articles 14, 16 and 233 of the Constitution of India.

47.6. The decision in Vijay Kumar Mishra7 providing eligibility, of judicial officer to compete as against the post of District Judge by way of direct recruitment, cannot be said to be laying down the law correctly. The same is hereby overruled."

51) The dicta of the Supreme court in para 45 that "*Advocate/pleader should be in practice in the immediate past for 7 years and must be in practice while applying on the cut-off date fixed under the rules and should be in practice as an Advocate on the date of appointment"* suggest that the candidate should be in *continuous* practice for 7 years as on cut-off date and also as on date of appointment.

52) But the dicta in para 47.4 that "*an Advocate has to be continuing in practice for not less than 7 years as on the cut-off date and at the time of appointment as District Judge*" suggests that the candidate should have

minimum 7 years service, that he must be practicing as on cut off date and at the time of appointment. Thus it suggests that if even *cumulatively* he had minimum of 7 years of service, he is eligible and he need not have 7 continuous years of practice as on cut off date.

53) It is because of this ambiguity that several Review petitions had been filed in the Supreme Court and are pending consideration before it as pointed out by counsel for respondent no.4.

54) But in the facts of the said case, the issue arose at the instance of selected candidates who were in fact not practicing as Advocates on the date of their application but were already members of Judicial service. The Supreme Court held that as per the rules framed by the Delhi High Court, such judicial officers were prohibited from staking claim to the post of District Judge against posts reserved for Advocates by way of recruitment and the said rules were valid (in para 47.5 p.445)

55) We understand the said decision to mean that a judicial officer, regardless of his or her previous experience as an Advocate of 7 years, cannot apply and compete for appointment to the post of Additional District and Sessions Judge in the direct recruitment quota meant for Advocates, and nothing more. Art.233(2) of the Constitution of India, on a plain reading, also does not support the view that the candidate must have “continuous” 7 years of practice as an Advocate, though he is required to have minimum 7 years of practice as Advocate and must be continuing as Advocate on date of making application for appointment and also on the date of his/her appointment.

56) The question whether the candidates should have continuous practice as Advocates as on the date of their application, in our opinion,

did not directly arise in the case since the appellants before the Supreme Court were in Judicial service on the date of their application for said post. So the question being considered in that case was only whether such persons can claim posts in direct recruitment meant for Advocates relying on their past practice of 7 years as Advocate.

Praveen Garg case of Delhi High Court

57) We shall now deal with a decision of the Delhi High Court involving the respondent no.4- ***Praveen Garg (3 supra)***.

Rule 9(2) of the Delhi Higher Judiciary rules, 1970 had been amended on 8.2.2022 after the decision in ***Dheeraj Mor(2 supra)*** on the assumption that the said decision and the decision in ***Deepak Aggarwal (4 supra)*** interpreted Art.233 (2) as requiring practice as an Advocate for a *continuous* period of 7 years as on the date of application.

The amended Rule 9(2) stated that the qualifications for direct recruits shall be as follows:

"*Must be a citizen of India.*

(1) Must have been continuously practicing as an Advocate for not less than 7 years as on the last date of receipt of application

(2)…"

The challenge by the respondent no.4 herein to Rule 9(2) was rejected by the Delhi High Court in view of it's above understanding of interpretation of Art.233(2) of the Constitution of India based on ***Dheeraj Mor*** (2 supra) and ***Deepak Aggarwal*** (4 supra) .

The decision of the Delhi High Court was not interfered with by the Supreme Court in SLP No.1377/2023 and the SLP was dismissed.

58) This judgment, in our opinion, is based on the Rule 9(2) of the Delhi

Higher Judiciary rules, 1970 as was amended on 8.2.2022 by the Delhi High Court which prescribed such continuous practice for 7 years by an Advocate.

59) Whether the Rule in question was framed by the Delhi High court on a correct understanding of the decisions in ***Dheeraj Mor*** (supra) and ***Deepak Aggarwal*** (supra), in our opinion, has to be seen.

60) We do not agree with the view of the Delhi High Court's understanding of the said two decisions that they insist that there ought to be continuous 7 years practice for being eligible to be appointed as an Additional District Judge, as is being contended by counsel for petitioner.

The decision of Allahabad High Court in Bindu and Shashak Singh.

61) The Allahabad High Court in ***Bindu v.High Court of Judicature at Allahabad through it's RG and another***[8] disqualified a candidate who had applied for appointment as a Judicial officer in the UP Higher Judicial Services on the ground that in August 2017 she had got selected as Examiner of Trade Mark & G.I after surrendering her practicing licence, though she later quit the said job and was working as a Public prosecutor in CBI in 2019. The Court extracted the passage from paras 101 and 102 in ***Deepak Aggarwal*** (4 supra) and also it's previous decision in ***Shashank Singh*** *and others* v. ***High Court of Judicature at Allahabad through it's RG and another***[9] , which applied ***Dheeraj Mor*** (2 supra) and ***Deepak Aggarwal*** *(4 supra).*

There was no analysis of the fact scenario in the decisions of ***Dheeraj Mor*** (2 supra) or ***Deepak Aggarwal*** (4 supra) in these decisions.

62) We are not in agreement with the view taken by the Allahabad High

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8 2022 Live Law (All) 137

9 W.A.No.27120 of 2018 dt.3.12.2021

Court in these decisions as we are of the view that considered in proper perspective, the passages in those decisions do not unequivocally convey the view that a candidate must have *continuous* practice of 7 years to be eligible to be appointed as an Additional District Judge.

63) There are other passages , particularly in ***Dheeraj Mor(2 supra)*** as explained supra, which suggest that total 7 years of practice as Advocate cumulatively has to be possessed, but the candidate must be in active practice on date of his application and also on the date of his appointment.

64) However to the extent the Note under clause (c) of Rule 5 counted the period spent on judicial service by a candidate towards the 7 year periods of service as Advocate is clearly contrary to the para 45 of *Dheerj Mor* (2 supra) where the Supreme Court held that "….*For constituting experience of 7 years of practice as Advocate, experience obtained in judicial service cannot be equated/combined…".*

65) So the said "Note" is struck down as contrary to the law laid down in *Dheeraj Mor* (2 supra).

66) However we do not accept the contention of petitioner that respondent no.4 is ineligible to be appointed as Additional District Judge as per Rule 5 (c) of the Himachal Pradesh Judicial Service Rules, 2004. We hold that he is eligible for such appointment and was rightly selected and recommended by the High Court of Himachal Pradesh for such appointment and was rightly issued appointment order by the State of Himachal Pradesh.

67) In view of the above discussion, we do not propose to go into the other contentions raised by counsel for parties.

68) Therefore the Writ Petition is dismissed in all respects except to the extent that "Note" below clause (c) of Rule 5 of the Himachal Pradesh

Judicial Service Rules, 2004 (permitting counting of Judicial service of a candidate towards counting of 7 years practice as Advocate for being eligible to be appointed as Additional District Judge) is declared unenforceable and struck down. No costs.

(M.S. Ramachandra Rao)
Chief Justice

(Satyen Vaidya)
Judge

July 11, 2024.
(priti)