**IN THE HIGH COURT OF JUDICATURE AT PATNA**
**Civil Writ Jurisdiction Case No.8306 of 2020**

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Sunil Kumar Verma, Aged about 40 years, Male, Son of Sohan Lal Swarnkar Resident of 8-C/3, Awas Vikash Colony, P.S.- Jhunsi, District- Allahabad (Uttar Pradesh).

... ... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Principal Secretary, General Administration Department, Government of Bihar, Patna.
3. The Patna High Court Through The Registrar General, Patna High Court, Patna.

... ... Respondent/s

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**Appearance :**

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| For the Petitioner/s | : | Mr. Sandeep Kumar, Adv.<br>Mr. Alok Kumar Shahi, Adv. |
| For the State | : | Mr. P.K. Verma, Sr. Adv.<br>Mr. Anand Kumar, AC to AAG3 |
| For the High Court | : | Mr. Piyush Lall, Adv. |

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**CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY**
**and**
**HONOURABLE MR. JUSTICE PARTHA SARTHY**
**CAV JUDGMENT**
**(Per: HONOURABLE MR. JUSTICE SHIVAJI PANDEY)**

**Date : 08-04-2021**

Heard learned counsel for the parties.

The petitioner was the Judicial Officer, has challenged the letter no. 23842 dated 18.5.2020 and letter no. 24973 dated 1.6.2020 issued by the Patna High Court (this Court) by which a show-cause notice was issued to the petitioner in view of the judgment of Hon'ble Apex Court passed in the case of Dheeraj Mor Vs. High Court of Delhi along with Prem Shankar & Ors. Vs. High Court of Patna & Anr. reported in (2020) 7 SCC 401 as to why his services from the post of Additional District and Sessions

Judge be not terminated assigning reason that the petitioner was not a practicing advocate on the date of preliminary test, main test, interview and declaration of final result as well as on the date of his appointment as an Additional District and Sessions Judge and, at later stage, the petitioner filed interlocutory application bearing I.A. No. 1/2020 by which he has sought amendment of the writ petition in order to bring new developmental fact as has been informed vide letter dated 22.9.2020 that the response/submission of the petitioner has been rejected by this Court and further I.A. No. 2/2020 has been filed by which he has made a prayer for grant of interim relief that during pendency of this writ application, no order of termination be passed against the petitioner and again I.A. No. 3/2020 has been filed by which a prayer has been made for quashing the notification no. 7 dated 17.12.2020 along with letter dated 4.1.2021 by which the petitioner has been terminated from service and communicated at his place of posting at Begusarai respectively.

The short fact of this case is that the petitioner has enrolled himself in Bar Council of Uttar Pradesh vide Enrollment No. 7938 of 07 dated 5.12.2007 and joined the State High Court Bar Association, Allahabad on 5.12.2007 and remained in practice till 15.1.2017. During that period, he was appearing in various

competitive examination such as PCS-J and District Judge (Entry Level) Direct from Bar Exams at different States. This High Court had issued an advertisement for recruitment of suitable candidates to the post of District Judge (Entry Level), Direct From Bar Exam-2016 on its website dated 22.8.2016 notifying 98 vacancies as on 31.3.2017. One of the terms and conditions was mentioned therein that the candidates must possess 7 years practice including his appearance at least in 24 cases per annum preceding three years on the last date of receipt of the application as specified in the advertisement and further condition was provided that the candidate must have completed 35 years of age and who has not completed the 50 years as on 1.1.2016, shall be eligible for consideration. The cut off date for the purpose of consideration of eligibility of the application was fixed as on 16.9.2016. In pursuance of the advertisement, the petitioner applied for the said post on 31.8.2016 before the last date i.e. 16.9.2016. While filling up the form, he has also obtained experience certificate from the Registrar, High Court showing his professional experience of seven years on or before the cut off date. It has to be noted that the petitioner had also applied in U.P. Judicial Services (Junior Division), where he was selected on 16.1.2017 and, accordingly, he joined the judicial services (Junior Division) in the state of

Uttar Pradesh and, as per petitioner, on or before the cut off date, he was not in any service either judicial or otherwise. Further that the condition does not stipulate in the advertisement that candidate who has joined judicial service or in any services later on would be made ineligible for the consideration of the said post. The petitioner succeeded in preliminary examination as well as in the main examination. After the main examination, this Court published notice in its website dated 9.2.2018, giving liberty to the candidates to remove defects and discrepancies in the application form. In the notice, it has been mentioned that on scrutiny of the application forms and documents uploaded by the candidates who have qualified in the main (Written) examination of District Judge (Entry Level), Direct from Bar, 2016, certain discrepancies have been found. The same have been indicated against respective candidates in the chart attached herewith.

The candidates were directed to do the needful and clause-3 prescribes that the candidates in respect of whom clarification was required regarding enrollment/experience certificates, may clarify their position on affidavit which they shall bring at the time of interview and clause-4 provides that the candidates who are judicial officers and also those who are serving in some other organization having 7 years of experience as

advocate are provisionally allowed to appear at the interview and their candidature shall be considered later on in the light of the legal position settled bythe Hon'ble Supreme Court in the cases of Deepak Aggrawal vs. Keshav Kaushik and Others, Civil Appeal No. 561 of 2013 (arising out of SLP (C) No. 17463 of 2010) and Vijay Kumar Mishra & Another Vs. High Court of Judicature at Patna & Ors., Civil Appeal No. 7358 of 2016 (arising out of SLP (C) No. 17466 of 2016). In clause-7, it has been mentioned that the candidate having roll no. 15395 has been held ineligible to appear in interview because of not having 7 years of experience as advocate as because being in full time corporate employment having not practiced as advocate and also in view of Rule 49 of the BCI Rules.

The claim of the petitioner is that on the cut off date, he was possessing the essential qualification of 7 years of experience as an advocate and the cases mentioned in the notice does not apply to the case of the petitioner as the fact in those cases were quite different.

The names attached with this notice contains the name of the petitioner at serial no.93 wherein in the column, it has been mentioned that the experience certificate dated 19.01.2018 shows he has practiced as an advocate from 5.12.2007 to 15.1.2017only

and it appears that from the letter dated 21.1.2018 issued by the Bar council of UP in favor of the petitioner that presently he has surrendered his certificate to Bar Council. The Patna High Court published the final result in its website on 21.3.2018 comprising of successful 98 candidates. The petitioner was declared successful and his name finds place at serial no. 50. At the bottom of the result, it has been mentioned that recommendation of the candidates bearing Roll Nos. 13869 & 12239 at merit position no. 61 & 67, respectively is kept pending and shall be considered only after final decision of the Hon'ble Supreme Court in SLP © No. 14156/2015. Further, it has been mentioned that the candidates, with curable defects in their applications/documents, will have to rectify the defect(s) within the time granted to them failing which their respective recommendation/appointment would be canceled. The details of such candidates shall be uploaded on the website of the Court shortly, followed by letter of appointment vide Memo No. 6909 dated 28.5.2018 in turn, he tendered resignation, which was accepted. Thereafter, he joined the judgeship of Begusarai as Additional District Judge and was discharging the duty satisfactorily.

A show-cause letter dated 18th May, 2020 was issued to the petitioner through District & Sessions Judge, Begusarai, was

served upon the present petitioner mentioning therein that the petitioner does have 7 years experience as on 16.9.2016 on the date of filing the application for District Judge (Entry Level), Direct from Bar Exam.-2016. Subsequently, he had joined the judicial service with effect from 16.1.2017, thereafter, he appeared in preliminary examination and mains examination held on 23.7.2017 and 8.10.2017 respectively. He participated in the interview held on 14.2.2018, after declaration of final result on 21.3.2018 and subsequent notifications of appointment and posting issued by General Administration Department, Government of Bihar dated 28.5.2018 & 7.8.2018 respectively, he joined as Additional District & Sessions Judge, Begusarai on 21.8.2018. It has further been mentioned that he was not a practicing Advocate on the date of Preliminary Test, Main (Written) Examination, Interview and declaration of final result as well as on the date of his appointment as an Additional District & Sessions Judge. Therefore, he was ineligible to be appointed as Additional District & Sessions Judge against the quota for Bar on the date of joining in the service in the light of judgment dated 19.2.2020 passed in Dheeraj Mor case (supra) of the Hon'ble Supreme Court and directed the District & Sessions Judge, Begusarai to take response from Sri Sunil Kumar Verma (petitioner) as to why his services be

not terminated from the post of Additional District & Sessions Judge. Ultimately, he filed a representation dated 8.9.2020 but, his representation was rejected vide letter dated 22.9.2020 (Annexure-8) and, finally, the petitioner has been terminated from service vide Memo No. 12094 dated 17.12.2020 (Annexure-12) which is under challenge through I.A. No. 03 of 2021.

This Court in the administrative side filed the counter affidavit, has given details of the event relating to recruitment of District Judge (Entry Level), Direct From Bar Exam-2016. It has been stated that the advertisement was published on 22.8.2016 inviting application from the eligible candidates for direct recruitment to 98 vacancies as on 31.3.2017, the time was allowed to submit online application forms from 22.8.2016 to 16.9.2016. On 15.9.2016, a corrigendum to the said advertisement was issued making a statement interalia that original certificates from the candidates regarding eligibility shall be requisitioned after the result of the main (written) examination in respect to the qualified candidates. In pursuance to the advertisement, the petitioner applied for the post online on 31.8.2016, as he was enrolled as an advocate with the Bar Council of Uttar Pradesh on 5.12.2007, he joined the High Court Bar Association on the same day.

A writ petition was filed before the Hon'ble Apex Court by the Judicial Officers of the State of Bihar and Uttar Pradesh bearing W.P.(S) No. 733 of 2016, Prem Shankar and Ors. Vs. Hon'ble High Court of Judicature at Patna and another seeking a relief for declaring Rule 5 of the above 1951 Rules as ultra vires to the Constitution to the extent it prescribed promotion as the only mode of appointment for Judicial Officers of Subordinate Judiciary of the State of Bihar to the Higher Judicial Service and to consequently declare them eligible to appear in the forthcoming District Judge Entry Level (Direct from Bar) Examination, 2016. The claim has been made that had Rule 5 of the 1951 Rules precludes the Judicial Officers for direct appointment to Higher judicial Service by taking examination along with advocates eligible after 7 years of practice and reserving the said process of recruitment for members of the Bar, is complete failure to the object sought to be achieved. It has further been stated that identical matter is pending before Hon'ble the Apex Court in Writ Petition (Civil) No. 414 of 2016 (Dr. Anil Kumar Singh Vs. Hon'ble High Court of Allahabad and another and S.L.P. (Civil) No. 14676 of 2015, Dheeraj Mor Vs. Hon'ble High Court of Delhi. The Hon'ble Supreme Court vide order dated 27.9.2016 passed an interim order directing that the petitioners be allowed to appear in

the District Judge Entry Level (Direct from Bar) Examination, 2016 subject to the two conditions being (i) they make an application before the Registrar General, Patna High Court within one week from today and (ii) upon scrutiny of applications, the Registrar General finds the petitioners to be within the upper age limit prescribed for the examination and further directed for listing the W.P.(Civil) No. 414 of 2016 and other connected cases along with the aforesaid case. The two candidates of the preceding selection process by direct recruitment to the Bihar Superior Judicial Service against 25% posts reserved for eligible advocates vide Advt. No. 01/2015 dated 5.1.2015 moved the Hon'ble Supreme Court vide Civil Appeal No. 7358 of 2016, Vijay Kumar Mishra and another Versus High Court of Judicature at Patna and others raising grievance against the decision of this Court as communicated under letter dated 16.2.2016 (and also the judgment and order dated 12.5.2016 passed in C.W.J.C. No. 3504 of 2016 filed by them before the Hon'ble Court in this regard) by which they were not granted permission to appear in the viva voce test on the plea that when the selection process was going on, they had, in the meantime, joined as Judicial Officers in the Bihar Judicial Service i.e. on the post of Civil Judge (Junior Division) but, they had option to resign and appear in the said viva voce test. The

Hon'ble Supreme Court vide order dated 9.8.2016 passed in Civil Appeal No. 7358 of 2016 (Vijay Kumar Mishra and another), held that Article 233(2) of the Constitution of India prohibits the appointment of a person as District Judge who was already in service of the Union or the State but, not the consideration/selection of such a person and that a person who is already in service of either the Union or the State would still have the option if selected to join the service as District Judge or continue with his existing employment and accordingly they were allowed to participate in the selection process under Advertisement No. 01 of 2015 conducted by this Court without insisting upon their resigning from the post of Civil Judge (Junior Division) under the Bihar Subordinate Judicial Service as per the impugned letter dated 16.2.2016 issued by this Court.

In connection with the present matter, the Standing Committee of this Court in its Additional Agenda Item No.2 considered the representation of the petitioners (i.e. Judicial Officers) of W.P.(C) No. 733 of 2016 (Prem Shankar and others) to accept their candidature under the advertisement dated 22.8.2016 in view of the interim order dated 27.9.2016 of the Hon'ble Supreme Court and the Standing Committee resolved to permit them to appear in the District Judge (Entry Level) Direct from Bar

Examination, 2016, subject to the result of the said writ petition filed by them. The Selection and Appointment Committee of this Court considered the representation of number of candidates on 6.10.2016 with respect to advertisement dated 22.8.2016 requesting them to permit them to rectify the typographical errors committed by them and allow them to upload their documents which they could not upload or to allow them to deposit fee which they were unable to deposit and the Committee resolved that in view of the interim order of the Hon'ble Supreme Court dated 27.9.2016 passed in W.P.(C) No. 733 of 2016 (Prem Shankar and others) serving judicial officers were allowed to participate in the selection process against the aforesaid advertisement and the online application portal was opened for limited period from 17.10.2016 to 29.10.2016 and all persons whose applications were found defective would get an opportunity to rectify them and that the same be notified.

Pursuant thereto the petitioners and a number of other judicial officers submitted their applications for the said examination under advertisement dated 22.8.2016. Before the direct entry examination of District Judge level, the petitioner participated in Civil Judge (Junior Division) Examination, in which the final result was declared on 5.8.2016 in which the

petitioner was declared, selected and, accordingly, appointment letter dated 22.12.2016 was issued in his favor and, pursuant thereto, he joined the said post of Civil Judge (Junior Division) at Gyanpur, Uttar Pradesh on 16.1.2017. In that view of the matter, the petitioner ceased to be an advocate on 16.1.2017 within the meaning of Article 233(2) of the Constitution of India. Accordingly, on and after that date, he was no longer eligible advocate as per the provisions of 1951 Rules to be considered for appointment to the post of District Judge (Entry Level) under the Bihar Superior Judicial Service by direct recruitment under 25% quota reserved for practicing advocates of Bar. The preliminary examination was conducted on 23.7.2017 and its result was declared on 24.8.2017 and the petitioner was declared successful. On 8.10.2017, the mains examination was held and its result was declared on 16.1.2018 in which the petitioner was again declared successful. The matter was taken up before the Hon'ble Supreme Court and the same was pending before it in S.L.P. (C) No. 14676 of 2015 (Dheeraj Mor Vs. Hon'ble High Court of Delhi) and other connected matters and relying on the judgment dated 9.8.2016 passed in Civil Appeal No. 7358 of 2016 (Vijay Kumar Mishra and another) wherein the petitioners had claimed that they completed 7 years of practice as an advocate then they would be eligible

candidate despite the fact that on the date of application/appointment, he was in service of the Union or State. The Hon'ble Supreme Court vide order dated 23.1.2018 was pleased to refer the matter before the appropriate Bench in view of the fact that this case involves substantial question of law as to the interpretation of Article 233 of the Constitution of India with an observation that one major issue which arose for consideration was whether the eligibility for appointment as District Judge is to be seen only at the time of appointment or at the time of application or both. On 8.2.2018, the Hon'ble Selection and Appointment Committee considered the matter relating to discrepancies found during scrutiny of the application forms and documents of the candidates who had qualified in the mains (written) examination under advertisement dated 22.8.2016 as placed before it in form of a tabulated chart. With respect to the petitioner, the discrepancies which were pointed out were that (i) his experience certificate dated 19.1.2018 shows his practice as an advocate from 5.12.2017 to 15.1.2017 and (ii) it appeared from letter dated 21.1.2018 of the Bar Council of Uttar Pradesh to him that presently he had surrendered his enrollment certificate to the said Council. The Committee also took into consideration that total 11 as per the chart, qualified for interview and had 7 years of practice as an

advocate before they joined the Judicial Service and was pleased to decide that they were to be provisionally allowed to appear at the interview and their candidature shall be considered later on in the light to the legal position settled by the Hon'ble Supreme Court in the cases of Deepak Aggrawal Vs. Keshav Kaushik and others, Civil Appeal No. 561 of 2013 and Vijay Kumar Mishra and another Vs. High Court of Judicature at Patna and others, Civil Appeal No. 7358 of 2016. The above decision dated 8.2.2018 was notified by the Court vide Notice dated 9.2.2018 along with the tabular chart showing the discrepancies in the application forms and documents uploaded by the candidates who had qualified in the mains written examination under the advertisement dated 22.8.2016. The name of the petitioner with his roll number was also mentioned at serial no. 93 of the said chart, pointed out two discrepancies and he was called upon to explain through an affidavit to be placed at the time of interview. The notice made it very clear that those judicial officers with 7 years of practice as an advocate, they were allowed provisionally to appear in the interview and their candidature shall be decided later on. The petitioner appeared in the viva voce test on 14.2.2018 and, in terms of the notice dated 9.2.2018, he produced the affidavit sworn by him on 12.2.2018 explaining the fact as stated above that he was

enrolled as an advocate on 5.12.2007 and continued to practice as an advocate from 5.12.2007 to 15.1.2017, he joined the Uttar Pradesh Judicial Service as Civil Judge (Junior Division) on 16.1.2017, before his said joining, he had surrendered his enrollment certificate to the Bar Council of Uttar Pradesh and in the event of his selection, he would produce the same after procuring it from the Bar Council. He also produced the certificate dated 9.2.2018 issued by the Allahabad High Court vide letter bearing memo no. 2375 dated 12.2.2018 wherein a statement was made that the Court had no objection if the petitioner would appear in viva voce test under the advertisement dated 22.8.2016. After completion of the interview, the office of the Court placed before the Selection and Appointment Committee the result of the successful candidates for publication of the final result, the Committee in its meeting dated 14.3.2018, approved the merit panel of 98 successful candidates on the basis of marks obtained by them. Those judicial officers who had been permitted to participate in the selection process, the Committee took note of the following facts – the previous decisions of the Court with respect to them, as above; Rule 5(C) (iii) of the 1951 Rules read with clause 3 of Appendix C thereto provided that 25% vacancies are to be filled up by eligible advocates with not less than 7 years

practice and also decided that the applicants who were advocates which term does not include the judicial officers, the interim order dated 27.9.2016 passed by the Hon'ble Supreme Court in the case of Prem Shankar and others, the judgment dated 9.8.2016 passed by Hon'ble Supreme Court in the case of Vijay Kumar Mishra and another, the order dated 21.1.2018 of the Hon'ble Supreme Court by which it had referred the case of Dheeraj Mor to a larger Bench and observed that a decision would have to be taken whether the two judicial officers, namely, Lallan Kumar and Santosh Kumar whose names were contained in the above merit list of 98 candidates be disqualified or their candidature be kept open until disposal of Dheeraj Mor and other analogous cases. With respect to the petitioner whose name was at serial no.50 of the merit list, the Committee observed that though he has joined the U.P. Judicial Service with effect from 16.1.2017 but, on the cut off date, he was a practicing advocate and having 7 years of experience and thus, his candidature was valid and was recommended for appointment. The Full Court of the Court in its meeting dated 21.3.2018 vide Agenda No.1 considered the above minutes of the Selection and Appointment Committee.

The Full Court approved the list with the caveat with respect to two candidates, namely, Sri Lallan Kumar and Sri

Santosh Kumar were permitted to participate in the selection process, subject to final adjudication by the Supreme Court in the case of Prem Shankar and Ors. along with Dheeraj Mor case. Accordingly, their matter was kept pending and would be considered only after decision of the Supreme Court in the aforesaid case. The appointment of 98 candidates were directed to be uploaded in the website of the Patna High Court and he found himself to be recommended to the State Government for his appointment to the post of District Judge (Entry Level) and, in view of the recommendation of this Court, the State Government, vide notification no. 6909 dated 28.5.2018, appointed 96 successful candidates on the post of Additional District Judge and posted the petitioner at Begusarai. After his appointment on 28.5.2018 and posting on 7.8.2018 on the post of District Judge (Entry Level) at Begusarai, the petitioner resigned from the post of Civil Judge (Junior Division) in Uttar Pradesh Judicial Service on 17.8.2018 and joined on the said post at Begusarai on 21.8.2018. The Hon'ble Supreme Court considered and interpreted Article 233(2) of the Constitution of India and vis-à-vis examined the validity of the Rules of the various High Courts including the members of judicial service staking their claim against the post reserved for direct recruitment from the Bar which included the

validity of Rule 5(c) of the 1951 Rules in W.P.(C) No. 733 of 2016 as it excluded judicial officers from direct recruitment to Bihar Superior Judicial Service. The Hon'ble Supreme Court has held that the quota fixed for advocates/pleaders incumbent must be a practicing advocate as on the cut-off date including at the time of appointment he must not be in judicial service or other services of the Union or State. The Hon'ble Supreme Court has further pleased to hold that the law laid down in Civil Appeal No. 7358 of 2016 (Vijay Kumar Mishra and another), on the basis of distinction between selection and appointment, that Article 233(2) only prohibits appointment of a person as District Judge who is already in service of the Union or State and it does not prohibit the consideration of the candidature of a person who is already in service of the Union or State and if such a candidate is selected then he would have the option to continue with his existing employment or join the service as District Judge is not correct law thus overruled the said judgment. The Selection and Appointment Committee in its meeting dated 6.5.2020 considered the matter regarding appointment of judicial officers under District Judge (Entry Level) Direct from Bar Exam, 2016 and in the light of the judgment dated 19.2.2020 passed in Dheeraj Mor case with respect to the present petitioner, it has been recorded that he was

practicing advocate for 7 years experience as on cut-off date. Subsequently, he has joined the judicial officer in Uttar Pradesh Judicial Service, thereafter, he appeared in the preliminary examination and main examination on 23.7.2017 and 8.10.2017 respectively, participated in the interview on 14.2.2018 and the result was published on 21.3.2018 and, subsequently, the notification of posting was issued on 7.8.2018 and he joined the post of Additional District and Sessions Judge, Begusarai on 21.8.2018 and, as such, he was not a practicing advocate on the date of preliminary test, mains examination, interview and on the date of appointment as Additional District and Sessions Judge, Begusarai. The Committee took a view that he was/is ineligible to be appointed as Additional District Judge against the quota from Bar on the date of joining the service in the light of the aforesaid judgment.

The matter was referred to the Standing Committee. The Standing committee in its meeting dated 12.5.2020 vide Agenda Item No.10 considered the minutes of the Selection Committee dated 6.5.2020 related to appointment of judicial officers and finally resolved that “The Committee deliberated upon the matter and resolves to request the Hon’ble Selection & Appointment Committee to opine after seeking response from the three Judicial

Officers namely, Sri Santosh Kumar, Sri Lalan Kumar and Sri Sunil Kumar Verma, with regard to the implementation of the judgment dated 19.02.2020 of the Hon'ble Supreme Court in Dheeraj Mor case". Accordingly, a letter no. 23842 dated 18.5.2020 was issued to the petitioner to give response within a period of four weeks. The petitioner made representation that the records were lying in his native place or his place of posting in Uttar Pradesh, as because of lock down, he was unable to procure the documents, requested for one month to enable him to file his explanation. His request was considered in the meeting dated 29.5.2020 and the Committee resolved to grant time of one month to file his response. Again vide representation no.57 dated 30.6.2020, he requested for grant of suitable time to file his response as on account of lock down due to Covid-19 pandemic, he failed to procure the document, taking a plea that there is suspension of train service till 12.8.2020. The matter was placed before the Selection and Appointment Committee and the Committee took a view that granting any further time to the petitioner would amount to sitting over the decision of the Hon'ble Supreme Court like an appellate authority and the same would be futile exercise as the matter has attained finality in judicial side and finally took a view that the petitioner was ineligible to be

appointed as Additional District & Sessions Judge against the quota for Bar on the date of joining the service in the light of the aforesaid judgment. Hence, the candidature of the petitioner needs to be canceled and his termination from service was recommended. The matter was placed before the Standing Committee to consider the view of the Selection and Appointment Committee, after consideration, approved the same and directed the Standing Committee to place before the Full Court for consideration but, in the meantime, the response was received and the same was directed to be placed before the Full Court and the Full Court, in its meeting dated 19.9.2020 vide Agenda No.7 considered the resolution dated 1.9.2020 of the Standing Committee and finally accepted the minutes dated 12.8.2020 of the Selection and Appointment Committee, thereby recommended the cancellation of candidature of the petitioner, in consequence, his termination from the Bihar Superior Judicial Service. His representation was also considered and the same was rejected. In pursuance thereof, vide letter no. 37424 dated 22.9.2020, he was communicated the decision of the Full Court. Ultimately, the petitioner has been terminated from service vide Memo No. 12094 dated 17.12.2020.

Learned counsel for the petitioner submits that in terms of the advertisement, he fulfills all the conditions and one of the condition that he must have an experience of 7 years as an advocate as on the cut-off date and it cannot be re-shifted on the date of preliminary examination, main examination and interview but, it has to be confined whether the petitioner was having requisite qualification on the cut-off date and further submitted that the law is well settled that a person having a qualification on the cut-off date, the subsequent event cannot be a basis for making him ineligible for the post as after filling up the form, he was selected in the Uttar Pradesh Judicial Service (Junior Service) and he continued to discharge the duty till he was appointed and he had appeared in the preliminary text, mains examination and interview after taking permission from the Hon'ble Allahabad High Court and, finally, when selected, he resigned from the post. So, he will be treated to be a candidate from Bar quota. The judgment rendered in the case of Dheeraj Mor (supra) does not apply to his case as the judgment was decided on different sets of facts and context dealing with the person who was in service on the cut-off date, whereas the petitioner was an advocate on the cut-off date. So, the bar prescribed under Article 233(2) of the Constitution of India will not come in operation against the petitioner.

The learned counsel for the High Court submits that the two streams have been provided for recruitment, appointment and promotion, one is from the Judicial Officers who are already in service in judicial service, they can be promoted to either in 65% quota or in the accelerated promotion in 10% quota and there is another stream for direct recruitment from the Bar to the post of District Judge (Entry Level). So, the person has to be an advocate having an experience of 7 years not only on the cut-off date but he will remain as such on the date of examination as well as on the date when he has been appointed but, in the present case, the petitioner was an advocate on the cut-off date, having experience of 7 years but, later on, after recruitment in Junior Division of the judicial service, Uttar Pradesh, he joined and, thereby, he ceased to be considered for recruitment as District Judge (Entry Level) under the Bihar Judicial Service. It has further been argued that the word ‘appointment’ under Article 233 of the Constitution of India would take its color and interpretation according to its placement in the Constitution and intention derived from the Constitution.

Part-IV of the Constitution of India deals with the Union Judiciary and Article 124 (3) prescribes the qualification for appointment as a Judge of Hon’ble Apex Court and prescribes that a person shall not be qualified for appointment as a Judge of the

Supreme Court unless he is a citizen of India and has been for at least five years a Judge of a High Court or of two or more such Courts in succession. Article 217 falls in Chapter V Part VI of the Constitution of India prescribes the minimum 10 years of service in judicial office. In identical manner, a person at least 10 years as an advocate has been made eligible for appointment of a High Court Judge. Article 233 deals with appointment of District Judge stipulates, which is under consideration in the present case that 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 and Clause-2 prescribes that 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. Article 124, 217 and 233 deliniates the person can be appointed as a Supreme Court Judge, High Court Judge and District Judge either from the service or from the Bar. The scheme of the Constitution is very much clear that those who are in service, their channel of appointment falls in different stream, as mentioned above, will be made from the cadres of those already in service and another stream deals with

those advocate to be appointed as Judge either to the Supreme Court or the High Court and District Judge prescribing different minimum period of experience as an advocate at different level. Both the streams are running parallel, had merged and unified after being appointed at different levels i.e. Supreme Court level or High Court level or district court level. The person standing on particular stream cannot be allowed for hopping from one stream to another stream, they will have to swim and succeed in their own stream and they cannot take help of the other stream. Article 236(b) of the Constitution deals with interpretation wherein it has been provided that the 'judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

Article 233 (2) of the Constitution specifically stipulates that a person already in service of Union or State shall not be eligible to be appointed as a district judge. So, it has been provided mandatorily that in Bar quota, a person should not be in service either in the Union or State, has been made ineligible for consideration for appointment as a district judge but, has been made eligible those advocates having 7 years of experience and is to be recommended by the High Court for such appointment. So, it

is made clear that those who are in service of Union or State has specifically been deprived for consideration for the post of district judge. At the same time, a person having 7 years of experience as an Advocate has been made eligible for consideration for appointment as a district judge by way of lateral entry in service in the District Judge cadre.

In view of the scheme of the Constitution, two sources have been prescribed for recruitment and appointment, one is from Bar and another from the service but, in the present case, the moot question to be answered is as to whether the person who is to be appointed from the stream of Bar quota is required to continue to be an advocate at the cut-off date prescribed in the advertisement or is required to continue to be an advocate at all the times till recruited as district judge, direct recruit.

In reply, it has been submitted by the learned counsel for the petitioner, the Constitutional scheme is to be construed in the manner the requisite qualification is co-relative to cut-off date and would not be interpreted in such manner that the person to be remained all through an advocate till the date of his appointment rather only prescription has been provided that a person who is an advocate for 7 years on the cut-off date has been made eligible for consideration for the post.

This Court, before arriving to concrete conclusion, has to examine the judgments cited by the parties.

This complex issue has to be decided in the proper and fair interpretation of the Constitution as has been submitted by the counsel in what manner Article 233(2) of the Constitution is to be construed as it exposits that the minimum qualification from the stream of Bar quota is 7 years of practice which is essential qualification for consideration for direct recruit but, the next question is vital in the sense that in Article 233 of the Constitution the word has been used in present perfect continuous tense, its effect and its amplitude in the background whether the person should continue to be advocate on the day of filing of the application and also at the time of appearance in the different stages of examination including at the time of his appointment.

**Interpretation Of Constitution**

Time without number the Hon'ble Apex Court has adumbrated that the Court never allow a Constitution to be narrowly construed keeping in view the principle that a Constitution is a living document and organic which has the innate potentiality to take many a concept within its fold. The Courts, being alive to their constitutional sensibility, do possess a progressive outlook having a telescopic view of the growing

jurisprudence. The Court should not be oblivious of the idea, being the final arbiter of the Constitution, to strike the requisite balance whenever there is a necessity, for the Founding Fathers had wisely conceived the same in various articles of the grand fundamental document. The Constitution itself has its own intrinsic force and its wisdom that any words and phrase used in the part of Constitution has its own fragrance and ideology than that of the same words and clause used in another place of the Constitution takes its different color and shade as it conceptually and sensibly derive in a manner that the words or clause has been mentioned and to be exposited in consideration to the subject and context has to be given full color according to its requirement and necessity.

Putting stress on the facet of interpreting any law, including the Constitution, the Court observed that the text of the provision under consideration would be the primary source for discerning the meanings that inhere in the enactment. It has been laid down that in the light of the serious issues, it would always be prudent, as a matter of constitutional necessity, to widen the search for the true meaning, purport and ambit of the provision under consideration. No provision, and indeed no word or expression, of the Constitution exists in isolation, they are necessarily related to, transforming and, in turn, being transformed by other provisions,

words and phrases in the Constitution. It will be relevant for this Court to quote paragraph nos. 50 to 54 of the judgment in the case of Kalpana Mehta & Ors. Vs. Union of India & Ors. reported in (2018) 7 SCC 1 : 2018 SCC OnLine SC 512, which reads as follows:-

> *"50. Stressing on the facet of interpreting any law, including the Constitution, the Court observed that the text of the provision under consideration would be the primary source for discerning the meanings that inhere in the enactment. It has also been laid down that in the light of the serious issues, it would always be prudent, as a matter of constitutional necessity, to widen the search for the true meaning, purport and ambit of the provision under consideration. No provision, and indeed no word or expression, of the Constitution exists in isolation—they are necessarily related to, transforming and, in turn, being transformed by other provisions, words and phrases in the Constitution. Therefore, the Court went on to say:- (GVK Industries case, SCC p. 59, para 38)*
>
> *"38. Our Constitution is both long and also an intricate matrix of meanings, purposes and structures. It is only by locating a particular constitutional provision under consideration within that constitutional matrix could one hope to be able to discern its true meaning, purport and ambit. As Prof. Laurence Tribe points out:*
>
> *'[T]o understand the Constitution as a legal text, it is essential to recognize the ... sort of text it is: a constitutive text that purports, in the name of the people…, to bring into being a number of distinct but inter-related institutions and practices, at once legal and political, and*

*to define the rules governing those institutions and practices. (See "Reflections on Free-Form Method in Constitutional Interpretation", [(1995) 108 Harv L Rev 1221] p. 1235.*

*51. The Constitution being an organic document, its ongoing interpretation is permissible. The supremacy of the Constitution is essential to bring social changes in the national polity evolved with the passage of time. The interpretation of the Constitution is a difficult task. While doing so, the Constitutional Courts are not only required to take into consideration their own experience over time, the international treaties and covenants but also keep the doctrine of flexibility in mind. It has been so stated in Union of India v. Naveen Jindal and another [(2004) 2 SCC 510].*

*52. In S.R. Bommai, [(1994) 3 SCC 1] the Court ruled that correct interpretation in proper perspective would be in the defence of democracy and in order to maintain the democratic process on an even keel even in the face of possible friction, it is but the duty of the Court to interpret the 34 108 Harv L Rev 1221, 1235 (1995) 35 (2004) 2 SCC 510 Constitution to bring the political parties within the purview of the constitutional parameters for accountability and to abide by the Constitution and the laws for their strict adherence. With the passage of time, the interpretative process has become expansive. It has been built brick by brick to broaden the sphere of rights and to assert the constitutional supremacy to meet the legitimate expectations of the citizens. The words of the Constitution have been injected life to express connotative meaning.*

*53. Recently, in K.S. Puttaswamy and another v. Union of India and others, [(2017) 10 SCC 1], one of us (Dr. D.Y. Chandrachud, J.) has opined that constitutional developments have taken place as the words of the Constitution have been interpreted to deal with new exigencies requiring an expansive reading of liberties and freedoms to preserve human rights under the Rule of Law. It has been further observed that the interpretation of the Constitution cannot be frozen by its original understanding, for the Constitution has evolved and must continuously evolve to meet the aspirations and challenges of the present and the future. The duty of the Constitutional Courts to interpret the Constitution opened the path for succeeding generations to meet the challenges. Be it stated, the Court was dealing with privacy as a matter of fundamental right.*

*54. In Supreme Court Advocates-on-Record Association and others v. Union of India, [(1993) 4 SCC 441] , the Court exposited that the Constitution has not only to be read in the light of contemporary circumstances and values but also in such a way that the circumstances and values of the present generation are given expression in its provisions. The Court has observed that constitutional interpretation is as much a process of creation as one of discovery. Thus viewed, the process of interpretation ought to meet the values and aspirations of the present generation and it has two facets, namely, process of creation and discovery. It has to be remembered that while interpreting a constitutional provision, one has to be guided by the letter, spirit and purpose of the language employed therein and also the constitutional silences or abeyances that are discoverable. The scope and discovery has a connection with the theory of constitutional implication. Additionally, the interpretative process of a provision of a Constitution is also*

*required to accentuate the purpose and convey the message of the Constitution which is intrinsic to the Constitution."*

In the case of R.C. Poudyal Vs. Union of India & Ors. reported in 1994 Supp (1) SCC 324 wherein in paragraph no.124, the Hon'ble Apex Court has observed that in the interpretation of a constitutional document, 'words are but the framework of concepts and concepts may change more than words themselves'. The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that "the intention of a Constitution is rather to outline principles than to engrave details and in paragraph no.125 quotes Australian Law Journal wherein it has been exposited that a flexible approach is imperative when it is sought to regulate the affairs of a nation by powers which are distributed, not always in the most logical fashion, among two or more classes of political agencies. The difficulties arising from this premise are much exacerbated by the way in which the Australian Constitution came to be formed. Paragraph no.125 being relevant is quoted herein below:-

*"125. Commenting on the approach appropriate to a Constitution, a learned author speaking of another federal document says (The Australian Law Journal, Vol. 43 at p.256) :*

> *"A moment's reflection will show that a flexible approach is almost imperative when it is sought to regulate the affairs of a nation by powers which are distributed, not always in the most logical fashion, among two or more classes of political agencies. The difficulties arising from this premise are much exacerbated by the way in which the Australian Constitution came to be formed : drafted by many hands, then subjected to the hazards of political debate, where the achievement of unanimity is often bought at the price of compromise, of bargaining and expediency."*

In view of the aforesaid judgments, this Court has to see in what manner the words have been framed and its color, its fragrance and shades including where the word has been placed and context, it cannot be understood in inflexibility but, has to be understood and construed in the manner any clause or word has been used for solving the complex problem that has been raised in the present application.

**Interpretation of applicability of Article 233 in the matter of recruitment of District Judge, Entry Level, Direct from Bar**

Article 233 is in two parts, clause (1) deals with in what manner the appointment and promotion of the district judge has to be made by the Governor in consultation with the High Court but, it does not construe the source of appointment whereas clause (2) deals with two source of appointment, one from the bar having experience of 7 years and another source is from the service. It has specifically been stipulated that a person in service in the Union or

State, will not be eligible for appointment in the district judge from the stream of Advocate. So, itself negates the right of a person who is in judicial service would be eligible for consideration for appointment as District Judge (Direct Entry) from another stream which is meant for advocate. It has also to be noted in significance Clause (2) of Article 233 of the Constitution has used present perfect tense in consideration to source of appointment in Bar quota. So, its true color and meaning came for consideration in the case of Rameshwar Dayal Vs. State of Punjab and Ors. reported in (1961) 2 SCR 874 : AIR 1961 SC 816 as in that case, one of the question was raised, in what manner Article 233(2) has to be construed looking to arrangement and placement of words. One of the question was raised that by reason of the use of present perfect tense "has been" in clause (2) of Article 233, the rules of grammar require that the person eligible for appointment must not only have been an advocate or pleader before but must be an advocate or pleader at the time he is appointed to the office of District Judge. In paragraph no.13, it has been held in the following manner: " It is perhaps necessary to add that we must not be understood to have decided that the expression 'has been' must always mean what learned Counsel for the appellant says it means according to the strict rules of grammar. 'It may be seriously questioned if an

organic Constitution must be so narrowly interpreted, and the learned Additional Solicitor-General has drawn our attention to other Articles of the Constitution like Article 5(c) where in the context the expression has a different meaning. Our attention has also been drawn to the decision of the Allahabad High Court in Mubarak Mazdoor v. K. K. Banerji {AIR 1958 All 323} where a different meaning was given to a similar expression occurring in the proviso to Sub-section (3) of Section 86 of the Representation of the People Act, 1951. We consider it unnecessary to pursue this matter further because the respondents continued to be an advocate at Punjab High Court, when they were appointed as district judges and they had a standing of more than seven years when they were appointed. They were clearly eligible for appointment under clause 2 of Article 233 of the Constitution.

In the case of Chandra Mohan Vs. High Court of Judicature at Allahabad reported in AIR 1966 SC 1987 where the problem arose as the Selection Committee, constituted for appointment of U.P. Higher Judicial Service, according to the said Rule, selected 6 candidates who were suitable for appointment to the service as it appears that certain persons were appointed in Higher Judicial Service from the executive side who were discharging judicial duty. Challenge was made that the person

from executive side cannot be treated to be in judicial service as has been mentioned in Article 233 (2) of the Constitution wherein service of Union or State has been mentioned to be taken into consideration for appointment from the judicial officer. To solve this issue, the Court has delineated and enunciated that the service under Article 233 of the Constitution it has to be construed those who are discharging the duty from a judicial service, it cannot be extended to those officers who are discharging the judicial functions in the executive side as judicial officer has to be construed who are member of judicial service of State. The Hon'ble Apex Court in Chandra Mohan's case (supra) has laid down that before construing the said provisions, it should be remembered that the fundamental rule of interpretation is the same whether one construes the constitutional provisions or the normal statutory provision enacted by the Parliament or State Legislature, namely, that the court will have to find out the express intention from the words of the Constitution or the Act, as the case may be but, if, two constructions are possible then the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory.

The Court has also held that the 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. There are two sources of recruitment, namely, (i) service of the Union or of the State, and (ii) members of the Bar. The judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district judges, they will be made by the Governor of the State in accordance with rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all the district courts and courts subordinate thereto, subject to certain prescribed limitations. It has further been held that "the service of the Union or the State" means any of the Union or of the State. Meaning of judicial service in exclusive term has been provided for appointment from that source and this judgment made it very clear, two sources are there, one from the member of judicial service and another from the member of the bar. It will be relevant to quote following excerpts from the aforesaid judgment which reads as follows:-

*"------Before construing the said provisions, it should be remembered that the fundamental rule of interpretation is the*

*same whether one construes the provisions of the Constitution or an Act of Parliament, namely, that the court will have to find out the expressed intention from the words of the Constitution or the Act, as the case may be. But, "if, however, two constructions are possible then the Court must adopt that which will ensure smooth and harmonious working of. the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory." The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States; it constitutes a High Court for each State, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue writs to keep all tribunals, including in appropriate cases the Governments, within bounds and gives to it the power of superintendence over all courts and tribunals in the territory over which it has jurisdiction. But the makers of the Constitution also realised that "it is the Subordinate Judiciary in India who are brought most closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of the superior Judges." Presumably to secure the independence of the judiciary from the executive, the Constitution introduced a group of articles in Ch. VI of Part VI under the heading "Subordinate Courts". But at the time the Constitution was made, in most of the States the magistracy was under the direct control of the executive. Indeed it is common knowledge that in pre- independent India there was a strong agitation that the judiciary should be separated from the executive and that the agitation, was based upon the assumption that unless they were separated, the independence of the judiciary at the lower levels would be a mockery. So article 50*

*of the Directive Principles of Policy states that the State shall take steps to separate the judiciary from the executive in the public services of the States. Simply stated, it means that there shall be a separate judicial service free from the executive control.*

*"-------So far there is no dispute. But the real conflict rests on the question whether the Governor can appoint as district judges persons from services other than the judicial service; that is to say, can he appoint a person who is in the police, excise, revenue or such other service as a district judge? The acceptance of this position would take us back to the pre-independence days and that too to the conditions prevailing in the Princely States. In the Princely States one used to come across appointments to the judicial service from police and other departments. This would also cut across the well-knit scheme of the Constitution and the principle underlying it, namely, the judiciary shall be an independent service. Doubtless, if Article 233(1) stood alone, it may be argued that the Governor may appoint any person as a district judge, whether legally qualified or not, if he belongs to any service under the State. But Article 233(1) is nothing more than a declaration of the general power of the Governor in the matter of appointment of district judges. It does not lay down the qualifications of the candidates to be appointed or denote the sources from which the recruitment has to be made. But the sources of recruitment are indicated in clause (2) thereof. Under clause (2) of Article 233 two sources are given, namely, (i) persons in the service of the Union or of the State, and (ii) advocate or pleader. Can it be said that in the context of Ch. VI of Part VI of the Constitution "the service of the Union or of the State" means any service of the Union or of the State or does it mean the judicial service of the Union or of the State? The*

*setting, viz., the chapter dealing with subordinate courts, in which the expression "the service" appears indicates that the service mentioned therein is the service pertaining to courts. That apart, Article 236(b) defines the expression "judicial service" to mean a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior Sup.C.1/66-7 to the post of district judge. If this definition, instead of appearing in Article 236, is placed as a clause before Article 233(2), there cannot be any dispute that "the service" in Article 233(2) can only mean the judicial service. The circumstance that the definition of "judicial service" finds a place in a subsequent Article does not necessarily lead to a contrary conclusion. The fact that in Article 233(2) the expression "the service" is used whereas in Articles 234 and 235 the expression "judicial service" is found is not decisive of the question whether the expression "the service" in Article 233(2) must be something other than the judicial service, for, the entire chapter is dealing with the judicial service. The definition is exhaustive of the service. Two expressions in the definition bring out the idea that the judicial service consists of hierarchy of judicial officers starting from the lowest and ending with district judges. The expressions "exclusively" and "intended" emphasise the fact that the judicial service consists only of persons intended to fill up the posts of district judges and other civil judicial posts and that is the exclusive service of judicial officers. Having defined "judicial service" in exclusive terms, having provided for appointments to that service and having entrusted the control of the said service to the care of the High Court, the makers of the world Constitution not have conferred a blanket power on the Governor to appoint any person from any service as a district judge."*

In the case of Satya Narayan Singh Vs. High Court of Judicature at Allahabad reported in (1985) 1 SCC 225, the issue was raised that the person in the State Judicial Service, can he claim his right for consideration for being appointed to the direct recruit in higher judicial service as before joining the sub-ordinate judicial service, he acquired the qualification of 7 years of experience. The Court has held that the person in the sub-ordinate judicial service of the State cannot claim of being appointed in the direct recruitment in District Judge level on the plea that before joining the sub-ordinate judicial service, he acquired the experience of 7 years as an advocate. The Hon'ble Apex Court has held that as they are in judicial service, they fall under the different stream for recruitment in District level (Direct Recruit) as that of the direct recruitment meant for the lawyers who acquired 7 years of experience and they cannot claim as because they do have an experience of 7 years. In view of Article 233(2) of the Constitution, it demarcates two source of recruitment in the District Judge level, one from the person in the judicial service and another from the person who is an advocate having 7 years of qualification, as because they have acquired before joining the State Judicial Service cannot claim recruitment under the different source meant for the advocate.

In the case of Deepak Agrawal Vs. Keshaw Kaushik & Ors. reported in (2013) 5 SCC 277, the Hon'ble Apex Court was considering the meaning of expression "the service" in Article 233(2) of the Constitution. The questions were (1) what is the meaning of the expression "the service" in Article 233(2) of the Constitution of India?, (2) what is meant by "advocate" or "pleader" under Article 233(2)? and (3) whether a District Attorney/Additional District Attorney/Public Prosecutor/Assistant Public Prosecutor/Assistant Advocate General, who is full time employee of the Government and governed and regulated by the statutory rules of the State and is appointed through direct recruitment by the Public Service Commission, is eligible for appointment to the post of District Judge under Article 233(2) of the Constitution? In this background, the Hon'ble Apex Court has arrived to a conclusion that if Assistant District Attorney/Public Prosecutor/Deputy Advocate General are conducting the cases for and on behalf of the State Government in court and each of them continue to be enrolled in the respective State Bar Council, they will be treated to be an advocate in terms of Article 233(2) of the Constitution and such person will not fall in the category under service of the Union or the State. While considering the expression "if he has been for not less than seven years an advocate", it has

been held that the terms is couched with "present perfect continuous tense" which is used for a position which began at some time in the past and is still continuing. In that context, paragraph no.102, being relevant is quoted herein below:-

> *"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 some time 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."*

The case of Vijay Kumar Mishra and Anr. Vs. High Court of Judicature at Patna and Ors. reported in (2016) 9 SCC 313 in which the question came for consideration as to whether the direction of the High Court that if the person of sub-ordinate service intending to appear in the interview for direct recruitment as District Judge Entry Level, he should first tender his resignation and, only thereafter, he could be allowed to participate in interview. In that case, an advertisement was issued inviting applications from eligible Advocates for direct recruitment in

respect of 99 vacancies and the cut off date for the eligibility was 5th of February, 2015. The petitioners appeared and qualified in the Preliminary as well as in the Mains Examination. In the meantime, the petitioners qualified in the Subordinate Judicial Service of the State of Bihar and they joined the service accordingly. The result of the Mains Examination of the District Judge Entry Level (Direct from Bar) was published on 22.1.2016 and the petitioners were declared qualified. The High Court published the schedule of interview and issued Call Letters but one of the conditions in the Interview Letter was ‘No-Objection Certificate of the Employer’. In pursuance thereof, the petitioners filed their respective applications for granting permission to appear in the interview wherein the High Court has communicated that he may choose to resign before participating in the interview, once tendered resignation, would not be permitted to be withdrawn. That becomes the subject matter of consideration before the Hon’ble Apex Court and the Hon’ble Apex Court considered the selection and appointment and placing reliance on the judgment passed in the case of Prafulla Kumar Swain vs. Prakash Chandra Misra & Ors., (1993) Supp. (3) SCC 181 held that when the framers of the Constitution have used the word "appointed" in clause (2) of Article 233 for determining the eligibility of a person

with reference to his service then it is not possible to read the word "selection" or "recruitment" in its place. In other words, the word "appointed" cannot be read to include the word "selection", "recruitment" or "recruitment process" and directed the High Court to allow him to participate in the selection process without insisting the petitioner to resign from current employment and if the appellants are found suitable, it is open to the appellants to resign their current employment and opt for the post of District Judge, if they so choose. This case came for consideration in the case of Dheeraj Mor Vs. The Hon'ble High Court of Delhi reported in (2020) 7 SCC 401 : 2020 SCC OnLine SC 213 and the Hon'ble Supreme Court overruled the Vijay Kr. Mishra case (supra).

The petitioner has been removed from service in view of the judgment passed in the case of Dheeraj Mor (supra). The issue with regard to interpretation of Article 233 of the Constitution under consideration was as to in what manner it has to be construed with respect to two contentions, firstly, judicial officers, who after accruing 7 years of practice as an advocate, joined the judicial service and, on the date of filing application, he was judicial officer. The second issue under consideration was with respect to the members who are in judicial service as Civil Judge,

Junior Division or Senior Division, completed 7 years of judicial service or 7 years as judicial officer cum Advocate, as to whether they should be treated as eligible candidates. Both classes of candidates were claiming to earn eligibility for participating in the recruitment process. In the present case, with respect to petitioner who had acquired the eligibility qualification of 7 years and accordingly filled up the form but, the petitioner joined the service in Junior Division, civil Judge, later on, the petitioner while working, qualified in District Judge (Direct Recruit) also claiming under Bar Quota. In that context, the following points were under consideration which are as follows:-

> *"The petitioners who are in judicial service, have claimed that in case before joining judicial service 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 is that of the persons having completed only 7 years of service as judicial service.*
>
> *They contend that experience as a judge be treated at par with the Bar service, and they should be permitted to stake their claim. The third category is hybrid, consisting of candidates who have completed 7 years' by combining the experience serving as a judicial officer and as advocate. They claim to be eligible to stake their claim against the above quota."*

Article 233 of the Constitution came for consideration. The Court has placed reliance on the earlier judgment Rameshwar Dayal v. State of Punjab & Ors., AIR 1961 SC 816, Chandra Mohan (supra); Satya Narain Singh (supra) and in the case of Deepak Agrawal (supra); All India Judges' Association & Ors v Union of India & Ors (2010) 15 SCC 170 and on the judgment passed in the case of Vijay Kumar Mishra (supra) which have been held to be not a good law to certain extent. The Court while interpreting Article 233 held that there are two source of recruitment and appointment in the District Judge cadre, one is those judicial service, they would be promoted or they may get accelerated promotion. Another stream for direct recruitment from the Bar of those who has completed 7 years of experience as an advocate and, finally, the answer has been given to the reference that the candidate who acquired experience of 7 years on and before filling the application will not stake claim if he has joined the subordinate service, in corollary, require that he should not only remain an advocate at the time of filling of the form but also at the time of his selection, recruitment and appointment. The Court gave negative answer with respect to question framed as mentioned herein above. It will be relevant to quote the excerpts of the judgment which is as follows:-

> *Para-14 - "-----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 refers 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.-----"*

*Para-20 - "----Even if the word 'advocate' in clause (2) of Article 233 meant an advocate of a court in India, and the appointee must be such an advocate at the time of his appointment, no objection can be raised on this ground because being factually on the roll of Advocates of the Punjab High Court at the time of appointment, the candidate was admittedly an advocate in a court in India and continued as such till the date of his appointment.----"*

*Para-22 - "----It is only in respect of the persons covered by the second clause that there is a requirement that a person shall be eligible for appointment as District Judge if he has been an advocate or a pleader for not less than 7 years. In other words, in the case of candidates who are not members of a Judicial Service they must have been advocates or pleaders for not less than 7 years and they have to be recommended by the High Court before they may be appointed as District Judges, while in the case of candidates who are members of a Judicial Service the 7 years' rule has no application but there has to be consultation with the High Court. A clear distinction is made between the two sources of recruitment and the dichotomy is maintained. The two streams are separate until they come together by appointment. Obviously the same ship cannot sail both the streams simultaneously.----"*

*Para-23 - "----- It is clear from the decision of Deepak Aggarwal (supra) that recruitment from the Bar is only from among practicing 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."*

*Para-24 - "----- We find ourselves unable to agree with the proposition laid down in Vijay Kumar Mishra (supra). In our opinion, inservice candidates cannot apply as against the post reserved for the advocates/pleaders as he has to be in continuous practice in the past and at the time when he has applied and appointed. Thus, the decision in Vijay Kumar Mishra (supra) cannot be said to be laying down the law correctly."*

*Para-25 - "---- person in judicial service is eligible to be appointed as District Judge, but it is only by way of promotion or by way of merit promotion, which concept has been evolved in All India Judges Association and Ors. v. Union of India and Ors., (2002) 4 SCC 247, in which recommendations of the Shetty Commission were considered by this Court as to the method of recruitment to the post of the cadre of Higher Judicial Service – District Judges and Additional District Judges. This Court took note of the fact that at that moment, there were two sources for recruitment to the Higher Judicial Service, namely, (i) by promotion; and (ii) by direct recruitment. In order to strengthen the lower judiciary and to make them more efficient, the establishment of Judicial Academies was suggested. This Court approved the recommendations of Shetty Commission that the recruitment to the Higher*

*Judicial Service, i.e., the District Judge cadre from amongst the advocates should be 25 percent and the process of recruitment should be by a competitive examination including both written and viva voce tests. 75 percent should be by way of promotion and 25 percent by direct recruitment.----"*

*Para-28 - "They are not deprived of any opportunity in their pursuit once they have joined the judicial stream, they are bound to follow the provisions. It was open to them not to join the subordinate services. They could have staked a claim by continuing to be an advocate to the Higher Judicial Service as against the post of District Judge. However, once they chose to be in service, if they had seven years' experience at Bar before joining the judicial service, they are disentitled to lay a claim to the 25% quota exclusively earmarked for Advocates; having regard to the dichotomy of different streams and separate quota for recruitment. Opportunities are provided not only to in-service candidates but also to practicing candidates by the Constitutional Scheme to excel and to achieve what they aspire i.e. appointment as District Judge. However, when someone joins a particular stream, i.e. a judicial service by his own volition, he cannot sail in two boats. His chance to occupy the post of District Judge would be by a two-fold channel, either in the 50% seniority/merit quota, by promotion, or the quota for limited competitive examination."*

*Para-31 - "We are not impressed by the submission that when this Court has interpreted the meaning of service in Article 233(2) to mean judicial*

*service, judicial officers are eligible as against the posts reserved for the advocates/pleaders. Article 233(2) starts with the negative "not," which disentitles the claim of judicial officers against the post reserved for the practicing advocates/pleaders. They can be promoted to that post as per the rules;----"*

*Para-35 - "---- Though the appointment is made under Article 233(1), but the source and the channel for judicial officers is the promotion, and for the members of the Bar is by direct recruitment."*

*Para-45 - "In view of the aforesaid discussion, 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 practicing 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 practicing advocate having minimum 7 years' experience."*

*Para-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."*

*Para-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 Mishra (supra) 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."*

Hon'ble Mr. Justice S. Ravindra Bhat has concurred with the view of Mr. Justice Arun Mishra but, has given his separate opinion in the judgment.

*Para-79 - "The upshot of the above discussion is that the Constitution makers clearly wished to draw a distinction between the two sources of appointment to the post of District Judge. For one, i.e. Advocates, eligibility was spelt out in negative phraseology, i.e. not less than seven years' practice; for judicial officers, no eligibility condition was stipulated in Article 233 (2): this clearly meant that they were not eligible to be appointed (by direct recruitment) as they did not and could not be considered advocates with seven years' practise, once they entered the judicial service. The only channel for their appointment, was in accordance with rules framed by the High Court, for promotion (as District Judges) of officers in the judicial service (defined as those holding posts other than District Judges, per Article 236 [b])."*

*Para-80 - "In view of the above discussion clearly, the decision in Satya Naraian Singh (supra) correctly appreciated the relevant provisions and held that the dichotomy between the two streams meant that those in*

*one stream (read judicial service) could not compete for vacancies falling in the quota earmarked for advocates."*

*Para-84 - "This court is also of the opinion that if rules of any State permit judicial officers to compete in the quota for appointment as District Judges, they are susceptible to challenge."*

*"------Clear quotas for both sources have been earmarked by High Courts. If one those in one stream, or source- i.e. judicial officers- are permitted to compete in the quota earmarked for the other (i.e. advocates) without the converse situation (i.e. advocates competing in the quota earmarked for judicial officers- an impossibility) the result would be rank discrimination."*

*Para-87 - "The Constitution makers, in the opinion of this court, consciously wished that members of the Bar, should be considered for appointment at all three levels, i.e. as District Judges, High Courts and this court. This was because counsel practising in the law courts have a direct link with the people who need their services; their views about the functioning of the courts, is a constant dynamic. Similarly, their views, based on the experience gained at the Bar, injects the judicial branch with fresh perspectives; uniquely positioned as a professional, an advocate has a tripartite relationship: one with the public, the second with the court, and the third, with her or his client. A counsel, learned in the law, has an obligation, as an officer of the court, to advance the cause of his client, in a fair manner, and assist the court. Being members of the legal profession, advocates are also considered thought leaders. Therefore, the Constitution makers envisaged that*

*at every rung of the judicial system, a component of direct appointment from members of the Bar should be resorted to. For all these reasons, it is held that members of the judicial service of any State cannot claim to be appointed for vacancies in the cadre of District Judge, in the quota earmarked for appointment from amongst eligible Advocates, under Article 233."*

*Para-89 - "As a result of the above discussion, it is held that Vijay Kumar Mishra (supra), to the extent that it is contrary to Ashok Kumar Sharma (supra), as regards participation in the selection process, of candidates who are members of the judicial service, for appointment to the post of District Judge, from amongst the quota earmarked for advocates with seven years' practice, was wrongly decided. To that extent, Vijay Kumar Mishra (supra) is hereby overruled."*

A similar issue came for consideration in the case of R. Poornima and Ors. Vs. Union of India and Ors. reported in 2020 SCC OnLine SC 714. In that case, R. Poornima and others have joined the service as a District Judge (Direct Recruit) and before that they were advocates and they were claiming that their names should be considered for appointment as a High Court Judge taking into consideration their service rendered the service as an advocate but, the Hon'ble Apex Court has rejected the claim of Judicial Officers and refused to take into consideration the experience gained as an advocate. It has been held that they are

from the source of judicial service and they cannot be treated to be from the source of advocate. In that case, the judgment passed in the case of Dheeraj Mor (supra) came for consideration with approval and the Hon'ble Apex Court has made an observation that it is not permissible anymore, for people to hop-on and hop-off between the two independent streams of recruitment. Paragraph no.17 being relevant is quoted herein below:-

> *"17. Therefore, for the purpose of Article 233, it is not permissible anymore, for people to hop-on and hop-off between the two independent streams of recruitment, in the light of the law laid down in Dheeraj Mor. Hence the reliance placed by the Petitioners in their pleadings, on the reference pending at that time in Dheeraj Mor, has become irrelevant."*

## Consideration on the merit of the case

So, it is very much clear that those who are in the stream of advocate, have to remain in the same stream and the Judicial Officers who opted to be appointed in the Subordinate Service, have to claim to be appointed by way of promotion and they cannot stake claim to be taken into consideration the past experience as that experience will not make him eligible for consideration for appointment in the direct recruitment and it is made clear that he has to remain as an advocate with an experience of 7 years not only at the time of cut-off date but also at the stage of his appointment. In the present case, admittedly the petitioner

before joining the subordinate service i.e. on cut-off date, he filled up the form, had mentioned the experience of 7 years but, thereafter, he was selected in the Uttar Pradesh Judicial Service, he joined and continued to remain in service. At the same time, he appeared in the examination against the advertisement published for direct recruitment from the Bar as a District Judge in which he was finally selected but, on the date of result, he was in judicial service of the State of Uttar Pradesh. Later on, he tendered his resignation which was accepted and he joined and, accordingly, posted at Begusarai. So, admitted position is that in continuity he remained as a member of judicial service after his selection as a Subordinate Judicial Officer except after acceptance of his resignation till his joining, it is so close, he cannot claim to again became an advocate and, there is no evidence to show that he in between the period had made an application before the Bar Council and obtained permission for his practice. So, it is very much clear that he was in-service candidate though at the time of cut-off date, he was an advocate but, at the time of appointment, he was not an advocate. So, his claim that he has rightly been appointed as a District Judge Direct Entry Level is not sustainable and the submission of the petitioner is rejected accordingly.

**Consideration on applicability of Dheeraj Mor case**

The petitioner has raised the issue that the judgment of Dheeraj Mor (supra) case will not affect the case of the petitioner as the judgment was pronounced by the Hon'ble Apex Court after his appointment as an Additional District Judge and posted at Begusarai but, the law is very much settled that evey judgment has a retrospectivity unless the prospectivity is given to that judgment but, that power too lies on the Hon'ble Apex Court and an authority of giving judgment in prospective operation does not lie with the High Court but only to the Hon'ble Apex Court. Reliance can be placed to the judgment reported in the case of P.V. George and Ors. Vs. State of Kerala and Ors. reported in (2007) 3 SCC 557. Paragraph no.14 and 29, being relevant, are quoted herein below:-

> *"14. For the views we propose to take, it is not necessary for us to consider all the decisions relied upon by Mr. Rajan. The legal position as regards the applicability of doctrine of prospective overruling is no longer res integra. This Court in exercise of its jurisdiction under Article 32 or Article 142 of the Constitution of India may declare a law to have a prospective effect. The Division Bench of the High Court may be correct in opining that having regard to the decision of this Court in L.C. Golak Nath and Others v. State of Punjab and Another (AIR 1967 SC 1643) the power of overruling is vested only in this Court and that too in constitutional matters, but the High Courts in exercise of their jurisdiction under Article 226 of the Constitution of India,*

*even without applying the doctrine of prospective overruling, indisputably may grant a limited relief in exercise of their equity jurisdiction.*

*29. ------ The law declared by a court will have a retrospective effect if not otherwise stated to be so specifically.---"*

In that view of the matter, the judgment passed in the case of Dheeraj Mor (supra) applies to the present case as the judgment has not given the prospective over-ruling, it cannot be said that this judgment will not be applicable to the case of the present petitioner.

One plea was taken by the learned counsel for the petitioner that he has not approached to this Court or the Hon'ble Apex Court as well as his recommendation was not made subject to the outcome of the decision rendered by the Hon'ble Apex Court in S.L.P. (C) No. 14156 of 2015 and other connected cases as it was only confined to Roll Nos. 13869 and 12239 at merit position no. 61 & 67 respectively.

Learned counsel for the High Court has given reply that it was not known to the High Court that the petitioner was serving in the subordinate service of Uttar Pradesh Judicial Service but, in the judgment passed in the case of Dheeraj Mor (supra), the Hon'ble Apex Court has made it specifically the entitlement for being appointed as a District Judge in direct quota and postulates

that he must be an advocate not only on the cut-off date but also at the time of appointment.

## Final Result

This Court agrees with the submission of the learned counsel for the High Court and, accordingly, this Court does not find any merit in the submission. When law is very clear right from the beginning, the petitioner cannot be allowed to stake claim of being appointed as a District Judge from the stream of advocate and it has to be confined to those advocates who continues to be an advocate all through and also at the time of his appointment.

Accordingly, we do not find any merit in this writ application and the same is dismissed.

**(Shivaji Pandey, J)**

**Partha Sarthy, J :-** I Agree.

**( Partha Sarthy, J)**

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| **AFR/NAFR** | NAFR |
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