

AFRJudgment Reserved on : 12.11.2021Judgment Delivered on : 03.12.2021Court No. - 29

Case :- WRIT - A No. - 27120 of 2018

Petitioner :- Shashank Singh And 4 Others

Respondent :- Honble High Court Of Judicature At Allahabad And Another

Counsel for Petitioner :- Ashutosh Mishra

Counsel for Respondent :- C.S.C., Manish Goyal

Hon'ble Pritinker Diwaker, J.Hon'ble Ashutosh Srivastava, J.(Delivered by : Hon'ble Ashutosh Srivastava, J.)

Heard Sri Ashutosh Mishra, learned counsel for the petitioners and Sri Ashish Mishra, learned counsel, who represents the High Court, Respondent No.1. The learned Standing Counsel has accepted notice of the writ petition on behalf of the Respondent No.2.

Sri Ashish Mishra, learned counsel for the respondent High Court has filed counter affidavit. Learned counsel for the petitioners does not want to file rejoinder affidavit. We, therefore, proceed to decide the writ petition on merits.

The subject matter of the writ petition relates to the process of Direct Recruitment to the U.P. Higher Judicial Services-2018 (Part II). The Allahabad High Court issued a Notification dated 12.11.2018 inviting applications for direct recruitment to the Uttar Pradesh High Judicial Service-2018 (Part-II) against 59 vacancies (SC-08, ST-01, OBC-16 and Unreserved-34) in the pay scale of Rs.51550-1230-58930-1380-63070 from Advocates having not less than 7 years standing as on the last date fixed for the submission of application forms, who must have attained the age of 35 years and

must not have attained the age of 45 years as on 01.01.2019. The age limit was relaxed by 3 years in case of SC/ST/OBC category candidates, but such candidates must not have attained the age of 48 years as on 01.01.2019. 20% horizontal reservation for women candidates belonging to the State of U.P. only was provided. The applications were required to be filed online. A preliminary examination (objective type) was to be held at Prayagraj (Allahabad) on 03.02.2019. Both Advocates practicing within the State of U.P. and outside the State of U.P. were eligible to apply, but after obtaining requisite forwarding from the District and Sessions Judge/Registrar General/Registrar of the High Court/Secretary General of the Supreme Court as applicable.

All the petitioners, who are five in number, although enrolled with the Bar Council of U.P. are members of the M.P. Judicial Services and working as Judicial Officers in the State of M.P. under the supervision of the M.P. High Court at Jabalpur. The petitioners are aggrieved by Rule 5 of the U.P. Higher Judicial Service Rules, 1975 insofar as it bars the Judicial Officers from participating in the recruitment process for filling up the vacancies by direct recruitment.

It is contended on behalf of the petitioners that the Rule 5 of the 1975 Rules is violative of the fundamental rights of the petitioners and the source of direct recruitment cannot be restricted to practicing Advocates only. The petitioners were once practicing Advocates and later on got selected as Judicial Officers and otherwise satisfy the eligibility criteria laid down in the notification dated 12.11.2018 issued for filling up the vacancies. The 1975 Rules are liable to be declared unconstitutional to the extent it excludes the persons possessing requisite experience in the field of law of more than 7 years cumulatively as an Advocate and as a Judicial Officer for being considered eligible to appear in the U.P.H.J.S.

Exams.

For appreciating the arguments raised on behalf of the writ petitioners, it would be appropriate to refer to Rule 5 of the U.P. Higher Judicial Service Rules 1975, which is reproduced as under:-

***“5. Sources of recruitment.- The recruitment to the Service shall be made-***

*a) by promotion from amongst the Civil Judges (Senior Division) on the basis of Principle of merit-cum-seniority and passing a suitability test.*

*b) by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service;*

*c) by direct recruitment from amongst the Advocates of not less than seven years standing as on the last date fixed for the submission of application forms.*

A perusal of the Rule 5 of the 1975 Rules reveals that the source of recruitment to the U.P.H.J.S. is by promotion as also by direct recruitment. The source of recruitment by promotion is confined to Judicial Officers [Civil Judge (Senior Division)] while the source of direct recruitment is confined to Advocates with not less than 7 years standing.

The U.P. Higher Judicial Service Rules, 1975 have been framed in exercise of the power conferred by the Proviso to Article 309 read with Article 233 of the Constitution of India.

Article 309 of the Constitution of India deals with the recruitment and conditions of service of persons serving the Union or a State. The Article 309 provides the competence for the Governor of a State or such person as he may direct to make the rules regulating the recruitment and the conditions of service of persons appointed to services and posts in connection with the affairs of the State. Article 233 of the Constitution of India deals with the appointment of District Judges. The Article 233 of the Constitution of India is reproduced here-under:-

***“Article 233 of Constitution of India "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.”

The Article 233 of the Constitution of India has been recently interpreted by the Hon'ble Apex Court in the **Civil Appeal No.1698 of 2020 (Dheeraj Mor Vs. Hon'ble High Court of Delhi)** arising out of **SLP (C) No.14156 of 2015** and other connected matters vide decision dated February 19<sup>th</sup>, 2020 reported in **2020 SCC online SC 213**. The Hon'ble Apex Court after considering all aspects of the matter observed as under:-

*“59. 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.*

**60.** We answer the reference as under:-

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

(ii) 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.

(iii) 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.

(iv) 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.

(v) 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.

(vi) 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.

**61.** In the case of *Dheeraj Mor* and others cases, time to

*time interim orders have been passed by this Court, and incumbents in judicial service were permitted to appear in the examination. Though later on, this Court vacated the said interim orders, by that time certain appointments had been made in some of the States and in some of the States results have been withheld by the High Court owing to complication which has arisen due to participation of the ineligible in-service candidates as against the post reserved for the practising advocates. In the cases where such in-service incumbents have been appointed by way of direct recruitment from bar as we find no merit in the petitions and due to dismissal of the writ petitions filed by the judicial officers, as sequel no fruits can be ripened on the basis of selection without eligibility, they cannot continue as District Judges.*

*They have to be reverted to their original post. In case their right in channel for promotion had already been ripened, and their juniors have been promoted, the High Court has to consider their promotion in accordance with prevailing rules. However, they cannot claim any right on the basis of such an appointment obtained under interim order, which was subject to the outcome of the writ petition and they have to be reverted.”*

It would be apt to also quote the additional reasoning given by Justice S. Ravindra Bhat, in respect of the issue decided by the Hon'ble Apex Court.

*“90. A close reading of Article 233, other provisions of the Constitution, and the judgments discussed would show discloses the following:*

*(a) That the Governor of a State has the authority to make “appointments of persons to be, and the posting and promotion of, district judges in any State (Article 233 [1]);*

*(b) While so appointing the Governor is bound to consult the High Court (Article 233 [1]:Chandra Mohan (supra) and Chandramouleshwar Prasad v Patna High Court 1970 (2) SCR 6662);*

*(c) Article 233 (1) cannot be construed as a source of appointment; it merely delineates as to who is the appointing authority;*

*(d) In matters relating to initial posting, initial appointment, and promotion of District Judges, the Governor has the authority to issue the order; thereafter it is up to the High Court, by virtue of Article 235, to exercise control and superintendence over the conditions of service of such District Judges. (See State of Assam v Ranga Mahammad 1967 (1) SCR 4543);*

*(e) Article 233 (2) is concerned only with eligibility of those who can be considered for appointment as District Judge. The Constitution clearly states that one who has been for not less than seven years, “an advocate or pleader” and one who is “not already in the service of the Union or of the State” (in the sense that such person is not a holder of a civil or executive post, under the Union*

or of a State) can be considered for appointment, as a District judge. Significantly, the eligibility- for both categories, is couched in negative terms. Clearly, all that the Constitution envisioned was that an advocate with not less than seven years' practise could be appointed as a District Judge, under Article 233 (2).

(f) Significantly, Article 233 (2) *ex facie* does not exclude judicial officers from consideration for appointment to the post of District Judge. It, however, equally does not spell out any criteria for such category of candidates. This does not mean however, that if they or any of them, had seven years' practise in the past, can be considered eligible, because no one amongst them can be said to answer the description of a candidate who "has been for not less than seven years" "an advocate or a pleader" (per Deepak Agarwal, i.e. that the applicant/candidate should be an advocate fulfilling the condition of practise on the date of the eligibility condition, or applying for the post). The sequitur clearly is that a judicial officer is not one who has been for not less than seven years, an advocate or pleader.

91. The net result of the decision in Chandra Mohan (*supra*), and subsequent decisions which followed it, is that Article 233 (2) renders ineligible all those who hold civil posts under a State or the Union, just as it renders all advocates with less than seven years' practice ineligible, on the date fixed for reckoning eligibility. Equally, those in judicial service [i.e. holders of posts other than District Judge, per Article 236 (2)] are not entitled to consideration because the provision (Article 233 [2]) does not this part of the case it is sufficient to say that there was consultation." prescribe any eligibility condition. Does this mean that any judicial officer, with any length of service as a member of the judicial service, is entitled to consideration under Article 233 (2)? The answer is clearly in the negative. This is because the negative phraseology through which eligibility of holders of civil posts, or those in civil service (of the State or the Union) and advocates with seven years' service is couched. However, the eligibility conditions are not spelt out in respect of those who are in the judicial service.

92. The omission, - in regard to spelling out the eligibility conditions *vis-à-vis* judicial officers, to the post of District Judge, in the opinion of this court, is clearly by design. This subject matter is covered by three provisions: Article 233 (1)- which refers to promotions to the post of District Judge; Article 234, which, like Article 233 (1) constitutes the Governor as the appointing authority in respect of judicial posts or services, (other than District Judges), and like Article 233 (1), subject to recommendation of the High Court concerned. This position is most definitely brought home by the fact that Article 235 vests in the High Courts the power of supervision and control of the judicial service, "including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge." The corollary to this is that the Governor is appointing authority for the post of District Judge, and other judicial posts; both are to be filled after prior consultation with the High Court, and crucially, the promotion of judicial officers, to the post of District Judge, is regulated by

conditions (read rules) framed by the High Court.”

96. In the opinion of this court, there is an inherent flaw in the argument of the petitioners. The classification or distinction made- between advocates and judicial officers, per se is a constitutionally sanctioned one. This is clear from a plain reading of Article 233 itself. Firstly, Article 233 (1) talks of both appointments and promotions. Secondly, the classification is evident from the description of the two categories in Article 233 (2): one “not already in the service of the Union or of the State” and the other “if he has been for not less than seven years as an advocate or a pleader”. Both categories are to be “recommended by the High Court for appointment.” The intent here was that in both cases, there were clear exclusions, i.e. advocates with less than seven years’ practice (which meant, conversely that those with more than seven years’ practice were eligible) and those holding civil posts under the State or the Union. The omission of judicial officers only meant that such of them, who were recommended for promotion, could be so appointed by the Governor. The conditions for their promotion were left exclusively to be framed by the High Courts.

101. 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.

Apart from the above observations, the Hon'ble Supreme Court while interpreting Article 236(2) of the Constitution of India, in the Case of **Deepak Aggarwal Vs. Keshav Kaushik and others**, reported in **2013 (5) SCC 277**, was pleased to observed as under:-

“88. 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 as advocate on the date of application. ”*

In the light of the above, it is clear that under Article 233 of the Constitution of India, a Judicial Officer regardless of his or her previous experience, as an Advocate with 7 years practice, cannot apply and compete for appointment to any vacancy in the post of District Judge; his or her chance to occupy the post would be through promotion in accordance with the Rules framed under Article 233 and Proviso to Article 309 of the Constitution of India.

No relief can be given to the petitioners. The writ petition fails and is, accordingly, **dismissed**.

The interim order dated 20.12.2018 stands discharged.

**Order Date :-03.12.2021**

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**(Ashutosh Srivastava,J.)**

**(Pritinker Diwaker,J.)**