

(2018) 06 UK CK 0145

In the Uttarakhand High Court

Case No : Writ Petition (S/B) No. 267 of 2018

Balmesh Kumar

APPELLANT

Vs

High Court of Uttarakhand and others

RESPONDENT

Date of Decision : 29-06-2018

Acts Referred:

Constitution of India, 1950 — Article 223, 233(2)

Citation : (2018) 06 UK CK 0145

Hon'ble Judges : K.M. JOSEPH, C.J;SHARAD KUMAR SHARMA, J

Bench : Division Bench

Advocate : Bharat Singh, Shobhit Saharia, Narain Dutt

Final Decision : Dismissed

Judgement

K.M. JOSEPH, C.J. (Oral)

SHARAD KUMAR SHARMA, J.

1.Â Petitioner challenges the order dated 08.06.2018 passed by the Registrar General of the High Court of Uttarakhand rejecting the candidature of

the petitioner from appearing in the selection process for appointment as Additional District and Sessions Judge in the Uttarakhand Higher Judicial

Service Examination, 2018 as scheduled to be held on 01.07.2018. He prays that he may be permitted to participate in the selection process pursuant

to notification dated 28.04.2018.

2. An advertisement was issued on 28.04.2018 by respondent no.2 for holding of the examination for appointment as Additional District and Sessions

Judge. The further case of the petitioner appears to be that he has passed his High School Examination in the year 1990; Intermediate Examination in

the year 1992 from the U.P. Board, Allahabad and, thereafter, he completed his

graduation in the year 1995; post-graduation in the year 1997. He also got admitted to the LL.B course and completed the same in the year 2001. He has also done his B.Ed. course in the year 2007. It is his further case that he was got registered as an Advocate and started practicing as an Advocate since the year 2001 in the Civil Court at Roorkee, District Haridwar.

Annexure No. 1 purports to be his Registration Certificate. He claims to have practiced in the Civil Court, Roorkee, District Haridwar since

05.10.2001 to 08.10.2014. The District and Sessions Judge Haridwar, on the basis of certificate of experience dated 02.05.2018 issued by the

President of the Bar Association, has also issued an experience certificate dated 10.05.2018 as Annexure No. 3. It is his further admitted case that he

participated in the selection process for Assistant Teacher and he was appointed as an Assistant Teacher vide Annexure No. 4 appointment letter

dated 01.10.2014. He joined as an Assistant Teacher on 09.10.2014. Having rendered 14 yearsâ?? service as an Advocate and considering himself

to be eligible, he applied for participation in the process for appointment as Additional District Judge in pursuance of notification dated 28.04.2018. The

same came to be rejected by the impugned order dated 08.06.2018 by respondent no. 2. The reason given for rejecting his candidature is that he is not

a â??practicing Advocateâ??; because as per the petitioner himself, he is working as an Assistant Teacher since 09.10.2014.

3. We heard Mr. Bharat Singh, learned counsel on behalf of the petitioner and Mr. Shobhit Saharia, learned counsel on behalf of respondent nos. 1

and 2/High Court of Uttarakhand.

4. Mr. Bharat Singh, learned counsel for the petitioner would reiterate that he had indeed more than seven yearsâ?? practice as an Advocate. In

fact, he has practiced from the year 2001 till the year 2014. In fact, there does not appear to be much dispute about this aspect. The fact of his having

such practice for the aforesaid period or not is not disputed in the order rejecting his application. So, we can proceed on the basis that the petitioner did

have such practice, as certified by the President of Bar and District and Sessions Judge. He would, therefore, submit that having regard to Article

233(2) of the Constitution of India since he has requisite extent of practice, namely, more than 7 years, he cannot be declared ineligible to be

considered in the selection process. He would also draw our attention to the

judgment of the Honâ??ble Apex Court in the case of Deepak

Aggarwal Vs. Keshav Kaushik and others reported in (2013) 5 SCC 277. Therein, he points out that the question, which was posed, has arisen for

consideration, is noted as follows in paragraph no. 52. The same reads as follows:

â??52. The question that has been raised before us is whether a Public Prosecutor/Assistant Public Prosecutor/District Attorney/Assistant District

Attorney/Deputy Advocate General, who is in full time employ of the Government, ceases to be an advocate or pleader within the meaning of Article

233(2) of the Constitution.â??

5. Therefore, he would submit that the fact that the person is in full time employment of State would not stand in the way of the person being

considered as eligible for being considered for appointment as District Judge. He would also draw our attention to the order passed by the Honâ??ble

Apex Court in the case of Dheeraj Mor Vs. Honâ??ble High Court of Delhi reported in (2018) 4 SCC 619. More about the same will follow later in

our judgment.

6. Per contra, Mr. Shobhit Saharia, learned counsel for respondent nos. 1 and 2/ High Court of Uttarakhand would draw our attention to the notification

dated 28.04.2018 inviting applications. He would submit that in the notification, it is made very clear that the recruitment is to be made from among

â??practicing Advocateâ?. He would further stress that the person must be a practicing Advocate as on the first day of January of the recruitment

year, which means that as on 01.01.2018, a candidate must be effectively practicing Advocate as on 01.01.2018. The petitioner had, admittedly,

secured employment as a Teacher in the year 2014. The aforesaid also stands fortified from the fact that the petitioner at the time of joining his

services as an Assistant Teacher, had submitted an application before Bar Council of Uttar Pradesh on 29.04.2016 and had surrendered his certificate

of Registration as an Advocate.

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7. Therefore, the petitioner would not qualify and this is the reason, which is mentioned in the rejection order also. The reasons are in conformity with

the terms of the advertisement and the Rules of 2004. He would also draw our attention to the Rules, which have been made, which also reinforce his

contention, namely, Rule 5 of the Uttaranchal Higher Judicial Service Rules, 2004 (hereinafter referred to as the "Rules"). He also seeks to draw

support from Clause 9 of the application form to contend that the intent is that the legal requirement is that only a candidate, who is actually practicing,

is to be entitled to participate in the recruitment process.

8. We have already culled out the facts. We proceed on the basis that the petitioner, after enrolment, practiced as an Advocate in the Civil Court

Roorkee, District Haridwar from the year 2001 till the year 2014 when he was liable to surrender his certificate of practice on 29.04.2014. We also

can take it, as not in the region of dispute, that in the year 2014, the petitioner applied for selection as an Assistant Teacher and secured appointment

as an Assistant Teacher, and joined his service as an Assistant Teacher, thereafter, he surrendered his license on 29.04.2016 and as on the first day of

January, 2018 and even as on today, he is working as an Assistant Teacher, and is not practicing as an Advocate, nor does he has a valid license

subsisting to practice as it must have been surrendered by him.

9. Since, we are not writing on a clean slate and the matter is not entirely res integra, we may advert to a few of the decisions, which may be relevant.

Before that, we must advert to Article 233 of the Constitution of India since it is the Constitutional provision, which deals with the matter. Article

233 of the Constitution of India reads as follows:

"233. Appointment of district judges."(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be

made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than

seven years an advocate or a pleader and is recommended by the High Court for appointment."

10. In the case of Chandra Mohan Vs. State of Uttar Pradesh and others reported in AIR 1966 SC 1987, a Constitution Bench of the Hon'ble

Apex Court had this to say about the words "the service" in clause (2) of Article 233 of the Constitution of India :

â??The expression â??the serviceâ? in Cl. (2) of Art. 233 of Constitution means the judicial service. The Chapter dealing with â??subordinate

courtsâ?, in which the expression â??the serviceâ? appears indicates that the service mentioned therein is the service pertaining to courts. That apart,

Art. 236 (2) defines the expression â??judicial serviceâ? to mean 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. The expressions â??exclusivelyâ? and â??intendedâ? 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.â??

11. This Article came to be interpreted by the Honâ??ble Apex Court in the case of Satya Narain Singh Vs. High Court of Judicature At Allahabad

and others reported in (1985) 1 SCC 225 by a Bench of three Judges. It is necessary to notice the facts, which arose therein. The petitioners therein

were members of the Uttar Pradesh Judicial Service. There was an advertisement issued by the High Court of Allahabad for direct recruitment to the

Uttar Pradesh Higher Judicial Service. They claimed that each of them had completed 7 years of practice at the bar even before their appointment in

U.P. Judicial Services and were, therefore, eligible to be appointed by direct recruitment to the Higher Judicial Service. Writ Petitions were filed and

finally being unsuccessful before the High Court, the matter reached the Honâ??ble Apex Court. The contention taken by the learned counsel for the

respondent therein was that there was a clear demarcation in the Constitution between two sources of recruitment namely: (1). those who were in the

service of a State or Union and (2).those who were not in such service. He contended that sub-article (2) of Article 233 of the Constitution of India

was attracted only in the case of the second source, namely, appointment of persons who were not in the service of a State or Union. The

requirement of further qualification of seven years as an Advocate or a pleader is made obligatory for eligibility only in respect of the second source,

namely, when recruitment is made from the Bar. Apparently, this contention came to be accepted. The following is the discussion by the Court (pg.

228).

â??3. â?!

We may mention here that "Service of the Union or of the State" has been interpreted by this Court to mean judicial service. Again while the first

clause make consultation by the Governor of the State with the High Court necessary, the second clause requires that the High Court must

recommend a person for appointment as a District Judge. 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 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."

5. Posing the question whether the expression "the service of the Union or of the State" meant any service of the Union or of the State or whether it

meant the judicial service of the Union or of the State, the learned Chief Justice emphatically held that the expression "the service" in Art. 233(2)

could only mean the judicial service. But he did not mean by the above statement that persons who are already in the service, on the recommendation

by the High Court can be appointed as District Judges, overlooking the claims of all other Seniors in the Subordinate Judiciary Contrary to Art. 14 and

Art. 16 of the Constitution."

12. From this, we may take it that the Hon'ble Apex Court has understood that the experience in the service of the Union or of a State is only to

denote the judicial service. In other words, in respect of those, who are already in the judicial service, the Constitution does not enforce the

requirement of seven years' practice as an Advocate. Those, who are already in the judicial service, can be appointed as a District Judge without

having seven years' practice at the Bar. Those, who are not in the judicial service, on the other hand, usually described as a direct recruit, can

apply only if they have seven years' practice at the Bar.

13. We must also refer to the decision of the Honâ??ble Apex Court in the case of Deepak Aggarwal Vs. Keshav Kaushik and others reportedâ?? in

(2013) 5â?? SCCâ?? 277,â?? which was also referred to by the learned counsel for the petitioner. Therein, as already noted, in paragraph no.52,

theâ?? â?? â?? â?? question, which arose, was whether Public Prosecutors/Assistant Public Prosecutors/Districtâ?? Attorneys/Assistant District

Attorneys/Deputy Advocate Generals, who are not full time employ of the Government, would cease to be an Advocate or pleader within the meaning

of Article 233(2) of the Constitution of India. The answer, we notice, may be seen located in paragraph no. 98 of the said judgment. The same reads

as follows:

â??98. Admittedly, by the above resolution of the Bar Council of India, the second and third para of Rule 49 have been deleted but we have to see

the effect of such deletion. What Rule 49 of the BCI Rules provides is that an advocate shall not be a full time salaried employee of any person,

government, firm, corporation or concern so long as he continues to practice. The â??employmentâ?? spoken of in Rule 49 does not cover the

employment of an advocate who has been solely or, in any case, predominantly employed to act and/or plead on behalf of his client in courts of law. If

a person has been engaged to act and/or plead in court of law as an advocate although by way of employment on terms of salary and other service

conditions, such employment is not what is covered by Rule 49 as he continues to practice law but, on the other hand, if he is employed not mainly to

act and/or plead in a court of law, but to do other kinds of legal work, the prohibition in Rule 49 immediately comes into play and then he becomes a

mere employee and ceases to be an advocate. The bar contained in Rule 49 applies to an employment for work other than conduct of cases in courts

as an advocate. In this view of the matter, the deletion of second and third para by the Resolution dated 22.6.2001 has not materially altered the

position insofar as advocates who have been employed by the State Government or the Central Government to conduct civil and criminal cases on

their behalf in the courts are concerned.â??

14. We may, at once, notice that the petitioner cannot be allowed to draw any support from the said judgment. This is for the reason that the petitioner

does not fall in any of the categories, whose cases were being considered by the

Honâ??ble Apex Court in the said judgment. Petitioner has secured employment as an Assistant Teacher in 2014, after surrendering his license to practice. Petitioner does not even have a case and rightly so that his employment as an Assistant Teacher has got anything to do with practice in the Courts or related to judicial services. In fact, the requirement of Rule 49 of the Rules has been succinctly culled out in paragraph no. 98, which we have already noticed. An Advocate cannot also at the same time be a full time salary employee of any person. The exception in Rule 49 is only in extent of an Advocate, who has been solely or, in any case, predominantly employed to act and/or plead on behalf of his client in courts of law. The petitioner has no case that his employment as an Assistant Teacher involves anything to do with the Courts or that he is called upon to act and/or plead on behalf of his client in Courts. Therefore, the petitioner cannot be allowed to rely on that judgment.

15. The next decision, we may, undoubtedly, notice is the judgment of the Honâ??ble Apex Court in the case of Vijay Kumar Mishra and another

Vs. High Court of Judicature at Patna and others reported in (2016) 2 SCC 313. Therein, it is necessary that we notice the facts. An advertisement

was issued inviting applications from eligible Advocates for direct recruitment to the post of District Judge. The cutoff date for the eligibility was 5th

of February, 2015. The petitioners were permitted to appear in the Preliminary as well as in the Mains Examination conducted for recruitment as

District Judge. Subsequent to this, they were appointed as Civil Judges in August, 2015. Thereafter, they made a representation that they may be

permitted to appear for interview for the post of District Judge. This representation came to be rejected and a condition was imposed that the

appellants/petitioners should resign from their post before they can appear for the interview. It was this, which was in question before the Honâ??ble

Apex Court. Therein, the Court took the view that Article 233(2) of the Constitution of India prohibits appointment and not participation in the selection

process leading to the appointment. It is apposite that we refer to the following:

â??7. It is well settled in service law that there is a distinction between selection and appointment. Every person who is successful in the selection

process undertaken by the State for the purpose of filling up of certain posts under the State does not acquire any right to be appointed automatically.

Textually, Article 233(2) only prohibits the appointment of a person who is already in the service of the Union or the State, but not the selection of such a person. The right of such a person to participate in the selection process undertaken by the State for appointment to any post in public service (subject to other rational prescriptions regarding the eligibility for participating in the selection process such as age, educational qualification etc.) and be considered is guaranteed under Art. 14 and 16 of the Constitution.

8. The text of Article 233(2) only prohibits the appointment of a person as a District Judge, if such person is already in the service of either the Union or the State. It does not prohibit the consideration of the candidature of a person who is in the service of the Union or the State. A person who is in the service of either of the Union or the State would still have the option, if selected to join the service as a District Judge or continue with his existing employment. Compelling a person to resign his job even for the purpose of assessing his suitability for appointment as a District Judge, in our opinion, is not permitted either by the text of Art. 233(2) nor contemplated under the scheme of the constitution as it would not serve any constitutionally desirable purpose.â??

16. Lastly, we must advert to the order passed by the Honâ??ble Apex Court, which is brought to our notice by the learned counsel for the petitioner, in the case of Dheeraj Mor Vs. Honâ??ble High Court of Delhi reported in (2018) 4 SCC 619. We notice that the Court was interpreting Article 233 of the Constitution of India and noticing the decision in the case of Satya Narain Singh (supra), Deepak Aggarwal (supra) and finally the view taken in the case of Vijay Kumar Mishra (supra), to which we have already made reference, took the view that the major issue arising for consideration is whether the eligibility for appointment as a District Judge is to be seen only at the time of appointment or at the time of application or both. The Court took the view that, having regard to the observations in the various cases, which were referred to, this case involves substantial questions of law as to the interpretation of Article 233 of the Constitution of India and the matter was to be placed before Honâ??ble the Chief Justice for constituting appropriate Bench. Therefore, the aforesaid order can be understood as only meaning that a Bench of two Judges felt that the matter should be considered by a larger Bench and the matter was placed before Honâ??ble the

Chief Justice for appropriate orders.

17. We must proceed on the basis of the decisions, which we have adverted to, as things stand. We have already adverted to the principles, which have been laid down in the aforesaid cases. Time now, it is for us to refer to the actual facts of this case, which are most relevant. In the notification, which was issued, in the very first sentence, it is made clear that applications are invited from the practicing Advocates for filling up the vacancies in question.

Clause 3 of the notification reads as follows:

3. Applicants must have attained the age of 35 years and must not have attained the age of 45 years on the 1st day of January 2018. In other words, applicants should have been born on or after 02.01.1973 and not later than 01.01.1983. Relaxation in age to the candidates will be admissible as per rules of the State of Uttarakhand.

18. Clause 4 of the notification dated 28.04.2018, inviting application for recruitment for the year 2018, assumes crucial significance and it reads, inter alia, as follows:

4 Applicants for recruitment to the service: -

(i) Must be an Advocate as on 01.01.2018.

(ii) Must be an Advocate of not less than seven years standing as on the first day of January 2018.

Meaning thereby the determining factor for a candidate to make him eligible to apply, is the status of being an Advocate as on 01.01.2018 and in turn also on date of application in view of the words used practicing Advocate in the notification.

19. In Clause 5(ii) of the notification, it is stated that the applicants must enclose a certificate of experience and character from the District Judge of the respective District in which the applicant is practicing as an Advocate or in case, the applicant is practicing before High Court / Supreme Court, he must enclose the certificate of experience and character by the Registrar of the said Court along with the application form. Under Clause 5(ii) the condition to apply annexing therewith the certificate of practice to be given by the District Judge or the Registrar as the case may be would always mean the certificate, which defines the present status of the candidate to be

practicing. That is why clause 5(ii) uses the words "candidate is practicing", which always signifies the current situation of a candidate.

20. Even, Clause 5(vii) of the notification reads as follows:

“

5(vii) Any person who is already in the service of Union or of the State shall not be eligible for recruitment in

Uttarakhand Higher Judicial Service.”

21. We may notice that in the application form, Clause 9 reads as follows:

9. Place where you are practicing as an Advocate & since when (Please mention entire experience claimed, clearly mentioning the duration of practice (date month, year))

In answer to this Clause 9 of the application form of the petitioner, what is stated by him is that: “Has been practicing as an Advocate since

05/10/2001 to 08/10/2014 in the Civil Court at Roorkee, Dist-Haridwar. Meaning thereby on his own showing, he was not in effective practice on date of applying.

22. We may, finally, advert to the 2004 Rules. Rule 5 of the Rules reads as follows:

5. Source of Recruitment-

The recruitment to the service shall be made-

(a) By promotion from amongst the cadre of Civil Judge (Senior Division);

(b) By selection through limited competitive examination from amongst Civil Judges (Senior Division) cadre;

(c) By direct recruitment of Advocates of not less than seven years standing on the first day of January of the year in which the notice inviting applications is published.”

23. From the aforesaid, we conclude that the recruitment in question is one, which is purported to be made under Clause (c) of Rule 5 of the Rules of

2004, namely, by direct recruitment of Advocates of not less than seven years standing on the first day of January of the year in which the notice

inviting applications is published, which in the instant case would be 01.01.2018. We would think that the interpretation, which is sought to be placed by

the learned counsel for respondent nos. 1 and 2/High Court of Uttarakhand,

namely, that in Rule 5(c) of the Rules the words "recruitment of Advocates of not less than seven years standing on the first day of January of the year in which the notice inviting applications is published" must mean that he must be having seven years' practice as an Advocate as on the first day of the year, is corroborated by the clear indication to the said fact in the notification dated 28.04.2018 inviting applications as also the column where the question is posed relating to the practice. The answer given by the petitioner itself in his application form would show that he does not fulfill the requirement as per the notification and, in fact, there could not be any dispute relating to the same. If that is so, the reason given for rejecting the application, namely, that he is not a practicing Advocate is also in accord with the case of the petitioner himself that he was a lawyer, who was practicing between the period 2001 to 2014 and later he has surrendered his license to practice when appointed as Assistant Teacher was not having any license to practice on date of applying. Having secured employment in the year 2014, which must be treated as full time employment, he cannot be treated as an Advocate, who was practicing as on the first day of January, 2018, which is a requirement in the notification. It is noteworthy that the petitioner has not even called in question the provisions in the notification, which requires that he must be a practicing Advocate as on the first day of January, 2018. Therefore, we must take the notification as it is.

24. No doubt, a question could arise though not pressed by the petitioner as to whether it would be sufficient to comply with Article 233(2) of the Constitution of India that a person has, in the whole, practice of seven years or more. It could be argued that if in the past, he had, either continuous or even in the aggregate with breaks in between, a total of seven years' practice that would suffice to render him eligible within the meaning of Article 233(2) of the Constitution of India. We are freed from the obligation to consider these aspects from the specific requirement in the notification, which remains unchallenged that the candidate must have been an Advocate as on the first day of January, 2018. No doubt, it does not say that the candidate must have been practicing Advocate. This stipulation must be read with the requirement in the Notification that the recruitment is from practicing Advocates. The petitioner having surrendered his certificate in the year

2014 cannot be treated as an Advocate within the meaning of the terms of the Notification. The terms of the notification are binding on the petitioner and, in such circumstances; in this case the reasons given for rejecting the application of the petitioner are not flawed or illegal in any manner. It would appear to us that the founding fathers contemplated the source of recruitment from the Bar with the condition that persons, when they are recruited from the Bar should have seven yearsâ?? practice for the reason that unlike those, who are in the Judicial Service, the familiarity with the Courts in actual practice was considered necessary. We would think that the petitioner has not made out a case for grant of any relief. The writ petition will stand dismissed without any order as to cost.