

(2010) 09 J&K CK 0011

In the Jammu And Kashmir High Court

Case No : S.W.P. No's. 1691, 1741 and 1824 of 2010

Gurjot Kaur, Harminder Singh, Ranjeev Kumar and Vikram
Parihar and Others

APPELLANT

Vs

High Court of J and K and Another

RESPONDENT

Date of Decision : 14-09-2010

Acts Referred:

Advocates Act, 1961 — Section 18
Constitution of India, 1950 — Article 233

Citation : (2010) 3 JKJ 268

Hon'ble Judges : Jai Pal Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

J.P. Singh, J.

SWP No. 1691/2010 and CMP Nos. 2730/2010 and 2366/2010

SWP No. 1741/2010 and CMP No. 2437/2010

SWP No. 1824/2010 and CMP No. 2548/2010

SWP No. 1861/2010 and CMP No. 2597/2010

1. The petitioners, in all these Petitions, are the Police Prosecutors, serving as such in the Police Department of the State Government. They wish

to compete for the post of District Judge and participate in the selection process initiated pursuant to High Court of Jammu and Kashmir,

Srinagar's Notification No. 264-A dated 25.06.2010.

2. Rule 5(2)(b) of the Jammu and Kashmir Higher Judicial Service Rules, 2009, "the rules", for short, requires that a candidate must be a practicing

advocate in the Courts of civil and criminal jurisdiction on the last date of receipt

of applications and must have been in active practice for a period of not less than seven years.

3. Thus, disabled to compete pursuant to the above rule they have filed these Petitions seeking quashing of Rule 5(2)(b) of the rules, besides a

Command to the respondents to permit them to compete for the post and participate in the selection process therefor. The case set up in the Writ

Petition by them is that having remained as practicing Advocates before their selection and appointment as Prosecuting Officers in the Police

Department, and appearing in the Courts of civil and criminal jurisdiction as Prosecuting Officers on behalf of the State Government, they fall within

the definition of 'Advocate', in terms of the Advocates Act and thus entitled to compete for the post of District Judge and that Rule 5(2)(b) of the

rules, which disables them from competing, was ultra vires the Constitution of Jammu and Kashmir.

4. Majority of the petitioners barring a few in these Petitions do not possess minimum seven years' practice as an Advocate or Pleader before

joining the Government Service. They want their service as Police Prosecutors in the Police Department, to count as their practice at Bar whereas

the others urge that having seven years standing at the Bar before joining the Government Service, they were entitled to compete for the post of

District Judge.

5. I have considered the submissions of the petitioners' learned Counsel and those of the learned Senior Counsel appearing for the High Court of

Jammu and Kashmir.

6. The petitioners' plea that they are Advocates as defined under the Advocates Act and entitled to compete for the post of District Judge, is, ex-

facie, untenable, in view of the disqualification which an Advocate incurs on his joining a full time service, in view of the provisions of Rule 49 of the

Bar Council of India Rules framed under the Advocates Act, 1961 and other rules on the subject, in terms whereof a full time salaried employee of

any person, government, firm, corporation or concern, ceases to practice as Advocate so long as he continues in such employment and in this view

of the matter, the petitioners cannot be treated to be practicing Advocates entitled to compete for the post of District Judge.

7. Rule 49 of the Bar Council of India Rules, is reproduced hereunder for

reference:

49- 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, and shall on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears and shall thereupon cease to practice as an Advocate so long as he continues in such employment.

8. That apart, being a member of the Police Service, the petitioners, would not be eligible to compete for the post of District Judge, in terms of

Section 109 of the Constitution of Jammu and Kashmir, for, direct recruitment whereto, is permissible only for those who were practicing

Advocates or Pleaders with not less than seven years' practice, at the time of the filing of the applications.

9. Petitioners' next contention that Rule 5(2)(b) of the rules was ultra vires the Constitution of Jammu and Kashmir, which does not contemplate an

Advocate or Pleader with seven years' practice, to be a practicing Advocate, at the time of the filing of the application seeking consideration for

selection, too is found untenable in view of the reasoning given by the Court while dealing with a similar issue in Achal Sethi v. High Court of

Jammu and Kashmir and another, SWP No. 1735/2010, where relying on Chandra Mohan v. State of U.P. and Ors. reported as AIR 1966 SC

1987 it has been said, as follows:

To deal with the submissions advanced at the Bar, regard needs to be had to the provisions of Article 233 of the Constitution of India and Section

109 of the Constitution of Jammu and Kashmir, which for facility of reference are reproduced hereunder:

Article 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. Section 109- Appointment of district Judges

(1) Appointment of persons to be, and the posting and promotion of, district Judges in the State shall be made by the Governor in consultation with

the High Court.

(2) A person not already in the service 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 pleader and is recommended by the High Court for appointment." The phraseology employed in the above two provisions being

same, except for the absence of word 'Union', in the State Constitution, the expression 'service of the State' appearing in Section 109 of the

Constitution of Jammu and Kashmir needs to be understood as 'Judicial Service of the State' to deal with the submissions, for, in view of the law

laid-down in the Constitution Bench Judgment (supra) and followed in latter judgments of the Apex Court, the legal position that the expression

'service' appearing in Article 233 and Section 109, means 'Judicial service', is well settled.

10. Thus, proceeding on the premise that the expression 'service of the State' appearing in Section 109 of the Constitution of Jammu and Kashmir

means 'Judicial Service of the State', the issue that falls for consideration is as to whether or not, those in the service of the State, other than the

Judicial service, having minimum seven years of practice, as an Advocate or Pleader, to their credit, before joining the service, were entitled to

compete for the post of District Judge?

11. A careful reading of Section 109 of the Constitution of Jammu and Kashmir demonstrates the intention of the Constitution Makers to permit

only the Advocates or Pleaders having not less than seven years' practice as such to compete for appointment as District Judge, and it is, in this

context that a person already in Judicial Service of the State, is indicated in Section 109 not entitled to compete for such direct recruitment. This

would not, however, mean that persons in service of the State, other than judicial service, were entitled to compete, in that, Section 109

contemplates only two sources for entry into the Higher Judicial Service of the State i.e. the cadre of District Judges viz (1) by direct appointment

from amongst Advocates/Pleaders, having not less than seven years practice, and (2) by promotion from the State subordinate judicial service.

This is so because while interpreting one or the other provisions of the Constitution, all relevant provisions appearing in the Constitution in regard

thereto, demonstrating the intention of the Constitution Makers, needs to be kept

in view.

12. Therefore, while understanding the provisions of Section 109 of the Constitution and the spirit underlying therein, the provisions of Section 18

of the Constitution cannot be lost sight of, in terms whereof, the State is duty bound to take steps to separate the Judiciary from the Executive in

the public services to secure a Judicial system which was humane, cheap, certain, objective and impartial whereby justice would be done and shall

be seen to be done and shall strive to ensure efficiency, impartiality and incorruptibility of its various organs of justice, administration and public

utility.

13. Permitting persons who were already serving in the Executive, to compete for the District Judge's post, in my opinion, would be interference

with the Constitutional mandate aforementioned.

14. No further discussion on the issue may be necessary in view of the observations made by the Constitution Bench of the Apex Court in

Chandra Mohan's case (supra), on the issue, which for facility of reference is reproduced hereunder:

Till India attained independence, the position was that district Judges were appointed by the Governor from three sources, namely, (i) the Indian

Civil Service, (ii) the Provincial Judicial Service, and (iii) the Bar. But after India attained independence in 1947, recruitment to the Indian Civil

Service was discontinued and the Government of India decided that the members of the newly created Indian Administrative Service would not be

given judicial posts. Thereafter district Judges have been recruited only from either the judicial service or from the Bar. There was no case of a

member of the executive having been promoted as a district Judge. If that was the factual position at the time the constitution came into force, it is

unreasonable to attribute to the makers of the Constitution, who had so carefully provided for the independence of the judiciary, an intention to

destroy the same by an indirect method. What can be more deleterious to the good name of the judiciary than to permit at the level of district

Judges, recruitment from the executive departments?

15. Even otherwise, a person desirous of competing for the post of District Judge, has to be a practicing Advocate or Pleader with minimum seven

years of practice at the time of his seeking such consideration, for the

expression, ""if he has been"" appearing in the Section, indicates his continuance, as such, in the profession at the time of applying, and not his past experience as such. An Advocate, ceases to be a member of the Noble profession, the moment he joins service, in view of the rules framed by the Bar Council of India under the Indian Advocates Act and in this view of the matter, being in service of the State Government, since 2006, the petitioner has ceased to be an Advocate in terms of the provisions of the Advocates Act, hence disentitled to compete for the post of the District Judge.

16. For all what has been said above, the petitioners' case seeking quashing of Rule 5(2)(b) of the rules and issuance of direction to the respondents to permit their participation in the selection process for the posts of District Judge, does not warrant admission to hearing.

17. Thus, found without merit, all these Writ Petitions are, therefore, dismissed in limine.

18. A copy of this order shall be placed on the file of each Writ Petition.