

(2010) 05 P&H CK 0199
In the Punjab And Haryana At Chandigarh

Keshav Kaushik

APPELLANT

Vs

State of Haryana and Others etc. etc.

RESPONDENT

Date of Decision : 18-05-2010

Acts Referred:

Advocates Act, 1961 — Section 17, 2, 20, 22, 24
Civil Procedure Code, 1908 (CPC) — Section 2
Constitution of India, 1950 — Article 14, 141, 144, 16, 233
Criminal Procedure Code, 1973 (CrPC) — Section 24, 25

Citation : (2010) 3 SLR 449

Hon'ble Judges : Permod Kohli, J;K. Kannan, J

Bench : Division Bench

Judgement

Permod Kohli, J.

I. General

1. District Judiciary is the foundation of the judicial system upon which the whole edifice of the judicial institutions stands. Judiciary is the bulwark of the democratic system in India and reckons indubitably as the most potent institution in the triad, the executive and legislative being the other two pillars under the constitutional scheme. The selection/appointment to the Subordinate Judiciary thus assumes a great significance in the administration of justice. The administration of justice in turn depends upon the fairness of the appointments of the meritorious candidates necessary to keep and strengthen the faith in the judicial system. No doubt the appointments to any service should be fair and on merits and this is particularly so in case of judicial appointments. The reverence reposed in the judicial system makes it imperative that judicial appointments obtain a close scrutiny to dispel even the remotest apprehension in the minds of consumers of justice about quality and legality of the selection process. What to say of a common man who often approaches the courts for protection of their civil and constitutional rights, even the State some times seeks not only the advice and counselling from the courts, particularly, the higher judiciary, but

invokes the jurisdiction of the courts for remedying any action of its own statutory and other authorities. The complexity of the judicial functions imposes an onerous duty upon the courts in administration of justice, be it violation of fundamental rights, civil rights, disputes relating to property, matrimonial and host of other areas. Thus, it is essential that the judicial appointments must undergo the toughest test of scrutiny, not only to retain the faith reposed in the judicial system, but also to imbibe it further.

2. Judicial appointments to the middle rung of the judiciary below the High Court, called the superior judiciary is under scrutiny in the present bunch of writ petitions. Most of the issues raised are common in all these writ petitions; so is the nature of defence. Wherever the additional grounds of challenge are raised, we will advert to the same at the appropriate stage. In some of the writ petitions, the prayers made are for consideration of the candidature of the writ petitioners without challenging the selection of the private respondents.

II. The process and Procedure of Selection

3. Through the medium of advertisement dated 18.5.2007, the process for selection was set in motion by inviting applications for the notified posts of Additional District & Sessions Judges (hereinafter referred to as "ADJ") in the Haryana Superior Judicial Service by way of direct recruitment on the basis of a competitive examination envisaged under Rule 6 (1) (C) of Haryana Superior Judicial Service Rules, 2007. 22 posts were advertised for selection/appointment for the General and Reserved categories. Out of 22 posts, 14 posts were meant for General Category, 5 for Scheduled Castes and 3 for Backward Classes. Eligible candidates within the age limit of 35 to 45 years as on 1.1.2007 possessing the requisite qualifications could only apply. Qualification prescribed for the posts in question was that a person should be duly enrolled as an Advocate and has practiced for a period not less than seven years as on the date of notification i.e. 18.5.2007. Last date for making application was fixed as on 15.6.2007. The requirement of applications to be made strictly in the prescribed format was made part of the advertisement notification. The mode and method of selection were written examination comprising of 750 marks and viva-voce with 250 marks. Minimum qualifying marks in the written test prescribed under the notification were 40% in each paper and 50% in aggregate for the General Category and 45% in aggregate for the Scheduled Castes/Backward Class Category candidates. Achieving minimum percentage of marks in the written examination was prescribed for pass percentage, reserving right with the High Court to resort to short-listing of candidates equal to three times, the number of vacancies to be called for Viva-voce. The selections/appointments were to be made strictly in the order of merit (Category-wise) in which the candidates were to be placed after the result of written examination and Viva-voce.

III. Parties to the Litigation

4. All the writ petitioners and private respondents in some of the writ petitions

applied in response to the aforesaid advertisement on the prescribed formats. Written tests were conducted by the Punjab and Haryana High Court at Chandigarh between 22.2.2008 to 24.8.2008. On the basis of the performance in the written tests, a list of as many as 64 candidates who qualified the main written examination was issued vide press release dated 22.3.2008 indicating their roll numbers. These candidates were in fact short-listed for Viva-voce. Roll numbers of some of the writ petitioners were also included in the aforesaid list. Interview of the candidates bearing roll numbers referred to above was conducted in April, 2008 in the Chamber of Hon''ble the Chief Justice by a Committee comprising of Hon''ble Judges of Punjab and Haryana High Court. Based upon the combined merit of written test and Viva-voce, final select list was notified on the website of the Punjab and Haryana High Court as also by way of press release on 25.4.2008 followed by recommendation to the State of Haryana, the appointing authority. Private respondents No. 3 to 18 in CWP No. 9157 of 2008 are the recommendees who were appointed and whose selections are under challenge.

IV. Constitutional Provision/Rules governing the Selection/appointment to the posts of ADJ in the State of Haryana

5. Article 233 of the Constitution of India which is the source of judicial appointments for superior/higher judiciary; is reproduced as under:

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.

Rules 5, 6 and 11 of Part III of the Haryana Superior Judicial Service Rules, 2007 read as under:

PART III- METHOD OF RECRUITMENT

5. Recruitment to the Service shall be made by the Governor:

(i) by promotion from amongst the Haryana Civil Service (Judicial Branch) in consultation with the High Court; and

(ii) by direct recruitment from amongst eligible Advocates on the recommendations of the High Court on the basis of the written and viva-voce test conducted by the High Court.

6. (1) Recruitment to the Service shall be made:

(a) 50 per cent by promotion from amongst the Civil Judges (Senior Division)/

Chief Judicial Magistrates/Additional Civil Judges (Senior Division) on the basis of principle of merit-cum seniority and passing a suitability test;

(b) 25 per cent 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 as Civil Judges (Senior Division)/Chief Judicial Magistrates/Additional Civil Judges (Senior Division); and who are not less than thirty five years of age on the last date fixed for submission of applications for taking up the limited competitive examinations; and

(c) 25 per cent of the posts shall be filled by direct recruitment from amongst the eligible Advocates on the basis of the written and viva voce test, conducted by the High Court.

(2) The first and second post would go to category (a) (by promotion on the basis of merit-cum CWP seniority), third post would go to category (c) direct recruitment from the bar), and fourth post would go to category (b) (by limited competitive examination) by Rule 6 and so on.

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11. The qualifications for direct recruits shall be as follows:

(a) must be a citizen of India;

(b) must have been duly enrolled as an Advocate and has practiced for a period not less than seven years;

(c) must have attained the age of thirty five years and have not attained the age of forty five years on the 1st day of January of the year in which the applications for recruitment are invited.

V. Nature of Challenge and the Grounds therefor

6. Challenge to the selection/appointment falls under two broad categories with sub categories:

(i) Validity of the process of selection as a whole;

(a) assignment of marks for interview vis-a-vis written test;

(b) time for each candidate for interview

(ii) Ineligibility of the selectees/appointees. Under this category, the ineligibility is alleged to arise by-

(a) candidates selected/appointed as ADJs from the Fast Track Courts;

(b) Additional District Attorneys, Public Prosecutors and Assistant Advocate General.

Apart from the challenge to the selection, the petitioners in some cases challenge the rejection of the State Government the plea for de-reservation of seats for

backward and scheduled caste categories for general category seats. In this, the High Court (administration side) supports the claim of the petitioners. The issue of de-reservation and the validity of the state decision will also engage our attention in these cases.

VI. The statement in defence on behalf of the High Court and its recommendations for appointments:

7. The selection authority of the High Court has defended the selection process and selection of the candidates in its statement filed to the writ petitions. Detailing various steps in the process of selection, it is averred that the petitioners as well as the contesting private respondents were all found eligible in the written test having secured more than the prescribed marks and applying the notified short-listing criteria i.e. three times number of vacancies were called for interview. It is stated that on 4.4.2007, a Committee comprising of three Hon'ble Judges of the High Court finalized the syllabus for appointment and recruitment of 21 posts of ADJ by direct recruitment from the Bar in the State of Haryana, for General and Reserved Categories which resulted into issuance of advertisement notification dated 18.5.2007. After the result of the written test, the short-listed candidates were summoned for Viva-voce. In respect of the eligibility of the District Attorney/Additional District Attorney/Public Prosecutors, it is pleaded that a Committee consisting of five senior most judges of the High Court under the Chairmanship of the Hon'ble Chief Justice took following decision:

III. The matter as to whether District Attorney/Additional District Attorney/Public Prosecutor are eligible for direct recruitment from the quota of Bar under Rule 6 (1) (c) was considered and it was decided that they are eligible for direct recruitment from the quota of Bar under Rule 6 (1) (c).

It is further contended that in the Full Court meeting of the Hon'ble Judges held on 25.4.2008, recommendations were made to the State Government for appointment of 16 candidates in the order of merit to the post of ADJ in the State of Haryana by direct recruitment. Out of these 16 candidates, 13 candidates are from General Category, one from Backward Category and 2 from Scheduled Caste Category. The Full Court of the High Court further recommended six candidates of the General Category in the order of their merit against four vacancies of Scheduled Castes and two of the Backward Classes in relaxation of rule for appointment against the unfilled posts earmarked for these categories. It is accordingly stated that the petitioners do not fall amongst the recommendees having secured less marks than them. It is further pleaded that there was no impediment for an Advocate who was in service as a District Attorney, Additional District Attorney and Public Prosecutors to be selected as an ADJ in terms of the advertisement notification dated 18.5.2007 and the recruitment rules. It is, however, stated that only three selectees were working as Additional District Attorney, namely, Chandra Shekhar Roll No. 1074 (respondent No. 15), Sh. Desh Raj Chalia Roll No. 1084 (respondent No. 18), Sh.

Deepak Aggarwal, Roll No. 1436 (respondent No. 13).

VII. Reply by State of Haryana

8. As far as State of Haryana is concerned, it has only placed on record a short written statement through Under Secretary to Government of Haryana, Personnel Department simply pleading that the proposal for appointment of the private respondents as ADJ in the State of Haryana was forwarded by respondent No. 2 (High Court) and on the basis of the recommendation, the State has issued the appointment order dated 19.5.2008 (Annexure R-1) appointing the recommendees to the posts in the order of merit. Regarding the selection of these respondents, the High Court is said to be solely responsible. Almost all the private respondents have filed their separate and joint replies. Reference to the same shall be made while dealing with their individual eligibility.

VIII. Analysis and opinion on the issues:

(i) Validity of the process of selection as a whole:

(a) on assignment of marks

9. Firstly, we deal with the issue relating to validity of the process of selection as a whole. The only ground urged to challenge the selection process is the alleged excessive marks allocated for interview which is said to have nullified the merit in the written test and has the capacity of converting overall "merit" into "demerit" and "demerit" into "merit". We have carefully examined this aspect of the matter. Marks for written test and viva-voce are statutorily provided. Rule 7 of the Recruitment Rules prescribes procedure for direct recruitment which reads as under:

7. The High Court shall before making recommendations to the Governor invite applications by advertisement and may require the applicants to give such particulars as it may specify and may further hold written examination and viva-voce test for recruitment in terms of Rule 6 (c) above and the maximum marks shall be in the following manner:

(i) Written test 750 marks (ii) Viva Voce 250 marks

10. What is sought to be projected is the excessive allocation of marks for viva-voce i.e. undue weightage to interview, thus, providing discretion to the interviewing body to award marks in the interview to nullify the impact of merit in the written test. Rule 7 is not under challenge in any of the writ petitions. The criteria laid down under Rule 7 was not introduced during the process of selection, rather was in existence since the framing of Rules i.e. 10.1.2007. The rules are duly notified and also referred to in the advertisement notification in response to which the petitioners submitted their applications for selection. The petitioners had the notice and knowledge of the selection criteria and knowing fully well they participated in the process. Now after having remained unsuccessful, the criteria is sought to be assailed on the ground of arbitrariness.

How much marks should be allocated for interview/viva-voce when the same follows the written test has been subject of judicial debate in the cases of Lila Dhar v. State of Rajasthan AIR 1981 SC 1771; Ashok Kumar Yadav and Others Vs. State of Haryana and Others, and Ajay Hasia v. Khalid Mujib Sohrawardi AIR 1981 SC 486 . These cases deal with the question of allocation of marks for interview following written tests. The case of Lila Dhar (supra), relates to selection of Munsiff. Allocation of 25% marks for viva-voce as against 75% for the written test, which had been upheld. In the case of Ashok Kumar Yadav (supra), 12 1/2% for viva-voce and in case of Ajay Hasia v. Khalid Mujib (supra) 33 1/2% for interview have been upheld by the Hon''ble Supreme Court. Except the case of Ajay Hasia (supra), which relates to admission to professional college, all other cases relate to selection/appointment to various services. Thus, there is no hard and fast rule which inter-alia provides any fixed percentage of marks for interview as against the written test. It is primarily the prerogative of the employer, though the allocation should be within reasonable limits not to provide an arbitrary lever to the selection body to exercise the discretion in an arbitrary manner and completely nullify the impact of merit achieved by the candidates in the written test. In the present case, there is no allegation of bias, favouritism in general or in any specific case. The allegations are casual in nature without in any manner establishing a case of bias or arbitrary exercise by the selection body. Interview has been held by committee comprising of five Hon''ble judges of the High Court. No motive could be attributed nor there is any such averment in any of the writ petitions. We do not find any legal or factual basis to interfere in the selection on this ground.

(b) on time spent for each interviewee

11. The other limb of the argument sought to be urged relating to the validity of the selection process is that only 4 to 5 minutes were utilized to interview each candidate. In the case of All India Judges Association and Others Vs. Union of India (UOI) and Others, Hon''ble Supreme Court definitely suggested interview for 10 to 15 minutes. There is no material on record to support the contention of the petitioners that interview was confined to 4-5 minutes for each candidate, although some of the petitioners have made such an averment. Suffice it to say, caliber of a candidate may be tested some times by putting 1 or 2 questions and some times, may not be over a period of 10 to 15 minutes as well. No hard and fast rule could be prescribed to test the knowledge and depth on the subject of a candidate, particularly, in field of law. We have also noticed that none of the candidates has specified the nature of queries and questions put to them which may, in some way, suggest an arbitrariness and draw our attention to the allegations made in a casual manner. In any case averments simpliciter do not make the selection wrong warranting any interference. We thus reject the contentions of the petitioners on this ground as well.

IX Ineligibility of the selectees/appointees:

(a) Candidates selected/appointed as ADJs from the Fast Track Courts:

12. We now deal with the second issue relating to ineligibility of the candidates i.e. Presiding Officers of Fast Track Courts.

Appointment/absorption of the Presiding Officers of the Fast Track Courts in the State of Haryana against the quota of direct recruits in the Haryana Superior Judicial Service is other issue which has fallen for our consideration. It may be useful to briefly trace out the source of the Fast Track Courts.

11th Finance Commission allocated Rs. 5029 crores (275 of the Constitution of India) for setting up of 1734 Fast Track Courts in various States to deal with the long pending cases. This amount was to be utilized over a period of five years. Under the Scheme envisaged by the Central Government, the State Governments were required to establish such Fast Track Courts for disposal of the long pending cases. The Scheme formulated by the Government of India, however, received a challenge in the Hon'ble Supreme Court on variety of grounds, including the constitutional sanction, suggested re-employment of the retired Judicial officers, lack of infrastructural facilities etc. After inviting objections from the concerned quarters and hearing the parties at length, the Hon'ble Supreme Court issued various directions for the implementation of the Scheme in the case of Brij Mohan Lal v. Union of India and Ors. AIR 2001 SC 2096. Some of the directions relevant in the instant controversy are noticed here under:

Keeping in view the laudable objectives with which the Fast Track Courts Scheme has been conceived and introduced, we feel the following directions, for the present, would be sufficient to take care of initial teething problems highlighted by the parties:

Directions by the Court:

1. The first preference for appointment of judges of the Fast Track Courts is to be given by ad-hoc promotions from amongst eligible judicial officers. While giving such promotion, the High Court shall follow the procedures in force in the matter of promotion to such posts in Superior/Higher Judicial Services.
2. The second preference in appointments to Fast Track Courts shall be given to retired judges who have good service records with no adverse comments in their ACRs, so far as judicial acumen, reputation regarding honesty, integrity and character are concerned. Those who were not given the benefit of two years extension of the age of superannuation, shall not be considered for appointment. It should be ensured that they satisfy the conditions laid down in Article 233(2) and 309 of the Constitution. The concerned High Court shall take a decision with regard to the minimum- maximum age of eligibility to ensure that they are physically fit for the work in Fast Track Courts.
3. No Judicial Officer who was dismissed or removed or compulsorily retired or made to seek retirement shall be considered for appointment under the Scheme. Judicial Officers who have sought voluntary retirement after initiation of

Departmental proceedings/inquiry shall not be considered for appointment.

4. The third preference shall be given to members of the Bar for direct appointment in these Courts. They should be preferably in the age group of 35-45 years, so that they could aspire to continue against the regular posts if the Fast Track Courts cease to function. The question of their continuance in service shall be reviewed periodically by the High Court based on their performance. They may be absorbed in regular vacancies, if subsequent recruitment takes place and their performance in the Fast Track Courts is found satisfactory. For the initial selection, the High Court shall adopt such methods of selection as are normally followed for selection of members of the Bar as direct recruits to the Superior/Higher Judicial Services.

5. Overall preference for appointment in Fast Track Courts shall be given to eligible officers who are on the verge of retirement subject to they being physically fit.

6. The recommendation for selection shall be made by a Committee of at least three Judges of the High Court, constituted by the Chief Justice of the concerned High Court in this regard. The final decision in the matter shall be taken by the Full Court of the High Court.

7. After ad-hoc promotion of judicial officers to the Fast Track Courts, the consequential vacancies shall be filled up immediately by organizing a special recruitment drive. Steps should be taken in advance to initiate process for selection to fill up these vacancies much before the judicial officers are promoted to the Fast Track Courts, so that vacancies may not be generated at the lower levels of the subordinate judiciary. The High Court and the State Government concerned shall take prompt steps to fill up the consequential as well as existing vacancies in the subordinate Courts on priority basis. Concerned State Government shall take necessary decisions within a month from the receipt of the recommendations made by the High Court.

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14. No right will be conferred on Judicial Officers in service for claiming any regular promotion on the basis of his/her appointment on ad-hoc basis under the Scheme. The service rendered in Fast Track Courts will be deemed as service rendered in the parent cadre. In case any Judicial Officer is promoted to higher grade in the parent cadre during his tenure in Fast Track Courts, the service rendered in Fast Track Courts will be deemed to be service in such higher grade.

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16. Persons appointed under the Scheme shall be governed, for the purpose of leave, reimbursement of medical expenses, TA/DA and conduct rules and such other service benefits, by the rules and regulations which are applicable to the members of the Judicial Services of the State of equivalent status.

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18. The High Court and the State Government shall ensure that there exists no vacancy so far as the Fast Track Courts are concerned, and necessary steps in that regard shall be taken within three months from today. In other words, steps should be taken to set up all the Fast Track Courts within the stipulated time.

It was submitted by learned Counsel appearing for some of the parties that officers with tainted images have been appointed as Fast Track Courts. It is for the High Court of the concerned State to see if any undesirable person not fulfilling the requirements indicated in our directions above has been appointed, and to take immediate steps for terminating the appointment.

Copies of the judgment be sent by the Registry of this Court to each High Court and the concerned State Government for ensuring compliance with our directions. Though these petitions are to be treated as closed, Quarterly Status Reports shall be submitted by each High Court and the State Government. First such report shall be submitted by the end of August, 2002. The reports shall be placed for consideration before the Bench to be fixed by Hon"ble the Chief Justice of India.

13. In implementation of these recommendations/directions, the Government of Haryana vide Notification dated 16.10.2001 framed rules, namely, the Haryana Additional District and Sessions Judge (Ad hoc Recruitment and Conditions of Service) Rules, 2001. Vacancies on the sanctioned Fast Track Courts were created for retired members of Haryana Superior Judicial Service for their appointment as Additional District and Sessions Judge (Ad hoc) who could only be the members of the service. Under these rules. members of this service are not to be treated the members of the Haryana Superior Judicial Service under the 1963 Rules as amended from time to time. The appointment was to be made on a fixed term of two years to be extended by one year on the recommendation of the High Court. As many as 24 posts were created under the aforesaid rules.

14. The High Court of Punjab and Haryana issued notification dated 26.5.2003 inviting applications from the members of the Bar for appointment as Presiding Officers in the Fast Track Courts in Punjab and Haryana. Members of the Bar with ten years of practice as an advocate as on 1.1.2003 and between the age limit of 35 years and 50 years as on the said date were eligible to apply. Initial period of appointment was one year extendable by the High Court from time to time. By virtue of Clause IV of the notification, Haryana District Additional and Sessions Judge (Ad hoc) Recruitment and Conditions of Service Rules, 2001 were made applicable to such appointment. It appears that members of the Bar were appointed as Presiding Officers of the Fast Track Courts on the basis of the selection made through the above mentioned advertisement. When notification dated 18.5.2007 was issued for appointment of Additional District and Sessions Judge against the direct recruitment quota, for 22 advertised posts, some of the Presiding Officers of the Fast Track Courts appointed from the Bar pursuant to

notification dated 26.5.2003 also submitted their applications for their selection on regular basis. These applications were considered and rejected by the Selection committee constituted by the High Court for appointment to the post of Additional District and Sessions Judge in the State of Haryana by its decision taken in the meeting held on 19.1.2008. The said decision reads as under:

At present, 3 officers are working as Additional District & Sessions Judge (Fast Track Court) in the State of Punjab who were directly recruited from Bar. Similarly, 5 Officers are working as Additional District & Sessions Judges (Fast Track Courts) in the State of Haryana. As per the law laid down in the case of Brij Mohan Lal Vs. Union of India (UOI) and Others, these officers can be absorbed in the cadre, if subsequently recruitments take place and their performance in fast track court is found satisfactory.

At present, the recruitment of Punjab Superior Judicial Services and Haryana Superior Judicial Services is likely to take place shortly. It has been decided that in order to assess the suitability for absorption of Additional District & Sessions Judge (Fast Track Court), a suitability test followed by an interview be held for their absorption in the respective Superior Judicial Services of Punjab & Haryana against the regular posts belonging to the quota of direct recruits. The test be held on February 4, 2008 tentatively from 10.00 a.m. onwards.

15. Though the applications were rejected, however, it was decided to assess these Officers separately by written test and interview. In the meanwhile, some Presiding Officers of Fast Track Courts filed CWP No. 8587 of 2007 in the High Court challenging the notification dated 18.5.2007 to make selection against the advertised posts of Haryana Superior Judicial Service. A Division Bench of this Court vide its order dated 30.5.2007 permitted the three writ petitioners to make appropriate representations in terms of the judgment in Brij Mohan Lal's case (supra), for consideration by the High Court. A similar writ petition was heard by another Division Bench of this Court and disposed of on the same terms. It appears that a joint representation dated 19.6.2007 by the Presiding Officers of the Fast Track Courts in both the States of Punjab and Haryana came to be filed before the selection and appointment committee. The Committee in its meeting held on 10.9.2007 considering the directions of the Hon'ble Apex Court in the case of Brij Mohan Lal's case (supra) resolved as under:

...In view of the above, the committee feels that all officers recruited from bar and working as Addl. District & Sessions Judges, Fast Track Court are entitled to be considered for absorption against regular vacancies. However, their performance in the Fast Tract Courts must be satisfactory. Since recruitments are going to be made in the cadre of Superior Judicial Service of the States of Punjab and Haryana, the committee would like to have the views of Fast Track Court Committee regarding the performance of these officers.

16. As a sequel to the decision of the selection and appointment committee, a written test was held on 4.2.2008 and the 8 officers working as ADJs in the Fast

Track Courts in the States of Punjab and Haryana who participated in the selection were considered on the basis of the criteria laid down by the Selection Committee. The Selection Committee later interviewed the Fast Track Court Officers and awarded marks to them. It may be relevant to note that 100 marks were allocated out of which 50 marks were for written test and 25 marks for viva-voce and 25 marks for performance as a judge of the Fast Track Court. While considering the question of performance of these officers, it was decided in the meeting of the Fast Track Court Committee held on 8.2.2008 to seek the views and latest reports from the Administrative Judges of the concerned Fast Track Officers regarding their work, conduct and integrity etc. After obtaining the opinion of the concerned Administrative Judges, the Selection Committee in its meeting held on 18.3.2008 took following decision:

It has been decided that to be absorbed in the regular cadre of Additional District and Sessions Judges from the Fast Track Court, the benchmark would be 50% or above marks in the aggregate, out of the marks fixed for written examination; viva-voce and grading done by the Hon''ble Judges of the Fast Track Court Committee on the basis of the Annual Confidential Reports.

Accordingly, on the basis of the final result prepared, following officers were recommended for the absorption in the regular cadre of the Additional District & Sessions Judges in the States of Punjab and Haryana, of whom five were from Haryana (which includes the subject matter of selection in this writ petition) and two from Punjab.

Sr. No.

Name of the Candidate

Written Examination

Viva voce

ACR

Total Marks

Max. Marks

1.

Sh. Parminder Pal Singh

30

20

22

72

100

2.

Sh. Sukhdev Singh

30

15

16

61

100

3.

Sh. A.K. Shori

30

18

12

60

100

4.

Sh. Jasbir Singh Kundu

34

15

12

61

100

5.

Sh. Vimal Kumar

27

22

20

69

100

6.

Sh. Rajneesh Bansal

31

18

20

69

100

7.

Sh. Sandeep Garg

33

18

18

69

100

Shri Rohan Lal Ahuja, who has obtained 28 marks in the aggregate, is not recommended for absorption in the regular cadre.

17. The aforesaid decision of the Selection Committee was endorsed by the Full Court in its meeting held on 10.4.2008 and recommendation was made to the State Government for their appointment on the regular cadre of Additional District and Sessions Judge against the vacancies of direct quota in the States of Punjab and Haryana respectively. The selection/Administrative Committee also took another decision on 11.4.2008 to constitute a sub-committee to examine the total number of various categories against 25% direct recruitment Fast Track quota from the Bar and also to examine the issue of absorption of five officers recommended to be appointed as ADJ (Ad hoc), in the State of Haryana. The Sub Committee in its meeting held on 12.4.2008 resolved as under:

Vide advertisement No. 193 Gaz.I/VI.F.2, dated 18.5.2007, 22 vacancies (14 from General Category; 5 from Scheduled Caste Category; and 3 from Backward Class category) were advertised, for appointment to Haryana Superior Judicial Service by direct recruitment through competitive examination under Rule 6 (1) (c) of the Haryana Superior Judicial Service Rules, 2007. In pursuance of the said advertisement, applications were received, written examination and viva voce was held. In the meantime, 5 more vacancies (4- General category and 1- Scheduled Caste Category) for direct recruitment from Bar have become available.

A separate examination and viva voce was also held from absorbing 5 officers in regular vacancies, who are already working as Presiding Officers, Fast Track Courts in the State of Haryana. A decision has already been taken by Full Court to recommend to Govt. of Haryana for their absorption against the available

regular vacancies by direct recruitment from Bar. On the implementation of the instant recommendation, 22 posts belonging to the direct recruitment quota still remain vacant to accommodate recruits to be selected against the advertisement dated 18.5.2007.

All the 5 officers, who are presently working as Presiding Officers, Fast Track Courts in the State of Haryana, and who have been recommended to be absorbed against the 5 direct recruitment vacancies according to the decision of the Full Court, are all General Category candidates. No Presiding Officer Fast Track Court from any reserved category was available. However, out of the five additional posts, one post belongs to Scheduled Caste category. On account of the non-availability of reserved category candidates, out of Presiding Officers, Fast Track Courts it is proposed that a recommendation be made to the Govt. of Haryana for the absorption of 5 officers against the four posts meant for General category candidates, and that, the fifth post meant for a Scheduled Caste Category candidate be also filled up from the General Category in relaxation of Rule 18 of Haryana Superior Judicial Service Rules, 2007 in view of the decision of the Hon''ble Surpeme Court in State of Bihar and Another Vs. Bal Mukund Sah and Others, . Further, against the 22 vacancies of Additional District & Sessions Judges by direct recruitment besides the successful General category candidates only two candidates from the Scheduled Caste category and one from the Backward Class category could qualify. Three vacancies of Scheduled Castes and two of Backward Class category could not qualify. Three vacancies of Scheduled Castes and two of Backward Class cannot, therefore, be filled up. It is, therefore, proposed that a recommendation be made to the Govt. of Haryana to appoint 14 qualified candidates from the General Category as originally advertised, and 2 Scheduled Castes and 1 Backward Class candidates selected out of the posts to be filled up by reservation. Against three vacancies meant for Scheduled Castes and two from Backward Class which have remained unfilled, it is also proposed that a recommendation be made to the Govt. of Haryana to fill up the unfilled reserved posts from out of the General Category candidates in the order of merit by relaxation of Rule 18 of Haryana Superior Judicial Service Rules, 2007 in view of the decision of the Hon''ble Supreme Court in State of Bihar and Another Vs. Bal Mukund Sah and Others, .

18. It is relevant to notice that these Fast Track Judges were to be adjusted against these newly created posts of ADJs in the State of Haryana during the process of selection.

The Presiding Officers representing the Fast Track Courts who were recommended for appointment/absorption on the basis of their performance in the written test and viva-voce and service record, came to be appointed/absorbed by the Government vide order dated 19.5.2008. However, the recommendations of the High Court for de-reservation of the six vacancies (4 for Scheduled Castes and 2 for Backward Class) was declined by the Government vide its communication dated 22.9.2008 (Annexure R-IV in CWP No. 17708 of

2008). Refusal to de-reserve the vacancies is referable to government instructions dated 7.9.1989. This issue shall be separately considered here-in-after.

19. Appointment of respondents Nos. 3 to 7, namely, Rajneesh Bansal, Vimal Kumar, Sandeep Garg, Jasbir Singh Kundu and A.K. Shori, respectively, in CWP No. 3462 of 2009 (Baldev Singh v. State of Haryana and Ors.) as regular ADJs from the Fast Track Judges has been called in question on following grounds:

(i) The appointees are members of Judicial Service and ineligible to be appointed against the direct quota from the Bar in terms of Article 233(2) of the Constitution of India;

(ii) Their appointment has no statutory sanction under the Haryana Superior Recruitment Rules, 2007 which, inter-alia, do not envisage the absorption/appointment of the Fast Track Officers;

(iii) The procedure adopted is against the spirit of the judgment of the Supreme Court in the case of All India Judges Association and Others Vs. Union of India (UOI) and Others, .

(iv) A separate procedure adopted midstream to accommodate the Fast Track Officers against the vacancies meant for direct recruits is even not contemplated in the case of Brij Mohan Lal's case (supra).

(v) Providing minimum qualifying percentage for viva-voce during the process of selection is impermissible.

It may not be out of context to mention here that none of the petitioners challenged the legality, fairness and validity of the criteria adopted for selection of fast track officers against the posts of ADJ.

20. Article 233 of the Constitution of India makes a provision for appointment of the Additional District Judges (ADJs) from two sources- (a) By promotion from members of Judicial Service and (b) by recruitment from amongst the Advocates or pleaders having seven years practice at the Bar and who is not a member of a service under the State or the Union and on the recommendations of the High Court. We are concerned with later source. This provision has three important ingredients- (i) Enrolment as an Advocate or pleader for not less than seven years at the time of appointment; (ii) should not a member of service under the State or the Centre; and (iii) recommendations of the High Court. Service referred to in this Article has been interpreted by the Hon'ble Apex Court as a judicial service in the case of Chandra Mohan v. State of Uttar Pradesh and Ors. AIR 1966 SC 1987.

21. It is contended on behalf of the petitioners that these Fast Track judges were admittedly members of the judicial service at the time of their appointment against the regular advertised posts of ADJs and thus ineligible to be considered and appointed as such. Looking to the factual and legal aspect of this contention,

we have no option but to say that the Fast Track judges were members of a judicial service constituted under 2001 Rules, though the service is ad hoc/temporary and for a limited period. It is different question whether the service contemplated by Article 233 of the Constitution of India is referable and takes within its purview a regular service or even a short-term temporary ad hoc service. However, one thing cannot be ignored that it cannot be taken out of the compass of "judicial service". There is also no dispute that for appointment of Fast Track Officers to the Haryana Superior Judicial Service, there is no rule or statutory provision. To the contrary, 2001 Rules clearly stipulates that member of ad hoc Haryana Service shall not be deemed to be a member of Haryana Superior Judicial Service. Thus their eligibility or ineligibility may have to be examined in the backdrop of above statutory provisions. Be that as it may. We do not want to delve on this issue further on account of our opinion formulated here-in-after.

22. Fast Track Court judges have been appointed under a Scheme formulated by the Government of India on the recommendations of the 11th Finance Commission. The validity of the Scheme has been upheld by Hon"ble Apex Court in the case of Brij Mohal Lal (supra). The Scheme has been implemented throughout the country in various States. Appointments under the Scheme have been made from three prescribed sources- (i) serving Subordinate Judicial Officers of the rank of Senior Sub Judges; (ii) retired Judicial Officers of the rank of ADJs and District Judges and (iii) Members of the Bar.

Sub para iv of Paragraph 10 of Brij Mohan Lal's case (supra) not only permits appointment to these Fast Track Courts from the Bar, but also speaks of their continuation in service, and eventually absorption on regular vacancies in subsequent recruitment based upon their performance in the Fast Track Courts. High Court has been made the sole repository for selection against the direct recruitment quota for the superior/higher judicial service. These directions are admittedly binding upon the High Court as a precedent under Article 141 of the Constitution of India and it is the constitutional obligation of all the courts in the country as also all governmental authorities to follow and implement the same under Article 144 of the Constitution of India. The mandate is to continue such appointees if the Fast Track Courts still survive and to absorb them in service in future selections. Fast Track Courts are continuing on account of extension of the Central Scheme. As a natural consequence, the Officers appointed to man the posts are also working. They are to be absorbed in regular vacancies, though Hon"ble Supreme Court has not indicated about the nature of vacancies to be utilized for their absorption, but intention seems to consider their absorption against the direct recruitment quota. In any case, they are ineligible to be considered against the promotion quota which is meant only for Subordinate Judicial Officers of the rank of Civil Judges (Sr. Division) or equivalent posts. Thus, the only source against which these Fast Track Judges who are appointed at a high pedestal of Additional District and Sessions Judge in Fast Track Courts can be absorbed is against the vacancies meant for direct recruitment. This

inference gets fortified by the observations of the Hon''ble Supreme Court in Brij Mohan Lal's case (supra) in sub-para (4) when it states, "they may be absorbed in regular vacancies, if subsequent recruitment takes place and their performance in the Fast Track Courts is found satisfactory." We do not fall in line with the arguments of learned Counsel for the petitioners that Brij Mohan Lal's case (supra) do not contemplate their absorption against the direct recruitment vacancies. As a matter of fact there is no embargo for such appointment.

23. In Smt. Madhumita Das and Others Vs. State of Orissa and Others, the ad hoc Additional District Judges appointed to man the Fast Track Courts in the State of Orissa, challenged an advertisement of the High Court for recruitment to the post of Additional District Judges for regular appointment seeking their consideration for appointment/absorption in view of the directions/observations in Brij Mohan's case (supra). These petitioners were holding nine out of sixteen advertised posts. Hon''ble the Supreme Court passed an interim order allowing the Fast Track Judges to continue to hold the posts and recruitment was permitted only in respect to rest of the seven posts. The relevant observations are as under:

3. It is submitted by Mr. Uday U. Lalit, learned Senior Counsel that while assessing the performance, there cannot be different yardsticks i.e. same parameters have to be adopted while judging the performance of the petitioners viz-a-vis those who are recruited from another source i.e. from amongst the judicial officers. We find substance in this plea also. Therefore, we direct that the process of selection pursuant to Advertisement No. 1 of 2008 may continue but that shall only be in respect of 7 posts, and not in respect of 9 posts presently held by the petitioners.

4. It is pointed out that the High Court, after the advertisement had been issued, has issued certain letters regarding the non-disposal of adequate number of cases. The petitioners have given reasons as to why there could not be adequate disposal of the cases. Needless to say, the High Court shall consider the stand taken in the responses while judging their suitability for appointment on regular basis. The petitioners shall continue to hold the posts until further orders, for which necessary orders shall be passed by the High Court. It is made clear that as and when regular vacancies arise, cases of the petitioners shall be duly considered. There shall not be any need for them to appear in any examination meant for recruitment to the cadre of District Judge.

24. Though it is only an interim order, however, in this case, the appointments of the Fast Track Officers against the vacancies meant for the direct recruits have been protected by way of an interim measure by reducing the equal number of vacancies from the selection process for direct recruits. Matter is under consideration before the Hon''ble Supreme Court. We refrain from going further into this issue, in view of the pendency of the aforesaid matter before the Hon''ble Apex Court. Suffice it to say that Brij Mohan Lal's case (supra) does envisage absorption of Fast Track Judges against the future vacancies and thus

we are of the considered opinion that till the issue is finally determined by any authoritative pronouncement in Madhunita Dass" case (supra), it is inappropriate for this Court to interfere in the selection of these Fast Track Officers against the direct recruitment quota on the grounds projected in these writ petitions.

25. The other related issues i.e. the separate midstream procedure and laying down criteria of minimum marks in viva-voce becomes irrelevant, particularly, when the criteria for selection/appointment of these Fast Track Officers are fair. It is pertinent to mention that these Fast Track Court Officers have undergone the process of selection twice initially at the time of their recruitment as ad hoc Fast Track Court Presiding Officers and subsequently, at the time of their selection as regular ADJs. They have stood the test of merit and competence. None of the petitioners belong to the Category of these Fast Track Officers and thus their locus to agitate this issue itself is under cloud. We accordingly uphold the selection of these Fast Track Officers as it is and leave the nuances of the controversy open, in view of the pendency of the issue before Hon"ble Apex Court.

(b) Assistant District Attorneys, Public Prosecutors and Deputy Advocate General:

26. The next issue relates to eligibility of Government Attorneys, Public Prosecutors etc. Much emphasis has been laid on the ineligibility of Law Officers who have been selected and appointed as ADJs. Following Law Officers have been appointed as ADJs who are said to be ineligible:

Sr.No

Name

Designation prior to appointment

1.

Dinesh Kumar Mittal (respondent No. 9 in CWP No. 9157/2008)

Deputy Advocate General in the Office of Advocate General, Punjab

2.

Rajesh Malhotra (respondent No. 12 in CWP No. 9157/2008)

Public Prosecutor in the office of CBI (Union of India)

3.

Deepak Aggarwal (respondent No. 13 in CWP No. 9157/2008)

Assistant District Attorney in the State of Himachal Pradesh

4.

Chander Shekhar (respondent No. 15 in CWP No. 9157/2008)

Assistant District Attorney in the State of Haryana

5.

Desraj Chalia (respondent No. 18 in CWP No. 9157/2008)

Assistant District Attorney, in the State of Haryana

27. All the above named respondents are salaried, full time government employees. The service conditions of respondents 13, 15 and 18 are governed and regulated by the statutory rules, namely, the Haryana State Prosecution Legal Service (Group C) Rules, 1979. Their appointment is against the sanctioned posts borne on the cadre of service and they are appointed by direct recruitment by the Public Service Commission and are the members of the service as defined under 1979 Rules. Recruitment Rules relevant for the purpose of the writ petitions are noticed here under:

2. (b) "direct recruitment" means an appointment made otherwise than by promotion or by transfer of an official already in the service of the Government of India or any State Government.

XXX XXX XXX

(f) "Service" means the Haryana State Prosecution Legal Service (Group C).

6. APPOINTING AUTHORITY:- Appointment to the posts in the service shall be made by the Director.

7 & 8. XXX XXX XXX

9. METHOD OF RECRUITMENT.- (1) Recruitment to the Service shall be made:

(i) by direct recruitment; or

(ii) by promotion; or

(iii) by transfer of an official already in the service of any State Government or the Government of India.

(2) Of the total number of posts eighty per cent shall be filled by direct recruitment and the rest by promotion or transfer. If no person is available for appointment by promotion or transfer for a post meant to be filled up in this manner, the same shall be filled up by direct recruitment.

10. PROBATION: (1) Persons appointed to any post in the service shall remain on probation for a period of two years, if appointed by direct recruitment and one year, if appointed otherwise;

XXX XXX XXX

SENIORITY OF MEMBERS OF THE SERVICE.- The seniority inter se of members of the Service shall be determined by the length of their continuous service on any post in the Service.

Provided that in the case of members appointed by direct recruitment, the order of merit determined by the Commission or any other recruiting authority shall not be disturbed in fixing the seniority:

XXX XXX XXX

12. LIABILITY TO SERVICE.- (1) A member of the Service shall be liable to serve at any place, whether within or outside the State of Haryana, on being ordered so to do by the appointing authority;

XXX XXX XXX

13. LEAVE, PENSION OR OTHER MATTERS.- In respect of pay, leave, pension and all other matters not expressly provided for in these rules, the members of the service shall be governed by such rules and regulations as may have been, or may hereafter be, adopted or made by the competent authority under the Constitution of India or under any law for the time being in force made by the State Legislature.

(2) No member of the Service shall have the right of private practice.

14. DISCIPLINE, PENALTIES AND APPEALS.- (1) In matters relating to discipline, penalties and appeals, members of the Service shall be governed by the Punjab Civil Services (Punishment and Appeal) Rules, 1952, as amended from time to time.

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X X X X X X X X X

APPENDIX B (See Rule 7)

Qualifications and Experience

Designation of Post

Assistant District Attorney

For promotion/ Transfer

(i) Degree of Bachelor of Law of a recognized university; and

(ii) who has worked-

(a) for a period of not less than five years, as Assistant in any post in the equivalent or higher scale in any Government office; or

(b) for a period of not less than three years on an assignment (not less than that of an Assistant) involving legal work in any Government Office.

For direct recruitment

(i) Degree of Bachelor of Law of recognized university; and

(ii) who has practiced at the bar for a period of not less than two years

28. Under Rule 6, the Director Prosecution, State of Haryana is the appointing authority. Rule 9 deals with the method of recruitment, Rule 10 relates to probation and Rule 11 deals with the seniority of the members of the service. Rule 12 imposes an obligation upon the members of service to serve at any place within or outside the State, including deputation to any company or association or legal body as also the Central Government or any other organization to which the member of service is deputed, of course with his consent, in case of other State Governments or any other organization. Rule 13 deals with the leave, pension and other related matters whereas Rule 14 deals with the discipline, penalties and appeals. Appendix B of the aforesaid Rules deals with the qualifications and the mode of recruitment. Similarly, respondent No. 12, Rajesh Malhotra was working as Public Prosecutor with CBI prior to his appointment as ADJ and his services were governed and regulated by the statutory rules framed under Article 309 of the Constitution of India. General Rule 2.2 of the Recruitment Rules deals with the appointment of Law Officer, including Public Prosecutors. Relevant extract of the aforesaid Rule is as under:

2.2 Law Officers

XXX XXX XXX

(iii) Fifty five percent posts of Public Prosecutors are filled up by direct recruitment through UPSC. Twenty percent posts are filled up by promotion from amongst the Assistant Public Prosecutors of CBI with five years' regular service in the grade, failing which the posts are filled by deputation. The remaining twenty five percent posts by deputation or absorption from amongst the officers of Central/State Governments holding analogous posts.

(iv) The post of Assistant Public Prosecutor is filled up by direct recruitment through UPSC.

The aforementioned rules were, in fact part of General Rules framed for various cadres of CBI. These rules have been followed by another set of rules, namely, Central Bureau of Investigation (Legal Advisers and Prosecutors) Recruitment Rules, 2002, notified vide G.S.R. 74 (E) dated 21.01.2002 by the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training). Rule 4 of the aforesaid rules, deals with method of recruitment etc. and reads as under:

4. Method of recruitment, age-limit, qualifications, etc.- The method of recruitment to the said post, age limit, qualifications and other matters relating thereto shall be as specified in columns 5 to 14 of the said Schedule.

29. Schedule appended to the Rules has specified various categories of Law Officers, namely, Legal Adviser, Deputy Legal Adviser, Senior Public Prosecutor, Public Prosecutor, Assistant Public Prosecutor. All the posts are in the graded pay scales and qualifications for all the posts is Degree in Law and experience for the

post. Entry is at the level of Assistant Public Prosecutor and Public Prosecutor. The posts of Prosecutors are to be filled up by direct recruitment and also by promotion except the Assistant Public Prosecutor which is to be filled up by direct recruitment only. The recruitment (both by direct recruitment and promotion is to be made by the Union Public Service Commission) as is evident from the Schedule.

30. From the conjoint reading of the Rules, it becomes evident that an Assistant District Attorney is appointed by selection through the advertisement in consonance with Articles 14 and 16 of the Constitution of India by the Haryana Public Service commission. On such appointment, he acquires the status, responsibilities and obligations of a regular permanent government servant. The service is a full time job and is subject to all such conditions as are attached to any regular full time government service, which, inter alia includes appointment on probation, the seniority, graded pay scale, provisions for leave and pension and such appointee is also subjected to disciplinary control of the employer i.e. the State and is also liable for penalties specified under Appendix C of the rules. Appendix C incorporates all major and minor penalties known to the service jurisprudence. Thus, an Assistant District Attorney is a whole time regular Govt. employee and is a member of the State service constituted by the rules. Similarly, a Public Prosecutor in CBI is also appointed by Union Public Service Commission by direct recruitment or by promotion from in service Assistant Public Prosecutors or by deputation from in service government servants and a whole time member of Central Government service and is subject to all the service conditions which are applicable to any government servant or a member of a civil service.

31. Independence of the judiciary, which is the basic structure of the Constitution, sought to be attained, in so far as the Courts subordinate to High Court, through the provisions contained in Chapter VI of the Constitution of India. It is contended by Shri Anupam Gupta learned Counsel appearing on behalf of some of the writ petitioners that the basic idea underlying Article 233 to appoint practicing lawyers to the judicial service is to preserve independence of the judiciary. A lawyer by virtue of his duty is an independent person. Admittedly, practice at the Bar is two way track- a lawyer can appear on behalf of the private party or the Government or any other agency. There is no compulsion upon him not to appear against a person who had been his client in some unrelated case. It is argued that to the contrary, a public prosecutor or a government advocate has to appear only on behalf of his employer to whom he is committed on account of his nature of appointment. It is further contended that in present days, the office of the Advocate General as also the other Law Officer is primarily a political appointment. Such lawyer who has been appointed on political consideration has no option, but to toe the line of the government and thus ceases to be an independent person. It is argued that to appoint such a person as Judicial Officer may be tracking a dangerous path. As such appointee will only act according to his thoughts generated on account of his working for the

employer. The Law Officer only attempts to implement the executive policy being an agent and representative of the executive government. It is accordingly argued that to maintain the separation of judicial and executive powers, the court should be reluctant in giving opportunity to the Law Officer governed by specific Rules to join the judicial office.

32. We are conscious of the imperatives of judicial independence and its onerous responsibilities in the administration of justice. The source and the persons who should be appointed to the Judicial Office are relevant and significant factors. However, any extreme view in this regard may not be permissible under the Constitutional Scheme. No doubt, members of the Bar are associated with Political Parties, may have loyalties or proximity with the men in Government or bureaucracy and may be defending them in their professional or personal capacities, but to say that they cannot act independently, if appointed to judicial office, may not be a prudent approach. We are unable to subscribe to the view of Mr. Gupta that the Law Officers should be totally ignored from consideration for judicial appointments. Experience has proved otherwise. Some of the Law Officers have proved to be excellent Judges with independent thinking, uninfluenced by their past affiliation, association and proximity. There may be individuals who could be influenced even without past proximity. It is always an individual approach. In so far as the judicial service is concerned, it is not an ordinary employment. We may simply quote the observations of the Hon'ble Supreme Court in the case of All India Judges' Association (supra):

4. The judicial service is not service in the sense of employment. The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the State-power are the ministers, the legislators and the judges, and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the legislators are different from the legislative staff. So also the Judges from the judicial staff. The parity is between the political executive, the legislators and the Judges and not between the Judges and administrative executive. This distinction between the Judges and the members of the other services has to be constantly kept in mind for yet another important reason. Judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice. It is trite to say that those who are in want cannot be free. Selfreliance is the foundation of independence. The society has a stake in ensuring the independence of the judiciary, and no price is too heavy to secure

it. To keep the judges in want of the essential accoutrements and thus to impede them in the proper discharge of their duties is to impair and whittle away justice itself.

33. In the case of State of Bihar and Another Vs. Bal Mukund Sah and Others, while examining the constitutional Scheme and the place of judiciary therein, the Hon"ble Supreme Court observed:

118.(i) The constitutional-makers had given a special status and treatment to the judicial service;

(ii) That the independence of judiciary is ensured which cannot be interfered with either by an executive action or by an act of legislature;

(iii) That the conditions of service spelt out in Chapter VI of the Constitution cannot be altered, modified or substituted either by rule making power or by legislation made in exercise of the powers under Article 309 of the Constitution;

(iv) Rules made under Article 234 have primacy in the matter of appointment/recruitment, discipline and control of the judicial service and even such rules cannot take away from persons belonging to the judicial service any right of appeal which they may have under the law regulating the conditions of their service or as authorising the High Court to deal with them otherwise than in accordance with the conditions of their service prescribed under such law;

(v) The provisions of Chapter VI of Part VI and the powers conferred upon the appropriate legislature and the Governor under Article 309 are complementary and supplementary to each other subject to the conditions of ensuring the independence of judiciary;

(vi) That in case of conflict between the rules made under Chapter VI and under Article 309, the rules specifically framed under Article 234 of the Constitution would prevail and the rules made under Article 309, to that extent, shall give in their way;....

34. It is further contended that a Law Officer in whole time employment of the Central/State Governments ceases to remain a lawyer by virtue of such appointment and thus ineligible for appointment to the judicial office. It is contended that Article 233 of the Constitution of India requires that person should be an Advocate or a pleader at the time of his appointment and thus, a Law Officer cannot be termed as an Advocate or a pleader being a regular government servant. In this context, it is relevant to notice some of the statutory provisions of the Advocates Act and the rules of Bar Council of India. Sections 17, 22, 24 and 26A, 28(d), 29, 33 of the Advocates Act, 1961 read as under:

2(1)(a) "Advocate" means an advocate entered in any roll under the provision of this Act;

(b) to (h) XXX XXX XXX

(i) "legal practitioner" means an advocate [or valil], of any High Court, a pleader, Mukhtar or revenue agent.

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17. State Bar Councils to maintain roll of advocates.

(1) Every State Bar Council shall prepare and maintain a roll of advocates in which shall be entered the names and addresses of-

(a) all persons who were entered as advocates on the roll of any High Court under the Indian Bar Councils Act, 1926 (38 of 1926), immediately before the appointed day 3*[including persons, being citizens of India, who before the 15th day of August, 1947, were enrolled as advocates under the said Act in any area which before the said date was comprised within India as defined in the Government of India Act, 1935, and who at any time, express an intention in the prescribed manner to practise within the jurisdiction of the Bar Council;

(b) all other persons who are admitted to be advocates on the roll of the State Bar Council under this Act on or after the appointed day.

(2) Each such roll of advocates shall consist of two parts, the first part containing the names of senior advocates and the second part, the names of other advocates.

(3) Entries in each part of the roll of advocates prepared and maintained by a State Bar Council under this section shall be in the order of seniority, and subject to any rule that may be made by the Bar Council of India in this behalf, such seniority shall be determined as follows:

(a) to (e) XXX XXX XXX

(4) No person shall be enrolled as an advocate on the roll of more than one State Bar Council.

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22. Certificate of enrollment.

(1) There shall be issued a certificate of enrollment in the prescribed form by the State Bar Council to every person whose name is entered in the roll of advocates maintained by it under this Act.

(2) Every person whose name is so entered in the State roll shall notify any change in the place of his permanent residence to the State Bar Council concerned within ninety days of such change.

24. Persons who may be admitted as advocates on a State roll.

(1) Subject to the provisions of this Act, and the rules made there under, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfills the following conditions, namely:

(a) he is a citizen of India;

Provided that subject to the other provisions contained in this Act, a national of any other country may be admitted as an advocate on a State roll, if citizens of India, duly qualified, are permitted to practise law in that other country;

(b) he has completed the age of twenty-one years;

(c) he has obtained a degree in law-

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28. Power to make rules.

(1) A State Bar Council may make rules to carry out the purposes of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for--

(a) the time within which and form in which an advocate shall express his intention for the entry of his name in the roll of a State Bar Council u/s 20;

(b) .omitted;

(c) the form in which an application shall be made to the Bar Council for admission as an advocate on its roll and the manner in which such application shall be disposed of by the enrolment committee of the Bar Council;

(d) the conditions subject to which a person may be admitted as an advocate on any such roll;

(e) the instalments in which the enrolment fee may be paid.

(3) No rules made under this Chapter shall have effect unless they have been approved by the Bar Council of India.

29. Advocates to be the only recognised class of persons entitled to practice law. Subject to the provisions of this Act and any rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates.

30. Right of Advocates to practise- Subject to the provisions of this Act, every advocate whose name is entered in the (State roll) shall be entitled as of right to practise through the territories to which this Act extends,-

(i) in all Courts including the Supreme Court.

(ii) before any tribunal or person legally authorised to take evidence; and

(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise.

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32. Power of Court to permit appearances in particular cases.- Notwithstanding anything contained in this Chapter, any Court, authority or person may permit any person not enrolled as an advocate under this Act to appear before it or him in any particular case.

33. Advocates alone entitled to practise. Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under this Act.

Rule 49 of the Bar Council of India Rules reads as under:

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 practise, 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 practise as an advocate so long as he continues in such employment.

Note: The following provision has been deleted vide resolution dated 29.8.2001:

Nothing in this rule shall apply to a Law Officer of the Central Government of a State or of any Public Corporation or body constituted by statute who is entitled to be enrolled under the rules of his State Bar Council made u/s 28(2)(d) read with Section 24(1)(e) of the Act despite his being a full time salaried employee.

Law Officer for the purpose of these Rules means a person who is so designated by the terms of his appointment and who, by the said terms, is required to act and/or plead in Courts on behalf of his employer.

35. Sections 29 and 33 of the Advocates Act permit law practice only to the Advocates enrolled by any State Bar Council u/s 17 in whose favour a certificate of enrolment is issued in accordance with Section 22 of the Act. Section 24 of the Act lays down eligibility of a person for being enrolled in the State Bar as an Advocate. Rule 49 of the Bar Council of India Rules further defines the characteristic of an Advocate enrolled and entitled to practice law in India. It clearly defines that an Advocate is not to be a Full Time salaried employee of any person, government, firm, corporation or concern so long he continues to practice. If such a person takes up any such employment, he is under statutory obligation to intimate the factum of his employment to the Bar Council on whose roll, his name is entered and thereafter cease to practice law during the continuance of his employment. The unamended rule, however, contains an exception for the Law Officer of the Central Government and State Government or any Public Corporation who is otherwise entitled to be enrolled under the Rule of the State Bar Council framed under Sections 24 and 28 of the Advocates Act. Part of Rule 49 further defines the term "Law Officer" who is a person authorized by the terms of his appointment to act and/or plead in Court on behalf of his employer. The second part of Rule 49 which carved out an exception for Law Officer of the Central and State Governments and other bodies came to be

deleted by the Bar Council of India vide its resolution adopted on 29.8.2001 retaining only the first part of the Rule.

36. Subsequent to the amendment, the Bar Council of India adopted another resolution in its meeting held on 22nd to 25th December, 2001 regarding the impact of the amendment of Rule 49. The resolution reads as under:

RESOLUTION

Resolved and further clarified that as Supreme Court has struck down the appearance by Law Officers in Court even on behalf of their employers the judgment will operate in the case of all Law Officers. Even if they were allowed to appear on behalf of their employers, all such Law Officers who are till now appearing on behalf of their employers shall not be allowed to appear as advocates. The State Bar Councils should also ensure that those Law Officers who have been allowed to practice on behalf of their employers will cease to practise. It is made clear that those Law Officers who after joining services obtained enrolment by reason of the enabling provision cannot practise even on behalf of their employers.

This Resolution was communicated to all the Secretaries of the State Bar Councils vide communication dated 10.1.2002.

37. Even though the amendment to Rule 49 was adopted on 29.8.2001, however, it is contended on behalf of the private respondents that this amendment did not take effect for want of approval by Hon"ble the Chief Justice of India, in view of the provisions of Section 49 of the Advocates Act. Section 49 of the Advocates Act deal with the rule making power of the Bar Council of India. All rules, including Rule 49 have been framed by the Bar Council of India, in exercise of its power u/s 49 of the Advocates Act. Relevant extract of Section 49 of the Advocates Act reads as under:

49. General Power of the Bar Council of India to make rules.- (1) The Bar council of India may make rules for discharging its functions under this Act, and in particular, such rules may prescribe.-

(a) to (af)(b). XXX XXX XXX

(ag) the class or category of persons entitled to be enrolled as advocates;

(ah) the conditions subject to which an advocate shall have the right to practise and the circumstances under which a person shall be deemed to practise as an advocate in a court;]

XXX XXX XXX

(c) the standard of professional conduct and etiquette to be observed by advocates; XXX XXX XXX

(gg) the form of dresses or robes to be worn by advocates, having regard to the climatic conditions, appearing before any court or tribunal;]....

The first proviso to Section 49 provides for approval of Hon'ble the Chief Justice of India in respect of the matters specified under Clause (c) or Clause (gg).

38. It has been argued that the amendment received the approval of Hon'ble the Chief Justice of India on 23.4.2008 and thus, the amendment in Rule 49 became effective only on the said date. The selection having been made prior to that all the Law Officers (Assistant District Attorney's/District Attorney's) were eligible, in view of the original Rule 49. This argument is totally misplaced and misconceived. We have noticed that under first Proviso to Section 49 approval is needed only in respect of the matters indicated in Clause (c) and (gg). Clause (c) deals with the standard of professional conduct and etiquette to be observed by advocates whereas Clause (gg) deals with the dresses or robes to be worn by advocates. Power to frame Rule in respect to eligibility is traceable to Clause (ah) only and thus no approval of Hon'ble the Chief Justice was needed for any amendment to Rule 49 of Bar Council rules. The amendment thus operated and became effective from the date the resolution was adopted by the Bar Council of India i.e. 29.8.2001 or at least its publication in Govt. Gazette on 13.10.2001. A related argument advanced on behalf of the private respondents is referable to rules framed by the State Bar Council under Sections 24 and 28 of the Advocates Act. Section 24 deals with the enrolment of Advocates on State Roll and their qualifications whereas Section 28 deals with the power to make rules by the State Bar Council. The Bar Council of Punjab and Haryana framed rules under the aforesaid provisions. The relevant extract of the rule framed by the State Bar Council reads as under:

Rules u/s 28(2) read with Section 24(1)(e) of the Advocates Act, 1961.

1.A person who is otherwise qualified to be admitted as an advocate but is either in full or part-time service or employment or is engaged in any trade, business or profession shall not be admitted as an Advocate. Provided however that this rule shall not apply to-

(i)Any person who is a Law Officer of the Central Government or the Government of a State or of any Public Corporation or body constituted by statute. For the purpose of this clause a "Law Officer" shall mean a person who is so designated by the terms of his appointment and who by the said terms is required to act and/or plead in courts on behalf of his employers.

39. On the strength of the above Rule framed by the State Bar Council, it is contended that Assistant District Attorney/Public Prosecutors are permitted to appear on behalf of their employer in Courts and thus they fall within the exception created under Rule 49, notwithstanding the fact that they are full time salaried employees of the Government. It is further contended that they continue to hold and possess their licence i.e. the certificate of enrolment issued by the State Bar Council to practice law.

40. The contention on behalf of the appointees who were Law Officers prior to their appointment is that they continue to be practicing advocates

notwithstanding their appointment as Additional District Attorneys/Public Prosecutors under the State/Central Governments as they are permitted to practise law, though on behalf of their employer.

41. It is not in dispute that these Additional District Attorneys/District Attorneys/Public Prosecutors do appear on behalf of their respective States primarily in criminal/civil cases. As a matter of fact, they are engaged to prosecute the civil/criminal cases on behalf of the State. Their appointments are basically under CPC and Code of Criminal Procedure. The relevant provisions in this regard are already reproduced here in above.

42. Similarly, Government pleader is defined u/s 2(7) of Code of Civil Procedure, 1908 which reads as under:

2. (7) "Government Pleader" includes any officer appointed by the State Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader;

The Public Prosecutor is also defined u/s 24 of the Cr.P.C. as under:

24. Public Prosecutors.

1[24. Public Prosecutors.

(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutor for conducting in such court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district, or local area.

(3) For every districts the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare, a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutor or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under Sub-section (4).

(6) Notwithstanding anything contained in Sub-section (5), where in a State

there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting, such Cadre:

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by, the District Magistrate under Sub-section (4).

(7) A person shall be eligible to be appointed as a public Prosecutor under Sub-section (1) or Sub-section (2) or Sub-section (3) or Sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

(9) For the purposes of Sub-section (7) and Sub-section (8), the period during which a person has been in practice, is a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.]

1. Subs. by Act 45 of 1978 Section 8, for Section 24 (w.e.f 18-12-1978).

STATE AMENDMENTS

Haryana: To Sub-section (6) of Section 24, the following Explanation shall be added, namely.

Explanation. For the Purpose of Sub-section (6), the persons constituting the Haryana State Prosecution Legal Service (Group A) or Haryana State Prosecution Legal Service (Group B), shall be deemed to be a regular Cadre of Prosecuting Officers.

[Vide Haryana Act 14 of 1985, Section 2].

43. Section 2(7) envisages the appointment of the Government Pleader not only of a practicing advocate and even officer appointed by the State Government to perform the functions of a Government Pleader. Thus, a Government Pleader may not necessarily be a practicing advocate. It may be relevant to notice that even Order 3 Rules 1 and 2 of the CPC provide for appearance before the Court not only by an enrolled pleader but even by authorized agents. "Legal Practitioner" defined u/s 2(1)(i) of the Advocates Act include not only an advocate or vakil, pleader, but also a Mukhtar or revenue agent. The qualifications for later two categories have not been specified and it can safely be presumed that they may not be necessarily Law Graduates. Thus, the appearance and actions on behalf of the parties including Government can also

be made by the officers/persons who may not be enrolled as Advocate/pleader or even may not be law graduates provided they are authorized by the parties to the litigation to make such appearance/actions. Similarly, the Public Prosecutors could be appointed u/s 24 of the Code of Criminal Procedure by the Central or the State Government, respectively, in the manner prescribed therein. Sub-sections (4) and (5) of Section 24 of the Code of Criminal Procedure deal with the appointment of the Public Prosecutor/Additional Public Prosecutor for any district out of a panel prepared by the District Magistrate, whereas Sub-section (6) of Section 24 of the Code of Criminal Procedure speaks of the appointment of Public Prosecutor/Additional Public Prosecutor from amongst a cadred officer who is born on the regular cadre of a Prosecuting Officers. Proviso to Sub-section (6) of Section 24 assumes significance in the matter of determining the status of a Public Prosecutor/Additional Public Prosecutor. This proviso deals with two kinds of appointment: (i) in terms of Sub-section (6) i.e. from the regular cadre of officers (Prosecuting Officers) and (ii) from the panel prepared by the District Magistrate. Thus, the source for appointment of Public Prosecutor is from the cadre of regular government service in accordance with Sub-section (6) or a practicing lawyer empanelled by the District Magistrate. The qualifications for such appointment are further laid down in Sub-section (7) of Section 24 of the Code of Criminal Procedure i.e. not less than seven years of service before such appointment. Thus, where a person is appointed a Public Prosecutor from the cadre of regular service of Prosecuting Officers, his status will be that of a government servant whereas if a Public Prosecutor is appointed from the panel of the District Magistrate, his status will be that of a practicing lawyer notwithstanding his appointment as a Public Prosecutor.

44. It is pertinent to note that State of Haryana introduced an amendment to Sub-section (6) of Section 24 of the Code of Criminal Procedure by way of explanation noticed hereinabove. This explanation clearly prescribes that a person who is Member of the Haryana State Prosecuting Legal Services (Group-A) shall be deemed to be in a regular cadre of Prosecuting Officers-meaning thereby that any Prosecuting Officer who may be assigned duties of a Public Prosecutor/ Additional Public Prosecutor is, in fact, a government servant in the regular government service as Prosecuting Officer.

45. On the appointment of these Law Officers i.e. Additional District Attorneys/ District Attorneys/Public Prosecutors, they are authorized by virtue of the aforesaid provisions to represent their employers. However, they are not entitled to appear on behalf of the private parties or even against their employers. Their remuneration is salary irrespective of the number of cases they handle and their job is transferable from one court to another or from one District to another under the statutory rules framed by the Government. The mode of their appointment and conditions of their services are absolutely that of a regular government servant. To the contrary an Advocate is a freelancer and has the right to practise law in any court in the country, including Hon''ble Supreme Court by virtue of provisions of Section 30 of the Advocates Act noticed here-in-

above. Article 233(2) of the Constitution of India only refers to an advocate or a pleader which means a person should be entitled to practice in all forums and all places/courts as provided under the Advocates Act which is not so in case of Public Prosecutors/District Attorneys/Additional District Attorneys. It is also significant to note that by virtue of amendment u/s 24 of the Advocates Act carried out by the State of Haryana, the members of the Haryana State Prosecution Legal Service Group-A or Haryana State Prosecution Legal Services Group-B are deemed to be the prosecuting officers that means a regular employee of the Government engaged for specific purpose. They have no right to practice law in all courts in the country, except to appear or represent their employer that too in the cases assigned to them in a particular court or district.

46. It is now a settled proposition of law that Government Pleaders/ Public Prosecutors and Law Officers hold public office.

In *Mundrika Prasad Singh Vs. State of Bihar*, the Hon'ble Supreme Court examined the power of the Government to appoint Government Pleaders in plurality and assigning to them the conduct of cases for a particular category of cases alone. The Hon'ble Supreme Court observed "we do recognize its importance in an era of infiltration of politicking even in forbidden areas. A Government pleader is more than an Advocate for a litigant. He holds a public office." Referring to the observations of a Division Bench of a Madras High Court in *A. Ramachandran v. A. Alagiriswami*, Govt. Pleader High Court, Madras and Anr. AIR 1961 Mad 450 where the Division Bench had held, "the duties of the Government Pleader, Madras are duties of a public nature. Besides, as already explained, the public are generally concerned with the manner in which a Government Pleader discharges his duties, because if he handles his case badly, they ultimately to foot the bill." In the same judgment, the Division Bench had also stated which was quoted with the approval, "I am clearly of the opinion that having regard to the fact that the Government Pleader of this Court is employed by the State on remuneration paid from the Public Exchequer and having regard to various functions and duties to be performed by him in the due exercise of that office, most of which are of an independent and responsible character, office must be held to be a public office within the scope of quo warranto proceedings." The attempt of the counsel, Sh.Gupta was, therefore, that a Public Prosecutor or a District Attorney, who holds a public office is not a person who can undertake cases other than for the Government and therefore, is not eligible. In the same very way as the Government Pleader is referred to, a Public Prosecutor also holds a public office. In *Mukul Dalal and Others Vs. Union of India (UOI) and Others*, the Hon'ble Supreme Court approved an observation of the Delhi High Court in *Lt. Col. K.C. Sud, New Delhi v. S.C. Gudimani* 1981 Cri. LJ 1779 that the Public Prosecutor, Additional Public Prosecutor and the Assistant Public Prosecutor hold "Public Offices" as also the observations of the Delhi High Court which said, "it is public office of trust and therefore, like any other public office is susceptible to misuse and corruption if not properly insulated. It is an office of responsibility more important than many others because the holder is required to prosecute

with detachment on the one hand and yet with the vigour on other. When Advocates are recruited to these offices, they have certain processional and official obligations and privileges. Some State Governments have appropriately made it an express term of their appointment that they shall not accept any brief in criminal matters and shall not even in civil matters appear in any case in which the interest of the State appear to be involved. In *Kumari Shrilekha Vidyarthi and Ors. v. State of U.P. and Ors.* (1991) 1 SCC 211 it has been held that all government counsel are paid remuneration out of the public exchequer and there is clear public element attaching to the "Office" or "Posts". It is held that their appointment is different than the engagement of a lawyer by ordinary litigant and reference is made to Section 24 of the Code of Criminal Procedure whereunder the appointments of Public Prosecutors are made. In *State of U.P. and Another Vs. Johri Mal*, it has been observed that a Public Prosecutor is required to perform statutory duties.

47. Assuming that Rules framed by the State Bar Council permit a District Attorney/ Assistant District Attorney, Public Prosecutor/ Additional Public Prosecutor to practice law on behalf of their employer, the moot and the principal question will be whether such permission/authority take them out of the purview of government servant or a Member of the service in the State or Centre to save them from the rigour of Article 233 of the Constitution of India. Clause (2) of Article 233 of the Constitution of India is couched both in negative and positive forms. The language used "a person not already in the service of Union or of the State" clearly envisages that no person in the service of a Union or of the State is eligible. The second part of sub clause "shall only be eligible to be appointed as District Judge if he has been or for at least not less than seven years as an Advocate or a Pleader" in unequivocal terms provide for appointment as the District Judge of a person who has been an Advocate or a Pleader. Thus, three essential requirements of this clause are : (a) a person who is not in any service whether under the Union or the State (b) a practicing Advocate/Pleader for at least seven years and (c) the last requirement is recommendation of the High Court. If any of the essential components contemplated by this Constitutional provision, is wanting, he is ineligible.

48. Both on behalf of the High Court and the Law Officers, it has been strenuously argued that once rule framed by the State Bar Council permits a Law Officer to practise notwithstanding his being in regular government service, he should be deemed to be eligible. Apparently, the argument seems to be attractive, but suffers from inherent fallacy. Assuming Bar Council Rules permit a government employee in regular service to appear and practice law, such rule/permission in no way circumvents the constitutional mandate contained under Article 233(2) with all its vitality, versatile and rigor prohibits a member of a service to seek appointment to the Office of Addl. District & Sessions Judge.

49. Undisputedly, respondent Nos. 12 (Rajesh Malhotra), 13 (Deepak Aggarwal), 15 (Chander Shekhar) and 18 (Desh Raj Chalia) are the Members of a Regular

cadre of Government service in their respective states. Thus, they come within the teeth of Clause (2) of Article 233 of the Constitution of India as they do not satisfy the first essential requirement that they should not be in any service under the Union or the State.

50. Much debate has been made on behalf of the parties to the litigation on this issue. Based upon some of the rulings of the Hon"ble Supreme Court, it is sought to be impressed upon us that expression " the service" envisaged in Article 233(2) of the Constitution, means a Judicial Service and, thus, Member of any other service would be eligible under this provision if he otherwise satisfies other two conditions i.e. has been a practicing Advocate /Pleader and recommendation by the High Court.

51. We may notice some of the relevant judgments of the Hon"ble Apex Court. In Chandra Mohan v. State of Uttar Pradesh and Ors. AIR 1966 SC 1987 the Hon"ble Apex Court interpreted the expression "the service" existing in Article 233(2) of the Constitution of India to mean a Judicial Service and held as under:

(18). We, therefore, construe the expression "the service" in Clause (2) of Article 233 as the Judicial service.

(20). ...Till India attained independence, the position was that district Judges were appointed by the Governor from three sources, namely, (i) the Indian Civil Services, (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? Therefore, the history of the services also supports our construction that the expression "the service" in Article 233(2) can only mean the judicial service.

52. In Satya Narain Singh and Others Vs. High Court of Judicature at Allahabad and Others, ; Article 233 of the Constitution again came up for discussion before the Hon"ble Supreme Court, particularly the expression "the service". Reiterating the view of Chandra Mohan's case (supra), it was held that a person already in judicial service is ineligible to be appointed as a District Judge by direct recruitment even if he had more than seven years of practice as an Advocate/ Pleader before his appointment in Judicial service at the subordinate level. The emphasis laid down in this judgment is on recruitment at the level of District Judge is only from two sources: (i) from the persons in the judicial service of the

Union or the State (ii) Advocate or Pleader with at least seven years of practice at the Bar.

53. Article 233(2) of the Constitution exclude the Members of any service appointed on regular/permanent basis from being considered for being appointed as a District Judge. Rule 49 of the Bar Council of India Rules also debars Member of any government service, corporation or other organization to continue to practice and even demand surrender of his enrollment certificate for the period he remained under such employment.

54. In the case of *Sushma Suri Vs. Govt. of National Capital Territory of Delhi and Another*, the petitioner who was an Advocate on record of the Supreme Court and also an Additional Government Advocate with the Government of India was considered ineligible for appointment to the Higher Judicial Service by the Delhi High Court. In an appeal preferred by her, the Hon''ble Supreme Court considered her status and noticed as under:

9. ...A Government Counsel may be a Public Prosecutor or Government Advocate or a Government Pleader. He too gets experience in handling various types of cases apart from dealing with the officers of the Government. Experience gained by such persons who fall in this description cannot be stated to be irrelevant nor detrimental to selection to the posts of the Higher Judicial Service. The expression "members of the Bar" in the relevant Rule would only mean that particular class of persons who are actually practicing in courts of law as pleaders or advocates. In a very general sense an advocate is a person who acts or pleads for another in a court and if a Public Prosecutor or a Government Counsel is on the rolls of the Bar Council and is entitled to practise under the Act, he answers the description of an advocate.

10. Under Rule 49 of the Bar Council of India Rules, an advocate shall not be a full-time employee of any person, Government, firm, corporation or concern and on taking up such employment, shall intimate such fact to the Bar Council concerned and shall cease to practice as long as he is in such employment. However, an exception is made in such cases of law officers of the Government and corporate bodies despite his being a full-time salaried employee if such law officer is required to act or plead in court on behalf of others. It is only to those who fall into other categories of employment that the bar under Rule 49 would apply. An advocate employed by the Government or a body corporate as its law officer even on terms of payment of salary would not cease to be an advocate in terms of Rule 49 if the condition is that such advocate is required to act or plead in courts on behalf of the employer. The test, therefore, is not whether such person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to act or plead on its behalf in a court of law as an advocate. In that even the terms of engagement will not matter at all. What is of essence is as to what such law officer engaged by the Government does-whether he acts or pleads in court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. If

the terms of engagement are such that he does not have to act or plead, but does other kinds of work, then he becomes a mere employee of the Government or the body corporate. Therefore, the Bar Council of India has understood the expression "advocate" as one who is actually practising before courts which expression would include even those who are law officers appointed as such by the Government or body corporate.

In the aforesaid case, the Hon"ble Supreme Court did consider a government Advocate who is also practicing advocate as eligible for appointment to the Higher Judiciary. The petitioner in that case was definitely an advocate on record enrolled with the Supreme Court of India. In addition to that, he was also working for the Government as an Additional Government Advocate. When this judgment came when unamended Rule 49 of the Bar Council of India, was in operation. Hon"ble Supreme Court was persuaded by the nature of duties of the candidate and under the exception created under Rule 49, declare her eligible. The mode and method of recruitment of the Additional Government Advocate never came up for consideration in the aforesaid judgment.

55. In *Satish Kumar Shrama v. Bar Council of H.P.* (2001) 2 SCC 365 the petitioner after acquiring degree of LL.B. was appointed as Assistant (Legal) in the Himachal Pradesh Electricity Board. He was designated as Law Officer in the Board. He applied and was enrolled as an Advocate on 09.07.1984. He continued to serve the Board in his capacity as Law Officer and earned further promotions to the posts of Under Secretary (Legal)-cum- Law Officer, Deputy Secretary (Legal)-cum-Law Officer. Bar Council of Himachal Pradesh by a resolution withdrew his enrolment. The petitioner challenged the resolution of Bar Council of Himachal Pradesh and pleaded that the nature of duties being that of an advocate, he was entitled to be enrolled as an advocate and continue as such notwithstanding his employment as a regular employee of the Board. Apart from the above, refuge of Rule 49 was also taken. Under the Rules framed by the Himachal Pradesh Bar Council, reference was also made to Sections 24 and 28 of the Advocates Act which, inter-alia, permit a Law Office to practice. Hon"ble the Supreme Court examined the status of the petitioner and made the following observations:

17. Look into the various appointment/promotion order issued by the Board to the appellant and regulation of business relating to Legal Cell of the Board aforementioned, we can gather that:

(1) the appellant was a full-time salaried employee at the time of his enrolment as an advocate and continues to be so, getting fixed scales of pay;

(2) he is governed by the conditions of service applicable to the employees of the Board including disciplinary proceedings. When asked by us, the learned Counsel for the appellant also confirmed the same;

(3) he joined the services of the Board as a temporary Assistant (Legal) and continues to head the Legal Cell after promotions, a wing in the Secretariat of

the Board;

(4) his duties were/are not exclusively or mostly to act or plead in courts; and

(5) promotions were given from time to time in higher pay scales as is done in case of other employees of the Board on the basis of recommendation of Departmental Promotion Committee.

18. On a proper and careful analysis, having regard to the plain language and clear terms of Rule 49 extracted above, it is clear that:

(i) the main and opening paragraph of the rule prohibits or bars an advocate from being a full-time salaried employee of any person, Government, firm, corporation or concern so long as he continues to practice and an obligation is cast on an advocate who takes up any such employment to intimate the fact to the Bar Council concerned and he shall cease to practice so long as he continues in such employment;

(ii) para 2 of the rule is in the nature of an exception to the general rule contained in main and opening paragraph of it. The bar created in para 1 will not be applicable to Law Officers of the Central Government or a State or any public corporation or body constituted by a statute, if they are given entitlement under the rules of their State Bar Council. To put in the other way, this provision is an enabling provision. If in the rules of any State Bar Council, a provision is made entitling Law Officers of the Government or authorities mentioned above, the bar contained in Rule 49 shall not apply to such Law Officers despite they being full-time salaried employees:

(iii) not every Law Officer but only a person who is designated as Law Officer by the terms of his appointment and who by the said terms is required to act and/or plead in courts on behalf of his employer can avail the benefit of the exception contained in para 2 of Rule 49.

21. In the present case, on facts narrated above, relating to his employment as well as in the absence of rule made by the respondent entitling a Law Officer to enroll as an advocate despite being a full-time salaried employee, the appellant was not entitled to enrolment as an advocate. Hence, the appellant cannot take benefit of aforementioned judgment.

In the aforesaid case, Hon^{ble} the Supreme Court also considered the judgment in Sushma Suri's case (supra).

56. A Division Bench of Kerala High Court in the case of K.R. Biju Babu v. High Court of Kerala and Anr. 2003 LAB. I.C. 1784 examined the status of a Public Prosecutor in C.B.I. On consideration, the Court made the following observations:

9. ...The President of India has framed the Recruitment Rules to the post held by the appellant in exercise of the power under the above proviso. So, it is clear that the post of Public Prosecutor in the C.B.I. is a post in connection with the affairs of the Union. In other words, the appellant who is appointed to that post,

is a member of the service in connection with the affairs of the Union. Such a person is ineligible to be appointed as a District Judge. The same is clear from Article 233(2) which reads as follows:

233. Appointment of District Judges:

(1)

(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

In view of the above constitutional bar, the appellant, who is holding a civil post under the Union of India, is barred from being considered for appointment to the post of District Judge.

57. In the aforesaid case, Hon''ble the Division Bench also examined the judgment in Sushma Suri's case (supra) which was on un-amended Rule 49 and the judgment in Satish Kumar Sharma's case (supra) and observed as follows:

11. While practicing as an advocate, the appellant joined the service of the Union of India as a full time salaried employee. Therefore, even if she has failed to intimate the Bar Council about her taking up employment and consequently to suspend her enrolment, still she cannot be treated as an advocate on the rolls of the Bar Council of Kerala. A person holding the post now held by the appellant in the C.B.I., is not eligible to be enrolled by the Bar Council of Kerala, unless he resigns from the post.

58. In *Mallaraddi H. Itagi and Ors. v. The High Court of Karnataka and Anr.* 2002 LAB I.C. 2074 a Division Bench of the Karnataka High Court, considered the validity of the order of the High Court rejecting the applications of the Assistant Public Prosecutor/Public Prosecutor and the Senior Public Prosecutor for appointment to the post of District Judges. On examination of the mode of their appointment and other related factors, the Division Bench observed as follows:

11. ...In our view the Petitioners 1 to 9 are only Civil Servants in the employment of the State and they cannot be treated as practicing advocates from the date of their appointment to the post of Assistant Public Prosecutors. As rightly pointed out by the learned Advocate General, it is only in the case of Law Officer of the Central Government or the State Government or a Public Corporation who is so designated by the terms of his/her appointment order and who by the terms of said appointment order required to act and/or plead in Courts on behalf of his/her employer is not required to intimate the fact of his appointment to the State Bar Council and would not cease to practice as an advocate. That is not the position in the case of the appointment of Assistant Public Prosecutors/ Senior Public Prosecutors/ Public Prosecutors....

59. To arrive at the aforesaid findings, the Hon''ble Division Bench also noticed

that appointment as Prosecutors was on the basis of the recruitment rules framed and they were a regular Government servants under the State Governments. Even the judgment in Sushma Suri's case (supra) was noticed and found inapplicable. The Court also relied upon the judgment in Satish Kumar Sharma's case (supra).

60. The aforesaid judgment of the Karnataka High Court was challenged before the Hon''ble Supreme Court in Civil Appeal Nos. 945-956 of 2003 which came to be decided vide judgment dated 18.05.2009. The appeals were dismissed with the following observations:

7. ...We have no reason to take any different view, as had already been taken by this Court, as the situation is not different. It is already considered before the High Court that the appellants were holding a regular post, they were having the regular pay scale, they were considered for promotion, they were employed by the State Government Rules and therefore they were actually the Government servants when they made applications for the posts of District Judges.

61. An identical issue also came up for consideration before the Hon''ble Supreme Court in the case of Sunil Kumar Goyal Vs. Rajasthan Public Service Commission, . In response to the advertisement for recruitment to the Rajasthan Judicial Services, the petitioners in this case working as the Legal Assistants in Education Deptt who were otherwise Law Graduates, applied for their selection/appointment to the posts of Judicial Officer. Their applications were rejected declaring them ineligible by Rajasthan Public Service Commission. The minimum eligibility for being appointed as a Judicial Officer prescribed under the relevant rules was a Degree in Law with minimum three years practice at the Bar. Before joining as Legal Assistants, they did not have three years practice at the Bar. They pleaded right of appearance before the Court/Tribunals on behalf of the employer and eligibility on that basis. Rejecting their contentions, Hon''ble the Supreme Court observed:

9. The petitioners herein admittedly did not complete the said period of three years of active practice at the Bar. They joined services prior thereto. They might have been representing their department while in service before the tribunal but we fail to understand as to how they could appear before the court like lawyers. Be that as it may, representing the employer in a court or tribunal would not amount to practice at the Bar and as such the criteria laid down by this Court would not stand satisfied.

In the light of the various judgments noticed here-in-above, we may proceed to examine the respective contentions of the private respondents who fall in the category of Law Officers.

62. Respondent No. 9 (Dinesh Kumar Mittal) was working as Deputy Advocate General in the office of the Advocate General, Punjab. This respondent has chosen not to file any disclaimer though party in CWP Nos. 9157, 11437, 14743, 12410 and 17137 of 2008. To the contrary, from the interlocutory order dated

24.09.2008 passed in CWP No. 9157 of 2008 , it appears that respondent Nos. 3,14, 7, 8, 9 and 17 adopted the reply filed on behalf of respondent No. 2 (High Court).

63. There is no specific allegation/averment in respect of status and nature of employment of Dinesh Kumar Mittal, respondent No. 9 in any of the writ petitions to which he is a party, except CWP No. 17137 of 2008. In CWP No. 17137 of 2008, it is alleged that this respondent was working as Deputy Advocate General, Punjab and was a full time salaried employee of the State of Punjab. It is also relevant to notice that neither the High Court nor the State of Haryana in their respective replies have in any manner demonstrated the status of this respondent. It is, however, admitted position that he was working as Deputy Advocate General in the State of Punjab. The nature of employment/engagement of the Assistant/Deputy Advocate General came up for consideration before this Court in some of the judgments. We may notice these judgments.

64. In the case of Mrs. Nirmal Yadav v. The State of Haryana 1992 RSJ 314 Mrs. Nirmal Yadav, presently a Judge of the High Court was working as Assistant Advocate General in the State of Haryana when she was selected and appointed as Additional District and Sessions Judge in the State of Haryana. Admittedly, she was in the graded pay scale. She claimed pay protection as a member of Superior Judicial Service under Rule 4.4 of the Punjab Civil Services as applicable to the State of Haryana. This Court allowed the writ petition with the following observations:

K.P. Bhandari, J. (Oral).- The petitioner, in this case, is aggrieved against the order dated 21.9.1979 (Annexure P/1) regarding fixation of pay. She claims that her pay as Assistant Advocate General, Haryana be protected on her appointment to the Superior Judicial Service. She has further submitted that her pay should be fixed in accordance with Rule 4.4 of the Punjab Civil Services rules, as applicable to the State of Haryana. I find force in this argument. Rule 13 of the Punjab Superior Judicial Service Rules, was also applicable to the State of Haryana mutatis mutandi, at the time of the appointment of the petitioner in the Superior Judicial Service.

2. This case is squarely covered by the Division Bench judgment in State of Punjab v. Balwant Rai LPA No. 1099 of 1988 decided on April 26 1990. In this view of the matter, this writ petition is allowed and a writ of mandamus is issued to the respondents to fix the pay of the petitioner keeping in view her pay as Assistant Advocate General, Haryana. Her pay, which she was drawing as Assistant Advocate General, Haryana, be protected on her appointment to the Superior Judicial Service. The petitioner shall be entitled to get the arrears of pay and allowances and interest thereon at the rate of 12% per annum from the date her pay became due to her till the date of payment thereof. The respondents are directed to make the payment of arrears of pay and allowances besides interest within one month.

65. A similar issue arose in the case of *State of Punjab and Anr. v. Balwant Rai* 1991 (1) RSJ 496 where a Division Bench of this Court directed pay protection of an Assistant Advocate General on his appointment as Additional District & Sessions Judge rejecting the contention of the State that an Assistant Advocate General is not a regular government employee.

In the case of *Dr. Ms. S.K. Bhatia v. State of Punjab* 1998 (1) S.C.T 514 Hon'ble G.S. Singhvi, J. as His Lordship was, while considering the nature of employment of a Deputy Advocate General, observed:

15. ...The fact that the petitioner was appointed in regular time scale, benefit of annual grade increments was given to her, she was called upon to exercise option under the revised pay rules and the fact that the Annual Confidential Report were recorded from time to time go a long way to negate the case set up by the respondents that the petitioner's appointment was in the nature of a contract of personal service and as such the writ petition is not maintainable.

16. ...In our opinion, the observations made in the aforementioned cases can usefully be relied upon to support the view taken by the two Division Benches in *D.N. Rampal's* case and *V.P. Prashar's* case. Thus, I hold that the appointment of the petitioner was not in the nature of contract of personal service, but as a regular Government employee.

66. Private respondent No. 12 (Rajesh Malhotra) in CWP No. 9157 of 2008, was serving as Senior Public Prosecutor in C.B.I. This respondent was enrolled as an Advocate with Delhi Bar Council on 22.08.1986 and was appointed as Public Prosecutor in C.B.I. on 29.05.1998 on the recommendation of the Union Public Service Commission and later promoted as a Senior Public Prosecutor from 20.04.2005. From 29.05.1998 till his appointment, he was working as Public Prosecutor/Senior Public Prosecutor with C.B.I. He was, admittedly, having more than 10 years practice before his selection as Additional District and Sessions Judge. From the certificate placed on record, it appears that he was in the pay scale of Rs. 10,000-15250/-.

67. Private respondent No. 13 (Deepak Aggarwal) in CWP No. 9157 of 2008, was enrolled with the Bar Council on 01.09.1992 and came to be appointed as Assistant District Attorney-cum-Assistant Public Prosecutor in the State of Himachal Pradesh with effect from 17.09.1996. Admittedly, he was having only four years of practice at the Bar as a lawyer before his appointment as Assistant District Attorney-cum-Assistsant Public Prosecutor.

68. Private respondent No. 15 (Chandra Shekhar) in CWP No. 9157 of 2008, was enrolled as an Advocate in the State Bar Council of Punjab and Haryana on 19.08.1993. He was selected and appointed as Assistant District Attorney on 11.05.1999. He was having less than six years of practice as an Advocate at the time of appointment as Assistant District Attorney. In his capacity as a Assistant District Attorney, he was discharging his duties as an Assistant Public Prosecutor and Government Pleader on behalf of the State of Haryana. He has placed

reliance upon two government notifications, both dated 29.07.1999 (Annexures R-15/1 and R- 15/2). Vide first notification issued u/s 25(1) of the Code of Criminal Procedure, he was appointed as Assistant Public Prosecutor, whereas vide the second notification issued u/s 2(7) of the Code of Civil Procedure, he was appointed as Assistant District Attorney.

69. It is relevant to notice that this respondent was appointed as Assistant District Attorney on 11.05.1999, whereas these notifications were issued subsequent to his appointment and even in those notifications, he has been shown to be Assistant District Attorney assigned the duties of Assistant Public Prosecutor and Assistant District Attorney under the Criminal and Civil Procedure Codes, respectively.

70. Private respondent No. 18 (Desh Raj Chalia) in CWP No. 9157 of 2008, was enrolled as an Advocate in the year 1992 and was appointed as Assistant District Attorney/ Assistant Public Prosecutor, in the year 1999. He has not disclosed his date of enrollment or even the date of his appointment as Assistant District Attorney/ Assistant Public Prosecutor in the reply to indicate whether he had clear seven years practice at the Bar at the time of his appointment as Assistant District Attorney/ Assistant Public Prosecutor in the State of Haryana.

71. In respect to all other selectees, i.e. respondent Nos. 3 to 8, 10, 11, 14, 16 and 17 there are no allegations about their ineligibility on account of their practice or otherwise. Respondent Nos. 9 (Dinesh Kumar Mittal), respondent No. 12 (Rajesh Malhotra), respondent No. 13 (Deepak Aggarwal), respondent No. 15 (Chandra Shekhar) and respondent No. 18 (Desh Raj Chalia), in our considered opinion, were ineligible at the time of their appointment as Additional District and Sessions Judges. We have formulated this opinion on account of the following circumstances: (i) They were in regular government service with the Union or the State. Their recruitment to the posts of Deputy Advocate General, Assistant District Attorney's/Prosecutors was pursuant to their selection by the respective Public Service Commission/Government. All of them were in the graded pay scale and subjected to all rigors of service conditions of a government servant known to service jurisprudence. We may not be misunderstood to mean that the Law Officers as a genre are ineligible for judicial appointment. Disqualification/ineligibility is attracted only to such category of Law Officers who opt for regular Government employment. However, no such ineligibility is attached to the other category of Law Officers who are practising lawyers and are engaged on behalf of the Government or any other organization/authority, even on salary to appear on their behalf either under any contractual arrangement or on case to case basis, without subjecting themselves to the conditions of regular government employment such as the Advocate General, Additional Advocate General in the State, Assistant Solicitor General or Central Government Standing Counsel or any other Law Officer engaged by various Government Corporations or otherwise who are engaged to represent them in courts of law.

72. Mr. Ashok Aggarwal, learned Senior Advocate, appearing on behalf of some

of the private respondents has vehemently argued that since the expression "the service" in Article 233(2) of the Constitution of India has been interpreted by the Hon"ble Supreme Court in Satya Narain Singh's case (supra) to mean only Judicial Service. Assistant District Attorney's and Public Prosecutors who belong to services other than Judicial Services are to be considered eligible.

73. We are unable to appreciate this contention. The mere fact that expression "the service" in Article 233(2) of the Constitution of India has been interpreted by the Hon"ble Supreme Court as Judicial Service, its corollary cannot be that the Members of other services become eligible for appointment to the Judicial Service. As a matter of fact, the only possible interpretation which can be given to Article 233 of the Constitution is that the recruitment is from two sources: (i) a Member of Subordinate Judicial Service (Civil Judge, Sr.Division) and (ii) from the Advocates/Pleaders with at least seven years of practice at the Bar. Even though expression "service" occurring in Article 233(2) of the Constitution of India does not speak of the "Judicial Service", however, a conjoint reading of Clause (1) of Article 233 and Articles 234, 235 and 236 under Chapter IV of Constitution of India permit only one inference i.e. Judicial Service. Since under this Chapter recruitment is confined only to Judicial Service and except from the Judicial Service, no other service can be brought within the purview of Article 233(2) of the Constitution. Expression "judicial service" defined in Articles 233 and 236(b) only strengthen this view. Even in Chandra Mohan's case (supra), the Hon"ble Supreme Court noticed this aspect and posed following question for consideration:

(13) The third point raised is one of the far reaching importance. Can the Governor after the Constitution directly appoint persons from services other than the judicial service as district judges in consultation with the High Court?

(16) 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?.

Answering these questions, it has been interpreted that expression "the service" mean only Judicial Service and the recruitment to the posts of District Judges could only be either from Judicial Service i.e. from the strength of cadre of Subordinate Judicial officers or from the Advocates with at least seven years of practice at the Bar.

74. As ruled in Satya Narain's case (supra) for the purpose of direct recruitment, even a Member of Subordinate Judicial Service (Civil Judge, Sr. Division) is debarred from appearing and thus, it is in conceivable that a Member of any other service can be recruited to Superior Judicial Service. Such a view is totally an anti thesis to the scheme under Chapter-VI of the Constitution of India.

75. Apart from the above, we may also notice that except respondent No. 12 (Rajesh Malhotra), the other private respondents i.e. respondent No. 9 (Dinesh

Kumar Mittal); respondent No. 13 (Deepak Aggarwal); respondent No. 15 (Chandra Shekhar) and respondent No. 18 (Desh Raj Chalia) were having less than seven years practice at the Bar before their engagement as Assistant District Attorney/Public Prosecutors. The ratio of Sunil Kumar Goyal's cases (supra) and Mallaraddi H. Itagi's case (supra) is applicable on all fours. X. Claim of candidates recommended, but not appointed, including those next to appointees in the merit.

76. Petitioners in CWP No. 17708 of 2008 are in the waiting list at Sr. Nos. 18 and 17, respectively in the General Category. These petitioners are claiming their right to appointment on the following grounds:

(i) Against the six reserved category vacancies (4 Scheduled Castes and 2 Backward Classes) recommended by the High Court to the Government for de-reservation and consequential appointment of the General Category candidates. Petitioners are the recommendees for such appointment;

(ii) Against the vacancies fallen vacant or added to the cadre of service till the next selection;

(iii) One vacancy fallen vacant on account of resignation of Jitender Kumar Sinha; and

(iv) One unfilled vacancy of the General Category. We may take up these issues seriatim.

77. As against 14 out of 22 advertised posts vide Notification dated 18.5.2007, admittedly, only 13 candidates have been appointed under the General Category and one vacancy is apparently unfilled. Against 5 posts of Scheduled Castes and three of Backward Class categories advertised, only one Scheduled Caste Candidate and one Backward Class candidate has been selected leaving six vacancies belonging to these reserved categories unfilled. The High Court vide its communication dated 29.4.2008 while recommending 16 candidates in the order of merit for appointment by direct recruitment from the Bar as Additional District and Sessions Judges in the State of Haryana also recommended six candidates, including the petitioners in this petition against six reserved category vacancies (4 Scheduled Castes, 2 Backward Classes) remaining unfilled on account of non-qualification of the candidates belonging to these categories. Petitioners' name figure at Sr. Nos. 4 and 5 of the recommendation letter. State of Haryana, however, did not accede to the request and rejected the recommendations of the High Court for de-reservation of reserved category vacancies vide its communication dated 22.9.2008. It may be useful to refer to the order rejecting the proposal:

No. 28/18/2007-4SIII

From Chief Secretary to Govt. Haryana To

The Registrar General, Punjab & Haryana High Court, Chandigarh.

Dated Chandigarh the 22.9.08.

Subject: Appointment of Additional District and Sessions Judges in accordance with the provisions of Haryana Superior Judicial Service Rules, 2007.

Sir,

I am directed to refer to your D.O. No. 338 dated 28/29-4-2008 on the subject cited above and to say that the Government has examined the proposal for de-reservation of vacancies meant for reserved categories and is unable to accept the same, keeping in view the existing policy of dereservation of posts meant for direct recruitment.

Yours faithfully,

sd/- Under Secretary Services-III, For Chief Secretary to Govt.Haryana"

78. The petitioners have relied upon the Government instructions governing the question of de-reservation of the vacancies under the government. The Government instructions circulated vide letter dated 7.9.1989 has been placed on record as Annexure P-13 in the aforesaid writ petition. The aforesaid notification reads as under:

No. 22/28/89-3GS-III

From

The Chief Secretary to Govt., Haryana

To

1. All Heads of the Departments, Commissioners, Ambala and Hissar Divisions, All Deputy Commissioners and Sub Divisional Officers (Civil) in Haryana State.
2. Registrar Punjab & Haryana High Court, Chandigarh Dated, Chandigarh the 7th September, 1989.

Subject: Ban on de-reservation in direct recruitment to the vacancies under the Government.

Sir,

1.38/20/78-2GS-II dt. 09.02.79

2.4/12/79-3GS-III dt. 18.09.79

3.4/20/79-3GS-III dt. 08.05.80

4.24/17/80-3GS-III dt. 16.12.80

5.22/46/85-3GS-III dt. 22.8.85

6.22/2/87-3GS-III dt. 11.08.88

I am directed to refer to Haryana Govt. Instructions noted in the margin

regarding reservation of posts for Scheduled Castes, Backward Classes, Ex-servicemen and Physically handicapped persons in the service of Haryana State and to say that with a view to protecting the interest of SC/ST communities and to ensure that the posts reserved for them are filled up only by candidates belonging to these communities. Government has decided that where candidates belonging to Scheduled Castes/Scheduled Tribes are not available to fill up the vacancies reserved for them in direct recruitment, in spite of required number of advertisements i.e. two/three advertisement, the vacancies shall not be filled up by candidates other than belonging to reservation of vacancies meant for Scheduled Castes/Scheduled Tribes to be filled in by direct recruitment. This decision will be applicable on the vacancies meant for Scheduled Castes/Scheduled Tribes existing on and arising after 1.4.89.

2. It has further been decided that in case of direct recruitment to the vacancies meant for Scheduled Castes and Scheduled Tribes in Class-I services in rare and exceptional cases where after the no availability of suitable Scheduled Castes and Scheduled Tribes candidates, the posts cannot be allowed to remain vacant in public interest, the Administrative Department will put up a proposal with full justification for de-reservation before the Committee of Secretaries of the State Government, comprising of Chief Secretary, Finance Secretary and concerned Administrative Secretary. Only after obtaining the approval of this Committee, the vacancy(s) may be filled up by the candidates not belonging to the Scheduled Castes and Scheduled Tribes candidates.

3. The other condition laid down in the Govt.'s instructions noted in the margin will remain the same.

4. These instructions may be brought to the notice of all concerned working under you for strict compliance.

5. Receipt of this communication may kindly be acknowledged.

Yours faithfully,

sd/- Under Secretary Services-III, For Chief Secretary to Govt. Haryana

79. Paragraph 1 of the Government instructions does not permit dereservation of the vacancies belonging to Scheduled Castes and Scheduled Tribes in the Haryana Government Service in direct recruitment quota, even if the eligible candidates are not available in respect of 2/3 advertisements. However, Clause 2 of the same instructions do permit de-reservation of the vacancies belonging to SC/ST in Class I service in direct recruitment quota in exceptional cases where no suitable candidate is available and the post cannot be allowed to remain vacant in public interest. It is further provided that proposal for de-reservation is to be considered by the Committee of Secretaries of the State Government comprising of Chief Secretary, Finance Secretary and concerned Administrative Secretary and after obtaining the approval of the Committee, the vacancies may be filled up by the candidates not belonging to the SC/ST categories. From the

rejection letter (Annexure P-8), we have found that the proposal for de-reservation has not been considered by the Committee of Secretaries specified in these Government instructions. It seems that the administrative department, without placing the proposal before the competent committee/authority, rejected the recommendation of the High Court and even without recording any reason much less valid reason by simply stating "not accepted under the existing policy". With a view to ascertain the fact, we called for the record of the Government where under the proposal of the High Court for de-reservation was considered. Mr. Kundu, Addl. A.G., Haryana produced the record before us. We have carefully examined the record of the Government. It appears that the comprehensive proposal of the High Court for appointment of the Additional District & Sessions Judges from 16 regular selectees, absorption of five Fast Track Presiding Officers and six recommendees against de-reserved vacancies was examined and as per the note dated 8.5.08 of P. Raghavendra Rao, SSPS the case of de-reservation was delinked to be dealt with separately. It also appears that the issue was again considered by the Chief Secretary with the Chief Minister, Advocate General and LR and declined as is evident from the note dated 17.5.2008. From the subsequent note, it appears that the matter was again examined by one Suresh Kumar in the light of the above noted government instructions dated 7.9.1989 and following remarks made:

Above office note.

2. This case may be sent to CS (in GS III Br.) for de-reserving the 6 posts of reserve category.

For orders.

80. From the another note dated 20.9.08, it appears that the issue regarding de-reservation of the vacancies was kept pending. However, a later note of the same date reads as under:

Office note may kindly be perused. If agreed, High Court may be informed that at this stage Govt. could not accept your recommendation for appointment of addl. 6 candidates from the GC against reserved vacancies. "A" above for approval Pl.

sd/- Submitted for approval of CS please sd/-20.9.08

81. Thereafter the communication dated 22.9.08 was sent to the High Court rejecting the proposal for de-reservation. From the above notings on file of the Government, it is evident that the request of the High Court for de-reservation of the vacancies was never considered by the competent Committee constituted under the government instructions dated 7.9.1989. At one stage, it was decided to keep the issue pending and immediately thereafter, it was decided to decline the proposal.

82. Haryana Superior Judicial Service Recruitment Rules regulating the recruitment to the posts in question has adopted the reservation policy of the

State by virtue of Rule 18 which reads as under:

18. Reservations:-The reservation of posts for the Scheduled Castes, Scheduled Tribes and Backward Classes shall be in accordance with the orders issued by the Haryana Government from time to time.

83. Above rule prescribes the reservation for Scheduled Caste, Scheduled Tribes and Backward Classes in the Haryana Superior Judicial Service as per the norms prescribed by the Government. Rule 31 of the same Rule provides for relaxation. The same is reproduced here under:

31. Relaxation of rules:- Where the Governor in consultation with the High Court, is of opinion that it is necessary so to do, he may be order, for reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category of persons.

84. This rule specifically confers the power upon the Governor to relax the rule in consultation with the High Court, if necessary to do so. Powers are wide enough to relax the rules of reservation as well. The Government instructions referred to above also provide for relaxation of the reservation policy of the Government in special circumstances and in public interest. The High Court in its recommendation dated 29.4.2008 has indicated the public interest. The relevant remarks are noticed here under:

...There is a dire need for more officers to work as Additional District and Sessions Judges in the State of Haryana taking into consideration the pendency of total cases and old cases. Hence Hon"ble Chief Justice and Judges have been pleased to recommend that the following six candidates of General Category in that order of merit against four vacancies of Scheduled Caste and two vacancies of Backward Class category or appointment as Additional District & Sessions Judges in the State of Haryana in relaxation of Rule 18 of Haryana Superior Judicial Services, Rules, 2007.

85. The Government has not considered the recommendations of the High Court for relaxation of rule in the right perspective. As a matter of fact, the larger public interest has been totally ignored. We can take judicial notice of the fact that large number of cases are pending in courts in the State of Haryana. It has been impressed upon by all the States even in the Annual Conference of Prime Minister, Chief Justice of India, Chief Justices of the High Courts, Chief Ministers of the States to appoint more and more Judges to over-come the delay and reduce the pendency. We may also notice that as against 110 Judges per million population ratio universally recognized, in India, we have only 10.5 Judges per million population ratio. Thus there is dire need of more Judges. The recommendation of the High Court for dereservation of the reserved vacancies in larger public interest should not have been lightly brushed aside by the Government.

86. There is another important aspect, the 1st para of Government instructions

only prohibit de-reservation of Scheduled Caste and Scheduled Tribes vacancies whereas there is no government instruction or norm/rule which prohibits de-reservation of Backward Class vacancies and in view of the clear mandate of Rule 31 for relaxation of the rules, it was not proper on the part of the Government to have declined the request for dereservation of at least Backward Class vacancies. It has also been pleaded that reserved vacancies could not be filled up despite advertisements issued at earlier occasions as well. Thus, it would have been prudent for the Government to have accepted the recommendation of the High Court for de-reservation in public interest.

87. We have also noticed that Rule 31 provides for relaxation by the Governor in consultation with the High Court. The request of the High Court for de-reservation in relaxation of Rule 18 has also not been placed before the Governor for his opinion and thus the entire exercise of consideration by the Government for de-reservation and relaxation of rules is improper. It would not be out of context to say that there was no valid and legal consideration of the recommendations/request of the High Court for de-reservation of the vacancies. Mr. Malik has vehemently argued that the recommendations of the High Court are binding upon the Government. To support his contention, reliance is placed upon Hari Datt Kainthla and Another Vs. State of Himachal Pradesh and Others, . We have gone through the aforesaid judgment. Suffice it to say that the recommendation of the High Court with regard to the appointments to judicial service are binding upon the Government. However, the question of relaxation of the rules and de-reservation is to be examined by the Government in the context of its own policy as well. Though we may say that the government should not ordinarily ignore the recommendations of the High Court, even for relaxation of the rules and dereservation of the vacancies, particularly, when the High Court has spelt out the reasons for its opinion. We are of the considered opinion that the matter regarding de-reservation of the six vacancies, particularly, two vacancies of the Backward Classes needs re-consideration by the Government in view of our observations here-in-above

88. The other contention of Mr. Malik is regarding availability of the vacancies upto the next selection. Reliance is placed upon the judgment of the Hon"ble Apex Court in the case of Malik Mazhar Sultan and Anr. v. U.P. Public Service Commission and Ors. JT 2007 (3) SC 352. While laying emphasis on the requirement of filling up of the vacancies at all levels of Judicial Service, following directions have been issued:

14. The select list prepared for all categories of officials shall be valid till the next select list is published.

15. We further direct that ten per cent of unforeseen vacancies would be in respect of sanctioned posts and not vacancies occurring in a particular year.

89. In the case of Rakhi Ray and Others Vs. The High Court of Delhi and Others, the Hon"ble Supreme Court examined the scope of the directions in Malik Mazhar

Sultan's case (supra). It has been noticed that even in Malik Mazhar Sultan's case (supra), the direction was to fill up the vacancies according to the statutory rules. It has been further observed that no vacancies more than the advertised vacancies can be filled up. The relevant observations are as under:

24. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate. In the instant case, once 13 notified vacancies were filled up, the selection process came to an end, thus there could be no scope of any further appointment.

90. Thus, the contention of Mr. Malik that all vacancies whether unfilled, drop out or occurring till next selection be filled up from the candidates next in the merit de-reserve to be rejected. It has come on record that 20 more vacancies were created and added to the cadre of Superior Judicial Service before the select list could be prepared and out of these 20 vacancies five belong to the quota of direct recruits. These vacancies cannot be utilized for appointment out of the panel/list prepared, pursuant to the advertisement dated 18.5.2009. It is a different matter that these five vacancies were in fact utilized for adjustment of the Fast Track Court Officers, whose selection has not been interfered by us. The claim of the petitioners for consideration/appointment against the drop out vacancy of Jitender Kumar Sinha is also not sustainable. As a matter of fact, the advertised vacancy was utilized by appointment of Jatinder Kumar Sinha and on his resignation, the vacancy had to be re-advertised to provide opportunity to all eligible candidates to apply and be considered for such selection/appointment, in view of the law laid down by Hon'ble Supreme Court in case of Madan Lal and Others Vs. State of Jammu and Kashmir and Others, as under:

23. It is no doubt true that even if requisition is made by the Government for 11 posts the public Service Commission may "send merit list of suitable candidates which may exceed 11. That by itself may not be bad but at the time of giving actual appointments the merit list has to be so operated that only 11 vacancies are filled up, because the requisition being for 11 vacancies, the consequent advertisement and recruitment could also be for 11 vacancies and no more....

Consequently the actual appointments to the posts have to be confined to the posts for recruitment to which requisition is sent by the Government. In such an eventuality, candidates in excess of 11 who are lower in the merit list of candidates can only be treated as wait listed candidates in order of merit to fill only the eleven vacancies for which recruitment has been made, in the event of any higher candidate not being available to fill the 11 vacancies, for any reason. Once 11 Vacancies are filled by candidates taken in order of merit from the select list that list will get exhausted, having served its purpose.

This view has been reiterated in the case of Rakhi Ray (supra). XI. Reliefs:

91. In view of our analysis of factual and legal issues, we dispose of these writ petitions in the following manner:

(A) Selections/appointments of respondents No. 9- (Dinesh Kumar Mittal), 12 (Rajesh Malhotra), 13 (Deepak Aggarwal), 15 (Chandra Shekhar) and 18 (Desh Raj Chalia) in CWP No. 9157 of 2008 (wherever they may be in other writ petitions) as Additional District and Sessions Judges, are hereby quashed. This direction shall, however, remain in abeyance for a period of two months to enable the High Court to make alternative arrangements;

(B) As a consequence of the quashment of the selections/appointments of above named respondents, the resultant five vacancies shall be filled up from the candidates next in the order of merit, out of the panel prepared by the Selection Committee;

(C) The appointment of Fast Track Court Judges by a process of absorption after further examination and selection contained in the recommendation of the Selection Committee dated 18.03.2008 is affirmed.

(D) Order dated 22.9.2008 (Annexure P-8 in CWP No. 17708 of 2008 rejecting the request of the High Court for de-reservation of six vacancies (four Scheduled Caste, 2 Backward Classes) is hereby quashed. Resultantly, the matter is remitted back to the Government to re-consider the request of the High Court for de-reservation in relaxation of rules by the competent authority empowered under the Government instructions dated 7.9.2008 and Rule 31 of the Haryana Superior Judicial Service Rules, 2007. The process of re-consideration shall be completed within six weeks and the decision be communicated to the High Court;

(E) If on such re-consideration, the State decides to de-reserve the vacancies, candidates recommended by the High Court vide its recommendation letter dated 25.4.2008, shall be appointed;

(F) Writ petitions claiming other reliefs shall stand dismissed.