
(2015) 03 AHC CK 0111

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 664 of 2015

Krishna Kumar and Others

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 24-03-2015

Acts Referred:

Constitution of India, 1950 — Article 124, 14, 16, 19, 21

Citation : (2015) 4 ADJ 227 : (2015) 5 ALJ 564 : (2015) 3 ESC 1308

Hon'ble Judges : Dilip Gupta, J; Vinod Kumar Misra, J

Bench : Division Bench

Advocate : Akhilesh Tripathi, for the Appellant; Manish Goyal and Ravi Kant, Advocates for the Respondent

Final Decision : Dismissed

Judgement

1. The petitioners, who are Civil Judges (Senior Division/Junior Division) in Uttar Pradesh, Bihar and Jharkhand and had responded to the advertisement dated 17 May 2014 that had been issued by the High Court of Judicature at Allahabad (the High Court) inviting applications for direct recruitment to the U.P. Higher Judicial Service-2014, have filed this petition for quashing Rule 5(c) of the U.P. Higher Judicial Service Rules, 1975 (the 1975 Rules). The petitioners have also sought a relief that the services rendered by them as judicial officers or as members of a Tribunal or on any post under the Union or a State requiring special knowledge of law, should be computed for determining the qualifying period for recruitment to the Higher Judicial Service. It is stated that petitioner Nos. 1 to 4 have more than 7 years experience in judicial service; petitioner Nos. 5 to 8 have more than 7 years standing as advocates before joining the judicial service; and petitioner Nos. 9 to 15 have more than 7 years cumulative experience of judicial service and as advocates. Petitioner No. 10 has worked as an Assistant Law Officer in NTPC, which is a Government of India Enterprise, from 16 September 2006 to 31 March 2009 before being appointed as a judicial officer.

2. An advertisement was issued by the High Court inviting applications for direct

recruitment against 82 vacancies in the U.P. Higher Judicial Service from advocates of not less than 7 years standing as on 1 January 2015. The recruitment, under the 1975 Rules, is based on a preliminary examination (objective) consisting of 100 marks and only those candidates can appear at the main written examination who secure 45% or more marks in the preliminary examination. Candidates securing 45% or above in the main written examination are called for interview subject to a maximum of three times the number of vacancies category-wise.

3. The petitioners were not eligible for appearing at the preliminary examination as they did not satisfy the requirements contained in Rule 5(c) of the 1975 Rules. They had earlier filed writ petitions in the Supreme Court under Article 32 of the Constitution in which interim orders were passed permitting the petitioners to appear in the preliminary examination. The petitioners also claim to have appeared at the main written examination but ultimately they withdrew the writ petitions filed by them in the Supreme Court after seeking liberty to file a fresh petition before the High Court under Article 226 of the Constitution. This petition has, accordingly, been filed.

4. Article 233 of the Constitution contained in Chapter VI deals with appointment of District Judges and is as follows:

"233. Appointment of District Judges (1) Appointments of persons to be, and the posting and promotion of, district Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

5. In exercise of powers conferred by the proviso to Article 309 read with Article 233 of the Constitution and in supersession of the existing Rules, the 1975 Rules were made. Part-III of the 1975 Rules deals with recruitment and Rule 5 is as follows:

"5. Source of recruitment. The recruitment to the service shall be made--

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

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

(c) by direct recruitment from amongst the Advocates of not less than seven years standing on the first day of January next following the year in which the notice inviting applications is published."

6. "Service" has been defined in Rule 4 to consist of a single cadre comprising the posts of District and Sessions Judges and Additional District and Sessions Judges.

7. Under sub-rules (a) and (b) of Rule 5, the recruitment to the service shall be made by promotion and under sub-rule (c) by direct recruitment. Under sub-rule (a), the recruitment to the service is made by promotion from amongst the Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test, while under sub-rule (b) the recruitment to the service is made by promotion strictly on the basis of merit through a limited competitive examination of Civil Judges (Senior Division) having not less than 5 years qualifying service. It is under sub-rule (c) of Rule 5 that the recruitment to service is made by direct recruitment from amongst the advocates of not less than seven years standing on the first day of January next following the year in which the notice inviting applications is published.

8. The procedure for direct recruitment to the service is provided for in Part IV of the 1975 Rules. Rule 17 contained in Part IV provides that application for direct recruitment to the service shall be invited by the Court by publishing a notice to that effect in leading newspapers of the State. The applications shall be submitted to the Court by the candidate through the District Judge within whose jurisdiction the candidate has been practicing and in the case of members of the Bar normally practicing in the High Court, through the Registrar of the High Court. The procedure for selection is provided for in Rule 18.

9. The procedure for recruitment by promotion is contained in Part V of the 1975 Rules. The procedure for promotion contemplated under Rule 5(a) is contained in Rule 20 while that under Rule 5(b) is contained in Rule 21.

10. The petitioners have sought the quashing of Rule 5(c) of the 1975 Rules which provides that the recruitment to the service shall be made by direct recruitment from amongst the advocates of not less than 7 years standing on the first day of January next following the year in which the notice inviting applications is published. The petitioners are conscious that they would not be advocates of not less than 7 years standing on the first day of January 2015 and have, therefore, sought the quashing of sub-rule (c) of Rule 5 with a further prayer that they may be considered eligible for the reason that they are either advocates of not less than 7 years standing when they joined the judicial service or they have completed 7 years standing as advocates or Civil Judges cumulatively or they have worked as Assistant Law Officers in a Government of India Enterprise.

11. Learned counsel for the petitioners submitted that Rule 5(c) is ultra vires Articles 14, 16, 19 and 21 of the Constitution and that prohibiting a judicial officer from participating in the recruitment by direct recruitment is discriminatory since the petitioners who have a good amount of experience are better suited for the post. Learned counsel also submitted that classification that

has been made in Rule 5(c) of the 1975 Rules is arbitrary and illegal. Elaborating his submission, learned counsel for the petitioners contended that the purpose behind the 1975 Rules requiring advocate having not less than 7 years standing on the first day of January next following the year in which the notice is issued is to ensure that the candidates have adequate knowledge of law and judicial officers who have adequate standing as advocates and have acquired adequate knowledge of administration of justice are better suited and cannot be deprived from being recruited to the service by direct recruitment. Learned counsel also submitted that the petitioners have a fundamental right under Article 21 of the Constitution to participate in the direct recruitment and they cannot be deprived merely because they had entered service through a competition. Learned counsel submitted that the "service" referred to in Article 232(2) of the Constitution refers not to judicial service but "executive" service of the State and that when Article 233(2) of the Constitution provides that a person not already in the service of the Union or of the State shall only be eligible to be appointed as a District Judge if he has been for not less than 7 years an advocate or a pleader, it would not mean that a person who was earlier an advocate but is now a judicial officer would not be eligible.

12. In support of the contentions so raised, learned counsel for the petitioners placed reliance upon the decisions of the Supreme Court in *Rameshwar Dayal Vs. The State of Punjab and Others*, AIR 1961 SC 816 : (1961) 2 SCR 874 ; *J. Pandurangarao Vs. Andhra Pradesh Public Service Commission*, AIR 1963 SC 268 : (1963) 1 SCR 707 ; *Chandra Mohan Vs. State of Uttar Pradesh and Others*, (1967) 14 FLR 386 : (1967) 1 LLJ 412 : (1967) 1 SCR 77 ; *Shri Kumar Padma Prasad Vs. Union of India and others*, AIR 1992 SC 1213 : (1992) 2 JT 247 : (1993) 2 LLJ 972 : (1992) 1 SCALE 581 : (1992) 2 SCC 428 : (1992) 2 SCR 109 : (1992) 2 SLJ 115 : (1992) 1 UJ 639 ; and *Ganga Ram Moolchandani and Others Vs. State of Rajasthan and Others*, AIR 2001 SC 2616 : (2001) 90 FLR 812 : (2001) 5 JT 470 : (2001) LabIC 2795 : (2001) 4 SCALE 371 : (2001) 6 SCC 89 : (2001) SCC(L&S) 928 : (2001) 3 SCR 992 : (2001) 3 SCT 820 : (2002) 1 SLJ 197 : (2001) 2 UJ 1410 : (2001) AIRSCW 2596 : (2001) 5 Supreme 169 .

13. Sri Ravi Kant, learned Senior Counsel for the respondents assisted by Sri Manish Goyal, however, submitted that the petitioners are not eligible in view of the conditions contained in the advertisement that had been issued by the High Court for recruitment to the service by direct recruitment. Learned Senior Counsel submitted that Rule 5(c) of the 1975 Rules is not violative of the provisions of the Constitution and in fact is in accordance with Article 233(2) of the Constitution. Learned Senior Counsel also contended that the petitioners cannot complain of violation of the Articles 14, 16, 19 and 21 of the Constitution as Article 233(2) of the Constitution itself provides that a person not already in the service of the Union or of the State shall only be eligible to be appointed as a District Judge if he has been for not less than 7 years an advocate or a pleader. In support of his contention, learned Senior Counsel has placed reliance upon the decisions of the Supreme Court in *Satya Narain Singh and Others Vs. High Court*

of Judicature at Allahabad and Others, AIR 1985 SC 308 : (1985) 50 FLR 102 : (1985) LabIC 1230 : (1985) 2 LLJ 1 : (1984) 2 SCALE 790 : (1985) 1 SCC 225 : (1985) 2 SCR 112 : (1985) 17 UJ 29 and Deepak Aggarwal Vs. Keshav Kaushik and Others, (2013) 2 AD 177 : (2013) 2 JT 139 : (2013) LabIC 1449 : (2013) 1 LLN 273 : (2013) 1 SCALE 564 : (2013) 5 SCC 277 : (2013) 2 SCC(L&S) 88 : (2013) 1 SCT 752 : (2013) 1 SLJ 435 : (2013) AIRSCW 1190 : (2013) 1 Supreme 355 .

14. We have considered the rival submissions advanced by the learned counsel for the parties.

15. What needs to be noticed is that prior to the 1975 Rules, the recruitment or appointment to the U.P. Higher Judicial Service was governed by the U.P. Higher Judicial Service Rules, 1953 (the 1953 Rules). Rule 5 of the 1953 Rules was as follows:

"5. Sources of recruitment.--(1) Recruitment to the service shall be made to the posts of Civil and Sessions Judges-

(i) by promotion from the members of the Uttar Pradesh Civil Service vice (Judicial Branch);

(ii) by direct recruitment after consultation with the Court.

(2) Persons eligible for direct recruitment under sub-clause (ii) of clause (1) of this rule shall be-

(a) Barrister's Advocates, Vakils or Pleaders of more than 7 years standing; (b) Judicial Officers, as defined in U.P. Government's Notification No. 4957/II-A-120-50, dated October 14, 1980, who may be eligible for applying for recruitment to the service in accordance with such rules as may be prescribed by the Governor in this behalf from time to time.

Note--The rules on the subject in force on the date of this notification are given in Appendix 13".

Appendix B was as follows:

"Rules Regarding the Eligibility etc. of Judicial Officers

1. A candidate from among Judicial Officers (as defined in Government's Notification No. 4957/II-A-120-1950, dated October 14, 1950) for recruitment to the U.P. Higher Judicial Service, must be either-

(a) a Bachelor of Laws of a University established by law in Uttar Pradesh, or any other University in India recognised for this purpose by the Governor; or

(b) a Barrister of England or Northern Ireland, or a member of the Faculty of Advocates in Scotland.

2. He should have put in a minimum of seven years total service in posts of

Judicial Magistrates, Revenue Officers or Judicial Officers or in posts deemed to be equivalent thereto by the Governor for this purpose.

3. His age should be within the age limits prescribed for direct recruitment under rule 11 of the U.P. Higher Judicial Service Rules.

4. Eligible Judicial Officers will submit their applications on the prescribed form to the Chief Secretary to Government, through the District Magistrate or other head of Office under whom the candidates may, for the time being, be employed, and the applications thus received will be forwarded by the Chief Secretary to the High Court, with the Officer's records and other remarks."

16. It has time and again been pointed out by the Supreme Court that Article 233(2) of the Constitution provides for qualifications for a person who is not already in service of the Union or the State, while under Article 233(1) of the Constitution, no specific qualifications are laid down for a person who is already in the service of the Union or the State. Thus, a person not already in service of the Union or of the State shall only be eligible for direct recruitment if he has been for not less than seven years standing as an advocate and is recommended by the High Court for appointment.

17. It has now to be examined whether "service" mentioned in Article 233(2) of the Constitution is a service pertaining to Courts or does it refer to any other service like Police, Excise, Revenue etc. In Chandra Mohan (supra), the Supreme Court, having regard to the fact that Article 233 occurs in Chapter VI of the Constitution dealing with Subordinate Courts and that Article 236(2) defines the expression "judicial service" to mean a service consisting exclusively of persons intended to fill the post of District Judge and other Civil Judicial posts inferior to the post of District Judge, held that the "service" in Article 233(2) can only mean judicial service. The Supreme Court distinguished its earlier decision in Rameshwar Dayal (supra) as the question whether "service" in Article 233(2) is any service of the Union or of the State did not arise for consideration in that case nor did the Court express any opinion. The relevant observations of the Supreme Court in Chandra Mohan (supra) are as follows:

"16. ...But Article 233(1) is nothing more than a declaration of the general power of the Governor in the matter of appointment of district judges. It does not lay down the qualifications of the candidates to be appointed or denote the sources from which the recruitment has to be made. But the sources of recruitment are indicated in clause (2) thereof. Under clause (2) of Article 233 two sources are given, namely, (i) persons in the service of the Union or of the State and (ii) advocate or pleader. Can it be said that in the context of Ch. VI of Part VI of the Constitution "the service of the Union or of the State" means any service of the Union or of the State or does it mean the judicial service of the Union or of the State? The setting, viz., the chapter dealing with subordinate Courts, in which the expression "the service" appears indicates that the service mentioned therein is the service pertaining to Courts. That apart, Article 236(2) defines the

expression "judicial service" to mean a service consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge. If this definition, instead of appearing in Article 236, is placed as a clause before Article 233(2), there cannot be any dispute that "the service" in Article 233(2) can only mean the judicial service. The circumstance that the definition of "judicial service" finds a place in a subsequent Article does not necessarily lead to a contrary conclusion. The fact that in Article 233(2) the expression "the service" is used whereas in Arts. 234 and 235 the expression "judicial service" is found is not decisive of the question whether the expression "the service" in Article 233(2) must be something other than the judicial service, for, the entire chapter is dealing with the judicial service. The definition is exhaustive of the service. Two expressions in the definition bring out the idea that the judicial service consists of hierarchy of judicial officers starting from the lowest and ending with District Judges. The expressions "exclusively" and "intended" emphasise the fact that the judicial service consists only of persons intended to fill up the posts of District Judges and other civil judicial posts and that is the exclusive service of judicial officers. Having defined "judicial service" in exclusive terms, having provided for appointments to that service and having entrusted the control of the said service to the care of the High Court, the makers of the Constitution would not have conferred a blanket power on the Governor to appoint any person from any service as a District Judge.

17. Reliance is placed upon the decision of this Court in *Rameshwar Dayal Vs. The State of Punjab and Others*, AIR 1961 SC 816 : (1961) 2 SCR 874 , in support of the contention that "the service" in Article 233(2) means any service under the State. The question in that case was, whether a person whose name was on the roll of advocates of the East Punjab High Court could be appointed as a district judge. In the course of the judgment S.K. Das, J., speaking for the Court, observed:

"Article 233 is a self contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under clause (1) the Governor can appoint such a person as a district judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in clause (2) and all that is required is that he should be an advocate or pleader of seven years" standing."

This passage is nothing more than a summary of the relevant provisions. The question whether "the service" in Art. 233(2) is any service of the Union or of the State did not arise for consideration in that case nor did the Court express any opinion thereon."

(emphasis supplied)

This decision was subsequently followed by the Supreme Court in *Satya Narain Singh* (supra).

18. Learned counsel for the petitioners is also not justified in placing reliance upon para 21 of the judgment of the Supreme Court in *Shri Kumar Padma Prasad* (supra) in support of his contention that the appointment of District Judges under Article 233(2) can only be made from the judicial service of the State as defined in Article 236(b) of the Constitution. The Supreme Court was considering the 1953 Rules and it is in this context that it was observed that appointment of District Judge in Article 233(2) can only be made from the judicial service of the State as defined in Article 236(b) of the Constitution and not from an Executive Officer or Magistrate. It needs to be noted that under Rule 5(2)(b) of the 1953 Rules, judicial officers were also considered eligible for direct recruitment.

19. It is, therefore, more than apparent that what Article 233(2) of the Constitution provides is that a person not already in the judicial service shall only be eligible to be appointed as a District Judge if he has been for not less than 7 years an advocate or a pleader and is recommended by the High Court for appointment. Reliance placed by the learned counsel for the petitioners on the decision of the Supreme Court in *Rameshwar Dayal* (supra) is, therefore, misconceived.

20. The expression "If he has been for not less than 7 years an advocate in Article 233(2) of the Constitution" has also been considered by the Supreme Court in *Deepak Aggarwal* (supra) to mean seven years as an advocate immediately preceding the application and not 7 years any time in the past because of use of "has been". The Supreme Court held that one of the essential requirement of the above expression in Article 233(2) of the Constitution is that such a person must with requisite period be continuing as an advocate on the date of application. The observations of the Supreme Court are as follows:

"102. As regards construction of the expression, "if he has been for not less than seven years an advocate" in Article 233(2) of the Constitution, we think Mr. Prashant Bhushan was right in his submission that this expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of "has been". The present perfect continuous tense is used for a position which began at some time in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as an advocate on the date of application."

(emphasis supplied)

21. It is apparent that it is for this reason that learned counsel for the petitioners contended that Rule 5(c) of the 1975 Rules is violative of the provisions of Articles 14, 16, 19 and 22 of the Constitution. The contention of learned counsel for the petitioners is that Rule 5(c) insofar as it prohibits the judicial officers from participating in the recruitment to the service by direct recruitment is discriminatory as judicial officers who have gained sufficient experience are not only better suited for the post, but they also have the requisite seven years

standing on the relevant date.

22. This submission of learned counsel for the petitioners cannot be accepted. In the first instance, the Constitution itself in Article 233(2) prohibits the Judicial Officers from participating in the recruitment to the service by direct recruitment. The petitioners who belong to the judicial service can be considered for recruitment to the service by promotion either under sub-rule (a) or sub-rule (b) of Rule 5 of the 1975 Rules and not under sub-rule (c) of Rule 5. Thus, when Article 233 itself provides that a person not already in the judicial service shall only be eligible to be appointed as a District Judge if he has been for not less than 7 years an advocate or a pleader, the petitioners cannot be permitted to contend that prohibiting a judicial officer from applying to the recruitment for service would result in violation of Articles 14, 16, 19 and 21 of the Constitution.

23. It also needs to be noted that the submission of the petitioners that excluding the judicial officer from participating in the recruitment to the service by direct recruitment would be arbitrary as it seeks to exclude persons who are better suited for the service was considered by the Supreme Court in *Satya Narayan Singh (Supra)*. The Supreme Court examined whether there was any constitutional inhibition against members of a subordinate judicial service seeking appointment as District Judges by direct recruitment provided they had completed 7 years' practice at the Bar. In fact, what was submitted, as has been submitted by the present petitioners, was that members of the subordinate judiciary who had put in 7 years practice at the Bar before joining the subordinate judiciary service and who had gained experience as judicial officers should be considered better suited for appointment as District Judges because of the additional experience gained by them, rather than prohibiting them for that reason. Repelling this contention, the Supreme Court observed that the two streams are separate. While candidates who are not members of a judicial service must be advocates or pleaders for not less than 7 years and they have to be recommended by the High Court before they can be appointed as District Judges, in the case of candidates who are members of a judicial service, the 7 years rule has no application but there has to be consultation with High Court. The observations are:

"2. The submission of Shri Lal Narain Sinha and Shri K.K. Venugopal was that there was no constitutional inhibition against members of any Subordinate Judicial Service seeking to be appointed as District Judges by direct recruitment provided they had completed 7 years practice at the bar. The submission of the learned counsel was that members of the Subordinate Judiciary, who had put in 7 years' practice at the bar before joining the Subordinate Judicial Service and who had gained experience as Judicial officers by joining the Subordinate Judicial Service ought to be considered better fitted for appointment as District Judges because of the additional experience gained by them rather than be penalised for that reason. The learned counsel submitted that a construction of Article 233 of the Constitution which would render a member of the Subordinate Judicial

Service ineligible for appointment to the Higher Judicial Service because of the additional experience gained by him as a Judicial officer would be both unjust and paradoxical. It was also suggested that it would be extremely anomalous if a member of the Uttar Pradesh Judicial Service who, on the present construction of Article 233 is ineligible for appointment as a District Judge by direct recruitment, is nevertheless eligible to be appointed as a Judge of the High Court by reason of Article 217(2)(aa). On the other hand Sri Gopal Subramaniam, learned counsel for the respondent urged that there was a clear demarcation in the Constitution between two sources of recruitment namely: (1) those who were in the service of a State or Union and (2) those who were not in such service. He contended that the second clause of Article 233 was attracted only to the second source and in respect of candidates from that source the further qualification of 7 years as an advocate or a pleader was made obligatory for eligibility. According to Mr. Gopal Subramaniam, a plain reading of both the clauses of Article 233 showed that while the second clause of Article 233 was applicable only to those who were not already in service, the first clause was applicable to those who were already in service. He urged that any other construction would lead to anomalous and absurd consequences such as a junior member of the Subordinate Judicial Service taking a leap, as it were, over senior members of the Judicial Service with long records of meritorious service. Both sides relied upon the decisions of this Court in *Rameshwar Dayal v. State of Punjab* and *Chandra Mohan v. State of Uttar Pradesh*.

3. Article 233 is as follows:

17. "233(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.

18. (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 as an advocate or pleader and is recommended by the High Court for appointment."

Two points straightway project themselves when the two clauses of Article 233 are read: The first clause deals with "appointments of persons to be, and the posting and promotion of, District Judges in any State" while the second clause is confined in its application to persons "not already in the service of the Union or of the State". We may mention here that "Service of the Union or of the State" has been interpreted by this Court to mean judicial service. Again while the first clause makes consultation by the Governor of the State with the High Court necessary, the second clause requires that the High Court must recommend a person for appointment as a District Judge. It is only in respect of the persons covered by the second clause that there is a requirement that a person shall be eligible for appointment as District Judge if he has been an advocate or a pleader for not less than 7 years. In other words, in the case of candidates who are not members of a Judicial Service they must have been advocates or pleaders for not

less than 7 years and they have to be recommended by the High Court before they may be appointed as District Judges, while in the case of candidates who are members of a Judicial Service the 7 years rule has no application but there has to be consultation with High Court. A clear distinction is made between the two sources of recruitment and the dichotomy is maintained. The two streams are separate until they come together by appointment. Obviously the same slip cannot sail both the streams simultaneously. The dichotomy is clearly brought out by S.K. Das, J. in *Rameshwar Dayal v. State of Punjab* (supra) where he observes:

"Article 233 is a self contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under Clause (1) the Governor can appoint such a person as a District Judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in Clause (2) and all that is required is that he should be an advocate or pleader of seven years" standing."

Again dealing with the cases of Harbans Singh and Sawhney it was observed:

"We consider that even if we proceed on the footing that both those persons were recruited from the Bar and their appointment has to be tested by the requirements of Clause (2), we must hold that they fulfilled those requirements".

Clearly the Court was expressing the view that it was in the case of recruitment from the Bar, distinguished from Judicial Service that the requirements of Clause (2) had to be fulfilled. We may also add here earlier the Court also expressed the view:

"...we do not think that Clause (2) of Article 233 can be interpreted in the light of the Explanation added to Articles 124 and 217."

In *Chandra Mohan v. State of Uttar Pradesh* (supra) Subba Rao, C.J. after referring to Articles 233, 234, 235, 236 and 237 stated:

"The gist of the said provisions may be stated thus: Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State. There are two sources of recruitment, namely, (i) service or the Union or of the State and (ii) members of Bar. The said Judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district judges, they will be made by the Governor of the State in accordance with rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all the district Courts and Courts subordinate thereto, subject to certain prescribed limitations."

Subba Rao, C.J. then proceeded to consider whether the Government could appoint as district judges persons from services other than the judicial service.

After pointing out that Article 233(1) was a declaration of the general power of the Governor in the matter of appointment of district judges and he did not lay down the qualifications of the candidates to be appointed or denoted the sources from which the recruitment had to be made, he proceeded to state,

"But the sources of recruitment are indicated in Clause (2) thereof. Under Clause (2) of Article 233 two sources are given namely, (i) persons in the service of the Union or of the State, and (ii) advocate or pleader."

(emphasis supplied)

24. Thus, it is not possible to accept the contention of learned counsel for the petitioners that Rule 5(c) of the 1975 Rules is either discriminatory or arbitrary for the reason that it excludes judicial officers from recruitment to the service by direct recruitment. Accordingly, the contention of learned counsel for the petitioners that Rule 5(c) of the 1975 Rules is violative of the provisions of Articles 14, 16, 19 and 21 of the Constitution cannot be accepted.

There is, therefore, no merit in any of the contentions advanced by learned counsel for the petitioners.

The writ petition is, accordingly, dismissed.