

(2022) 04 GUJ CK 0084

In the Gujarat High Court

Case No : R/Special Civil Application No. 819, 8251 Of 2022

Niraj Jaykumar Sharma

APPELLANT

Vs

High Court Of Gujarat

RESPONDENT

Date of Decision : 28-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 33, 33(2), 226, 233, 233(2), 233(3), 234, 309
Gujarat State Judicial Services Rules, 2005 — Rule 5(2)(b), 5(2)(e)

Citation : (2022) 04 GUJ CK 0084

Hon'ble Judges : Biren Vaishnav, J

Bench : Single Bench

Advocate : S.N.Shelat, Vikas V Nair, Dhara Shah

Final Decision : ?Dismissed

Judgement

Biren Vaishnav, J

1 Both these petitions under Article 226 of the Constitution of India, assail the stand of the relevant clause of the advertisement issued on the administrative side by the High Court of the advertisement dated 12.04.2022. Clause 2(ii) of the advertisement issued by the High Court on the administrative side provides that a candidate must be a practising advocate in Courts' of Civil and / or Criminal jurisdiction on the last date fixed for submission of online applications and must have so practiced continuously for a period of not less than seven years immediately preceeding as on the last date for submission of the online application on 04.05.2022.

2 Special Civil Application No. 8251 of 2022 has been filed for a direction to quash and set aside the position reflected in the E.mail dated 30.03.2022, by which, the candidature of the petitioner has been rejected on the interpretation advanced by the High Court on the administrative side referred to hereinabove.

3 Facts in brief of Special Civil Application No. 8251 of 2022 would indicate that the petitioner got enrolled with the Bar Council of Gujarat on 31.08.2003 and

started practice as an advocate. She was appointed as a Civil Judge on an adhoc basis on 13.09.2012. On 11.11.2015, the petitioner resigned from the post of Civil Judge. After her resignation from the said post, the petitioner resumed her practice as an advocate before the District Courts, Valsad, Vapi, Silvassa, Daman and also before the Indore Bench of the Madhya Pradesh High Court and the High Court of Gujarat.

3.1 Pursuant to an advertisement No. 1250 of 2020 dated 05.03.2020, which invited applications for recruitment to the post of District Judges, she applied for the said post on 09.03.2020. When the list of eligible candidates who appeared in the preliminary examination was declared and in the subsequent preliminary examinations, the petitioner was successful. On 21.11.2021, she appeared for the written examinations conducted by the High Court. On 07.01.2022, she was declared as the sole qualified candidate. An interview was held on 18.01.2022. However, when the final result was put on the website of the High Court, she found that she was unsuccessful.

3.2 Oral representations and written representations were made by the petitioner for disclosure of reasons and for conveying her final marks. The High Court on 23.02.2022 conveyed to the petitioner by an E-mail rejecting her candidature by relying on Rule 5(2)(b) of the Gujarat State Judicial Services Rules, 2005, amended by the Notification of 05.06.2017. The impugned E-mail of 30.03.2022 informs the petitioner that "the extant rules i.e. the Gujarat State Judicial Services Rules, 2005 read with Article 233 of the Constitution of India makes it abundantly clear that the period of 7 years of practice has to be continuous period immediately preceding the date of the application and not 7 years any time in the past". While communicating this decision, the High Court on the administrative side has relied upon the decision of the Apex Court in the cases of Dheeraj Mor vs. Honourable High Court of Delhi (Civil Appeal No. 1698 of 2020) and Deepak Aggarwal vs. Keshav Kaushik and Others (Civil Appeal No. 561 of 2013).

4 Shri S.N. Shelat, learned Senior Counsel appearing with Ms. Dhara Shah, learned advocate for the petitioner inviting the attention of the court to the pleadings particularly with regard to the dates of enrollment of the petitioner as an advocate and the judicial service in the interregnum would submit that the petitioner was enrolled at the bar on 31.08.2003. Before she was appointed as a Civil Judge on ad-hoc basis on 30.09.2012 she had practiced at the bar for over 9 years and 13 days. On resigning from judicial service and resuming her practice, on the last date of the application pursuant to the advertisement of 2020 she had four years, four months and two days of practice. In other words, when she applied for the post of District Judge, she had in all put in 13 years at the bar and was therefore eligible in accordance with the provisions of Article 32/33(2) of the Constitution of India read with Rule 5(2)(e) of the Gujarat State Judicial Services Rules 2017/2005.

4.1 Mr. Shelat would then invite the attention of the court to Article 233(2) of the

Constitution of India and submit that as stipulated in the Article what was required for being eligible to be appointed as a District Judge is that a person should have been in practice for not less than 7 years as an advocate. Reading the provision of Article 233(3) with that of Rule, he would therefore submit that the rule nowhere contemplated that there was a requisite of having continuous practice immediately preceding the date of advertisement and therefore the addition of the word 'continuous' cannot be added to the rules in question.

4.2 The petitioner was therefore justified in agitating her being overlooked for consideration for appointment to the post of District Judge. The rules are clear and when read with the language in Article 233(2) of the Constitution of India that there is no use of the requirement of continuous experience which is imported while interpreting Article 233(2) of the Constitution of India.

4.3 Mr.S.N.Shelat, learned Senior Advocate, would submit that but for the decision in the case of Dheeraj Mor, the petitioners would not have resigned from their service as Judicial Officer and aspire to apply for the post of District Judge.

5 As far as Special Civil Application No. 8193 of 2022 is concerned, the prayer in the petition is to quash and set aside clause 2(ii) of the advertisement which provides for prescription of continuous and immediately preceding clause of practice as an advocate.

6 Facts would indicate that the petitioner therein enrolled at the Bar Council of Gujarat on 02.05.2006 and started practice in the High Court of Gujarat. On 13.09.2012 the petitioner was appointed as a Civil Judge on adhoc basis. In the year 2015 he was absorbed in the regular judicial service. On 30.06.2019 the petitioner resigned from the post of Civil Judge and Judicial Magistrate First Class and resumed practice as an advocate before the High Court of Gujarat. In other words, taking his enrollment at the Bar of the year 02.05.2006, except for his judicial service of approximately 6 years and 9 months, total experience of the petitioner as an advocate at the bar was 9 years, 2 months and 5 days. Inspite of he having practiced for over a period of 9 years, he is not eligible to participate in the recruitment process as the words 'continuous' and 'immediately preceding as on the last date of the application' have been added as an essential qualification which are not part of the rules.

7 The submission of Mr. Shelat, learned Senior Counsel in Special Civil Application No. 8193 of 2022 appearing with Mr. Vikas Nair, learned advocate for the petitioner are similar inasmuch as the legal submissions are concerned. However, the additional submission is that by way of an interim order, the petitioner may be permitted to apply for the post of District Judge in view of the fact that review petitions have been filed before the Apex Court in context of the decision rendered by the Apex Court in the case of Dheeraj Mor (supra) which is the basis of the clause in the advertisement requiring a candidate as an advocate to be practicing continuously for a period of 7 years immediately preceding the last date of the application.

7.1 In other words, therefore, both these petitioners are aspirants for being appointed as District Judges in judiciary of the State of Gujarat. In case of the petitioner of Special Civil Application No. 8251 of 2022 she had participated earlier and was unsuccessful and when she had sought to seek reasons has been informed by the impugned email that in view of the decision of the Apex Court in the case of Dheeraj Mor (supra), despite her experience as an advocate of 13 years, 4 months and 15 days, since she was not in continuous practice as an advocate immediately preceding the date of her application as on 21.03.2020, when she had only completed 4 years, 4 months and 2 days of practice, even in the advertisement pursuant to which she applied i.e. Advertisement No. 1250/2020 the words 'continuous' and 'immediately preceding the last date of application' were missing and therefore the rigors of the decision in the case of Dheeraj Mor (supra) should not apply.

8 As far as Special Civil Application No. 8193 of 2022 is concerned, though he had an experience of being an advocate for over 9 years, 2 months and 5 days is concerned, since the experience was 2 years 9 months and 12 days not falling within parameters of Clause 2(ii) requiring continuous practice of seven years relying on the same interpretation as in the case of Dheeraj Mor (supra) the petitioner of SCA No. 8193 of 2022 will not be in a position to apply online. Prayer therefore in this petition is that atleast pending consideration of the review petition before the Apex Court he may be permitted to apply.

9 For the purposes of this order, Rule 5(2)(b) of the Gujarat State Judicial Services Rules, 2005 is reproduced hereinbelow:

"5(2) In order to be eligible for the appointment by direct recruitment to the cadre of District Judges, the incumbent-

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(b) must be a practicing Advocate in Courts of Civil and Criminal jurisdiction on the date fixed for receipt of applications and must have so practiced for a period not less than seven years as on such date."

10 Article 233 of the Constitution of India provides for appointment of District Judge. Article 233(2) reads as under:

"233. Appointment of district judges.-

XXX XXX XXX

(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 Couert for appointment."

11 Accordingly, the article stipulates that a person not already in service of the Union or the State shall be eligible to be appointed as 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.

12 In the case of Dheeraj Mor (supra) the Apex Court on 19.02.2020 was considering the question involved in the matters i.e. the interpretation of Article 233 of the Constitution of India. Therein the petitioners who were in judicial service had claimed that in case before joining the judicial service they had completed seven years of practice as advocates and therefore they were entitled to stake claim for direct recruitment quota from the Bar. One of the categories was a category consisted of candidates who had completed seven years by combining the experience serving as Judicial Officers and as an advocates. Rules of various High Courts' in context of interpretation of Article 233 came up for consideration before the 3 Judge Bench of the Apex Court. After reproducing Article 233(2) the Apex Court opined that Article 233(2) starts with a negative stipulation that a person who is not already in service shall be eligible to be appointed as a District Judge if he has been an advocate or a pleader for not less than seven years. The interpretation of the clause of the Article 233(2) in para 14 reads as under:

"14. Article 233(2) provides that if an advocate or a pleader has to be appointed, he must have completed 7 years of practice. It is coupled with the condition in the opening part that the person should not be in service of the Union or state, which is the judicial service of the State. The person in judicial service is not eligible for being appointed as against the quota reserved for advocates. Once he has joined the stream of service, he ceases to be an advocate. The requirement of 7 years of minimum experience has to be considered as the practising advocate as on the cut off date, the phrase used is a continuous state of affairs from the past. The context has been in practice in which it has been used, it is apparent that the provisions refers to a person who has been an advocate or pleader not only on the cut off date but continues to be so at the time of appointment."

13 The Apex Court observed that the requirement of seven years of minimum experience has to be considered as the practicing advocate as on the cut off date, the phrase used is a continuous state of affairs from the past. Context "has been in practice" in which it has been used, it is apparent that the provisions refers to a person who has been an advocate or a pleader not only on the cut off date but continuous to be so at the time of appointment. The Apex Court was considering a decision of a three judge Bench of the Court in the case of Deepak Aggarwal (supra).

Para 23 of the decision in the case of Dheeraj Mor (supra) reads as under:

"23. In Deepak Aggarwal (supra) a threeJudge Bench of this Court considered the provisions of Article 233(2) and held that service in Article 233 to mean judicial service and there is dichotomy of sources of recruitment, namely, (i) from judicial service; and (ii) from the advocate/pleader or in other words from the Bar. The meaning of the term advocate/pleader too has been considered by

this Court. The expression "advocate" or "pleader" refers to the members of the Bar practicing law. Relying upon *Sushma Suri v. Govt. (NCT of Delhi)*, (1999) 1 SCC 330, this Court further observed that members of the Bar meant classes of persons who were practicing in a court of law as pleaders or advocates. This Court further held that in Article 233(2), "if he has been for not less than seven years," the present perfect continuous tense is used for a position which began at some time in the past and is continuing. Therefore, one of the essential requirements is that such a person must with requisite period be continuing as an advocate on the date of application. This Court has observed:

"70. A few decisions rendered by some of the High Courts on the point may also be noticed here. In *Sudhakar Govindrao Deshpande v. State of Maharashtra*, 1986 Lab IC 710 (Bom) the issue that fell for consideration before the Bombay High Court was whether the petitioner therein who was serving as Deputy Registrar at the Nagpur Bench of the Bombay High Court, was eligible for appointment to the post of the District Judge. The advertisement that was issued by the High Court inviting applications for five posts of District Judges, inter alia, stated that, "candidate must ordinarily be an advocate or pleader who has practised in the High Court, Bombay or court subordinate thereto for not less than seven years on 110 1980". The Single Judge of the Bombay High Court considered Articles 233, 234 and 309 of the Constitution, relevant recruitment rules and noted the judgments of this Court in *Chandra Mohan v. State of U.P.*, AIR 1966 SC 1987, *Satya Narain Singh v. High Court of Judicature of Allahabad*, (1985) 1 SCC 225 and *Rameshwar Dayal v. State of Punjab*, AIR 1961 SC 816. It was observed as follows: (*Sudhakar case*, Lab IC p. 715, para 16) "16. ... the phrase 'has been an advocate or a pleader' must be interpreted as a person who has been immediately prior to his appointment a member of the Bar, that is to say either an advocate or a pleader. In fact, in the above judgment, the Supreme Court has repeatedly referred to the second group of persons eligible for appointment under Article 233(2) as 'members of the Bar'. Article 233(2) therefore, when it refers to a person who has been for not less than seven years an advocate or pleader refers to a member of the Bar who is of not less than seven years' standing."

89. We do not think there is any doubt about the meaning of the expression "advocate or pleader" in Article 233(2) of the Constitution. This should bear the meaning it had in law preceding the Constitution and as the expression was generally understood. The expression "advocate or pleader" refers to legal practitioner and, thus, it means a person who has a right to act and/or plead in court on behalf of his client. There is no indication in the context to the contrary. It refers to the members of the Bar practising law. In other words, the expression "advocate or pleader" in Article 233(2) has been used for a member of the Bar who conducts cases in court or, in other words acts and/or pleads in court on behalf of his client. In *Sushma Suri v. Govt. (NCT of Delhi)*, (1999) 1 SCC 330, a threeJudge Bench of this Court construed the expression "members of the Bar" to mean class of persons who were actually practising in courts of law

as pleaders or advocates. ...

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 sometime 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) It is clear from the decision of Deepak Aggarwal (supra) that recruitment from the Bar is only from among practicing advocates and those continuing as advocates on the date of appointment. The submission that the issue of eligibility of inservice candidates did not come up for consideration is of no consequence as provisions of Article 233(2) came up for consideration directly before this Court."

14 Referring to the relevant paragraph of the decision in the case of Deepak Aggarwal (supra), the Court held that in Article 233(2) "if he has been for not less than seven years", the present perfect continuous tense is used for a position which began at some time in the past and is continuing. Therefore, one of the essential requirement is that such a person must with requisite period be continuing as an advocate on the date of the application. It is in this context that the Apex Court, therefore, reproduced paragraphs 17,89 and 102 of the para 23 of Deepak Mor, which are reproduced hereinabove.

15 In view of this unequivocal position of law declared by the Apex Court in the case of Dheeraj Mor (supra), even if the Court were to by an interim order grant the benefit of the petitioner of SCA No. 8193 of 2022 to apply pending consideration of the review, it will amount to permitting the petitioner who is not fulfilling the conditions to participate in such selection to apply for the post when a equivocal question of law on the interpretation of Article 233(2) with its grammatical variation has been set out by the Apex Court extensively reproduced hereinabove.

For the aforesaid reasons, both these petitions are dismissed.