

(1988) 01 DEL CK 0042

In the Delhi High Court

Case No : Civil Writ Petition No. 1961 of 1987

Oma Shanker Sharma and Another

APPELLANT

Vs

Delhi Administration and Another

RESPONDENT

Date of Decision : 13-01-1988

Acts Referred:

Citation : (1988) 14 DRJ 293

Hon'ble Judges : Y.K. Sabharwal, J; S.S. Chadha, J

Bench : Division Bench

Advocate : Urmila Kapoor, V.C. Mahajan, P.P. Rao and C.M. Nayar, for the Appellant;

Judgement

S.S. Chadha, J.

(1) The question raised in this petition under Article 226 of the Constitution of India is whether the petitioners who have taken full time employment as Public Prosecutors, are eligible for appointment to the Delhi Higher Judicial Service.

(2) The High Court of Delhi, respondent No. 2, issued public notice and invited applications from practicing advocates possessing the qualifications and satisfying the conditions enumerated in the advertisement for direct recruitment to the Delhi Higher Judicial Service. In response to the advertisement, petitioner No. 1 applied and claims that he fully satisfies the qualifications prescribed for the appointment and is eligible for being considered and fit to be appointed on merits. Petitioner No. 1 is admittedly employed as Public Prosecutor in Delhi under the direct control of Delhi Administration. The eligibility of petitioner No. 1 was examined and it was found by respondent No. 2 that petitioner No. 1 and similarly situated persons are ineligible for direct recruitment as the same is meant only for practicing advocates with seven years or more practice at the Bar. The decision was communicated to petitioner No. 1 by the impugned letter dated May 13, 1987. Petitioner No. 2 is the association of all the Public Prosecutors in Delhi. The petitioners contend that the view taken by respondent No. 2 is not

tenable and is bad in law and is entitled to be set aside on its judicial side. Before the commencement of the arguments we informed the counsel for the petitioners about our participation and in fact the participation of all sitting Judges in the decision of respondent No. 2. They reposed full confidence in our judgment on the judicial side. We must record our sincere appreciation to this approach.

(3) The first submission of Shri V.C. Mahajan and Ms. Urmila Kapoor, the learned counsel for the petitioners is that there is no constitutional prohibition against the appointment of a Public Prosecutor to the Delhi Higher Judicial Service provided he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for such appointment. The contention is that the Public Prosecutors who had put in seven years practice at the Bar before joining their posts, are not persons already in the "service of the Union or State" within the meaning of Article 233(2) of the Constitution and as such they are eligible. Our attention is invited to the decision of the Supreme Court in *Rameshwar Dayal Vs. The State of Punjab and Others*, wherein it was held :-

".....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. The clause does not say how that standing must be reckoned and if an Advocate of the Punjab High Court is entitled to count the period of his practice in the Lahore High Court for determining his standing at the Bar, we see nothing in Article 233 which must .. lead to the exclusion of that period for determine his eligibility for appointments District Judge."

In that case the appointment of two of the respondents, namely, S. Harbans Singh who was Deputy Custodian, Evacuee Property and Shri P.P.R. Sawhney who was Officer on Special Duty and Administrator, Rajpura Township under the Ministry of Rehabilitation, at the time of their appointments as Additional District Judges under the Punjab High Court, was upheld as they had the necessary standing of seven years to be eligible under Clause 2 of Article 233 of the Constitution. The second submission is that Public Prosecutors remain advocates and members of the Bar even after their appointment. In support thereof, reliance is placed on Rule 49 of the Bar Council of India Rules, and the decision in "*Sudhansu Sekhar v. State & others*" 1976(1) S.L.R. 477 and *B.V. Chalapathi v. State of A.P.*, 1970 S.L.R. 192 On the other hand, the submission of Shri P.P.Rao.the learned counsel for the respondents is that the scheme of the Constitution enshrined in Article 233 rules out the appointment of any person from any service except by the method of promotion of officers belonging to the lower judicial service. Reliance is heavily placed on the two decisions of the Supreme Court in "*Chander Mohan v. State of U .P.* AIR 1966 S.C. 1987 and

Satya Narain Singh and Others Vs. High Court of Judicature at Allahabad and Others, . By the combined reading of the constitutional provisions and the statutory rules, the counsel urges that the petitioners who have taken full time employment as Public Prosecutors are not entitled to be considered and appointed to the Delhi Higher Judicial Service.

(4) It is apposite at this stage to recall the statutory provisions. Articles 233 to 237 of the Constitution of India deal with subordinate Courts. Article 233 which provides for the appointment of District Judges reads as follows:-

"233.Appointment of district judges.-(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. (2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

"c" and "Judicial Service" are defined in Article 236 as follows:- "236. Interpretation-In this Chapter- (a) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge; (b) the expression "judicial service" means 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."

(5) In exercise of the powers conferred by-the proviso to Article 309 of the Constitution read with the Government of India, Ministry of Home Affairs Notification No. 1/2/70-DH(S) dated May, 29, 1970, as amended by notification dated July 25, 1970 and all other powers enabling him in this behalf, the Lt. Governor of Delhi in consultation with the High Court of Delhi has notified on August 27, 1970 the rules called the Delhi Higher Judicial Service Rules (hereinafter referred to as the Rules). It, inter alia, provides for the constitution of a Civil Service called the Delhi Higher Judicial Service. The method of recruitment is contained in Part Iii of the Rules, The relevant Rules read as under :-

"5.Method of Recruitment:- (1) The recruitment of persons to the service from the Delhi Judicial Service shall be made by the Administrator in consultation with the High Court .(2) In regard to the persons not already in the Delhi Judicial Service, appointment to service shall be made by the Administrator on the recommendation of the High Court."

"6.(1) For initial recruitment to the service, the Administrator shall in consultation with the High Court, appoint persons to the service substantively from amongst the following :- (a) x x x x xx (b) District Judges and Additional District Judges whose names. may be recommended by their respective States

for appointment..."

"7.Regular recruitment :-Recruitment after the initial recruitment" shall be made :- (a) by promotion on the basis of selection from members of the Delhi Judicial Service, who have completed not less than. 10 years of service in the Delhi Judicial Service ; (b) by direct recruitment from the Bar. Provided that not more- than 1/3rd of the posts in the Service shall be held by direct recruits; Provided further that where a member of the Delhi Judicial Service is considered for such appointment under Clause (a) all persons senior to him in the Service shall also be considered, irrespective of the fact whether or not they fulfill the-requirements as to the minimum of 10 years service. Explanation .For calculating the period of 10 years of service for the purpose of Clause (a) with respect to officer appointed to the Delhi Judicial Service at the time of its initial constitution, service rendered by them in the cadre to which they belonged at the time of the initial recruitment to that service which Was counted for determining the seniority under Rule 11 of the Delhi Judicial Service Rules, shall also be counted."

"9.The qualifications for direct recruits shall be as follows :- (1) must be a citizen of India. (2) must have practiced as an Advocate for not less than seven years. (3) must have attained the age of 35 years and not attained the age of 45 years on the first January of the year in which his appointment is made."

(6) In exercise of the powers conferred by the proviso to Article 309 of the Constitution read with the Government of India, Ministry of Home Affairs Notification dated July 13, 1959, the Administrator after previous consultation with the Union Public Service Commission has framed and notified on January 27, 1978 rules regarding the method of recruitment and qualifications necessary for appointment to the posts of (1) Senior Prosecutor and (2). Prosecutor in the Law and Judicial Department, Delhi Administration, Delhi. Recruitment to the posts have been made thereafter and petitioner No. I and persons similarly situated have been duly appointed against the vacant posts. The appointment is initially on probation for a period of two years and thereafter on successful completion they are confirmed against permanent posts. The duties in the nutshell are that they represent the State in criminal cases in the "Magisterial Courts".

(7) The interpretation and scope of Articles 233 to 237 of the Constitution of India was considered by the Supreme Court in "Chander Mohan v. State of V.P.", reported in AIR 1966 S.C. 1987. The Registrar of the Allahabad High Court called for the applications for recruitment to ten vacancies in the U.P. Higher Judicial Service from Barristers, Advocates, Vakils and Pleaders of more than seven years standing, and from "judicial officers". "The expression "judicial officers" is a euphemism for the members of the Executive department who discharge some revenue and magisterial duties". Three of the "judicial officers" were selected by the Selection Committee and the High Court approved their selection. Some officers of the U.P. Civil Services (Judicial Branch) challenged their selection and the matter was ultimately decided by the Supreme Court. Subha Rao, C.J. who

spoke for the Supreme Court, expressed about the gist of the provisions contained in Articles 233 to 237 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 of the Union or of the State, and (ii) members of the 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 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."

His Lordship then posed the question :-

"c 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 ?"

It was answered in these words :-

" DOUBTLESS if Article 233(1) stood alone, it may be argued that the Governor may appoint any person as a district Judge, whether legally qualified or not, if he belongs to any service under the State. 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....."

Their Lordship then construed the expression "the service" in Clause (2) of Article 233 as the judicial service. Chander Mohan's case was quoted with approval in Satya Narain Singh and Others Vs. High Court of Judicature at Allahabad and Others, . It was reiterated that there are two sources of recruitment, namely, (i) service of the Union or the State and (ii) members of the Bar. In fact emphasis was supplied when quoting from the earlier judgment. Thus the sources of recruitment so far as the Delhi Higher Judicial Service is concerned are indicated in Clause (2) of Article 233 of the Constitution, namely, (i) the persons in the Delhi Judicial Service and (ii) Advocate or pleader of not less than seven years standing. These are the two methods of recruitment prescribed in Rule 7 quoted above. In other words, the recruitment is either by promotion on the basis of selection from members of the Delhi Judicial Service, who have completed not less than 10 years of service in the Delhi Judicial Service or by direct recruitment from the Bar. The qualifications for direct recruitment are laid down in Rule 9 including must have practiced as an Advocate

for not less than seven years.

(8) We are not inclined to go into the arguments of the counsel that the definition of judicial service given in Article 236(b) of the Constitution cannot be read in Article 233. It is concluded against the petitioners by the aforesaid two decisions of the Supreme Court. Rameshwar Dayal's case (supra) did not deal at all with the question whether "the service" in Clause (2) of Article 233 is any service of the Union or of the State. No challenge was directed in that case that S/Shri Harbans Singh and P.P.R. Sawhney were not eligible because of their being already in Service of the Union and were not at the time of appointment practicing advocates. Their Lordships were only called upon to pronounce in that case whether they were advocates or pleaders of seven years' standing.

(9) That takes us to the consideration of the question whether petitioner No. 1 and persons similarly situated are members of the Bar within the meaning of the aforesaid statutory provisions. Article 309 of the Constitution of India contains the power to make laws regulating the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State. It enables the appropriate legislature to regulate the recruitment and conditions of service of persons appointed to public services and to such posts. Proviso to Article 309 enables the President or the Governor or such person as they may direct, to make rules regulating the recruitment and conditions of service of persons appointed, to such services and posts until provision is made by an Act of appropriate legislature. The aforesaid Rules notified on January 27, 1978 and published in Delhi Gazette, Delhi Administration on February 9, 1978 are in exercise of the powers conferred by the proviso to Article 309 of the Constitution laying down the method of recruitment to a public service and posts in connection with the affairs of the Union or the State. It is for the posts of (1) Senior Prosecutor and (2) Prosecutor in the Law and Judicial Department, Delhi Administration, Delhi. The classification of the post is "General Central Service Group 'B', Gazetted, Non-Ministerial". Recruitment of the petitioners has been made against the civil posts and in accordance with the aforesaid recruitment rules. They have been regularly appointed against the vacant posts of Prosecutors under the Delhi Administration (Law and Justice Department), Delhi to represent the State in criminal cases in the "Magisterial Courts". They are required to give their whole time to the service of the Delhi Administration in the conduct of the criminal cases. They have to give up their practice as advocates and become the whole time employees.

(10) The expression "Public Prosecutor" is defined in Section 2, Clause (u) of the Code of Criminal Procedure, 1973 to mean "any person appointed u/s 24 and includes any person acting under the directions of a public prosecutor". Section 24 provides for the appointment of a Public Prosecutor. An advocate may be appointed as a Public Prosecutor for conducting any prosecutions or other proceedings on behalf of the Government, but then he does not place all his time and services at the disposal of the Government. Public Prosecutors and Additional

Public Prosecutors have been appointed from time to time for conducting individual or set of cases in Courts, prosecutions, appeals or other proceedings, but such appointment has to be contrasted to the appointment to a civil post. The duties and functions of the two may be identical, but the later category of public prosecutors go into the employment of the Union or State for representing the State and for conducting the prosecution on behalf of the State. This distinction was noticed by Chinnappa Reddy, J. in the case of B.V. Chalapathi (supra) relied upon by the counsel for the petitioners in these words :-

" I cannot Therefore hold that an advocate who is appointed as a Public Prosecutor holds a "civil post" within the meaning of Article 311 of the Constitution of India. I however guard myself against being understood to have expressed the opinion that persons appointed to the cadre of Assistant Public Prosecutors in the State Service who give up their practice as advocates and give their whole time to the service of the Government are not persons holding "civil post" within the meaning of Article 311 of the Constitution."

(11) Sudhansu Sekhar's case (supra) relied upon by the petitioners does not advance their case. In that case the petitioner was the Public Prosecutor and his term expired in December, 1973. It was not extended and another person (opposite party in that case) was appointed. The challenge was that the appointment of Public Prosecutor and Government Pleader could only be made in accordance with the procedure prescribed by Rule 5 of the Orissa Law Officers Rules, 1971. It was found that those rules are not statutory and the appointment by the State is not an appointment to any post in connection with the affairs of the Union or of any State in accordance with the rules under Article 309. It was found as a fact that the Law Officer remains an advocate of the Court even after appointment and the relationship between him and the State after appointment continues to be that of a counsel and a client. Such is not the case before us as the petitioners have been appointed against the posts of Prosecutors in accordance with the aforesaid Rules framed in exercise of the powers conferred under proviso to Article 309 and then assigned the duties of representing the State in criminal cases.

(12) The Advocate Act, 1961 is an Act to amend and consolidate the law relating to legal practitioners and to provide for the constitution of Bar Councils and an All India Bar Council. The Act in pith and substance is an enactment dealing with qualifications, enrolment, right to practice and discipline of advocates. Power has been conferred by Section 49 on the Bar Council of India to make rules for discharging its functions under the Act. Such rules may prescribe, inter alia, the standards of professional conduct and etiquette to be observed by advocates. Rules have been framed u/s 49(1)(c) of the Act read with the proviso thereto laying down the standards of Professional Conduct and Etiquette. Section VII in which Rule 49 is enacted relates to the restrictions on other employments. An advocate cannot personally engage in any business or be a Managing Director or Secretary of any company. He cannot be a full time salaried employee of any

person, government, firm, corporation or concern. He ceases to be an Advocate so long as he continues in such employment. A proviso was added with effect from February 9, 1980 to Rule 49 reading as follows :-

"Nothing in this rule shall apply to a Law Officer of the Central Government or the 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(l)(e) of the Act despite his being a full time salaried employee. Law Officer for the purpose of this rule 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 employee."

The petitioners who are Prosecutors may not cease to be Advocates under the Advocates Act, 1961 or the Bar Council Rules, yet they are not members of the Bar.

(13) The source of recruitment under the statutory Rules is by direct recruitment from the Bar. As the counter-affidavit rightly puts it the expression "from the Bar" has to be understood in the larger sense of self-employed professional engaged in practicing law. Traditionally, the members of the Bar are those who are free to accept any case that comes to them on such terms as to fees etc. as may be agreed upon between the client and a member of the Bar consistent with the service oriented character of the profession. An Advocate does not become the servant of the client or party who engages him but the true position is that he is a servant of or a limb in the administration of justice. He owes a duty to the Court to assist it in the administration of justice and is one of its officers. An advocate has a special responsibility as a member of the Bar and owes duty to the Court, to his client and to the profession to which he belongs. He has rights, privileges and duties, not as an employee of the party he represents, but because he belongs to the honourable profession of law. His decisions in the conduct of cases, cannot be circumscribed, controlled or restricted by his client like a master and servant. Law Officers employed by the Government as whole time servants with no right to engage themselves in private practice are not the persons who are ordinarily referred to as members of the Bar in the common parlance, notwithstanding that by way of exception to said Rule 49 such persons are allowed to appear in Courts only to represent the Government.

(14) "IT is undoubtedly true that the Public Prosecutor is an officer of the Court, as indeed every advocate practicing before the Court is and he owes an obligation to the Court to be fair and just : he must not introduce any personal interest in the prosecution nor must he be anxious to secure conviction at any cost..." (See Sheonandan Paswan Vs. State of Bihar and Others, . Yet the Public Prosecutor is not an independent officer like any advocate entitled to practice on his own free volition. He is appointed to the cadre of prosecutors against a post and is bound by the directions issued by the Government. Section 321 of the Code of Criminal Procedure, 1973 lays down the power of withdrawal from prosecution. Section 321 empowers the Government to withdraw any criminal

case on larger grounds of public policy. If the Government takes a decision to withdraw from the prosecution and communicates such direction to the Public Prosecutor, he is bound to act accordingly. It was observed in Sheonandan"s case (supra) :-

" THE Public Prosecutor would inter alias consider the grounds on which the government has taken the decision to withdraw from the prosecution and if he is satisfied that those grounds are legitimate, he may file an application for withdrawal from the prosecution. If on the other hand he takes the view that the grounds which have been given by the government are not legitimate he has two options available to him. He may inform the government that in his opinion, the grounds which have weighed with the government are not valid and that he should be relieved from the case and if this request of his is not granted, he may tender his resignation. Or else, he may make an application for withdrawal from the prosecution as directed by the government and at the hearing of the application he may offer his considered view to the court that the application is not sustainable on the grounds set out by him and leave it to the court to reject the application....."

(15) For the above reasons, the writ petition fails and is hereby dismissed with no order as to costs.