

(2022) 08 GUJ CK 0069

In the Gujarat High Court

Case No : R/Special Civil Application No. 1672, 9933 Of 2022, Civil Application
(For Direction) No. 1 Of 2022

Pruthvirajsinh Bhagirathsinh Jadeja

APPELLANT

Vs

State Of Gujarat & 2 Other(S)

RESPONDENT

Date of Decision : 17-08-2022

Acts Referred:

Constitution Of India, 1950 — Article 233, 233(2)
Recruitment Rules, 2017 — Rule 2(b), 3(b), 3(b)(ii), 5, 5(1), 5(3), 24, 49
Bar Council Of India Rules, 1975 — Rule 5, 43, 49
Karnataka Judicial Services (Recruitment) Rules, 1983 — Rule 2
Gujarat Judicial Service Recruitment Haryana Superior Judicial Service Rules, 2007 —
Rule 11, 11(b)
Gujarat Public Trusts Act, 1950 — Section 4
Advocates Act, 1961 — Section 1(a), 1(b), 1(e), 1(f), 2(a), 2(1)(b), 3, 3(1), 4, 17, 24,
24A, 26(1), 26(A), 28, 34(1A), 35, 35(3), 35(4), 37, 38, 42, 43, 49, 49(a)

Citation : (2022) 08 GUJ CK 0069

Hon'ble Judges : Biren Vaishnav, J

Bench : Single Bench

Advocate : KB Pujara, Utpal Dave, Kurven Desai, Vidhi J Bhatt

Final Decision : Disposed Of

Judgement

Biren Vaishnav, J

1. RULE returnable forthwith.
2. Mr.Kurven Desai learned AGP waives service of notice of Rule on behalf of the respondent nos.1 and 2 and Ms.Vidhi Bhatt learned advocate waives service of notice of Rule on behalf of the respondent no.3.
3. Present petitions are taken up for final hearing with the consent of the learned Advocates for the respective parties as a neat interpretation of law is involved.
4. FACTS IN BRIEF ARE AS UNDER:
5. In Special Civil Application No.1672 of 2022 the Petitioner holds the

qualification of B.A., LL.B. He was enrolled as an Advocate on 20.6.2010. The Petitioner was appointed as an assistant Charity Commissioner on 21.12.2019.

6. The Gujarat Public Services Commission ("GPSC" for short) issued an Advertisement inviting applications for one post of Joint Charity Commissioner, Class-I in the General State Service, in the Charity Organization, Gujarat State under the Legal Department. The last date of submitting the Applications was 17.2.2021. The Petitioner applied for the post, appeared in the Preliminary Examinations and the exercise of verification of documents was undergone.

7. On 30.10.2021 the GPSC published a list of ineligible candidates wherein the name of the present petitioner and the Petitioner of Special Civil Application No.9933 of 2022 figured with a remark "Not possessing the requisite experience as Advocate as per Recruitment Rules".

8. This communication is impugned in both the Petitions.

9. Facts of Special Civil Application No.9933 of 2022 are different only to the extent of details of date of enrollment and date of joining. The Petitioner therein was enrolled as an Advocate on 23.2.1998 but the relevant date for our purposes as per the judgement of the Supreme Court in the case of V.Sudeer vs Bar Council Of India is considered as 29.1.1997.

10. The Petitioner was appointed as Assistant Charity Commissioner on 21.06.2007.

11. The Petitioner of Special Civil Application No.1672 of 2022, as per the reply of the GPSC is not possessing the requisite experience as an Advocate as according to the GPSC he has practiced as Advocate for 9 years and 6 months only i.e. not the required minimum of 10 years and the Petitioner of Special Civil Application No.9933 of 2022 has the requisite experience of 9 years and 3 months which also is less than 10 years as required by the Recruitment Rules.

12. Mr.K.B.Pujara learned Advocate for the Petitioner of Special Civil Application No.1672 of 2022 would make the following submissions.

12.1 The Petitioner is fully qualified and eligible for the post in question and the objections raised by the GPSC are wholly illegal.

12.2 As per the provisions of the Gujarat Public Trusts Act, 1950 and particularly Section 4 thereof the qualifications for the post of Charity Commissioner as well as Joint Charity Commissioner provide amongst others that a person should have been for not less than 10 years enrolled as an advocate. The Petitioner whose date of enrollment is 20.06.2010 therefore on the date of the Application i.e.17.2.2021 had been enrolled as an Advocate for more than 10 years.

12.3 Mr.Pujara would further submit that even as per the Recruitment Rules namely the Joint Charity Commissioner, Class-I Recruitment Rules, 2017 in order to be eligible for direct selection to the post of Joint Charity Commissioner, Class-I the candidate shall have not less than ten years as an advocate enrolled under

the Advocates Act, 1961. Admittedly therefore even according to the Recruitment Rules the Petitioner was qualified for the post in question.

12.4 Reliance was also placed on the relevant provisions of the Advocates Act, 1961 as well as the Bar Council Of India Rules to submit that the Petitioner was qualified. Section 2(1)(a) of the Advocates Act, 1961 defines that "advocate" means an advocate entered in any roll under the provisions of the Act. Section 24 provides for a person who may be admitted on the rolls. Section 17 provides for the State Bar councils to maintain roll of advocates and Section 26(A) provides for a contingency of removal from the State rolls. Section 35 of the Advocates Act, 1961 would provide for suspension of the advocates. Section 49(a) would provide for conditions for the right to practice and in exercise of this powers in the Bar Council Of India Rules the Chapter on Restrictions on Employment would provide that when the advocate is employed he ceases to practice and his name is suspended till his employed.

12.5 These provisions are placed to support the submission that the enrollment of the Advocate continues until his name is removed from the roll of Advocates and when he takes up employment he ceases to practice but the enrollment continues. In other words, since the requirement of the Recruitment Rules and the Trust Act provide that the Advocate must be enrolled for 10 years is satisfied and merely because he is employed him enrollment as an Advocate wouldn't cease to make his ineligible because of his being appointed as an Assistant Charity Commissioner. The enrollment continues even if he is employed as his name from the rolls is not removed but only kept under suspension.

12.6 In support of his submissions Mr.Pujara would rely upon a decision of the Kerala High Court annexed to the Petition in the case of R.Sreekanth and Others versus Kerala Public Service Commission rendered in Writ Petition no.31585 of 2009 vide judgement dated 6.7.2010.

12.7 Mr.Pujara would submit based on the decision that merely being employed would not result in ceasing of enrollment as an Advocate as defined under the Advocates Act, 1961. He would rely on paras 4 to 8 and 12 to 15 of the said decision which read as under:

"4. While the petitioners are thus continuing in Government Service, by Ext.P1 notification, Public Service Commission invited applications for appointment to the post of Legal Assistant Gr-II in the Law Department of the Government of Kerala. Ext.P14 is the Special Rules, viz., the Kerala Secretariat Subordinate Service Rules, which prescribes the qualification for the post of Legal Assistant Gr.II. Ext.P1 vacancy notification incorporates the qualification prescribed, which is extracted below for reference.

"7. Qualifications:

(1) Degree in Law of any recognized University (2) Pass in the Bar Council Examination OR Enrollment as an Advocate.

Note:-(i) A Pass in the 'Apprentice Examination' of the Madras High Court or the possession of the Enrollment Certificate of Mysore High Court will be considered as equivalent to a pass in the Bar Council Examination.

(ii) Candidates belonging to the scheduled Castes or Scheduled Tribes (in the absence of qualified persons, from among them) shall not be required to possess the qualifications prescribed in

(2) above."

5. In response to Ext.P1 notification, the petitioners WP(C) No.28144, 29672, 31585 of 2009 & 7164 of 2010 submitted their applications. They appeared for the written test held on 10/01/2009. In the meantime, the PSC issued Ext.P15 to the Government of Kerala stating that a doubt has arisen whether a candidate, who was enrolled once as an Advocate and later has taken up an employment under the Government with or without getting the enrollment suspended or has engaged in any other profession or calling, is eligible to be considered for the post. The Government was requested to examine the issue and clarify the doubt. Accordingly, the Government considered the matter and issued Ext.P16 dated 04/07/2008 clarifying that a candidate, who was enrolled once as an Advocate and later taken up employment with or without suspending practice continues in the roll of advocates and as such, is eligible to be considered for appointment to the post of Legal Assistant Grade-II. Despite the clarification issued by the Government, the PSC passed Ext.P18(a) resolution dated 17/11/2008 which reads as under:-

"As on the last date for receipt of application, the candidate should have enrollment with the Bar Council. Candidates having an employment in Govt. service as on the date will not be considered as having enrollment with the Bar Council."

6. Subsequently, the petitioners were issued Exts.P8 to P10 WP(C) No.28144, 29672, 31585 of 2009 & 7164 of 2010 memos dated 15/09/2009 requiring them to produce the documents mentioned therein, with a note to the effect that candidates, who were employed in Government Service at the time of submission of their applications, will not be treated as having enrollment with the Bar Council. Thereupon, petitioners submitted Exts.P11 to P13 representations to the PSC against the note incorporated in Exts.P8 to P10 memos, which had the effect of rendering them ineligible for the post. Response was not forthcoming. Therefore, this writ petition was filed on 15/11/2009 seeking mainly to quash Ext.P18(a) resolution of the PSC and the note added to Exts.P8 to P10 memos and to declare that the decision of the PSC to treat them ineligible to be considered for the post of Legal Assistant Gr.II is illegal.

7. Pursuant to the interim orders passed by this Court, the petitioners were permitted to appear for the interview. However, when ranked list was published on 07/06/2010, their results were withheld. Contention raised by the learned Senior counsel for the petitioners is that in view of the provisions contained in

the Advocates Act, 1961 (hereinafter referred to as the Act for short), and the Rules, an Advocate, who takes up any employment, shall WP(C) No.28144, 29672, 31585 of 2009 & 7164 of 2010 intimate the fact to the Bar Council on whose roll his name appears and that thereupon, he shall only cease to practice as an Advocate so long as he continues to be in employment. It is stated that an Advocate whose right to practice is suspended, desires to resume practice, he has only to apply to the Secretary of the Bar Council for resumption of practice in compliance with the provisions of the Rules and that thereupon the Enrollment Committee is to take a decision in the matter and return the certificates surrendered by the Advocate concerned. It is stated that suspension contemplated by the Act and the Rules is only suspension of the right to practice and the suspension does not amount to suspension of the enrollment itself.

8. It is contended that since the qualification prescribed in Ext.P14 Special Rules, which is also incorporated in Ext.P1 vacancy notification, only requires "enrollment as an Advocate" and as the petitioners still continue to be enrolled on the rolls of the Bar Council of Kerala, they are eligible candidates and are entitled to be included in the ranked list that was published by the PSC on 07/06/2010. Learned Senior Counsel also contended that in response to Ext.P15 clarification sought for by the PSC, the WP(C) No.28144, 29672, 31585 of 2009 & 7164 of 2010 Government, the appointing authority, clarified by Ext.P16 that candidates like the petitioners are eligible in terms of the Special Rules and that in such circumstances, the PSC should not have resolved that they are ineligible in terms of the provisions contained in the Special Rules.

...

...

12. The main issue that arises for consideration is the legality of Ext.P18(a) resolution, where the PSC has decided that employees in Government Service like the petitioners are ineligible to be candidates in response to Ext.P1 notification. Ext.P1 notification incorporates the provisions contained in Ext.P14 Special Rules, and the qualifications prescribed, insofar as it is relevant, are a Degree of Law of any recognised University, a pass in the Bar Council Examination or enrollment as an Advocate.

13. The validity of Ext.P18 (a) resolution of the PSC will depend upon the answer to the question whether, in the light of the provisions of the Act and the Rules, the petitioners are candidates having enrollment as Advocates. Admittedly, all the petitioners have enrolled themselves on the rolls of the Bar Council of Kerala in terms of the provisions contained in the Act and the Rules referred to above.

14. These Rules are framed by the Bar Council of India in terms of the provisions contained in Section 49 of the Act. In terms of the provisions contained in the Act and the Rules, Advocate means a person whose name has been entered on the rolls under the provisions of the Act. Rule 49 of Part-VI of the 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 practice, and shall, on taking up any employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practice as an advocate so long as he continues in such employment." (emphasis supplied)

Rule 5 of Chapter III of Part-VI of the Rules, which is of relevance, also reads as under:-

"5(1) : An advocate who voluntarily suspends his practice for any reason whatsoever, shall intimate by registered post to the State Bar Council on the rolls of which his name is entered, of such suspension together with his certificate of enrollment in original. (2) Whenever any such advocate who has suspended his practice desires to resume his practice, he shall apply to the Secretary of the State Bar Council for resumption of practice, along with an affidavit stating whether he has incurred any of the disqualifications under Section 24A, Chapter III of the Act during the period of suspension.

(3) The Enrollment Committee of the State Bar Council may order the resumption of his practice and return the certificate to him with necessary endorsement. If the Enrollment Committee is of the view that the advocate has incurred any of the disqualifications the Committee shall refer the matter under proviso to Section 26(1) of the Act.

(4) On suspension and resumption of practice the Secretary shall act in terms of rule 24 of Part IX." (emphasis supplied)

15. A reading of Rules 49 and 5, which have been extracted above, show that if an Advocate accepts employment as a full time salaried employee, he shall intimate the fact to the Bar Council concerned and shall thereupon "cease to practice as an Advocate so long as he continues in employment". When he is desirous of resuming practice, he has to make an application as per Rule 5 extracted above and on receipt of the application, the Enrollment Committee of the Bar Council is to consider the matter and pass order of resumption and return the enrollment certificate surrendered by him in terms of Rule 5(1). Therefore, on accepting employment when an application is made to the Bar Council, what is suspended is not the enrollment as such, but only the right of the Advocate concerned to practice as Advocate and he does not cease to have his enrollment on the rolls of the Bar Council. In terms of Rule 5(3), when an application for resumption of practice is made, all that is required is that the Enrollment Committee should decide as to whether the Advocate is entitled to resume his practice and if the decision is favourable to him, without anything further, the Bar Council has to return the certificate to the candidate concerned. The Rules do not contemplate any fresh enrollment for resumption of practice. If that be the effect of Rules 49 & 5 extracted above, the fact that the petitioners have accepted employment in the Government Service and that their right to practice is suspended, does not result in depriving them of their enrollment as

Advocates on the rolls of the Bar Council.”

13. Mr.Pujara Learned Advocate would submit that after the opinion sought from the Legal Department is read what is evident is that it is an accepted fact that there is no express provision in the Rules that a candidate should be a practicing advocate for not less than 10 years and therefore the stand of the GPSC to bring in the criteria of experience cannot be read into the rules when the prescription is only enrollment.

FACTS OF SPECIAL CIVIL APPLICATION NO.9933 of 2022

14.Mr.Chintan Gandhi Learned Advocate appearing for the Petitioner of Special Civil Application No.9933 of 2022 in addition to the submissions made by Mr Pujara would submit that the certificate of the Bar Council specifically provided the date as 21.09.1997 and in accordance with the decision of the Supreme Court in the case of V.Sudeer vs Bar Council Of India reported in 1999 (3) SCC 176 the Petitioner has admittedly completed 10 years of enrollment and is entitled to be considered for appointment to the post of Joint Charity Commissioner.

15. Ms.Vidhi J Bhatt has appeared for the GPSC in both the Petitions and made submissions justifying the overlooking of the case of the Petitioners for the appointment on the ground that the Petitioners on the date of the Application excluding their service period were enrolled as advocates for a period of 9 years and 6 months and 9 years and 3 months respectively and therefore were not eligible as the requirement was 10 years of enrollment.

Enrollment as an advocate is a must for 10 years. As per the Recruitment Rules especially Rule 3(b)(ii) a candidate for recruitment to the post is required to have not less than 10 years as an advocate enrolled under the Advocates Act,1961. Though the rules do not provide that a candidate should be an advocate practicing law for not less than 10 years, the rules have to be construed in a purposive manner as only then the purpose and intention can be achieved.

16.She would submit that the post of the Joint Charity Commissioner is a very important post and therefore a person to be appointed should be one who has been not less than 10 years as an advocate enrolled meaning thereby that before the relevant date he should have the requisite experience of practicing as an advocate for 10 years.

17.Ms Bhatt reading the provisions of the Advocates Act,1961 especially the definition of the term “advocate” would submit that the said definition was under consideration before the Supreme Court in the case of Deepak Aggarwal versus Keshav Kaushik and Others reported in 2013 (5) SCC 277. She would extensively read out several paragraphs of the Judgement to submit that enrollment as an advocate essentially means an advocate one who is actually practicing before Courts and if he is employed and not acting or pleading in terms of his engagement in employment but does other kinds of work then he becomes a

mere employee and not an “advocate” as the expression as defined under the Advocates Act, 1961.

18. She would rely upon Paras 52, 57, 58, 61, 62, 66 to 68, 70, 89, 91, 92, 94, 96, 98, 99 and 102 of the decision in the case of Deepak Aggarwal (supra).

19. Ms. Bhatt would distinguish the judgement of the Kerala High Court in the case of R. Sreekanth (supra) and submit that the qualifications therein did not prescribe for any minimum experience and therefore the question of experience as decided by the Supreme Court was distinguished. When the Recruitment Rules of the present case is considered there is a specific stipulation of minimum of 10 years.

20. Mr. Kurven Desai Learned Assistant Government Pleader would submit that the Legal Department had opined clearly that though the literal meaning of the rule requires only enrollment as an advocate looking to the nature of the post of Joint Charity Commissioner and the duties that need to be performed the provision has to be construed that a person has to be practicing as an advocate for 10 years in order to be eligible for appointment.

21. Considered the submissions made by the Learned Advocates for the respective parties.

22. Before getting into the aspect of considering the question of interpretations as canvassed it would be in the fitness of things to reproduce the relevant provisions of Rules and Sections of the Recruitment Rules, The Gujarat Public Trusts Act, 1950, Advocates Act, 1961 and the Bar Council of India Rules.

23. Section 4 of the Gujarat Public Trusts Act, 1950 reads as under:

5. Qualifications for appointment of Charity Commissioner and Joint Charity Commissioner.- (1) A person to be appointed as the Charity Commissioner shall be one -

...

...

(b) who has been for not less than ten years

(i) an advocate enrolled under Indian Bar Councils Act, 1926 (XXXVIII of 1926)

(ii) an attorney of the High Court, or

(iii) a pleader enrolled under the Bombay Pleaders Act, 1920 (Bom. XVII of 1920)

24. Rule 2 (b) and Rule 3 (b) of the Joint Charity Commissioner Class, I, in the Charity Organization, Gujarat State reads as under:

2. Definitions.?(1) In this Act, unless the context otherwise requires,?

(a) “advocate” means an advocate entered in any roll under the provisions of this

Act;

(b) "appointed day", in relation to any provision of this Act, means the day on which that provision comes into force;

[***]

(d) "Bar Council" means a Bar Council constituted under this Act;

(e) "Bar Council of India" means the Bar Council constituted under section 4 for the territories to which this Act extends; 2

[***]

(g) "High Court", except in sub-section (1) 3 [and sub-section (1A)] of section 34 and in sections 42 and 43, does not include a court of the Judicial Commissioner, and, in relation to a State Bar Council, means,--

(i) in the case of a Bar Council constituted for a State or for a State and one or more Union territories, the High Court for the State;

(ii) in the case of the Bar Council constituted for Delhi, 4 [the High Court of Delhi];

(h) "law graduate" means a person who has obtained a bachelor's degree in law from any University established by law in India;

(i) "legal practitioner" means an advocate 5 [or vakil] of any High Court, a pleader, mukhtar or revenue agent;

(j) "prescribed" means prescribed by rules made under this Act;

(k) "roll" means a roll of advocates prepared and maintained under this Act;

(l) "State" does not include a Union territory;

(m) "State Bar Council" means a Bar Council constituted under section 3;

(n) "State roll" means a roll of advocates prepared and maintained by a State Bar Council under section 17.

Section 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 5 [including persons, being citizens 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, 1 [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) the seniority of an advocate referred to in clause (a) of sub-section (1) shall be determined in accordance with his date of enrollment under the Indian Bar Councils Act, 1926 (38 of 1926);

(b) the seniority of any person who was a senior advocate of the Supreme Court immediately before the appointed day shall, for the purposes of the first part of the State roll, be determined in accordance with such principles as the Bar Council of India may specify; 2

[***]

(d) the seniority of any other person who, on or after the appointed day, is enrolled as a senior advocate or is admitted as an advocate shall be determined by the date of such enrollment or admission, as the case may be.

[(e) notwithstanding anything contained in clause (a), the seniority of an attorney enrolled [whether before or after the commencement of the Advocates (Amendment) Act, 1980 (47 of 1980)] as an advocate shall be determined in accordance with the date of his enrollment as an attorney.]

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

...

24. Persons who may be admitted as advocates on a State roll.?(1) Subject to the provisions of this Act, and the rules made thereunder, 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—

(i) before the 1 [12th day of March, 1967], from any University in the territory of India; or

(ii) before the 15th day of August, 1947, from any University in any area which was comprised before that date within India as defined by the Government of India Act, 1935; or

[(iii) after the 12th day of March, 1967, save as provided in sub-clause

(iia), after undergoing a three-year course of study in law from any University in India which is recognised for the purposes of this Act by the Bar Council of India; or

(iia) after undergoing a course of study in law, the duration of which is not less than two academic years commencing from the academic year 1967-68 or any earlier academic year from any University in India which is recognised for the purposes of this Act by the Bar Council of India; or] 3

[(iv) in any other case, from any University outside the territory of India, if the degree is recognised for the purposes of this Act by the Bar Council of India; or]

[he is a barrister and is called to the Bar on or before the 31st day of December, 1976; 5 [or has passed passed the article clerk's examination or any other examination specified by the High Court at Bombay or Calcutta for enrollment as an attorney of that High Court;] or has obtained such other foreign qualification in law as is recognised by the Bar Council of India for the purpose of admission as an advocate under this Act];

[***]

(e) he fulfills such other conditions as may be specified in the rules made by the State Bar Council under this Chapter;

[(f) he has paid, in respect of the enrollment, stamp duty, if any, chargeable under the Indian Stamp Act, 1899 (2 of 1899), and an enrollment fee payable to the State Bar Council of 8 [six hundred rupees and to the Bar Council of India, one hundred and fifty rupees by way of a bank draft drawn in favour of that Council:]

Provided that where such person is a member of the Scheduled Castes or the Scheduled Tribes and produces a certificate to that effect from such authority as may be prescribed, the enrollment fee payable by him to the State Bar Council shall be 1 [one hundred rupees and to the Bar Council of India, twenty-five rupees.]

[Explanation.?For the purposes of this sub-section, a person shall be deemed to have obtained a degree in law from a University in India on the date on which the results of the examination for that degree are published by the University on its notice board or otherwise declaring him to have passed that examination.]

(2) Notwithstanding anything contained in sub-section (1), [a vakil or a pleader who is a law graduate] may be admitted as an advocate on a State roll if he—

(a) makes an application for such enrollment in accordance with the provisions of this Act, not later than two years from the appointed day; and

(b) fulfills the conditions specified in clauses (a), (b), (e) and (f) of sub-section (1).

[(3) Notwithstanding anything contained in sub-section (1) a person who—

(a) 5 *** has, for at least three years, been a vakil or a pleader or a mukhtar, or was entitled at any time to be enrolled under any law 6 *** as an advocate of a High Court (including a High Court of a former Part B State) or of a Court of Judicial Commissioner in any Union territory; or 7

[(aa) before the 1st day of December, 1961, was entitled otherwise than as an advocate to practise the the profession of law (whether by way of pleading or acting or both) by virtue of the provisions of any law, or who would have been so entitled had he not been in public service on the said date; or]

[***]

(c) before the 1st day of April, 1937, has been an advocate of any High Court in any area which was comprised within Burma as defined in the Government of India Act, 1935 (25 & 26 Geo. 5 C 42); or

(d) is entitled to be enrolled as an advocate under any rule made by the Bar Council of India in this behalf, may be admitted as an advocate on a State roll if he—

(i) makes an application for such enrollment in accordance with the provisions of this Act; and

(ii) fulfills the conditions specified in clauses (a), (b), (e) and (f) of sub-section (1).]

26. Disposal of applications for admission as an advocate.?

(1) A State Bar Council shall refer every application for admission as an advocate to its enrollment committee, and subject to the provisions of sub-sections (2) and (3) 3 [and to any direction that may be given in writing by the State Bar Council in this behalf], such committee shall dispose of the application in the prescribed manner: 4

[Provided that the Bar Council of India may, if satisfied, either on a reference made to it in this behalf or otherwise, that any person has got his name entered on the roll of advocates by misrepresentation as to an essential fact or by fraud or undue influence, remove the name of such person from the roll of advocates after giving him an opportunity of being heard.]

(2) Where the enrollment committee of a State Bar Council proposes to refuse any such application, it shall refer the application for opinion to the Bar Council of India and every such reference shall be accompanied by a statement of the grounds in support of the refusal of the application.

(3) The enrollment committee of a State Bar Council shall dispose of any application referred to the Bar Council of India under sub-section (2) in conformity with the opinion of the Bar Council of India.

[(4) Where the enrollment committee of a State Bar Council has refused any application for admission as an advocate on its roll, the State Bar Council shall, as soon as may be, send intimation to all other State Bar Councils about such refusal stating the name, address and qualifications of the person whose application was refused and the grounds for the refusal.]

35. Punishment of advocates for misconduct.?

(1) Where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee.

[(1A) The State Bar Council may, either of its own motion or on application made to it by any person interested, withdraw a proceeding pending before its disciplinary committee and direct the inquiry to be made by any other disciplinary committee of that State Bar Council.]

(2) The disciplinary committee of a State Bar Council 4 *** shall fix a date for the hearing of the case and shall cause a notice thereof to be given to the advocate concerned and to the Advocate-General of the State.

(3) The disciplinary committee of a State Bar Council after giving the advocate concerned and the Advocate-General an opportunity of being heard, may make any of the following orders, namely:?

(a) dismiss the complaint or, where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed;

(b) reprimand the advocate;

(c) suspend the advocate from practice for such period as it may deem fit;

(d) remove the name of the advocate from the State roll of advocates.

(4) Where an advocate is suspended from practice under clause (c) of sub-section (3), he shall, during the period of suspension, be debarred from practicing in any court or before any authority or person in India.

(5) Where any notice is issued to the Advocate-General under sub-section

(2) , the Advocate-General may appear before the disciplinary committee of the State Bar Council either in person or through any advocate appearing on his

behalf.

[Explanation.?In this section, 3 [section 37 and section 38], the expressions "Advocate-General" and "Advocate-General of the State" shall, in relation to the Union territory of Delhi, mean the Additional Solicitor General of India.]

PART VI Standard of Professional Conduct and Etiquette 25. Construction and interpretation of the term "enrolled as an Advocate" is relevant for our purposes.

26. Reading the term in context of the Recruitment Rules would indicate that in order to be eligible to be considered for appointment as a Joint Charity Commissioner the requirement is that a candidate has to have not less than ten years as an Advocate enrolled under the Advocates Act, 1961.

27. The definition of the term Advocate means an advocate entered in any roll under the provisions of the Act. The submission of the learned advocates for the Petitioners that whilst in employment the person only ceases to practice and the enrollment does remain but is suspended and therefore for the entire period even when in employment is "enrollment as an advocate" for the purposes of eligibility is to be considered in light of the decision of the Kerala High Court in the case of R. Sreekanth (supra) and the decision of the Supreme Court in the case of Deepak Aggarwal (supra).

28. Before the Kerala High Court the petitioners were enrolled as Advocates on the rolls of the Bar Council of Kerala and while practicing as Advocates they were appointed in different departments. They therefore had surrendered their right to practice and their certificates. The Kerala Public Service Commission invited applications for appointment to the post of Legal Assistant Gr. II in the Law Department Of the Government of Kerala. The qualification prescribed was a Degree in Law of any recognised University; Pass in the Bar Council Examination OR Enrollment as an Advocate. The government issued a clarification that a candidate who was enrolled as an advocate but had later taken an employment was eligible as he continues to be on the rolls of the advocates. The Commission opined otherwise holding that those in employment on the date of application were not eligible. The submission on behalf of the Petitioners was that suspension as a result of surrender of certificate of practice was only suspension of right to practice and does not amount to suspension of enrollment itself.

29. It is based on this which was considered and the Court held what is suspended during the employment of the advocate in service is not enrollment because suspension of certificate of practice does not cease to have his enrollment on the rolls of the Bar Council.

30. This according to the present Petitioners would be of a help in as much as though the Petitioners are working as Assistant Charity Commissioners and irrespective of whether they have or have not surrendered their certificate to practice their enrollment as Advocate on the rolls does not cease and therefore they having continued to be enrolled at the Bar for more than 10 years as their

names are not struck off or removed would not make them ineligible for appointment. As the Recruitment Rules and the provisions of the Gujarat Public Trusts Act, 1950 only provide for 10 years' enrollment which they satisfy, the concept of "not practicing as advocate for 10 years" is beyond the Rules and can't make them ineligible.

31. Before I go to the judgement of the Supreme Court in the case of Deepak Aggarwal (supra) what is required to be noticed in the judgement of the Kerala High Court is that the rules only required enrollment as an Advocate. There was no minimum stipulation of number of years of such enrollment as an Advocate was provided for. Ms. Bhatt is therefore right in her submission that the Court had given the decision in light of the qualification as required in the rule under consideration which was only enrollment.

32. In the decision of the Supreme Court in the case of Deepak Aggarwal (supra) what was under consideration before the Supreme Court was what is meant by "advocate" or "pleader" under Article 233(2) of the Constitution Of India. The question was in context of a challenge to the appointments as District Judges where whether District Attorneys or Government Advocates who were in full time employment of Government could be considered for appointment as District Judges.

33. The Rule that was considered for interpretation was one which prescribed qualification that a candidate must have been duly enrolled as an advocate and has practiced for a period of not less than seven years. One of the submissions on behalf of the successful petitioners before the Delhi High Court had submitted that the term "must have been as an advocate for at least seven years" must be read to mean seven years immediately preceding the appointment and it cannot mean seven years in any time past.

34. The question was whether a Public Prosecutor/Assistant Public Prosecutor who is in full time employment ceases to be an advocate within the meaning of Article 233(2) of the Constitution Of India. Considering the decision of the Supreme Court in the case of Sushma Suri v Govt. (NCT of Delhi), 1999 (1) SCC 330, and Para 6 thereof the Court held that if a person on being enrolled as an advocate ceases to practise and takes up employment, such a person can by no stretch of imagination be termed as an advocate.

35. Rule 49 of the Bar Council of India Rules were also considered and it was observed that if an Advocate by virtue of taking up employment does not plead or act as a pleader then as per the terms of his engagement that he becomes a mere employee and therefore the Bar Council has understood the expression "advocate" as one who is actually practicing before courts.

36. In Para 67 of the decision in the case of Deepak Aggarwal (supra) the Court considered other decisions wherein Section 2(a) of the Advocates Act was interpreted and it was held that no doubt, Section 2(a) of the Advocates Act, 1961 provides that "an advocate" means an advocate entered in any roll under the

provisions of Advocates Act. That does not mean the advocate who has surrendered the certificate of practice to the State Bar Council and who has suspended practice also can be treated as an advocate or as a practicing advocate. The Court drew support from the provisions of sub-section(4) of Section 35 of the Act wherein it is provided that where an Advocate is suspended from practice,during the period of suspension he is debarred from practicing in any court and therefore if the object of surrendering certificate of practise is considered then during such a period such a person ceases to be an advocate.

37.The continuance of his name on the rolls of the Bar Council is of no consequence as far as his right to practice is considered and such a person cannot designate himself as an advocate.

38. Relevant paragraphs of the judgment in case of Deepak Aggarwal (supra) read as under:

"52.The question that has been raised before us is whether a Public Prosecutor/ Assistant Public Prosecutor/District Attorney/Assistant District Attorney/Deputy Advocate General, who is in full time employ of the Government, ceases to be an advocate or pleader within the meaning of Article 233(2) of the Constitution.

57.In Sushma Suri⁶, a three-Judge Bench of this Court considered the meaning of the expression "advocate" occurring in Article 233 (2) of the Constitution and unamended Rule 49 of the BCI Rules. In paragraph 6 of the Report (Pg. 335) this Court held as under :

"6. If a person on being enrolled as an advocate ceases to practise law and takes up an employment, such a person can by no stretch of imagination be termed as an advocate. However, if a person who is on the rolls of any Bar Council is engaged either by employment or otherwise of the Union or the State or any corporate body or person practices before a court as an advocate for and on behalf of such Government, corporation or authority or person, the question is whether such a person also answers the description of an advocate under the Act. That is the precise question arising for our consideration in this case."

58.Then in paragraph 8 of the Report, this Court observed that for the purposes of the 1961 Act and the BCI Rules, a law officer (Public Prosecutor or Government Pleader) would continue to be an advocate. Not accepting the view of Delhi High Court in Oma Shanker Sharma v. Delhi Administration case (C.W.P. No. 1961 of 1987), this Court having regard to the object of recruitment under Article 233(2) held in paragraph 9 (Pg.336):

"9.To restrict it to advocates who are not engaged in the manner stated by us earlier in this order is too narrow a view, for the object of recruitment is to get persons of necessary qualification, experience and knowledge of life. 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."

61. In Satish Kumar Sharma, the facts were these : the appellant was initially appointed as Assistant (Legal) by the Himachal Pradesh State Electricity Board (for short, 'Board'); the said post was re-designated as Law Officer Grade-II. Later on, the appellant was allowed to act as an advocate of the Board and, accordingly, his application seeking enrollment was sent by the Board to the Bar Council of Himachal Pradesh. The Bar Council of Himachal Pradesh communicated to the Board that the appellant did not meet the requirements of the Rules; he should be first designated as Law Officer and the order of appointment and the terms of such appointment be communicated. Consequent on the communication received from the Bar Council of Himachal Pradesh, the Board designated the appellant as Law Officer. The Bar Council of Himachal Pradesh issued a certificate of enrollment dated 9.7.1984 to the appellant. Subsequently, the appellant was given ad hoc promotion to the post of Under Secretary, (Legal)-cum-Law Officer and then promoted as Under Secretary, (Legal)-cum- Law Officer on officiating basis. Bar Council of Himachal Pradesh issued a notice to the appellant to show cause why his enrollment be not withdrawn. The appellant responded to the said notice. In the meanwhile, appellant was also promoted as Deputy Secretary (Legal)-cum-Law Officer on ad hoc basis. On 12.5.1996, the Bar Council of Himachal Pradesh passed an order withdrawing the enrollment of the appellant with immediate effect and directed him to surrender the enrollment certificate within 15 days therefrom. It was this resolution which was challenged by the appellant before the Himachal Pradesh High Court. However, he was unsuccessful before the High Court and he approached this Court. This Court referred to Sections 24, 28 and 49 of the 1961 Act and Rule 49 of the BCI Rules.

62. This Court also considered the terms of appointment, nature of duties and service conditions relating to the appellant and in paragraph 17 (Pg. 377) of the Report noted as follows :

"17. Looking to the various appointment/ promotion orders 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 enrollment 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.”

...

...

66. The Karnataka High Court in *Mallaraddi H. Itagi and Others v. The High Court of Karnataka, Bangalore and Another*[17] was, inter alia, concerned with the question whether the petitioners, who were working as either Assistant Public Prosecutors or Senior Assistant Public Prosecutors or Public Prosecutors, were eligible to be considered for appointment as District Judges under Article 233(2) of the Constitution and Rule 2 of Karnataka Judicial Services (Recruitment) Rules, 1983 (for short, 'Karnataka Recruitment Rules'). The Division Bench of the High Court considered the relevant provisions and the decisions of this Court in *Sushma Suri*⁶ and *Satya Narain Singh*⁵. The High Court held that having regard to the provisions in the Karnataka Recruitment Rules, the petitioners were civil servants in the employment of the State Government and could not be treated as practicing advocates from the date they were appointed to the post of Assistant Public Prosecutors. The High Court took into consideration Rule 49 of the BCI Rules and held as under: (Pg. 86- 88):

“11. ...The petitioners 1 to 9 came to be appointed as Assistant Public Prosecutors/Senior Assistant Public Prosecutors/Public Prosecutors in terms of the Recruitment Rules framed by the State Government. Therefore, in terms of the main provision contained in Rule 49 of the Bar Council of India Rules, the petitioners on their appointment as Assistant Public Prosecutors ceased to be practicing Advocates. Further, as noticed by us earlier, when once the petitioners had surrendered their Certificate of Practice and suspended their practice in terms of Rule 5 of the Bar Council of India Rules, it is not possible to take the view that they still continue to be practicing Advocates. The rules which prescribe the qualification for appointment to the post of District Judges by direct recruitment provides that an applicant must be practicing on the last date fixed for submission of application, as an Advocate and must have so practiced for not less than 7 years as on such date. The case of *Sushma Suri*, supra, does not deal with the situation where the Law Officers had surrendered the Certificate of Practice and suspended their practice. The facts of that case indicates that the Hon'ble Supreme Court proceeded on the basis that the exception provided to Rule 49 of the Rules applies to the Law Officers in that case inasmuch as the Law

Officers in those cases were designated by terms of their appointment as Law Officers for the purpose of appearing before the Courts on behalf of their employers. Therefore, facts of those cases are different from the facts of the case of petitioners 1 to 9. The rule similar to the one before us which provides that an Advocate must be a practicing Advocate on the date of the submission of the application did not fall for consideration before the Hon'ble Supreme Court. The Delhi Higher Judicial Services Rules, 1970 did not provide that an Advocate should be a practicing Advocate on the date of submission of his application. Under these circumstances, in our considered view, the observation made by the Hon'ble Supreme Court in the case of Sushma Suri, *supra*, at paragraph 8 of the judgment which is strongly relied upon by the learned Counsel for the petitioners wherein it is stated that:

"8. for purposes of the Advocates Act and the Rules framed thereunder the Law Officer (Public Prosecutor or Government Counsel) will continue to be an Advocate. The intention of the relevant rules is that a candidate eligible for appointment to the higher judicial service should be a person who regularly, practices before the Court or Tribunal appearing for a client" has no application to the facts of the present case. As noticed by us, the qualification prescribed for Assistant Public Prosecutor is three years of practice as an Advocate on the date of submission of application. The qualification prescribed for recruitment to the post of Munsiff, i.e., Civil Judge (Junior Division) is that an applicant, on the last date fixed for submission of application, must be a practicing Advocate and must have practiced for not less than four years on the date of application; or who is working as an Assistant Public Prosecutor/Senior Assistant Public Prosecutor or as a Public Prosecutor in the Department of Prosecutions and must have so worked for not less than 4 years as on the date of application. Therefore, the Assistant Public Prosecutors/Senior Assistant Public Prosecutor/Assistant Public Prosecutor are made eligible for appointment only to the post of Munsiffs Civil Judge (Junior Division) under the Recruitment Rules. But, they are not made eligible under the Rules for appointment as District Judges. Therefore, when the Rule making Authority itself has not made the Assistant Public Prosecutor/Senior Assistant Public Prosecutor/Public Prosecutor as eligible for appointment to the post of District Judges, it is not permissible to treat the Assistant Public Prosecutor/Senior Assistant Public

Prosecutor/Public Prosecutor as practicing Advocates by judicial interpretation and by giving extended meaning to make them eligible for appointment to the post of District Judges."

67. With reference to the decision of this Court in Satya Narain Singh⁵, the Karnataka High Court held as under (Pg. 88- 89) :

"11. ...The Hon'ble Supreme Court in the case of Satya Narain Singh v. High Court of Judicature at Allahabad and Ors., 1985 (1) SCC 225, while interpreting Sub-clause (2) of Article 233 of the Constitution of India has taken the view that "a person not already in service of Union or of the State" shall mean only officers

in judicial service and the Judicial Officers who are already in service are not eligible for appointment in respect of the post reserved for direct recruitment under Sub-clause (2) of Article 233 of the Constitution of India. Therefore, the Judicial Officers who are in the State services are ineligible for appointment in respect of direct recruitment vacancies. However, if the argument of the learned Counsel for petitioners is accepted as correct, the Assistant Public Prosecutor and Senior Assistant Public Prosecutor who are only made eligible under the Recruitment Rules to the post of Munsiffs which is the lowest cadre in the District Judiciary would be eligible for appointment to the post of District Judges in respect of the posts reserved for direct recruitment vacancies. In our view, the acceptance of such a position would lead to discrimination between the officers of the State who are in judicial services on the one hand and Assistant Public Prosecutors, Senior Assistant Public Prosecutors and Public Prosecutors on the other. While considering the contention of the learned Counsel for the petitioners that the Assistant Public Prosecutor/Senior Assistant Public Prosecutor/Public Prosecutors should be treated as practicing Advocates, this Court cannot ignore the consequence of resultant incongruous situation, if such an argument is accepted. We are also unable to accede to the submission of the learned Counsel for the petitioners that so long as the names of the petitioners 1 to 9 are not removed from the Rolls of State Bar Council, the said petitioners would be practicing Advocates. In our view, there is no merit in this submission. No doubt, Section 2(a) of the Advocates Act (hereinafter referred to as the "Act") provides that "an 'Advocate' means an Advocate entered in any roll under the provisions of Advocates Act". That does not mean the Advocate who has surrendered the Certificate of Practice to the State Bar Council and who has suspended his practice also can be treated either as an Advocate or as a practicing Advocate. May be that once a Law graduate enrolls himself as an Advocate, his name finds a place in the Rolls of the State Bar Council till it is removed from the Rolls of the State Bar Council in terms of Clause (d) of Sub-section (3) of Section 35 of the Act. But, that does not mean a person who has suspended his practice on securing a full time appointment can still be considered as a practicing Advocate. This conclusion of ours gets support from the Sub-section (4) of Section 35 of the Act wherein it is provided that where an Advocate is suspended from practice, during the period of suspension he is debarred from practicing in any Court or before any authority or person in India. Therefore, if the object of surrendering Certificate of Practice and suspending the practice is to give up the right to practice before the Court; the petitioners 1 to 9 who were required to surrender the Certificate of Practice and who have so suspended their practice, cannot in our view, be held either as Advocates or as practicing Advocates. In our view, during the period of suspension of practice, such a person ceases to be an Advocate; and continuance of his name on the Rolls of Bar Council is of no consequence so far as his right to practice is concerned and such a person cannot designate himself as an Advocate. Therefore, we are of the view that the petitioners 1 to 9 not being practicing Advocates on the date of submission of their applications, they are not eligible for appointment as District Judges in

terms of the qualification prescribed. Therefore, the Selection Committee has, in our view, rightly rejected the claim of the petitioners 1 to 9 for appointment as District Judges and they were rightly not called for interview. The petitioners cannot have any grievance on that account."

68. The judgment of the Karnataka High Court in *Mallaraddi H. Itagi*¹⁷ was challenged before this Court. This Court dismissed the appeals on 18.05.2009^[18] and, upholding the judgment of the High Court, observed as follows:

"8. On that basis the Court came to the conclusion that the appellant therein was not liable to be considered as he was holding a regular post. In paragraph 19 it was observed:

"19....These orders clearly show that the appellant was required to work in the Legal Cell of the Secretariat of the Board; was given different pay scales; rules of seniority were applicable; promotions were given to him on the basis of the recommendations of the Departmental Promotion Committee; was amenable to disciplinary proceedings, etc. Further looking to the nature of duties of Legal Cell as stated in the regulation of business of the Board extracted above, the appellant being a full-time salaried employee had/has to attend to so many duties which appear to be substantial and predominant. In short and substance we find that the appellant was/is a full-time salaried employee and his work was not mainly or exclusively to act or plead in court. Further, there may be various challenges in courts of law assailing or relating to the decisions/actions taken by the appellant himself such as challenge to issue of statutory regulation, notification, the institution/ withdrawal of any prosecution or other legal/quasi-legal proceedings etc. In a given situation the appellant may be amenable to disciplinary jurisdiction of his employer and/or to the disciplinary jurisdiction of the Bar Council. There could be conflict of duties and interest. In such an event, the appellant would be in an embarrassing position to plead and conduct a case in a court of law. Moreover, mere occasional appearances in some courts on behalf of the Board even if they be, in our opinion, could not bring the appellant with the meaning of "Law Officer" in terms of para 3 of Rule 49."

and has also taken a view that in a situation like this the decision in *Sushma Suri* case is not applicable. 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."

39. In Paragraphs 90 to 102 in the case of *Deepak Aggarwal* (supra) the Supreme Court considered the Advocates Act and the Bar Council Rules and held that once the terms of employment do not require such an advocate to plead and appear before Courts then the period of such employment cannot be termed as

being “an advocate” because he is not practicing as one.

“90. In U.P. State Law Officers Association¹³, this Court stated that though the lawyers of the Government or a public body on the full-time rolls of the government and the public bodies are described as their law officers, but nevertheless they are professional practitioners. It is for this reason, the Court said that the Bar Council of India in Rule 49 of the BCI Rules (in its original form) in the saving clause waived the prohibition imposed by the said rule against the acceptance by a lawyer of a full-time employment.

91. In Sushma Suri⁶, a three-Judge Bench of this Court while considering the meaning of the expression advocate in Article 233(2) of the Constitution and unamended Rule 49 of the BCI Rules held that if a person was on the rolls of any Bar Council and is engaged either by employment or otherwise by the Union or State and practises before a court as an advocate for and on behalf of such Government, such person does not cease to be an advocate. This Court went on to say that a Public Prosecutor or a Government Counsel on the rolls of the Bar Council is entitled to practice. It was laid down that test was 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. The terms of engagement do not matter at all and what matters 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. The functions which the law officer discharges on his engagement by the Government were held decisive. We are in full agreement with the above view in Sushma Suri⁶.

92. While referring to unamended Rule 49, this Court in Sushma Suri⁶ said that Bar Council of India had understood the expression advocate as one who is actually practising before courts which expression would include even those who are law officers employed as such by the Government or a body corporate.

93. Have the two subsequent decisions in Satish Kumar Sharma and Mallaraddi H. Itagi¹⁸ differed from Sushma Suri? Is there any conflict or inconsistency in the three decisions?

94. Satish Kumar Sharma and Mallaraddi H. Itagi¹⁸ are the two decisions on which very heavy reliance has been placed on behalf of the successful writ-petitioners (respondents). In Satish Kumar Sharma, which has been elaborately noted in the earlier part of the judgment, this Court found from the appointment/promotion orders in respect of the appellant therein that he was required to work in the legal cell of the Secretariat of the Board. Central to the entire reasoning in Satish Kumar Sharma is that being a full-time salaried employee he had/has to attend many duties and his work was not mainly and exclusively to act or plead

in court. Mere occasional appearances on behalf of the Board in some courts were not held to be sufficient to bring him within the meaning of expression Law Officer. In the backdrop of nature of the office that the appellant therein held and the duties he was required to perform and in the absence of any rules framed by the State Bar Council with regard to enrolment of a full time salaried Law Officer, he was held to be not entitled for enrolment and the exception set out in paragraphs 2 and 3 of unamended Rule 49 of the BCI Rules was not found to be attracted. In *Satish Kumar Sharma*⁷, this Court did apply the test that was enunciated in *Sushma Suri*⁶ viz., whether a person is engaged to act and/or plead in a court of law to find out whether he is an advocate. In *Satish Kumar Sharma* when this Court observed with reference to Chapter II of the BCI Rules that an advocate has a duty to the court, duty to the client, duty to the opponent and duty to the colleagues unlike a full time salaried employee whose duties are specific and confined to his employment, the Court had in mind such full-time employment which was inconsistent with practice in law. In para 23 of the judgment in *Satish Kumar Sharma*⁷, pertinently this Court observed that the employment of appellant therein as a head of legal cell in the Secretariat of the Board was different from the work of the Prosecutors and Government Pleaders in relation to acting and pleading in Court. On principle of law, thus, it cannot be said that there is any departure in *Satish Kumar Sharma* from *Sushma Suri*⁶.

95. In *Mallaraddi H. Itagi*¹⁸, the appellants were actually found to be government servants when they made applications for the post of District Judges. The High Court in its judgment in *Mallaraddi H. Itagi*¹⁷ had noticed that the appellants had surrendered their certificate of practice and suspended their practice on their appointment as Assistant Public Prosecutors/Senior

Assistant Public Prosecutors/Public Prosecutors in terms of Karnataka Recruitment Rules. It was on this basis that Karnataka High Court held that *Sushma Suri*⁶ was not applicable to the case of the appellants. There is consonancy and congruity with the decisions of this Court in *Sushma Suri*⁶, *Satish Kumar Sharma* and *Mallaraddi H. Itagi*¹⁸ and, in our opinion, there is no conflict or inconsistency on the principle of law.

96. In none of the other decisions viz., *Mundrika Prasad Sinha*¹, *Mukul Dalal*² and *Kumari Shrilekha Vidyarthi*³, it has been held that a Government Pleader or a Public Prosecutor or a District Government Counsel, on his appointment as a full-time salaried employee subject to the disciplinary control of the Government, ceases to be a legal practitioner. In *Kumari Shrilekha Vidyarthi*³ while dealing with the office of District Government Counsel/ Additional District Government Counsel, it was held that the Government Counsel in the district were law officers of the State which were holders of an office or post but it was clarified that a District Government Counsel was not to be equated with post under the government in strict sense. In *Ramesh Chandra Sharma*²¹, this Court reiterated that the appointment of any legal practitioner as a District Government Counsel is only a professional engagement.

83.

97. However, much emphasis was placed on behalf of the contesting respondents on Rule 49 of the BCI Rules which provides that an advocate shall not be a full time salaried employee of any person, government, firm, corporation or concern so long as he continues to practice, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practice as an advocate so long as he continues in such employment. It was submitted that earlier in Rule 49 an exception was carved out that a Law Officer of the Central Government or of a State or of a body corporate who is entitled to be enrolled under the rules of State Bar Council shall not be affected by the main provision of Rule 49 despite his being a full time salaried employee but by Resolution dated 22.6.2001 which was published in the Gazette on 13.10.2001, the Bar Council of India has deleted the said provision and hence on and from that date a full time salaried employee, be he Public Prosecutor or Government Pleader, cannot be an advocate under the 1961 Act.

98. Admittedly, by the above resolution of the Bar Council of India, the second and third para of Rule 49 have been deleted but we have to see the effect of such deletion. What Rule 49 of the BCI Rules provides is that an advocate shall not be a full time salaried employee of any person, government, firm, corporation or concern so long as he continues to practice. The employment spoken of in Rule 49 does not cover the employment of an advocate who has been solely or, in any case, predominantly employed to act and/or plead on behalf of his client in courts of law. If a person has been engaged to act and/or plead in court of law as an advocate although by way of employment on terms of salary and other service conditions, such employment is not what is covered by Rule 49 as he continues to practice law but, on the other hand, if he is employed not mainly to act and/or plead in a court of law, but to do other kinds of legal work, the prohibition in Rule 49 immediately comes into play and then he becomes a mere employee and ceases to be an advocate. The bar contained in Rule 49 applies to an employment for work other than conduct of cases in courts as an advocate. In this view of the matter, the deletion of second and third para by the Resolution dated 22.6.2001 has not materially altered the position insofar as advocates who have been employed by the State Government or the Central Government to conduct civil and criminal cases on their behalf in the courts are concerned.

99. What we have said above gets fortified by Rule 43 of the BCI Rules. Rule 43 provides that an advocate, who has taken a full-time service or part-time service inconsistent with his practising as an advocate, shall send a declaration to that effect to the respective State Bar Council within time specified therein and any default in that regard may entail suspension of the right to practice. In other words, if full-time service or part-time service taken by an advocate is consistent with his practising as an advocate, no such declaration is necessary. The factum

of employment is not material but the key aspect is whether such employment is consistent with his practising as an advocate or, in other words, whether pursuant to such employment, he continues to act and/or plead in the courts. If the answer is yes, then despite employment he continues to be an advocate. On the other hand, if the answer is in negative, he ceases to be an advocate.

100. An advocate has a two-fold duty: (1) to protect the interest of his client and pursue the case briefed to him with the best of his ability, and (2) as an officer of the Court. Whether full-time employment creates any conflict of duty or interest for a Public Prosecutor/Assistant Public Prosecutor? We do not think so. As noticed above, and that has been consistently stated by this Court, a Public Prosecutor is not a mouth- piece of the investigating agency. In our opinion, even though Public Prosecutor/Assistant Public Prosecutor is in full-time employ with the government and is subject to disciplinary control of the employer, but once he appears in the court for conduct of a case or prosecution, he is guided by the norms consistent with the interest of justice. His acts always remain to serve and protect the public interest. He has to discharge his functions fairly, objectively and within the framework of the legal provisions. It may, therefore, not be correct to say that an Assistant Public Prosecutor is not an officer of the court. The view in *Samarendra Das*²² to the extent it holds that an Assistant Public Prosecutor is not an officer of the Court is not a correct view.

101. The Division Bench has in respect of all the five private appellants Assistant District Attorney, Public Prosecutor and Deputy Advocate General recorded undisputed factual position that they were appearing on behalf of their respective States primarily in criminal/civil cases and their appointments were basically under the C.P.C. or Cr.P.C. That means their job has been to conduct cases on behalf of the State Government/C.B.I. in courts. Each one of them continued to be enrolled with the respective State Bar Council. In view of this factual position and the legal position that we have discussed above, can it be said that these appellants were ineligible for appointment to the office of Additional District and Sessions Judge? Our answer is in the negative. The Division Bench committed two fundamental errors, first, the Division Bench erred in holding that since these appellants were in full-time employment of the State Government/Central Government, they ceased to be advocate under the 1961 Act and the BCI Rules, and second, that being a member of service, the first essential requirement under Article 233(2) of the Constitution that such person should not be in any service under the Union or the State was attracted. In our view, none of the five private appellants, on their appointment as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, ceased to be advocate and since each one of them continued to be advocate, they cannot be considered to be in the service of the Union or the State within the meaning of Article 233(2). The view of the Division Bench is clearly erroneous and cannot be sustained.

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. 89. Rule 11 of the HSJS Rules provides for qualifications for direct recruits in Haryana Superior Judicial Service. Clause (b) of this rule provides that the applicant must have been duly enrolled as an advocate and has practised for a period not less than seven years. Since we have already held that these five private appellants did not cease to be advocate while working as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, the period during which they have been working as such has to be considered as the period practising law. Seen thus, all of them have been advocates for not less than seven years and were enrolled as advocates and were continuing as advocates on the date of the application. 90. We, accordingly, hold that the five private appellants (Respondent Nos. 9,12,13,15 and 18 in CWP No. 9157/2008 before the High Court) fulfilled the eligibility under Article 233(2) of the Constitution and Rule 11(b) of the HSJS Rules on the date of application. The impugned judgment as regards them is liable to be set aside and is set aside. 91. Appeals are allowed as above with no order as to costs."

40.What is therefore evident from this Judgement of the Supreme Court is that even if an advocate during his employment is enrolled on the rolls of the Bar Council and but he is not practicing as an advocate and suspension of practice though would lead to he continuing to be enrolled but he ceases to and advocate actually and continuance of his name on the rolls of the Bar Council is of no consequence so far as his right to practice is concerned and such a person cannot designate himself as an advocate.

41.The stand of the GPSC as backed by the advice of the Legal Department as evident from the letter dated 23.3.2022 cannot be faulted and does not amount to reading something that is not in the rules.

42.The term "an advocate" has been interpreted as one where mere enrollment at the Bar Council would not by itself entitle the Petitioners to claim to have the requisite qualification as the as the same has been interpreted by the Supreme Court in the case of Deepak Aggarwal (supra) as being actually pleading and appearing before the Courts which the Petitioners have not after being appointed as Assistant Charity Commissioners on the respective dates and therefore their experience as advocates practicing falls short of ten years of enrollment as advocate as defined under the Rules and the decision of rejecting of their eligibility by the communication of the GPSC dated 31.10.2021 cannot be faulted.

43.Both the Petitions are accordingly dismissed.

Rule discharged with no order as to costs.

44. In view of disposal of the main petition, Civil Application No.1 of 2022 in Special Civil Application No.9933 of 2022 will not survive and hence the same is also disposed of.