

**(2013) 12 KAR CK 0538**

**In the Karnataka High Court**

**Case No :** Writ Appeal No's. 8473-8474 of 2012 (S-RES) and 1949-1954 of 2013 (S-RES)

Rajashekar M. Tilanganji and Others

APPELLANT

Vs

High Court of Karnataka, The Recruitment Committee for  
Selection to the Post of Civil Judges and State of Karnataka

RESPONDENT

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**Date of Decision :** 17-12-2013

**Acts Referred:**

**Citation :** (2014) ILR (Kar) 502 : (2014) 1 KCCR 585

**Hon'ble Judges :** Mohan M. Shantanagoudar, J;H.N. Nagamohan Das, J

**Bench :** Division Bench

**Advocate :** Vikas Rojipura, for Ravivarma Kumar Associates, for the Appellant;  
Rupa B.P., H.C.G.P., for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Mohan M. Shantanagoudar, J.—The appellants being the Law Graduates were appointed as Assistant Public Prosecutors-cum-Assistant Government Pleaders ("APPs" for short). They are serving as APPs in different parts of State of Karnataka. They are conducting civil as well as criminal cases on behalf of the State. They are not only officers of the Court but also representatives of the State. There cannot be any dispute that APPs play important role in administration of justice. Being representatives of the State, they represent the interest of general public before the Court of law.

The appointment to the posts of Civil Judges is governed by Karnataka Judicial Service (Recruitment) Rules, 2004 {"2004 Rules" for short}.

On 9.6.2011 the Department of Law, Justice and Human Rights, Government of Karnataka notified the draft of the Karnataka Judicial Service (Recruitment) (Amendment) Rules, 2011 ("Amendment Rules of 2011" for short) in the Karnataka Gazette for amending certain provisions of 2004 Rules relating to recruitment of Civil Judges (Jr. Dn.). The draft rules relating to recruitment of

Civil Judges (Jr. Dn.) were objected to by some of the appellants and by the Association of Prosecuting Officers by filing their statement of objections. Under the draft rules, APPs are excluded from being considered for appointment under the heading "recruitment of in-service candidates". However the Department of Law, Justice and Human Rights, Government of Karnataka promulgated "Amendment Rules of 2011" on 11.7.2011. The High Court of Karnataka, Bangalore issued a notification, inviting applications for making appointment to 152 posts of Civil Judges in the State of Karnataka on 6.8.2011. The recruitment of Civil Judges, under the recruitment notification was to be made from two categories of candidates viz., (a) in-service candidates (b) candidates other than in-service candidates (i.e. Direct Recruitment). The APPs were excluded from being considered under "in-service candidates" though members of other cadres working in the High Court and subordinate Courts were listed as in-service candidates.

The applications filed by the appellants are not considered on the ground that they do not fulfill the requisite qualifications prescribed for either of the two categories.

2. Aggrieved by the said recruitment notification and act of the State in not considering their applications for appointment, the appellants herein and certain others approached this Court in Writ Petition No. 18428/2012 c/w W.P. Nos. 6380/2012, 11611-11621/2012 and 38597-38600/2011 praying for following reliefs:

a. Issue an appropriate writ, order or direction:

i. Declaring the Resolution, dated 22.4.2011 of respondent No. 1, based on which APPs are being denied the opportunity to be considered for appointment as Civil Judges under the Karnataka Judicial Service (Recruitment) Rules, 2004, in Annexure-A as amended by the Karnataka Judicial Service (Recruitment) (Amendment) Rules, 2011, in Annexure-E as illegal and void.

ii. Striking down the provisions under Serial No. 3, Rule 4 of the Karnataka Judicial Service (Recruitment) Rules, 2004, in Annexure-A as inserted by the Karnataka Judicial Service (Recruitment) (Amendment) Rules, 2011, in Annexure-E as violative of Article 14, 16(1), 19(1)(g) and 21 of the Constitution of India, insofar as, it denies APPs the opportunity to be considered for appointment as Civil Judges.

iii. In the nature of certiorari, quashing the recruitment Notification No. CJRC. 1/2010, Bangalore, dated 6.8.2011, in Annexure-G issued by respondent No. 1, as violative of Article 14, 16(1), 19(1)(g) and 21 of the Constitution of India, insofar as, it denies APPs the opportunity to be considered for appointment as Civil Judges.

iv. Declaring all the letters, bearing the common date, 17.2.2012, by respondent No. 1 to the petitioners, such as those shown in Annexure-K to K6 as illegal and

void, and

v. In the nature of mandamus to respondent No. 1 to consider APPs for appointment as Civil Judges in the recruitment process pursuant to Notification No. CJRC. 1/2010, Bangalore, dated 6.8.2011, in Annexure-G and treat them as in-service candidates in the process of such recruitment;

And

b. Grant such other reliefs as this Hon"ble Court deems fit in the facts and circumstances of the case in the interest of justice and equity.

3. In effect, the writ petitioners prayed for considering their applications for appointment to the posts of Civil Judges by striking down the "Amendment Rules of 2011" insofar as they relate to exclusion of APPs from being considered for appointment to the posts of Civil Judges under the head of in-service candidates". Impliedly they have also sought for consideration of their applications under Direct Recruitment. The writ petitions came to be dismissed by the impugned order dated 6.12.2012, which is under challenge in these writ appeals.

4. The question to be decided in these appeals is as to "whether the APPs are entitled for being considered for the posts of Civil Judges"?

5. By virtue of "Amendment Rules of 2011", Para-B, Serial No. 3 of Rule-4 of the 2004 Rules reads thus:

B. Recruitment of in-service candidates-(1) Must be holder of a decree in Law granted by a University established by Law in India.

(2) Must not have completed 43 years of age in the case of Scheduled Caste/ Scheduled Tribes and 40 years of age in the case of others, as on the last date fixed for receipt of applications.

(3) No officer/official in service shall be eligible for appointment as Civil Judge unless he/she is working in the High Court and Courts subordinate to the High Court in the following cadre namely:-

(a) Deputy Registrars,

(b) Assistant Registrars/Public Relation Officer/Chief Librarian,

(c) Section Officers/Court Officers/Senior Judgment Writers/Deputy Librarians,

(d) Assistant Court Officers/Senior Assistants/Judgment Writers,

(e) Stenographers/FDAs/Assistant Librarians,

(f) Chief Administrative Officer/Assistant Registrars,

(g) Sheristedars and Senior Sheristedars, (h) Bench Clerks-Grade-I and II.

6. The grievance of the appellants is that they are excluded from the list of

eligible in-service candidates though the employees working in the High Court and the Courts subordinate to High Court are considered to be eligible for the posts of Civil Judges under the head of "in-service candidates". Their further grievance is that they shall be considered for appointment under "direct recruitment" also since they are advocates, coming within the prescribed age limit.

7. Though validity of "Amended Rules of 2011" is questioned by the appellants, it is wholly unnecessary for us to decide the said question for the present in these appeals. Thus we have heard the advocates on the question as to whether the request of the APPs can be considered for the posts of Civil Judges under "Direct Recruitment"?

8. It is relevant to note here itself that the posts of Civil Judges as aforementioned are to be filled up by direct recruitment also. The qualification and the age limit to participate in the selection process under the direct recruitment is that the candidate must be holder of a Degree in Law granted by a University established by Law in India and must have been enrolled as an Advocate. He must not have completed 38 years as on the last date fixed for receipt of applications in case of candidates belonging to Scheduled Caste or Scheduled Tribe and 35 years of age in case of others. Thus the advocates having requisite qualification are entitled to make the applications for being appointed as Civil Judges (Jr. Dn.) under the head "other than in-service candidates" i.e., by way of direct recruitment.

9. Learned advocate for the appellants taking the Court through the provisions of Advocates Act, 1961. The Bar Council of India Rules; 2004 Rules; Amendment Rules of 2011 and certain of the Articles of Constitution of India, submits that the State is not justified in excluding APPs from being considered to the posts of Civil Judges inasmuch as they are not only advocates, but are advocates having rich experience by performing as APPs. without any stigma. He submits that the order of the learned Single Judge is liable to be set aside.

Per contra, learned Government Advocate argued in support of the impugned order passed in the writ petitions.

According to the State, the object of the Rules is to recruit suitable and proper persons to the judicial service in the State of Karnataka with a view to secure fair and efficient administration of justice; Keeping in view the object to secure fair and efficient administration of justice, the policy decision is taken by the employer.

10. By the impugned order, the learned Single Judge relying mainly on the Judgment of this Court in the case of Mallaraddi H. Itagi and Others Vs. The High Court of Karnataka, Bangalore and Another, (confirmed by the Apex Court in C.A. No. 947-956/2003 decided on 18.5.2009) concluded that the rule relating to recruitment of in-service candidates to the Posts of Civil Judges limiting to those officers and officials working in the High Court and Courts subordinate to High

Court, is valid. It is observed in the impugned order that the APPs being Government servants are not qualified to appear in the recruitment process to the posts of District Judges/Civil Judges; that the policy decision taken by the High Court as well as the State Government in the matter of limitation placed with regard to the recruitment of in-service candidates is reasonable and does not amount to hostile discrimination.

11. If the statutory rule in the State contravenes Article 14 of the Constitution of India, its validity can be sustained, if two tests are satisfied i.e., (a) The classification on which it is founded must be based on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group; and (2) That the differentia in question must have a reasonable nexus to the object sought to be achieved by the rule or statutory provision in question.

12. Article 234 of the Constitution of India provides for appointment of persons other than District Judges to the judicial service. The same reads thus:

234. Recruitment of persons other than district judges to the judicial service:- Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

13. 2004 Rules regulate the appointment of subordinate Judges in the State of Karnataka. Rule 4 of the 2004 Rules, as amended by "Amendment Rules of 2011" deals with method of recruitment, qualification and age limit. The same reads thus:

4. Method of recruitment, qualification and age limit - In respect of each cadre of posts specified in column(2) of the table below, the method of recruitment and minimum qualification, age limit, etc., shall be as specified in the corresponding entries in columns (3) and (4) thereof.

1. Substituted for the words "Civil Judges (Junior Division)" by Notification No. LAW 123 LAC 2011 dated 11.7.2011 (w.e.f. 1.1.2011).

2. Inserted by Notification No. LAW 123 LAC 2011, dated 11.7.2011 (w.e.f. 1.1.2011).

3. Inserted by Notification No. LAW 123 LAC 2011, dated 11.7.2011 (w.e.f. 1.1.2011)

14. It will be relevant at this stage to refer to some of the provisions which have bearing in the matter and are relevant for the purpose of these appeals.

Section 24 of Code of Criminal Procedure ("Cr.P.C." for short) deals with "Public Prosecutors". Section 25 deals with "Assistant Public Prosecutors" and it reads thus:

25. Assistant Public Prosecutors. - (1) The State Government shall appoint in

every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

[(1A) The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the Courts of Magistrates.]

(2) Save as otherwise provided in sub-, section (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

(3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case:

Provided that a police officer shall not be so appointed-

(a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or

(b) if he is below the rank of Inspector.

Section 25A of Cr.P.C. provides that the State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as it thinks fit. Sub-section (6) of Section 25 of Cr.P.C. discloses that every Assistant Public Prosecutor appointed under sub-section (1) of Section 25 shall be subordinate to the Deputy Director of Prosecution.

Section 2(7) of CPC (CPC for short) defines "Government Pleader" and the same reads thus:

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

Section 2(15) of CPC defines "Pleader" and the same reads thus:

Section 2(15) "Pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court;

15. Section 17 of the Advocates Act, 1961 provides that every State Bar Council shall prepare and maintain a roll of advocates; No person shall be enrolled as an advocate on the roll of more than one State Bar Council. Section 24 of the Advocates Act provides for the eligibility of the persons who may be admitted as advocates on a State roll. Chapter IV of the Advocates Act deals with the right to practise. Section 29 of the Advocates Act provides that from the appointed day, there shall be only one class of persons entitled to practise the profession of law, namely, advocates. Section 30 of the Advocates Act provides for right of advocates to practise. Section 33 of the Advocates Act makes it clear that except

as otherwise provided in the Advocates Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practise in any Court or before any authority or person unless he is enrolled as an advocate under the Advocates Act. Section 49 of the Advocates Act gives power to the Bar Council of India to make rules for discharging its functions and also to frame rules in respect of the subjects enumerated in Clauses (a) to Clause (j). First proviso to Section 49 provides that no rules made with reference to clause (c) or clause (gg) shall have effect unless they have been approved by the Chief Justice of India. The second proviso to Section 49 provides that no rules made with reference to clause (e) shall have effect unless they have been approved by the Central Government.

Pursuant to the powers given u/s 49 of the Advocates Act, the Bar Council of India has framed the Bar Council of India Rules ("BCI Rules" for short). Rule 43 of the BCI Rules provides that an advocate, who has taken a full-time service or part-time service or engaged in business or any avocation inconsistent with his practising as an advocate, shall send a declaration to that effect to the respective State Bar Council within ninety days. On his failure to do so or in the absence of sufficient cause for not doing so, he may face suspension of licence to practise. Rule 49 of the BCI Rules (after 2001 amendment) reads thus:

49. An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practise, and shall, on taking up any employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practise as an advocate so long as he continues in such employment.

16. The learned Single Judge while considering the issue relating to eligibility of the appellants for selection and appointment to the posts of Civil Judges observed that the appellants are full-time salaried employees as APPs and that the advocate could not be a full-time salaried employee of any person; by relying heavily on the judgment in the case of *Mallaraddi* cited supra, concluded that the appellants are ineligible to apply for the posts of Civil Judges (Jr. Dn.) inasmuch as they are neither advocates as per "The Advocates Act" and the "Bar Council of India Rules" nor the "2004 Rules" permit them to apply for being appointed as Civil Judges (Jr. Dn.).

17. Article 234 of the Constitution of India, as aforementioned, makes the provision for appointment of persons other than District Judges to the judicial service. No special qualifications are laid down under the said Article. Article 234 mentions that the appointment of persons other than District Judges to judicial service shall be made by the Governor in accordance with the rules made by him in that behalf after consultation with the concerned High Court. Thus it is clear that Civil Judges posts are to be filled up in accordance with the rules made by the Governor after consultation with the concerned High Court. Admittedly, in the matter on hand, the relevant rules applicable are "2004 Rules". They are made by the Governor of Karnataka State in consultation with the High Court of

Karnataka. It is also not in dispute that the selection to the posts of Civil Judges are made, in the matter on hand, strictly in accordance with the aforementioned rules. However the grievance of the appellants is that the APPs., are excluded from being considered to the posts of Civil Judges without any valid reason.

18. Undisputedly, the appellants being the holders of Degree in Law granted by a University established by law in India are duly enrolled advocates and they are within the prescribed age limit. However they do not fall in any of the cadres mentioned in para-B, Serial No. 3 of Rule-4 of 2004 Rules as amended by Amendment Rules of 2011 inasmuch as all the appellants were working as APPs.

The sources available for appointment to the posts of Civil Judges are (i) advocates (by direct recruitment) and (ii) the "in-service candidates". Though number of cadres are specified in 2004 Rules showing them as feeder cadres (for in-service candidates) for being appointed as Civil Judges, the Public Prosecutors/ Assistant Public Prosecutors/Government Advocates are excluded. Thus one of the questions that has been raised before us is whether Public Prosecutors/ Assistant Public Prosecutors/Government Pleaders/Additional Government Pleaders, who are in full-time employment of the Government, cease to be advocates or pleaders?

19. In the case of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , the Apex Court has observed that there is no doubt that the function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of so acting only in the interest of administration of justice. In the case of Public Prosecutors, this additional public element flowing from statutory provisions in Cr.P.C., undoubtedly, invest the Public Prosecutors with the attribute of holder of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it.

20. As has been held by the Apex Court in the case of State of U.P. and others Vs. U.P. State Law Officers Association and others, , the legal profession is essentially a service-oriented profession. The services were rendered without regard to the remuneration received or to be received. With the growth of litigation, lawyering became a full-time occupation and most of the lawyers came to depend upon it as the sole source of livelihood. The nature of the service rendered by the lawyers was private till the Government and the public bodies started engaging them to conduct cases on their behalf. The lawyer of the Government or a public body was not its employee but was a professional practitioner engaged to do the specified work. This is so even today, though the lawyers on the full-time rolls of the Government and the public bodies are described as their law officers.

21. The Apex Court has explained the role of the Prosecutor in the case of Shiv Kumar Vs. Hukam Chand and Another, as under:

13. From the scheme of the Code the legislative intention is manifestly clear that

prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the force and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.

In the case of *Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others*, the Apex Court on the said point observed thus:

23. ... A Public Prosecutor is an important officer of the State Government and is appointed by the State under the Criminal Procedure Code. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A Public Prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation.

In the case of *Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi)*, the Apex Court has held that a Public Prosecutor has wider set of duties than to merely ensure that the accused is punished, the duties of ensuring fair play in the proceedings, all relevant facts are brought before the Court in order for the determination of truth and justice for all the parties including the victims.

22. From the aforementioned observations of the Apex Court in various judgments, it is amply clear that though the Prosecutors/Assistant Public Prosecutors are employees of the State, they are employed for the purpose of conducting matters on behalf of the State before the Courts of law. The Prosecutors while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies, but to the accused as well. In the appointment of Public Prosecutors/Assistant Public Prosecutors, the principle of master-servant does not apply. {see *Sidhartha Vashisht @ Manu Sharma Vs.*

State (NCT of Delhi), ; Sheonandan Paswan Vs. State of Bihar and Others, ; and State of U.P. and Another Vs. Johri Mal, }.

However in the decisions of the Apex Court in Samarendra Das, Advocate Vs. The State of West Bengal and Others, and State of U.P. and Another Vs. Johri Mal, , the Apex Court has observed that the post of Assistant Public Prosecutor is a civil post. Subsequently, i.e. very recently the three-Judge Bench of the Apex Court in the case of Deepak Aggarwal Vs. Keshav Kaushik and Others, has concluded that the view taken in Samarendra Das, Advocate Vs. The State of West Bengal and Others, to the extent it holds that Assistant Public Prosecutor is not an Officer of the Court, is not a correct view. Since the opinion expressed in the case of State of U.P. and Another Vs. Johri Mal, is fully based on the view taken by the Apex Court in Samarendra Das, Advocate Vs. The State of West Bengal and Others, , the respondents cannot take benefit of the view in the case of Johrimal to the extent it holds that Assistant Public Prosecutor is not an Officer of the Court.

23. In the case of Deepak Aggarwal, the Apex Court has observed thus:

86. Despite these differences, for the purposes of Article 233(2) there is not much difference in Public Prosecutor and an Assistant Public Prosecutor and both of them are covered by the expression "advocate". It is so for more than one reason:

86.1 In the first place, a Public Prosecutor u/s 24 is appointed by the State Government or the Central Government for conduct of prosecution, appeal or other proceeding on its behalf in the High Court or for a district and Assistant Public Prosecutor is appointed u/s 25 by the State Government or the Central Government to conduct prosecution on its behalf in the courts of Magistrates. So the main function of the Public Prosecutor as well as Assistant Public Prosecutor is to act and/or plead on behalf of the Government in a court; both of them conduct cases on behalf of the government.

86.2 Secondly and remarkably, for the purposes of counting experience as an advocate as presented in sub-sections 24(7) and 24(8), the period, during which a person has rendered service as a Public Prosecutor or as an Assistant Public Prosecutor, is treated as being in practice as an advocate u/s 24(9) Cr.P.C. In other words, the rendering of service as a Public Prosecutor or as an Assistant Public Prosecutor is deemed to be practice as an advocate.

100. xxx xxx 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, Advocate Vs. The State of West Bengal and Others, to the extent it holds that an Assistant

Public Prosecutor is not an officer of the court is not a correct view.

(Emphasis supplied)

Thus it is clear that a person rendering service as Public Prosecutor or as an Assistant Public Prosecutor is treated as being in practice as an advocate u/s 24(9) of Cr.P.C. In other words, the service of a Public Prosecutor or Assistant Public Prosecutor is nothing but the service of the Officer of the Court, as any other advocate. They can be safely be called as Advocates for the State wherein State is party to the proceedings before any Court. It goes without saying that Government is also treated as a party like any other party to the proceedings, before Courts.

APPs undisputedly are appearing on behalf of the State, primarily in civil and criminal cases and their appointments were basically under CPC, Cr.P.C. and the Karnataka Department of Prosecutors and Government Litigation (Recruitment) Rules - 1962 (during relevant time). Their job is to conduct cases on behalf of the State. The APPs, as in the case of other advocates, have a duty to the Court, duty to the client, duty to the opponent and duty to the colleagues. The appointment as APPs is not inconsistent with practise of law in Court.

24. Under amendment Rules of 2011, there is no need to have experience of practise as an advocate in the Courts of law for applying to the posts of Civil Judges under the head of "direct recruitment". It would be sufficient if an aspirant/applicant is a duly enrolled advocate after completion of law degree in the recognized University, who is within the prescribed age limit. Thus as on the date of filing the application to the post of Civil Judge, a person coming within the prescribed age limit would qualify to apply to the said post if he is duly enrolled as an advocate. No further qualification is necessary. Since the rules do not mandate that the candidate should have experience as a practising advocate, even a newly enrolled advocate or an advocate with experience of practice can apply. If it is so, the APPs who are undisputedly advocates having Law degrees from recognized Universities are entitled to apply under the head "direct recruitment". Merely because they are appointed by the State as Public Prosecutors, they cannot be denied of the opportunity to claim the posts of Civil Judges. The experience as APPs should not be a ground to deny the opportunity to such advocates at the time of making the application for appointment to Civil Judges. On the other hand, the experience gained by an advocate as APP should be beneficial for the State. Since the primary object of the State is to recruit suitable and proper persons to the judicial service in the State of Karnataka with a view to secure fair and efficient administration of justice, the advocates having practise in Courts of law either on their own or as APPs should not be overlooked.

In the case of S.B. Shahane and others Vs. State of Maharashtra and another, the Apex Court has observed that Assistant Public Prosecutors are appointed u/s 25 of Cr.P.C. for conducting prosecutions in courts of Magistrates in a district fairly and impartially, separating them from the police officers of the Police

Department and freeing them from the administrative or disciplinary control of officers of the Police Department. When large number of persons are appointed as Assistant Public Prosecutors, it becomes necessary for putting them on a separate cadre of Assistant Public Prosecutors and creating a separate Prosecution Department.

In the case of *Sushma Suri Vs. Govt. of National Capital Territory of Delhi and Another*, , the Apex Court has 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 said Judgment, it is observed as under:

6. If a person on being enrolled as an advocate ceases to practice 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.

In paragraph-8 of the very Judgment, the Apex Court has observed that for the purpose of the Advocates Act, 1961 and the BCI Rules, a Law Officer (Public Prosecutor or Government Pleader) would continue to be an advocate.

The Apex Court in the case of *Satish Kumar Sharma Vs. The Bar Council of Himachal Pradesh*, while considering Rule 49 of the BCI Rules observed thus:

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

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

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

(iii) not every Law Officer but only a person who is designated as Law Officer by

the terms of his appointment and who by the said terms is required to act and/or plead in courts on behalf of his employer can avail the benefit of the exception contained in para 2 of Rule 49.

In the case of *Mallaraddi* {(2013) 5 SCC 332}}, referring to the earlier judgment in the case of *Satish Kumar Sharma* cited *supra*, the Apex Court concurred with the dictum laid down in the case of *Satish Kumar Sharma* and held that the persons who are holding a regular post, having regular pay scale, being considered for promotion and employed under the State Government Rules, are actually the Government servants and therefore they are not entitled to appear for the posts of District Judges in the Karnataka State.

In the case of *Mallaraddi H. Itagi and Others Vs. The High Court of Karnataka, Bangalore and Another*, , the writ petitioners i.e., *Mallaraddi* and others were working as APPs and were aspirants to the posts of District Judges. Recruitment Rules as well as recruitment notification of District Judges prescribe 7 years of practice apart from other qualifications. The Division Bench of this Court having held that though the writ petitioners therein were working as APPs for 7 years or more, such services rendered by them as APPs cannot be taken into consideration to conclude that they are practicing advocates for 7 years. Thus it is clear that to be appointed as District Judges, 7 years of practice was necessary. The judgment of this Court in the case of *Mallaraddi* is confirmed by the Apex Court in (2013) 5 SCC 332 decided on 18.5.2009. Both these judgments are considered by the Apex Court in the recent judgment delivered on 21st January 2013 in the case of *Deepak Aggarwal* cited *supra*. The Apex Court in the case of *Deepak Aggarwal* found that the judgment rendered by the Apex Court in the case of *Mallaraddi* is in consonance and congruity with the decisions of the Apex Court in *Sushma Suri Vs. Govt. of National Capital Territory of Delhi and Another*, and *Satish Kumar Sharma Vs. The Bar Council of Himachal Pradesh*, . Thus the Supreme Court observed that there is no conflict or inconsistency in the principle of law laid down in the aforementioned three matters. In effect, in the case of *Deepak Aggarwal* the Apex Court has reconsidered all the case laws on the point, enactments and the Rules and has ultimately concluded that the factum of employment is not material but the key aspect is whether such employment is consistent with his practicing as an advocate or not. If the particular person pursuant to such employment as APP/ Public Prosecutor, continues to act and/or plead in the courts, then his employment is consistent with his practicing as an advocate

Even otherwise, the judgment of the Apex Court in the case of *Mallaraddi* can be distinguished on facts in this matter inasmuch as in the case of *Mallaraddi*, 7 years practice was mandatory for the purpose of appointment to the posts of District Judges, whereas in the matter on hand we are concerned only with the prayer of APPs. for appointment to the posts of Civil Judges, for which no experience as an advocate is mandatory. If a person who is a Law graduate duly enrolled as an advocate coming within the prescribed age limit, intends to apply

to the post of Civil Judge, there cannot be any prohibition against him for being considered. The appointment to the posts of Assistant Public Prosecutors is made by way of direct recruitment in terms of the provisions contained in the Karnataka Department of Prosecutors and Government Litigation (Recruitment) Rules - 1962. The qualification prescribed for recruitment of APPs is that the candidate must be a holder of degree in Law and must be practicing as an Advocate in Courts of Civil and Criminal Jurisdiction in India and must have so practiced for not less than 3 years on the last date fixed for submission of applications. Thus, it is seen that a practicing Advocate who has put in not less than 3 years of practice on the last date fixed for submission of applications is eligible to be considered for appointment as APPs. Thus it is amply clear that the APPs who are working so were appointed based on their experience as advocate for three years. In other words, APPs are having the Law degree from a recognized University and are all advocates, that too with experience of minimum three years. Thus the qualification prescribed for APPs is much higher than the qualification prescribed for the posts of Civil Judges. Since APPs were all advocates at the time of their appointment as APPs and as there is no prescribed Rule in the impugned Recruitment Rules pertaining to appointment of Civil Judges that the advocates should be newly enrolled, the APPs (who have enrolled about 5-6 years back as advocates) can also apply if they come within the prescribed age limit. In any view of the matter, the request of APPs for consideration of their case cannot be ignored at all.

The APPs are mainly required to perform the duties in Courts; once or twice in their career of APPs/Senior APPs/Public Prosecutors, they may be asked to perform the duties of Assistant Director of Prosecutions/Deputy Director of Prosecutions. After performing the duties as Assistant Director of Prosecutions/Deputy Director of Prosecutions for 2 or 3 years, they will come back to perform their duties in Courts. Even while working as Assistant Director of Prosecutions/Deputy Director of Prosecutions, they perform the duties of the advocates only, inasmuch as they will evaluate the judgments to find out whether they are fit for appeal or not, scrutinize charge sheets; give the legal opinion; prepare appeal memos etc. Therefore their working as Assistant Director of Prosecutions/Deputy Director of Prosecutions, cannot at any stretch of imagination be assumed that their employment is inconsistent with their practicing as advocates in Courts of law. The persons appointed as APPs/Public Prosecutors etc., are guided by the norms consistent with the interest of justice. Such persons always remain to serve and protect the public interest. They have to discharge their functions fairly, objectively and within the framework of the legal provisions. Therefore it is not correct to say that Assistant Public Prosecutors are not the Officers of the Court. Taking into consideration the various factors, the Apex Court in the case of Deepak Aggarwal has concluded that the view taken by the Apex Court in the case of Samarendra Das, Advocate Vs. The State of West Bengal and Others, that the post of APP is a civil post is held to be not a correct view.

25. In the case of Deepak Aggarwal, the Apex Court as aforementioned, has

considered various judgments on the point, rules of the BCI including amended Rule-49 of BCI Rules and other enactments on the question and while concluding, the following observations are made:

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 practicing as an advocate, shall send a declaration to that effect to the respective State Bar Council within the 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 practicing 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 practicing 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 the 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 mouthpiece 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, Advocate Vs. The State of West Bengal and Others*, 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 "advocates" 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 dearly erroneous and cannot be sustained.

(Emphasis Supplied)

26. Thus it is clear from the judgment of the Apex Court in the case of *Deepak Aggarwal* rendered by Three-Judge Bench that the bar contained in Rule 49 of the BCI Rules applies to an employment for work other than conduct of cases in courts as an advocate. If full time service or part time service undertaken by an advocate is consistent with his practicing as an advocate, no declaration under Rules 43 & 49 of the BCI Rules need be filed to the State Bar Council. The factum of employment is not material, but the key aspect is whether such employment is consistent with his practicing as an advocate or in other words, whether pursuant to such employment, he continues to act and/or plead in the courts. If the employment is consistent with his practicing as an advocate in Court, then despite employment, he continues to be an advocate. In the State of Karnataka, the APPs though are employed by the State of Karnataka, they shall have to act

or plead in Court. The APPs are appointed mainly or predominantly for the purpose of conducting cases in Court on behalf of the State. Therefore their employment is consistent with their practicing as advocates and hence, as held by the Apex Court in the case of Deepak Aggarwal, they do not cease to be advocates.

It is relevant to note that the decision in Deepak Aggarwal is the latest three-Judges Bench decision. On the other hand the decision in Mallaraddi H. Itagi is by two-Judges Bench and is earlier to Judgment in Deepak Aggarwal. The decision in Deepak Aggarwal has considered the Judgment in Mallareddi H. Itagi. Hence the dictum laid down in Deepak Aggarwal binds us.

27. The law by now is well settled that the classification must not be arbitrary, but must be rational in order to pass the test, it must satisfy two conditions, namely: (i) that the classification must be founded on an intelligible differentia which distinguishes those who are grouped together from others; and (ii) that differentia must have a rational relation to the object sought to be achieved by the Act or the Rules. The differentia which is the basis of classification and the object of the Act and the Rules are distinct things and what is necessary is that there must be a nexus between them. The consequence of classification is undoubtedly to differentiate persons belonging to that class from others and that by itself will not make the legislation obnoxious to the equal protection clause. Equality prescribed by the Constitution is not violated if the statute operates equally on all persons who are included in the group and the classification is not arbitrary or capricious but bears a reasonable relation to the objective of the Legislature. Though the Legislature is given the utmost latitude in making the classification, it is only when there is a palpable abuse of power and the differences made have no rational relation to the objectives, judicial interference becomes necessary.

28. Since the advocates and APPs participate in the Court proceedings with the same type of work, duties, obligations and responsibilities with a very object of assisting the Courts in the administration of justice, they shall be treated alike, otherwise the very mandate of the Constitution would be frustrated. In our considered opinion, the Apex Court in Deepak Aggarwal, though was considering the appointment to the posts of District Judges under Article 233 of the Constitution, the principle laid down in the said judgment fully answers the question involved in these matters.

In view of the above, the order passed in Writ Petition No. 18428/2012 c/w W.P. Nos. 6380/2012, 11611-11621/2012 and 38597-38600/2011 (S-RES) dated 6th December 2012, impugned in these writ appeals is liable to be set aside and accordingly the same stands set aside. We hold that the Assistant Public Prosecutors-cum-Additional Government Pleaders are eligible for being considered for appointment to the posts of Civil Judges. We also make it clear that the selections/appointments already made pursuant to the notification dated 6.8.2011 are not disturbed. However Assistant Public Prosecutors-cum-Assistant

Government Pleaders shall be considered for appointment to the posts of Civil Judges in future.

Writ Appeals are allowed accordingly.