

(2013) 11 CAL CK 0035
In the Calcutta High Court
Case No : Writ Petition No. 14165 (W) of 2013

Souvik Mukherjee

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 18-11-2013

Acts Referred:

Citation : (2014) 1 CALLT 146 : (2013) 5 LLN 507

Hon'ble Judges : D. Datta, J

Bench : Single Bench

Advocate : Biswaroop Bhattacharya and Mr. Sirsanya Bandopadhyay, for the Appellant; Sadhan Roy Chowdhury and Mr. Moloy Roy for Respondents 1 and 2, Mr. Amalendu Mitra and Ms. Sarvani Chanda for Respondents 3 to 5, Mr. Kallol Basu and Mr. Chandradoy Roy for Respondent 6, for the Respondent

Final Decision : Dismissed

Judgement

D. Datta, J.—Recruitment to the West Bengal Civil Service (Judicial) is governed by the West Bengal Civil Service (Judicial) Recruitment Rules, 1951 (hereafter the Recruitment Rules). In terms of Rule 2 thereof, recruitment shall be made on the basis of a competitive examination conducted by the Public Service Commission, West Bengal (hereafter the P.S.C.). Rule 3 provides for the qualifications which a candidate must possess. Clause (h) thereof ordains that every candidate must be enrolled as an advocate in the roll of Bar Council of any State or Union Territories in India on or before the date of advertisement for examination. By issuing Advertisement No. 2 of 2013, the P.S.C. invited applications from eligible candidates for participating in the West Bengal Judicial Service Examination, 2013 (hereafter the said examination). Aspiring to be a member of the West Bengal Civil Service (Judicial), the petitioner responded to the advertisement. He obtained the bachelor's degree in law (five year course) from the University of Calcutta (hereafter the University) in 2010, having been placed in the first class. He had thereafter applied before the Bar Council of West Bengal (hereafter the Council) for enrolment on September 6, 2010, in

pursuance whereof he was admitted and enrolled as an advocate under the Advocates Act, 1961 (hereafter the Act) on October 6, 2010. Along with other documents, the petitioner had enclosed with his application the degree awarded by the University and the enrolment certificate issued by the Council.

2. While answering a query in the application form as to whether he is presently employed or not, the petitioner had disclosed that between June 28, 2012 and January 22, 2013, he was in permanent full-time employment as an Associate with Corporate Professionals, New Delhi and from February 18, 2013 onwards, he has been employed on permanent full-time basis as an Associate with Acuity Law, Mumbai. Based on such disclosure, the P.S.C. did not treat him eligible for taking part in the said examination and refused to issue admit card in his favour. This prompted the petitioner to address a representation dated April 26, 2013 to the Chairperson of the P.S.C. Referring to Rule 49 of the Bar Council of India Rules (hereafter the BCI Rules), it was contended that there was erroneous application of the same to debar the petitioner from participating in the said examination. According to the petitioner, the organisations which had employed him were private law firms and he had rendered professional services as an advocate, and by virtue of providing legal services on behalf of the said law firms, he continued to be regulated by the Act and never ceased to be an advocate within the meaning thereof. It was further contended that neither the Act nor the rules/regulations framed thereunder required suspension or withdrawal of enrolment as an advocate while rendering services to a law firm on retainer basis and that a patently unreasonable and wrong interpretation of Rule 49 could not have resulted in his disqualification. Request for reconsideration of the decision rejecting his candidature was prayed for with consequent direction to issue admit card in his favour to enable him compete with others.

3. The Chairperson did not respond. Feeling aggrieved by the action of the P.S.C. in not treating him eligible to take the said examination, the petitioner presented this writ petition on May 8, 2013. In terms of interim orders passed by this Court, the petitioner was allowed by the P.S.C. to participate in the preliminary and final written examinations without prejudice to the rights and contentions of the parties. The petitioner has acquitted himself creditably in the written examinations and could be called for the interview scheduled to commence from November 18, 2013 i.e. today, provided the writ petition succeeds.

4. The only question that arises for decision on this writ petition is whether the petitioner was rightly debarred from taking the said examination or not.

5. I have heard the learned counsel for the parties at length and considered the materials on record.

6. Mr. Mitra, learned counsel appearing for the P.S.C. referred to the minutes of the Selection Committee meeting held on December 24, 2007 in connection with West Bengal Judicial Service Examination, 2007. The meeting was attended by the then Chairperson of the P.S.C., an Hon''ble Judge nominated by the Hon''ble

the Chief Justice, High Court at Calcutta in terms of Rule 4 of the Recruitment Rules, and the then Principal Secretary, Judicial Department, Govt. of West Bengal (being the Government representative). He submitted that it was on the basis thereof that the petitioner was treated as ineligible to participate in the said examination. Relevant portion of the minutes is quoted below:

...

C) By a notification dated October 22, 2003 the aforesaid clause was further modified as follows:-

Every candidate must be enrolled as an advocate in the roll of Bar Council of any State or Union Territories in India on the date of advertisement for examination.

D) Therefore, the law as it stands today, although the experience of three years" practice as a lawyer is no longer necessary yet, the candidate must be a practising lawyer on the date of advertisement for the examination the Supreme Court merely had done away with the necessity of three years" experience as lawyer but not given liberty to recruit the judicial officers from the persons who are not even the practising lawyers and accordingly, the Rules have been changed and the Committee is guided by the amended Rules mentioned above so long those are subsisting on the field.

E) According to the Rules framed by the Bar Council of India under the Advocates Act, if an Advocate intends to take up a fulltime job, he is required to intimate such fact to the concerned Bar Council along with his original enrolment certificate and is not entitled to practise any further so long he would be in the fulltime job and the bar Council, on an application of the applicant after he ceases to be in fulltime service, allows resumption of practice by returning the certificate provided he has not incurred any disqualification in the meantime. Therefore, if he intends to resume practice, he is required to file appropriate application for fresh permission to resume practice. (See Rule 49 of the Bar Council of India Rules and Rule 5 of the Rules framed u/s 49(1)(ah) of the Advocates Act, 1961). Accordingly, the moment an enrolled advocate takes up a fulltime job, he loses his right to practise and his enrolment remains suspended and consequently, he cannot be said to be still enrolled as an advocate in the roll on the date of advertisement for the examination as he has either returned his enrolment certificate or has become liable for penal action for not returning the same.

F) Therefore, unless the candidate is lawfully entitled to practise on the date of advertisement for the examination (may not have three years" experience as a lawyer), he will not be eligible to sit for the examination.

7. According to Mr. Mitra, the petitioner himself having declared to be in full-time employment of a private law firm is not entitled to offer his candidature and the P.S.C. did not commit any illegality warranting interference.

8. Mr. Bhattacharya, learned counsel for the petitioner contended that the

minutes of the Selection Committee meeting held on December 24, 2007 has no relevance at all in view of the decision of the Supreme Court, reported in Deepak Aggarwal Vs. Keshav Kaushik and Others,). According to him, employment in a law firm for rendering professional services to the clients who approach it cannot disqualify a candidate for selection as a judicial officer since he continues to be associated with legal work and is as much governed by the provisions of the Act as any other practising advocate.

9. Mr. Bhattacharya also referred to the decision of the Supreme Court reported in Mahesh Chandra Gupta Vs. Union of India (UOI) and Others, to contend that the Act deals with a person's right to practise or entitlement to practise and that actual practice has never been considered to be an eligibility criteria even for appointment of a high Court judge in terms of Article 217 of the Constitution.

10. It has accordingly been submitted in the alternative that even if the petitioner has not actually practised, that cannot operate as a bar for him to participate in the selection process.

11. Rule 49 u/s VII, Chapter I of Part VI of the BCI Rules being the provision that was pressed into service for declaring the petitioner ineligible requires to be noted and is set out hereunder:

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 such 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.

12. The Supreme Court very recently had the occasion to consider the effect, scope, purport and import of Rule 49 in its decision in Deepak Aggarwal (supra). To appreciate the principle of law laid down in paragraphs 98 and 99 of the decision, which are absolutely relevant for adjudication of the issue involved in this writ petition, it would be necessary to take a look at pre-amended Rule 49 reading 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 practise 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 practise as an advocate so long as he continues in such employment.

Nothing in this Rule shall apply to a Law Officer of the Central Government or the Government of a State or of any public corporation or body constituted by statute who is entitled to be enrolled under the Rules of his State Bar Council made u/s 28(2)(d) read with Section 24(1)(e) of the Act despite his being a full-time salaried employer.

Law Officer" for the purpose of this Rule means a person who is so designated by the terms of his appointment and who, by the said terms, is required to act and/

or plead in courts on behalf of his employer.

13. By resolution dated June 22, 2001, the Bar Council of India deleted the second and third paragraphs of the above Rule. The said resolution was published in the Government Gazette on October 13, 2001, and the Hon'ble the Chief Justice of India gave his consent to the said deletion on April 23, 2008.

14. It would now be profitable to extract paragraphs 98 and 99 from the decision in Deepak Aggarwal (*supra*). The same reads as follows:

98. Admittedly, by the above resolution of the Bar Council of India, the second and third paragraphs 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 practise. 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 practise 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 the second and third paragraphs 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 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 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 the negative, he ceases to be an advocate.

15. Having regard to the aforesaid dicta, the minutes of the Selection Committee meeting referred to by Mr. Mitra and extracted *supra* loses much of its relevance. The position as it stands now after the decision in Deepak Aggarwal (*supra*) is

that an advocate, even in employment, is ipso facto not debarred from participating in the examination leading to recruitment of judicial officers if in course of such employment he continues to act and/or plead in the courts of law. Such acting and/or pleading in courts is consistent with the practice of an advocate and, therefore, the declaration envisaged in Rule 49 of the BCI Rules, in such a case, would not be necessary. The decision in Deepak Aggarwal (supra) being one of recent origin, the members of the Selection Committee obviously did not have the benefit of perusing it and to the extent the minutes are contrary to the decision in Deepak Aggarwal (supra), the same must be held to be of no effect.

16. However, having regard to the facts and circumstances of the present case, the submission of Mr. Bhattacharya that the petitioner's claim is covered by the decision in Deepak Aggarwal (supra) appears to me to be misconceived. Mr. Bhattacharya was called upon to show either any pleading in the writ petition or any statement in the representation dated April 26, 2013 submitted by the petitioner to the effect that in course of his employment with the law firms referred to in his application, he was rendering professional services on behalf of his employer by acting and/or pleading in courts of law. Unfortunately no such averment/statement could be shown. He was also called upon to produce certified copies of orders recording the appearance of the petitioner as an advocate who appeared in the case on behalf of his client before the court/tribunal or any petition/application/plaint wherein the petitioner's name appeared as an advocate-on-record/filing advocate. Unfortunately, once again, no such evidence could be produced. It is thus clear that the petitioner in course of his employment was involved in other kinds of legal work to which Rule 49 of the BCI Rules was attracted. Once the prohibition in Rule 49 gets attracted, it is not possible to accept Mr. Bhattacharya's contention that the petitioner was eligible to participate in the said examination but was denied of such an opportunity by the P.S.C. In my view, the P.S.C. although had acted on the basis of the minutes of the Selection Committee meeting dated December 24, 2007, in the ultimate analysis it had not committed any illegality having regard to the discussions hereinbefore.

17. The decision in Mahesh Chandra Gupta (supra) does not come to the assistance of the petitioner in view of the finding that the prohibition in Rule 49 is attracted in his case.

18. Sensing that the decision in Deepak Aggarwal (supra) was doing more harm than good to the petitioner's cause and that the decision in Mahesh Chandra Gupta (supra) is of no assistance, Mr. Bhattacharya had contended that the Supreme Court did not consider the recent amendments in Rule 10 under Chapter III, Part VI of the BCI Rules requiring an advocate to obtain a "certificate to practice" before appearing in a court of law/tribunal while deciding Deepak Aggarwal (supra). It was also contended by him that without such "certificate to practice" issued by the Bar Council of India or a State Bar Council in favour of an

advocate, he is not entitled to practice and it ought to be ascertained by the Court, upon calling for and examining the records, as to how many of the candidates who had been found eligible to take the written examinations did possess such certificate.

19. The aforesaid off-the-cuff contention of Mr. Bhattacharya at first blush appeared to be attractive. Going by the minutes of the Selection Committee meeting dated December 24, 2007, the P.S.C. desired the aspiring candidates to have practised for some time in the courts of law and if indeed the candidates who responded to Advertisement No. 2/2013 did not possess any "certificate to practice", the entire exercise of selection would be one in futility. Mr. Bhattacharya was called upon to show the pleadings in the writ petition in this regard, which he could not. I am not inclined to conduct a roving enquiry without any pleading in the writ petition and, therefore, have no hesitation in rejecting the contention.

20. The writ petition is without merit and the same stands dismissed, without costs. Before parting, I wish to dwell on one observation of the Selection Committee as recorded in the minutes of the meeting dated December 24, 2007 extracted supra. In sub-paragraph D, it was observed that although the Supreme Court by its decision reported in *All India Judges Association and Others Vs. Union of India (UOI) and Others*, had done away with the necessity of 3 years' experience as a lawyer but had not given liberty to recruit judicial officers from persons who are not even practising lawyers. The observation appears to be in the teeth of the decision in *Mahesh Chandra Gupta (supra)*. The P.S.C. may reconsider its decision in the light of the said decision. In any event, if actual practice by a prospective candidate is regarded as a requirement, the Government and the High Court ought to take note of the recent amendments in the BCI Rules with effect from June 12, 2010. Rules 9 to 11 under Chapter III, Part VI of the BCI Rules have been amended and the concept of a "certificate to practice" has been introduced. The BCI Rules now require an advocate enrolled with any Bar Council to appear and succeed in an All India Bar Examination prior to commencement of practice before a court of law/tribunal. It is only after obtaining such certificate that an advocate would be entitled to practice. Although the BCI Rules have been amended in 2010, there appears to be no corresponding amendment in the Recruitment Rules. The reason for an amendment being required is this. If, indeed, it be the intention that judicial officers must be recruited from practising lawyers irrespective of the number of years of their practice, Rule 3(h) of the Recruitment Rules is an outdated provision. In view of the recent amendments in the BCI Rules, it appears to me that a legal practitioner is an advocate but an advocate is not a legal practitioner in all cases. It might well be so that a law graduate may enrol himself with a Bar Council but may not choose to appear at the All India Bar Examination. Without the certificate to practice, he does not acquire the right to practice in a court of law/tribunal but continues to remain on the roll of the Bar Council as an advocate, thereby acquiring the qualification to participate in the Judicial Service

Examination envisaged by the Recruitment Rules. Unless the Rules are amended, the object of recruiting judicial officers from practising lawyers (albeit not having 3 years" experience) would be completely frustrated. I hope and trust that the State as well as the High Court would take note of the amendments in the Act and the BCI Rules and consider the desirability of incorporating appropriate amendment in the Recruitment Rules so as to trace the most talented persons for future recruitment in the Judicial Service.

Urgent photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.