

(2009) 04 CAL CK 0014

In the Calcutta High Court

Case No : M.A.T. No. 815 of 2008 and C.A.N. No. 9192 of 2008

The Hon'ble High Court, Calcutta

APPELLANT

Vs

Shankar Kumar Das

RESPONDENT

Date of Decision : 09-04-2009

Acts Referred:

Advocates Act, 1961 — Section 2(1)(a), 2(a), 2(i), 22, 24
Constitution of India, 1950 — Article 124(3)(b), 217(2)(b), 217(2)(b), 226, 233
Industrial Disputes Act, 1947 — Section 7(a)(3), 7A(3)
Representation of the People Act, 1951 — Section 86(3)

Citation : (2009) 04 CAL CK 0014

Hon'ble Judges : Sadhan Kumar Gupta, J;Pratap Kumar Ray, J

Bench : Division Bench

Advocate : Samarditya Pal and Mr. Alope Ghosh, for the Appellant; Arunava Ghosh, Soumya Majumder, Anirban Pramanik and Mr. Lakshmi Narayan Banerjee for Respondents No. 1 in MAT 816/2008 with CAN 9196/08 Mr. Kishor Dutta for Respondents No. 1 in MAT 815/2008 with CAN 9192/08, Mr. Sandip Srimani, Pratik Dhar and Mr. Joyeeta Chakraborty for the State, Mr. Amalendu Mitra, Amalakshya Jana and Mr. S. Sirkar for the P.S.C., for the Respondent

Judgement

Pratap Kumar Ray, J.—Challenging the judgment and order dated 11th August, 2008 passed in writ petition No. 11974 (w) of 2008 and the judgment and order dated 7.8.2008 passed in writ petition No.7991 (W) of 2008 these appeals MAT No.815 of 2008 and MAT No.816 of 2008 respectively were preferred by the High Court, Calcutta through the Registrar General, High Court, Calcutta. The judgment dated 11th August, 2008 passed in W.P.No.11974(W) of 2008 as assailed in the Appeal MAT No.815 of 2008 read such:

"This is one more instance where a candidate who appeared in the West Bengal Judicial Examination, 2007 has approached this Court ventilating his grievances over the manner of selection and the appointment given thereto.

Heard Mr. Dutta appearing as learned counsel for the petitioner and Mr. Ghosh appearing as learning counsel for the respondent/High Court Administration.

According to Mr. Dutta, the position of the writ petitioner is 134 in the list of selected candidates. It is emphatically submitted that he has stood first amongst scheduled caste candidates and as such, he deserves to be appointed as a reserved category candidate. Many other issues have also been raised at the time of hearing of the present application.

Mr. Ghosh submits that if the petitioner comes within the selected candidates, there can be consideration for his appointment. He, however, does not admit the claim of the present writ petitioner that he has topped the list amongst the scheduled caste candidates.

Mr. Dutta submits that the petitioner was working as Assistant Public Prosecutor at the time appearing in the said examination. His candidature was rejected on such ground. It is not understood as to what could be the basis for rejection of the candidature of the petitioner only on the ground that he was functioning as Assistant Public Prosecutor at the time of filing up of the form or while appearing in the examination.

So far the eligibility criteria is concerned, Mr. Dutta submits that the petitioner is a citizen of India, he has a degree in Law from recognized university, he is enrolled in the Bar Council and he has the ability to read, write and speak in Bengali. Referring to the same, Mr. Dutta submits that there could be no reason for rejection of the candidature of the writ petitioner.

At this stage, Mr. Mitra, learned counsel for the respondent/Public Service Commission appears and adopts argument advanced by Mr. Ghosh. Mr. Mitra further submits that since the writ petitioner is enrolled as an Advocate, he may not be considered suitable or eligible for being considered for recruitment in the West Bengal Judicial Service. I fail to appreciate such inconsistent submission.

After hearing learned counsel for all the parties, I think much of the confusion is unwarranted. It is difficult to understand as to why enrolment of an Advocate has been introduced as one of the eligibility criteria - more so, in the backdrop of the apex Court's observation that doors rather be opened for fresh law graduates. It is not understood as to why the respondent authorities who are required to implement the observations and directions given by the apex Court have not approached the apex Court for necessary clarification. There is emphatic direction in the said judgment in the case of All India Judges Association and Others Vs. Union of India (UOI) and Others, , to the effect that those who are to implement the direction may approach the apex Court for necessary clarification.

In the present case, no such clarification was sought for. I do not find any reason whatsoever as to why should a candidate be considered ineligible just on the ground that he is functioning as the Assistant Public Prosecutor - if he otherwise satisfies all the eligibility criteria as per advertisement dated 17.2.2006.

So far other claim of the petitioner is concerned, that the writ petitioner has topped the list amongst the scheduled caste candidates, it is for the respondent

authority to consider the same. Since final list has reportedly been published, the respondent authority must give due regard to such list of the selected candidates and if the claim of the writ petitioner that he stood first amongst the selected scheduled caste candidates is correct, there is no reason as to why he shall not be given appointment. Since no other point has been raised at the time of hearing of the present writ application, the same is disposed of with the following directions:-

If the candidature of the writ petitioner has been turned down or rejected on the ground that he is functioning as Assistant Public Prosecutor, the respondent authority must take appropriate steps for rectification of the aforesaid stand and he cannot be disqualified for or, considered to be ineligible on that ground.

If the writ petitioner has topped the list amongst the scheduled caste candidates, the respondent authority must take appropriate steps by way of giving appointment to the writ petitioner and this should be done within a period of eight weeks from the date of communication of this order.

If the writ petitioner is thus given appointment, his seniority in the list also must be fixed up according to the merit list.

There will, however, be no order as to costs.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties expeditiously."

2. The judgment dated 7th August, 2008 passed in W. P. No.79991 (W) of 2008 assailed in the appeal MAT No.816 of 2008 read such:

"The backdrop of the present case is as follows:

The writ petitioner submitted his application in prescribed manner in response to the advertisement No.4/2007 dated 17th February, 2007 issued by the respondent No.1 i.e. Public Service Commission, West Bengal. This was in connection with recruitment in West Bengal Judicial Service.

He duly appeared in the earlier examination for selection in the said service. He was successful in the written examination and appeared in the personality test but unfortunately, could not make it.

In his second attempt, he passed the preliminary test, appeared in the written examination and was called for personality test. At the time of his interview, which was held on 23rd November, 2007, he was given an impression that he was possibly not eligible to appear in such examination as he was in full time employment. Subsequently when the select list of candidates was published, he did not find his name therein.

The petitioner is a citizen of India. He is a law graduate. He got enrolled as an Advocate in the Bar Council. He has ability to read, write and speak in Bengali. He was thus qualified to appear in the said examination since he satisfied all the

eligibility criteria.

He was quite confident that he would make it this time. He was shocked to find that his name was not in the select list. He submitted an application dated 25th March, 2008 under Right to Information Act to the respondent No.1 seeking certain particulars like marks obtained by him, lowest marks of the selected candidate in the general category and the ground of his disqualification, if any.

By Memo No. 946/PSC dated 9th April, 2008, respondent No.1 informed the petitioner that he had secured 6271/2 marks in the examination whereas the lowest ranked general category candidate had secured 540 marks in aggregate. He was further informed that since he was in full time employment on the date of the advertisement in respect of the examination, he was not lawfully entitled to practise and thus became ineligible in terms of Clause-III of "qualification" required for appearing in the West Bengal Judicial Service Examination.

Being seriously aggrieved by such decision of the respondent authority, the petitioner submitted a representation in the form of demand justice on 16th April, 2008. The petitioner did not receive any reply thereto. Thus, being left with no option, he approached this Court with such application under Article 226 of the Constitution seeking redress.

It seems to be the stand of the respondent authorities that the writ petitioner does not pass the test of scrutiny and is not eligible to appear in such examination.

Proper appreciation of the controversy raised in the present application demands consideration of the "qualification" as advertised. The same is:-

"Qualification : (i) A citizen of India or such a person of other nationality as declared eligible by Government of India; (ii) A degree in Law from any University or Institution affiliated to a University recognized by the State Government or the Central Government; (iii) Enrolment as an advocate in the roll of Bar Council of any State or Union Territory in India on the date of advertisement for the examination; (iv) Ability to read, write and speak in Bengali (not required for recruitment in the case of Nepali speaking candidates from hill areas of the district of Darjeeling)."

Mr. Arunava Ghosh, appearing as learned counsel for the writ petitioner, first invited attention of the Court to the fact that there is specific mention of candidates in employment and how they are required to apply.

The relevant portion may be reproduced as follows:

"Candidates in service of Government, a Local or Statutory Body must submit their applications in prescribed form with the requisite documents direct to the Commission's office within the closing date.

Candidates in service of Government, a Local or Statutory Body are required to submit an undertaking (as in the declaration printed in the Application Form) to

the effect that they have informed, in writing, their Head of Office/Department as to their applying for the examination."

The petitioner is employed as a Stamp Reporter, High Court, Original Side, Calcutta. It appears that he was given permission by the Registrar (vide order dated 19.2.2007) to appear in such examination. The petitioner as against column No.12 of the application form wrote "yes" in response to the query whether he was enrolled as an Advocate. The petitioner gave details of his employment as against column No. 16 of such application form. Inviting attention of the Court to all such facts and circumstances, learned counsel Mr. Ghosh expressed wonder and submitted as to how could the authorities be justified in making the writ petitioner `ineligible" for appearing in West Bengal Judicial Service Examination.

Mr. Aloke Kr. Ghosh, appearing as learned counsel for the respondent/High Court Authority, invited attention of the Court to the observations made by the Apex Court in All India Judges" Case, All India Judges" Association and Others Vs. Union of India and Others, Mr. Ghosh contended that keeping such directions of the Apex Court in mind, the respondent authorities held that the moment an enrolled advocate takes up a full time job, he loses his right to practise and his enrolment remains suspended. 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. It was submitted that the authority concerned took the view that unless the candidate is lawfully entitled to practise on the date of advertisement for the examination, he will not be eligible to sit for the examination.

In this context, Mr. Ghosh referred to Rule 49 of the Advocates Act, 1961. The same is:

"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."

This, of course, intensified the wonder in the mind of Mr. Arunava Ghosh, who submitted that in that event, there could be no answer as to why specific reference has been made in the application form regarding those who are in service and as to how they are required to submit their application.

Mr. Mitra, as learned counsel for the respondent/Public Service Commission, virtually adopted the argument advanced by Mr. Aloke Ghosh on behalf of the respondent No.3. At the time of hearing, Mr. Aloke Ghosh produced a copy of the minutes of the Selection Committee Meeting held on 24th December, 2007 in connection with the West Bengal Judicial Service Examination, 2007. It appears from the said document that a question arose before the Selection Committee as

to whether a candidate, who on the date of advertisement in full time service under any employer, is eligible to sit for the examination. The Committee decided to answer the question in negative.

In this context, reference was made to the decision of the Apex Court in the case of All India Judges' Association and Others Vs. Union of India and Others, . The relevant observation is :

"The recruitment of law graduates as judicial officers without any training or background of lawyering has not proved to be a successful experiment. Considering the fact that from the first day of his assuming office, the judge has to decide, among others, questions of life, liberty, property and reputation of the litigants, to induct graduates fresh from the Universities to occupy seats of such vital powers is neither prudent nor desirable. Neither knowledge derived from books nor pre-service training can be an adequate substitute for the firsthand experience of the working of the Court-system and the administration of justice begotten through legal practice. The practice involves much more than mere advocacy. A lawyer has to interact with several components of the administration of justice. Unless the judicial officer is familiar with the working of the said components, his education and equipment as a Judge is likely to remain incomplete. The experience as a lawyer is, therefore, essential to enable the judge to discharge his duties and functions efficiently and with confidence and circumspection. Many States have hence prescribed a minimum of three years' practice as a lawyer as an essential qualification for appointment as a judicial officer at the lowest rung. It is, hence, necessary that all the States prescribe the said minimum practice as lawyer as a necessary qualification for recruitment to the lowest rung in the judiciary. In this connection, it may be pointed out that under Article 233(2) of the Constitution, no person is eligible to be appointed a District Judge unless he has been an advocate or a pleader for not less than seven years while Articles 217(2)(b) and 214(3)(b) require at least ten years practice as an advocate of a High Court for the appointment of a person to the posts of the judge of the High Court and the Judge of the Supreme Court respectively. We, therefore, direct that all States shall take immediate steps to prescribe three years' practice as a lawyer as one of the essential qualifications for recruitment as the judicial officer at the lowest rung."

Subsequently, the concerned Recruitment Rules were amended and the following clause was substituted:

"A candidate shall not be eligible to appear all the examination unless he has put in at least three years' practice as a lawyer at the time of his application for appearing at the examination."

Thereafter, the Apex Court reviewed its earlier decision and held that three years' minimum experience as a lawyer would not be necessary as after three years' practice, the brilliant law graduates were not attracted by conditions of the Judicial Service.

It is significant to mention that the Apex Court observed in the All India Judges' Case, All India Judges' Association and Others Vs. Union of India and Others, that "we accept this recommendation of the Shetty Commission and the argument of the learned Amicus Curiae that it should be no longer mandatory for an applicant desirous of entering the Judicial Service to be an Advocate of at least three years' standing." Thus, doors were opened to "a fresh law graduate who may not even have put in even three years of practice, to be eligible to compete and enter the Judicial Service." This led to further amendment of the Rules and the following sentence was incorporated:-

"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 1st January of the year in which the examination is held."

Mr. Arunava Ghosh, as learned counsel for the writ petitioner, submitted that when the Apex Court thought it fit to open the gate for the fresh law graduates, how could there be any justification for insisting on "enrolment" as a Lawyer. Though there is force in the submission made by Mr. Ghosh in this regard, this Court does not think it necessary to proceed with a detailed analysis of the said aspect. The fact remains that the authority concerned in the advertisement published clearly mentioned that the candidate is required to be enrolled as an Advocate in the roll of the Bar council of any State or Union Territory of India on the date of advertisement for the examination.

It is not denied that the present writ petitioner was, thus, enrolled with the Bar Council. It is not in dispute that he was employed as Stamp Reporter in the High Court at Calcutta. The relevant advertisement very well mentions about candidates in service of Government, a Local or Statutory Body and that they are required to submit their applications in prescribed form with the requisite documents direct to the Commission's office. For candidates in service of Government, a Local or Statutory Body, there was a direction for submitting an undertaking to the effect that they have informed in writing their head office/department as to their applying for the examination. Thus, it cannot be said that the doors were closed to the candidates in some sort of employment - permanent or otherwise.

Then, the question naturally arises as to why should the petitioner be left out and how does the authority consider him "ineligible".

Mr. Aloke Ghosh on behalf of the High Court Administration submitted that the moment an enrolled advocate takes up an employment, it is for him to intimate the Bar Council and with such intimation, his enrolment remains suspended. It is not for this Court to enquire as to whether the enrolment of the writ petitioner had been suspended or not. The authority concerned also never sought a clarification as to whether the writ petitioner intimated the Bar Council about his taking up the job or whether he approached the Bar Council for keeping his enrolment suspended. It is also not for this Court within the scope and ambit of

the present application to find out as to whether any proceeding has been initiated by the Bar Council against the writ petitioner on the assumed ground that he did not send any intimation to the Bar Council. All these aspects do not seem to be relevant for adjudication of the controversy raised in the present application.

The advertisement published under reference being annexure- "P-3" at page 29 is required to be read in its usual simple manner. It is meant for the young law graduates, who aspire to be Judicial Officers. There should be no justification for attempting to read something more than what meets the eyes. Borrowing from Lord Denning (Ref:- The Discipline of Law") it can be said that words are the vehicle of thought. Obscurity in thought inexorably leads to obscurity in language. Language in an advertisement is required to be simple and direct and it should communicate effectively without leaving any scope for confusion or controversy. The effect of taking up a job subsequent to enrolment does not find any reference in the advertisement. A candidate is required to be enrolled and the writ petitioner satisfies that criterion. There are references to candidates in service of Government, a Local or Statutory Body and the writ petitioner is an employee of the High Court.

Thus, this Court finds it extremely difficult, if not impossible, to brush aside the submission made by learned counsel Mr. Arunava Ghosh.

Mr. Arunava Ghosh submitted that "advocate" means an advocate entered in any roll under the provisions of the Advocates Act, 1961. There are advocates practising and there may be others who are not. He elaborated this aspect by mentioning that in order to practise, enrolment with the Bar Council is essentially required. But even after enrolment with the Bar Council, an advocate may very well take up a job in the corporate sector or otherwise. In that event, there are specific provisions in the relevant Act indicating how the situation is required to be dealt with. If a person after enrolment as an advocate with the Bar Council chooses to take up a job, he is certainly expected to intimate accordingly. It may be that his enrolment would be kept under suspension. It "is relevant to mention that the writ petitioner appeared in West Bengal Civil Service (Judicial) Examination, 2003 in similar circumstances and under self-same eligibility criteria. True, he could not make it to the final merit list, but he was never declared ineligible by the PSC (W.B.). He mentioned it while filling up the application form in connection with the West Bengal Judicial Service Examination, 2007. Mr. Ghosh contended that if he could know that his employment would stand in the way of his qualifying for the said examination, he could have resigned.

Referring to the Black's Law Dictionary, it was submitted that enrolment means "to register", "to record", "to enter on the roll of a Court" etc. In Stout's Judicial Dictionary, it means "admit or enroll". Reference was made to Rule 49 of the Bar Council of India Rules (Part-VI, Chapter-II, Sec-VII), which provides for cessation of practice only on taking up full time employment. Mr. Ghosh submitted that it

does not provide for suspension and/or cessation of enrolment in any manner whatsoever.

On behalf of the writ petitioner, it was further contended that the Bar Council had no occasion to proceed against the writ petitioner u/s 35(3)(c)(d) of the Advocates Act, 1961. According to him, enrolment does not necessarily mean only practising advocate. Inviting attention of the Court to the fact that consideration has been made in the application form itself for full time Government servants and since there are instances where such Government servants had been allowed to appear for the examination and were declared selected, there could be no reason for such discrimination. It was further contended that the advertisement under reference expressly provides for two years age relaxation for the Government employees with at least two years service. This attracts the principle of "estoppel by encouragement and acquiescence".

On behalf of the writ petitioner, Mr. Ghosh categorically submitted that the confusing eligibility criteria cannot be permitted to take away the right of the writ petitioner and the intention put-forth by the Public Service Commission cannot be accepted as it is hit by the principle of "disproportionate counter mischief".

On the other hand, Mr. Alope Ghosh on behalf of the respondent No.3 submitted that the writ petitioner, being admittedly a full time salaried employee of the High Court, was required to intimate the fact to the Bar Council on whose roll his name appears and thereupon cease to practise as an advocate so long as he continues in such employment. It is not for this Court to consider as to whether the writ petitioner intimated the Bar Council. This Court also has no concern whether Bar Council has acted on such intimation, if any, or not. It is not in dispute that the writ petitioner got himself enrolled with the Bar Council. He also clearly satisfied the other eligibility criteria. It is worth mentioning that the Apex Court in the said judgment observed that the Hon'ble Court may be approached for clarification. This naturally applies to the implementing authorities and not to the candidates.

In such circumstances, the letter dated 9th April, 2008 issued by the Deputy Secretary & State Public Information Officer, Public Service Commission, West Bengal, thereby declaring the writ petitioner ineligible for appearing in the West Bengal Judicial Service Examination does not seem to have any rational basis.

It was emphatically submitted that when the Apex Court felt it necessary to open the door even to fresh law graduates with the idea to attract better candidates, there could be very little justification for insisting upon the candidates getting themselves enrolled as advocates. On behalf of the petitioner, Mr. Ghosh submitted that things appear to have been unnecessarily and unreasonably complicated, thereby giving rise to unpleasant and unfortunate controversies. There is nothing before this Court to suggest that the respondent authorities in this case, which are required to implement the directions, approached the Apex

Court for any clarification. That could perhaps make it clear whether there is any need for "enrolment" at all since anxiety is to attract fresh graduates.

After due consideration of entire facts and circumstances, this Court finds it very difficult to brush aside the grievances ventilated on behalf of the writ petitioner. Mere fact that the writ petitioner after enrolment as an advocate took up a full time employment cannot by itself be a ground for disqualifying him. The impugned communication being Memo No. 946/PSC dated 9th April, 2008, thus, seems to have no rational basis. In such circumstances, the present writ application being W.P. No. 7991(W) of 2008 is disposed of with the following directions:

The said communication being Memo No.946/PSC dated 9th April, 2008 stands cancelled. The respondent No.1 is hereby directed to consider the petitioner in order of merit in the select list of candidates and recommend the same to the respondent Nos. 2 and 3 for necessary follow up action. If the petitioner is so selected on merit, the respondent authorities must also take appropriate action in order to ensure that his seniority as per the merit list is not disturbed.

The aforesaid direction must be complied with within a period of two months from the date of communication of this order. There is no order as to costs.

Urgent xerox certified copy of the judgment be supplied to the parties, if applied for, as expeditiously as possible."

3. In both appeals a common question of law is involved namely interpretation of Rules for recruitment to the West Bengal Civil Service (Judicial) and more particularly the point as to whether a person initially enrolled himself as an advocate of the State Bar Council when voluntarily suspend his right to practice as an Advocate is eligible to appear in the examination of 2007. In both the writ applications challenge was made about the decision of Public Service Commission declaring them ineligible though in the meantime they appeared in the written examination. This decision of Public Service Commission was out come of unanimous resolution of the selection committee constituted with one sitting Judge of High Court, Calcutta as a nominee of the Hon"ble The Chief Justice.

4. The decision of Public Service Commission under challenge reads such:

"From : Shri S. K. Ghosal,

Deputy Secretary & State Public Information Officer,

Public Service Commission, West Bengal.

To: Shri Subhasish Muhuri,

R/ G-8, Old Dog Race Course Govt. Housing Estate,

P. S. Behala,

Kolkata - 700 038.

Kolkata, the 9th April, 2008

Sir,

With reference to your letter dated 25.03.08 seeking information regarding West Bengal Judicial Service Examination, 2007 under R.T.I. Act, 2005, I am to furnish the following information:

1. You have obtained 6271/2 marks in aggregate (i.e., written total and marks for personality Test taken together) in the West Bengal Judicial Service Examination, 2007.
2. The bottom ranked candidate in the unreserved category has obtain the marks.
3. As you were in full time employment on the date of advertisement of the examination you were not lawfully entitled to practice and thus you became ineligible for lacking in qualification in terms of Clause-III of qualification for appearing in West Bengal Judicial Service Examination.

Yours faithfully,

Deputy Secretary

&

State Public Information Officer."

The resolution of selection committee reads such:

"Minutes of the Selection Committee Meeting held on 24.12.2007 in connection with West Bengal Judicial Service Examination, 2007.

.....

A question has arisen before the Selection Committee as to whether a candidate who is on the date of advertisement in full time service under any employer, is eligible to sit for the examination. The Committee has decided to answer the question in negative for the following reasons.

A.

B.

C.

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 lawyer accordingly the rules have been changed and the Committee is guided by the amended rules mentioned-above so long those are subsisting on 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 full-time job, he is required to intimate such fact to the concerned Bar Council along his original enrollment certificate and is not entitled to practice any further so long he would be in the full-time job and the Bar Council on an application of the applicant after he ceases to be in full-time service allows resumption of practice by returning the certificate provided he has not incurred any disqualification in the mean time. 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 advocates looks up a full-time job he loses his right to practice and his enrollment 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 return his enrollment certificate or has become liable for penal action for not returning to the same.

F. Therefore, unless the candidate is lawfully entitled to practice on the date of advertisement for the examination (may not have 3 years experience as a lawyer) he will not be eligible to sit for the examination."

5. Since both these appeals are on identical question of law, those are taken up for analogous hearing.

6. Mr. Samaraditya Pal, learned senior advocate has attacked the judgment under appeal by raising the following points:

i) Writ petitioner Sri Mohuri admittedly full time salaried employee as Stamp Reporter in the High Court at Calcutta with effect from 12th March, 2002 and Sri Das, an Assistant Public Prosecutor, they cannot be said as an Advocate enrolled in the roll of Bar Council as per definition of advocate u/s 2(1)(a) of the advocate's Act, 1961 as they voluntarily suspended their practice due to such employment which is attracted by the bar imposed u/s VII of Part V Rule 49 of Bar Council of India Rules read with Rule 6(2) and 5(1) of Chapter III of Part VI of the Bar Council of India Rules, and as a consequence thereof the writ petitioners suffered the disability during their period of voluntary suspension of practice in the nature as if their names were removed from the roll, which the learned trial Judge failed to consider in its proper perspective.

ii) That under the West Bengal Civil Service (Judicial Recruitment) Rules, the eligibility qualification under Rule 3 (h) though in the language "enrolled as an advocate" in the roll of Bar Council of any State or Union Territory in India on the date of advertisement for examination, it impliedly provided eligibility criterion "as a practising Advocate" in the context of judgment of the Apex Court passed in the case of Dr. Chandra Prakash and Others Vs. State of U.P. and Another, whereby only embargo of minimum eligibility criterion for appearance in the judicial service examination prescribing 3 years practice as an advocate was directed to be changed/modified by putting an emphasis on the period of 3 years

practice but not total abolition of practising experience which became the consideration of framing the West Bengal Civil Service (Judicial Recruitment) Rules, hereinafter referred to as Recruitment Rules for brevity, by amending the earlier provision of 3 years practising experience to "enrolment as an advocate" under Rule 3(h) and that does not mean that practicing experience as an advocate was given a go-bye and this point was not looked into properly by the learned trial Judge.

iii) That the Selection Committee constituted by the Public Service Commission wherein a sitting Judge of this Court was a member as a nominee of the Hon'ble the Chief Justice, representing the High Court, by an unanimous decision on holding a meeting on 24th December, 2007 resolved that a candidate who on the date of advertisement was in full time service under any employer would not be eligible to sit for the examination namely West Bengal Judicial Service Examination, 2007 by discussing the conceptual effect of the judgment passed in the case All India Judges Association (supra) and the rule as framed for recruitment, which practically became the structural ground of the communication dated 9th April, 2008 issued by the Deputy Secretary and State Public Information Officer of Public Service Commission, West Bengal communicating the decision to the writ petitioners that due to the reason of their full time employment on the date of advertisement of the examination, they were not entitled to practice as an Advocate, so they became ineligible to be considered for recommendation in terms of qualification prescribed under the Rule 3(h), which became the subject matter of challenge of the writ applications, but the learned trial Judge failed to appreciate the conceptual idea of framing the said rule providing eligibility criterion that a candidate must be an advocate enrolled in the roll of Bar Council, State or other places on the date of advertisement and thereby passed judgments in favour of the writ petitioners which are not legally sustainable.

iv) That the appeal is maintainable by the High Court administration for sole reason that the High Court administration is a party interested about the selection as recruitment and appointment of candidates in the judicial service under Article 234 has placed the High Court in that position inasmuch as High Court administration since was made as a party in the writ application, High Court administration is a party aggrieved, by the judgments.

v) That age relaxation condition under Rule 3(d) (a) of the Rule introducing the words "have been in service of Government" does not in conflict with the Rule 3(h) of the said Rule by reading the meaning of the words "have been" in past perfect continuous tense.

7. Appeals have been opposed by Mr. Arunava Ghosh, learned advocate and Mr. Kishor Dutta, learned Advocate of the respondent/writ petitioners respectively, of respective appeals, by contending, inter alia, the following points:

i) High Court administration cannot be the appellant to prefer an appeal since the

High Court is not the appointing authority but the Hon"ble Governor of the State of West Bengal, following the rule as framed in consultation with the High Court, is appointing authority.

ii) That when appointing authority, the Governor of the State of Bengal and the Public Service Commission a recommending body, did not prefer any appeal, High Court administration cannot maintain this appeal and reliance has been made to the judgment reported in State of Bihar and Another Vs. Bal Mukund Sah and Others, ., Ashok Kumar Yadav and Others Vs. State of Haryana and Others, , Dr. Krushna Chandra Sahu and others Vs. State of Orissa and others, and Dr. M.V. Nair Vs. Union of India (UOI) and Others, ., and also the interim order dated 4th January, 2007 passed in the case Malik Majhar Sultan, Civil Appeal No. 1867 of 2006. Beside such reliance has been made to an affidavit of Registrar General, High Court, affirmed on 27th February, 2009 in another writ application W.P.No.1730 of 2008 wherein the Registrar General admitted that High Court Administration had nothing to say about recommendation by Public Service Commission as High Court administration was only vested with the right of posting of a candidate after appointment was made by the appropriate authority.

iii) So far as the submission of interpretation of the word "have been" in Rule 3(d) it should be considered as in present perfect continuous tense as per Wren & Martin English Grammar and hence the Rule 3 (d) (a) of the said Rule to be considered while interpreting the Rule 3(h) to interpret the word "enrolled as an Advocate in the roll of Bar council" in the angle that even a non -practicing advocate while in employment, is eligible to appear in examination.

iv) That Rule 5(1) and 6(2) of Chapter III Part 6 of the Bar Council of India Rules, never to be considered as provisions for striking out the name from the roll of State Bar Council and/or removal even if someone voluntarily suspends his practice as the said rule was framed deriving its power and authority u/s 49(1) (ah) of the advocate's Act, 1961, hereinafter for brevity referred to as the "concerned Act", which deals with condition for "right to practice" and not "for striking out the name from the roll of an enrolled advocate".

v) That Rule 49 of Chapter II Part VI of the said Bar Council of India Rules is a debarring clause to continue practice as an Advocate, but same cannot be read as a provision for striking out the name of an advocate already enrolled in the roll of State Bar council.

vi) That Advocates are only entitled to practice after being enrolled in the roll of State Bar Council and even on charge of misconduct of an advocate under Chapter V of the said Act when an Advocate is suspended from practice his name remains in the roll of the State Bar Council and as such even if there is any voluntary suspension though not out come of any disciplinary proceeding, the result and effect cannot be more worse than the effect of penal consequence of suspension u/s 35 of the said Act.

vii) That power to remove name from the roll is u/s 26A under the contingencies mentioned therein which is not applicable in the instant case and even on reading section 41 it cannot be said that the petitioner's name was removed from the State roll, as admittedly there is no order removing the writ petitioners names from roll of advocates.

viii) That even an Advocate who is not in any employment, enrolled on the date of advertisement for the said examination, when is entitled to be eligible satisfying Rule 3(h) of the Recruitment Rules who admittedly has no practising experience, the refusal to recommend by the Public Service Commission on the ground that the writ petitioners since voluntarily ceased their practice, same is attracted by eligibility criterion, has no logic and basis.

ix) That in the judgment of Judges Association (supra) case on the basis of which present recruitment rule has been framed it has categorically been observed that Rule should be framed by the High Court so that fresh law graduates may appear in the examination by reviewing the earlier provision of minimum 3 years practicing experience as an advocate, an eligibility criterion, to sit for the examination of judicial service and the learned Judge was right to take the view impugned in the appeal.

8. Having regard to the rival contentions of the parties, the point emerge for our decision in these appeals practically to, be decided on the interpretation of word voluntary suspension to practice and its effect thereof, in the angle of the Advocate's Act, the judgment of All India Judges Association (supra) and the consequent effect of framing of rule by the High Court.

9. So far as point of maintainability of the appeal as raised, the same is considered first. It is an admitted position that High Court administration was made as a party in the writ application and the judgment under appeal accordingly has affected the High Court administration who could be the party aggrieved to prefer any appeal. The Apex Court in the case *Adi Pheroosh Shah Gandhi Vs. H.M. Seervai, Advocate General of Maharashtra, Bombay*, a judgment of five Judges Bench in paragraph 12 held "any person who feels disappointed with the result of the case is not a person aggrieved. He must be disappointed of a benefit which he would have received if the order had gone the other way. The order must causes him a legal grievance by wrongfully depriving him of something. It is no doubt, a legal grievance and not a grievance about material matters". So a party aggrieved to prefer an appeal, is a party who has suffered a legal grievance and a party who has interest in the judgment.

10. To decide the issue whether the High Court administration could be said as a party interested and/or party aggrieved, we have to consider the structural foundation of judicial service, its appointment, procedure, recruitment rule, control over judicial officers, in the angle of the constitutional provision of Article 234 and also in the angle of conceptual structure of judicial service. Judicial service is not alike an employment in a Government service in terms of Article

309 of the Constitution of India. The judgment delivered by the Apex Court on that issue in the case *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, is relevant wherein at paragraph 31 the Apex Court dealt with the point about effect and purpose of nomination of a sitting Judge to sit as a member of Public Service Commission while considering the recruitment to the judicial service of the State and the determinative status of such nominee of the Chief Justice a sitting Judge of the High Court in the matter of selection. Paragraph 31 read such :

31. We would also like to point out that in some of the States, and the State of Haryana is one of them, the practice followed is to invite a retired Judge of the High Court of the State are being made and recruitment to the Judicial Service of the State are being made and the advice given by such retired High Court Judge who participates in the viva voce test as an expert is sometimes ignored by the Chairman and members of the Public Service Commission. This practice is in our opinion undesirable and does not commend itself to us. When selections for the Judicial Service of the State are being made it is necessary to exercise the utmost care to see that competent and able persons possessing a high degree of rectitude and integrity are selected, because if we do not have good, competent and honest Judges, the democratic polity of the State itself will be in serious peril. It is therefore essential that when selections to the Judicial service are being made, a sitting Judge of the High Court to be nominated by the Chief Justice of the State should be invited to participate in the interview as an expert and since such sitting Judge comes as an expert who, by reason of the fact that he is a sitting High Court Judge, knows the quality and character of the candidates appearing for the interview, the advice given by him should ordinarily be accepted, unless there are strong and cogent reasons for not accepting such advice and such strong and cogent reasons must be recorded in writing by the Chairman and members of the Public Service Commission. We are giving this direction to the Public Service Commission in every State because we are anxious that the finest talent should be recruited in the Judicial Service and that can be secured only by having a real expert whose advice constitutes a determinative factor in the selection process.

11. Recruitment in the judicial service is not a service in the sense of employment and the Judges are not employees. It is a settled legal position that members of the judiciary exercise the sovereign judicial power of the State. The issue was considered on impact of Article 309 of the Constitution of India in the case of *All India Judges' Association and Others Vs. Union of India and Others*, : *All India Judges' Association and Others Vs. Union of India and Others*, , a judgment of three Judges Bench, while dealing with review applications filed by the Union of India and various other states seeking review of the earlier judgment passed in *All India Judges Association reported in All India Judges' Association Vs. Union of India and others*, . The relevant paragraphs about status of judicial service vis a vis employment status under Article 309 from *All India Judges' Association and Others Vs. Union of India and Others*, are to this effect:

"4.It is not necessary to repeat here what has been stated in the judgment under review while dealing with the same contentious raised there. We cannot, however, help observing that the failure to realize the distinction between the judicial service and the other services is at the bottom of the hospitality displayed by the review petitioners to the directions given in the judgment. The judicial service is not service in the sense of "employment". The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the State power are the ministers, the legislatures and the judges, and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the legislators are different from the legislative staff. So also the judges from the judicial staff. He parity is between the political executive, the legislators and the Judges and not between the Judges and the administrative executive. In some democracies like the U.S.A., members of some State judiciaries are elected as much as the members of the legislature and the heads of the State. The Judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of the other services. The members of the other services, therefore, cannot be placed on par with the members of the judiciary, either constitutionally or functionally.

This distinction between the Judges and the members of the other services has to be constantly kept in mind for yet another important reason. Judicial independence cannot be secured by making mere solemn proclamations about it. It has to be secured both in substance and in practice. It is trite to say that those who are in want cannot be free. Self-reliance is the foundation of independence. The society has a stake in ensuring the independence of the judiciary, and no price is too heavy to secure it. To keep the judges in want of the essential accoutrements and thus to impede them in the proper discharge of their duties is to impair and whittle away justice itself.

5. So much for the contention of the review petitioners that the directions given by this Court would lead to the demand from the members of the other services for similar service conditions. It is high time that all concerned appreciated that for the reasons pointed out above there cannot be any link between the service conditions of the judges and those of the members of the other services. It is true that under Article 309 of the Constitution, the recruitment and conditions of service of the members of the subordinate judiciary are to be regulated by the Acts of the appropriate legislature and pending such legislation, the President

and the Governor or their nominees, as the case may be, are empowered to make rules regulating their recruitment and the conditions of service. It is also true that after the Council of States makes the necessary declaration under Article 312, it is the Parliament which is empowered to create an All India Judicial Service which will include posts not inferior to the post of District Judge as defined" under Article 236. However, this does not mean that while determining the service conditions of the members of the judiciary, a distinction should not be made between them and the members of the other Services or that the service conditions of the members of all the Services should be the same. As it is, even among the other Services, a distinction is drawn in the matter of their service conditions. This Court has in the judgment under review, pointed out that the linkage between the service conditions of the judiciary and that of the administrative executive was an historical accident. The erstwhile rulers constituted, only one service, viz., the Indian Civil Service for recruiting candidates for the Judicial as well as the Administrative Service and it is from among the successful candidates in the examination held for such recruitment, that some were sent to the administrative side while others to the judicial side. Initially, there was also no clear demarcation between the judicial and executive services and the same officers used to perform judicial and executive functions. Since the then Government had failed to make the distinction between the two services right from the stage of the recruitment, its logical consequences in terms of the service conditions could not be avoided. With the inauguration of the Constitution and the separation of the State power distributed among the three branches, the continuation of the linkage has become anachronistic and is inconsistent with the constitutional provisions. As pointed out earlier, the parity in status is no longer between the judiciary and the administrative executive but between the judiciary and the political executive. Under the Constitution, the judiciary is above the administrative executive and any attempt to place it on par with the administrative executive has to be discouraged. The failure to grasp this simple truth is responsible for the contention that the service conditions of the judiciary must be comparable to those of the administrative executive and any amelioration in the service conditions of the former must necessarily lead to the comparable improvement in the service conditions of the latter."

Article 234 of the Constitution of India reads such:

"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 in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such state."

12. Though the word "appointment" has been mentioned under Article 234 which to be made by Hon'ble Governor of the State, but it requires a prior consultation with the High Court and while framing recruitment rule such consultation is also must. Article 234, under the heading stipulates the word "Recruitment". Under

service jurisprudence, the word appointment has a different connotation and meaning and there is no doubt and we are not unmindful of the legal proposition that the word "appointment" and "recruitment" are not synonymous. The recruitment means under the service jurisprudence selection, empanelment, whereas appointment means the actual posting. Reliance is placed to the judgment passed in the case Prafulla Swain v. Prokash Chandra Mishra & Ors., reported in (1993) suppl 3 SCC 181 a judgment of three Judges Bench. But as already discussed above that the judicial service is not an employment in the sense under the anvil of Article 309 but it vests sovereign power of adjudication to one wing of the State as is administered by the judicial officers. Status of judicial service has been defined and settled by the judgment All India Judges Association (supra). Hence the general connotation and meaning of appointment under the service jurisprudence cannot be injected to identify the appointment word appearing under Article 234 of the Constitution of India having regard to the determinative opinion in the matter of recruitment of a candidate in the judicial service under the Recruitment Rules aforesaid vesting a superior power to the nominee of Chief Justice, a sitting Judge, one of the members of the selection committee, constituted by the Public Service Commission. Further Article 234 also deals with recruitment. So High Court has a say on such issue also. There is no doubt that the High Court administration itself is involved in the selection process thorough its nominee whose views is the determinative factor having regard to the recruitment rule providing exercise of determinative role. So the High Court administration cannot be said as a stranger and/or person not interested or affected by any judgment wherein such selection process became the subject matter and a judgment delivered contrary to the views raised by the High Court itself through its nominee as a member of that committee, which unanimously was accepted by the committee. As already discussed that appointment in a judicial service is not an employment in the sense of service jurisprudence and under Article 234 of Constitution of India read with said Rule from the stage of recruitment process till the appointment and thereafter, full control vests to the High Court, as a determinative body. Hence, we are of the reasoned view that appeals are maintainable by the High Court administration assailing the respective judgments delivered by the learned trial Judge. In the angle of Adi Pheroze Shah Gandhi (supra), the High Court is party affected by the judgments under appeal. The point as raised by Mr. Ghosh, learned advocate appearing for the respondent writ petitioner Subhasish Muhari and Mr. Dutta Learned Advocate appearing in another appeal on behalf of the writ petitioner respondent Shankar Kumar Das (MAT 815 of 2008) stand rejected. The appeals are thus maintainable and point is answered in favour of the appellant High Court administration in both appeals which were heard analogously.

13. In the writ applications as well as in the appeals question raised on interpretation of the recruitment rules following which the examination of 2007 was held by the Public Service Commission to recommend the names of candidates for appointment in the judicial service. The recruitment process and

the appointment procedure are controlled and guided by the West Bengal Civil Service (Judicial) Recruitment Rules framed by the High Court in terms of Article 234 of the Constitution of India. The said recruitment Rules read such:

"RULES FOR RECRUITMENT TO THE WEST BENGAL CIVIL SERVICE (JUDICIAL)

Notification Nos. 1713-J, 3653-J and 10587-J, dated 31st March, 1951, 2nd May, 1967, 1st May, 1959 and 17th December, 1959 respectively.

1. These Rules may be called the West Bengal Civil Service (Judicial) Recruitment Rules. They should come into forces immediately.

2. Method of Recruitment - Recruitment to the West Bengal Civil Service (Judicial) shall be made by a competitive examination to be conducted by the Public Service Commission, West Bengal. [Amendment published in the Calcutta Gazette, On January 2, 1995]

3. Qualifications:-

(a) Every candidate must be a citizen of India.

(b) Every candidate must be of good health and character and must be in all respects suitable for appointment to Government service.

(c) Every candidate must possess a degree in Law from any University, or any Institution affiliated to any University, recognized by the State Government or the Central Government.

(d) a) The age of a candidate for the examination shall not be less than 23 years and not more than 35 years on the date of advertisement for examination. The upper age limit being relaxable upto two years in case of candidates who have been in service of government for at least two years.

b) Provided that no candidate other than the candidates belonging to the Scheduled Castes or the Scheduled Tribes or Other Backward Classes, shall be allowed to appear in the examination for more than three times;

Provided further that the candidates belonging to the Scheduled Castes or the Scheduled Tribes or Other Backward Classes shall be allowed to appear in the examination for not more than five times;

Provided also that the upper age limit shall be relaxable for candidates belonging to the Scheduled Castes or the Scheduled Tribes or Other Backward Classes, or Physically Handicapped candidates as admissible under the rules made in this regard for such categories.

[Amendment published in the Kolkata Gazette, On April 3, 2003]

(e) Rule 3.e. is deleted and 3.f. is substituted and relettered as rule 3.e. Vide amendment published in the Calcutta Gazette on January 2, 1995.

Now Rule 3.e. is omitted vide amendment published in Kolkata Gazette on April

3, 2003

g) Rule 3.g. deleted vide amendment published in Calcutta Gazette on January 2, 1995

h) 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. [Rule 3.h. inserted vide amendment published in Kolkata Gazette on April 3, 2003 and Rule 3.h. further amendment and published in the Kolkata Gazette dated October 22, 2003.]

3A. Deleted vide amendment published in Calcutta Gazette on January 2, 1995.

4. Rules of Examination and lists of Subjects and Papers. A written examination to be conducted by the Public Service Commission will be in two parts:

Part I will consist of eight compulsory papers carrying a total of 800 marks.

Part II will consist of three optional papers in Law carrying a total of 300 marks.

The written test will be followed by a personality test to be conducted by the Public Service Commission. The Maximum marks for this test shall be 100.

The following subjects will comprise Part I of the written examination:

Compulsory Papers.

Marks

1. English Composition, Essay and

Precis Writing

100

2. Bengali (Hindi, Urdu or Nepali)

Composition, Essay and Translation

Form English to Bengali

100

3. General Knowledge and Current Affairs

100

4. Civil Procedure Code

100

5. Criminal Procedure Code and Indian

Penal Code

100

6. Indian Evidence Act

100

7. Law of Contracts and Torts

100

8. Transfer of Property Act

100

Any three of the following subjects will comprise Part II of the written examinations:

List of Optional Papers.

Marks

1. Hindu Law

100

2. Mohammedan Law

100

3. Jurisprudence and principles of Legislation

100

4. Indian Law relating to Companies and Insurance

100

5. Principles of Equity, including the Law of Trusts
and specific Relief

100

6. Partnership Act.

100

7. Law of Limitation and Law of Prescription

100

8. The Indian Constitution and Constitutional Law

100

Candidates must take up any three of the above subjects carrying a total of 300 marks. The standard of examination in the law papers (compulsory and optional) will be that of the LL.B. Degree of the Calcutta University.

All answers must be written in English (unless otherwise directed in the question

papers) except in the compulsory paper in Bengali composition, Essay and Translation.

There shall be no separate qualifying marks for any individual subject or for the Personality Test and merit of each candidate shall be determined in the basis of the total marks obtained by him in all the written papers of the examination and in the personality test and the Public Service Commission shall have discretion to fix qualifying marks in the aggregate. [Substituted vide Notification No. 9650-J dated 10th August 1976]

A sitting Judge of the High Court at Calcutta, nominated by the Chief Justice of the High Court, shall be one of the members of the Selection Committee and his opinion shall not be disregarded, unless there are strong and cogent reasons for not accepting the opinion. [Amendment insertion of this para after the last para of rule 4 vide the amendment published in the Calcutta Gazette on January 2, 1995].

5. The West Bengal State Service Recruitment Rules shall also apply to the West Bengal Civil Service (Judicial) to the extent of such particulars as are common to all other posts services under the State Government, provided that amendments to such of the Recruitment Rules which may be made from time to time shall only be extended to the West Bengal Civil Service (Judicial) on previous consultation with the High Court, Calcutta.

Schedule

Schedule deleted vide amendment published in Calcutta Gazette on January 2, 1995."

14. In the instant appeals interpretation of Rule 3(d) (a) providing relaxation clause of upper age limit of candidates who have been in service of Government and more particularly the meaning of the word "have been" and rule 3(h) providing eligibility criterion of a candidate that he must be "enrolled as an Advocate in the roll of Bar Council of the State or Union Territory" are the subject matter of interpretation. To answer the rival contentions of the parties as already discussed, we have to consider the Advocates Act, 1961, the Bar Council of India Rules, and the history of framing of the recruitment rules on the reflection of the judgment of the Apex Court passed in the case of All India Judges Association(supra) in the year 2002.

First we will deal with the Advocates Act.

15. The word "Advocate" has been defined u/s 2(a) of the Advocate's Act which means "an advocate entered in any roll under the provision of the Act".

16. u/s 2(i) of the said Act, legal practitioner means an advocate or Vakil of any High Court a pleader Mukhtar or revenue agent. Chapter IV of the advocates Act by section 29 and 30 stipulates the right of an advocate to practice which read such:

"29. Advocates to be the only recognised class of persons entitled to practise law.-Subject to the provisions of this Act and any rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates.

30. Right of advocates to practise. - Subject to provisions of this Act, every advocate whose name is entered in the [State roll] shall be entitled as of right to practise throughout the territories to which this Act extends, -

(i) in all Courts including the Supreme Court;

(ii) before any tribunal or person legally authorised to take evidence; and

(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise."

17. "Section 33 mandates that only the Advocates are entitled to practice which read such:

33. Advocates alone entitled to practise. - Except as otherwise provided in this 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 this Act.

18. Chapter V of the Advocates Act deal with disciplinary proceeding against an advocate relating to his misconduct and its different stages of initiation of disciplinary proceeding, penalty provision, appeal to the Bar council, to the Supreme Court etc. including alteration in the roll of advocate. u/s 35, sub-section 3 suspension of the Advocate to practice for a certain period as would be deem fit by decision of disciplinary committee of Bar Council, is a penalty on adjudicating the misconduct and under sub-section 4 of section 35 such type of advocates who would suffer suspension from practice under said Clause-C of sub-section 3 would be debarred from practising in any Court, Tribunal or before any authority in India during the suspended period. Section 35(3) (c) and 35(4) of the said Act read such:-

"35. Punishment of advocates for misconduct. -

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

(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 practising in any Court or before any authority or person in India.

19. Section 41 of the Advocates Act deal with the procedure of alteration of the roll of Advocate which provides that when an advocate is removed from practice his name shall be struck off from the State roll. Section 41 read such:

41. Alteration in roll of Advocates. - (1) Where an order is made under this

Chapter reprimanding or suspending an advocate, a record of the punishment shall be entered against his name-

(a) in the case of an advocate whose name is entered in a State roll, in that roll;

and where any order is made removing an advocate from practice, his name shall be struck of the State roll

(3) Where any advocate is suspended or removed from practice, the certificate granted to him u/s 22, in respect of his enrolment shall be recalled.

20. Section 45 of Advocates Act is the penal provision of imposing punishment with imprisonment to jail for a term of six months who illegally practice in Court and/or before any other authorities. Section 45 read such:

45. Penalty for persons illegally practising in Courts and before other authorities.
- Any person who practices in any Court or before any authority or person, in or before whom he is not entitled to practise under the provisions of this Act, shall be punishable with imprisonment for a term which may extend to six months.

21. Section 49 stipulates the general power of Bar Council of India to make rules and for our consideration relevant rules under 49(1) clause (ah) and clause (c) are set out herein below-

"49. General power of the Bar Council of India to make rules.- [(1)] The Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe -

(ah) the conditions subject to which an advocate shall have the right to practise and the circumstances under which a person shall be deemed to practise as an advocate in a Court;]"

(c) The standard of professional conduct and etiquette to be observed by advocates.

22. Under the Bar Council of India Rules in Chapter II with the heading standards of professional conduct and ethics, rule has been framed in exercise of the power u/s 49(1)(c) of the said Act read with proviso thereof. Section VII of the said Chapter II stipulates provision debarring employment of the Advocates in the different sectors under Rules 47 to 52 which read such:

"47. An advocate shall not personally engage in any business; but he may be a sleeping partner in a firm doing business provided that, in the opinion of the appropriate State Bar Council, the nature of the business is not inconsistent with the dignity of the profession.

48. An advocate may be Director or Chairman of the Board of Directors of a company with or without any ordinary sitting fee, provided none of his duties are of an executive character. An advocate shall not be a Managing Director or a Secretary of any company.

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.

50. An advocate who has inherited, or succeeded by survivorship to, a family business may continue it, but may not personally participate in the management thereof. He may continue to hold a share with others in any business which has descended to him by survivorship or inheritance or by will, provided he does not personally participate in the management thereof.

51. An advocate may review Parliamentary Bills for a remuneration, edit legal text books at a salary, do press-meeting for newspapers, coach pupils for legal examination, set and examine question papers, and, subject to the rules against advertising and full-time employment, engage in broadcasting journalism, lecturing and teaching subjects, both legal and non-legal.

52. Nothing in these rules shall prevent an advocate from accepting, after obtaining the consent of the State Bar Council part-time employment provided that in the opinion of the State Bar Council the nature of the employment does not conflict with his professional work and is not inconsistent with the dignity of the profession. This rule shall be subject to such directives if any as may be issued by the Bar Council of India from time to time."

23. Under Chapter III of the Bar Council of India Rules conditions for right to practice have been stipulated by framing a rule u/s 49(1) (ah) of the advocates Act wherein Rule 5 & 6 are the relevant provisions deal with voluntary suspension of practice by any Advocate and its consequential effect which read such:

"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 enrolment 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 u/s 24A, Chapter III of the Act during the period of suspension.

(3) The Enrolment Committee of the State Bar Council may order the resumption of his practice and return the certificate to him with necessary endorsement. If the Enrolment 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.

6. (1) An advocate whose name has been removed by order of the Supreme Court or a High Court or the Bar Council as the case may be, shall not be entitled to practice the profession of law either before the Court and authorities mentioned u/s 30 of the Act, or in chambers, or otherwise.

(2) An advocate who is under suspension, shall be under same disability during the period of such suspension as an advocate whose name has been removed from the roll."

24. On a reading of the Advocates Act and the Bar Council Rules as quoted above, it appears that suspension of an Advocate from practice are of two categories, one voluntary suspension another non voluntary suspension by coercive measure in a disciplinary proceeding. Section 35(3) (c) of advocates Act has taken care of coercive measures of suspending an advocate from practice holding a disciplinary proceeding whereby the period of suspension requires to be stipulated and during such period the advocate is debarred from practising and in the roll of advocate such decision suspending an advocate is recorded u/s 41 of the advocates Act.

25. Removal of the name of the Advocate from the State roll, is also a penal consequence for misconduct which requires adjudication by disciplinary committee u/s 35 sub-section 3(d) of said Act.

26. In Bar Council Rules as framed under Chapter III, on the heading "condition for right to practice", there is another category of suspension which has been termed as "voluntary suspension" where advocate voluntarily may suspend himself from practice. Rules 5 & 6 stipulates the consequential effect. Rule 6(2) provides that when an Advocate would be under such type of suspension he would suffer same disability during the period of suspension as an advocate whose name has been removed from the roll. On a bare reading of the advocates Act providing the penalty of suspension from practice as a punishment on proved misconduct and the voluntary suspension provision under Rule 5 & 6, it appears that there are basic differences in the qualitative approach of the word "suspension" in these two cases. When suspension is out come of coercive nature imposed upon the advocate by the Disciplinary committee for any proved misconduct, he is only debarred from practising in any Court of law for the period of suspension and after the period is over he is entitled to resume practice and under such contingency his name remains in the roll of Bar Council as an Advocate but in a suspended position debarring him to practice and to caste any vote in the election of Bar Council as his name is not included in the electoral roll in terms of Rule framed under Chapter I Part III of Bar Council India Rules. But when an Advocate voluntarily suspend himself from practice, the consequential effect is different and under Rule 6(2) of Chapter III, Part VI, of said rule he suffers a disability similar to the disability of an advocate whose name has been removed from the roll. Such voluntary suspension from practice may be an

informed action or an uninformed action. If it is an informed action, the advocate is required to submit the certificate of enrolment and it is accordingly noted in the roll and when he desires to resume practice, as per decision of the enrolment committee he may be allowed to resume practice and his certificate of enrolment is returned. These are stipulated in Rule 5 sub-clause 1 to 4. But Rule 6(2) of Part VI of Bar Council of India Rules provides that during such suspension period advocate has to suffer disability as if his name has been removed from the roll. The another contingency may arise when somebody does not practice and it is not even informed, the provision of voluntary suspension clause is also applicable to him and more particularly when he is in employment in breach of Rule 49 of section VII read with Rule 47 & 48 thereof of Bar Council of India Rules which mandates that an Advocate shall not engage himself in any other employment during practice. In such case, effect becomes in the nature of "removal from roll" as per Rule 6(2), which is applicable to the cases of writ petitioners.

27. Mr. Ghosh, learned advocate appearing for the writ petitioner/respondent however, has submitted that Rule 6(2) providing disability result namely removal of name from the roll was outside of the rule making power as the concerned rule was framed under Chapter III of the Bar Council of India Rules in exercise of the power u/s 49(1) (ah) of the advocates Act. However, Rule is not under challenge by Mr. Ghosh in the writ proceeding. On perusal of Rule 6(2) read with Rule 5 as already referred to, it appears that under Rule 5 read with Rule 6 during voluntarily suspension period the rule making authority purposely has used the language disability in the nature of removal of name from the roll. So far as coercive suspension by disciplinary measures the statutory provision is different to suspend the practice but in case of voluntary suspension when the word disability in the nature of removal from the roll have been prescribed, consequential effect of an Advocate who engage himself in employment by suspending his right to practice has to be accepted, more particularly when under Rule 49 nobody is entitled to practice being employed otherwise. The Apex Court has considered the impact of Rule 49 in the case Satish Sharma reported in (2001) 2 SCC 365 and held that a person employed even as Law Officer of State Electricity Board has no right of enrolment as an Advocate in the roll of any State Bar Council. In the case Ex-Capt. Harish Uppal Vs. Union of India (UOI) and Another, , a constitutional Bench judgment settled the law about parameters/ conditions of right to practice being enrolled as an advocate. The said Rule 49 got its amendment by resolution dated 22nd June, 2001 so far as paragraphs 2 and 3 are concerned whereby person engaged as law officer of the Government or public body in full time employment were exempted from the statutory rigours of rule 49. At the pre-amended stage, accordingly it was held in the case State of U.P. and others Vs. U.P. State Law Officers Association and others, that the Lawyers of the Government or a public body would not suffer any embargo. In the case State of U.P. and Another Vs. Johri Mal, the Apex Court held that Assistant Public Prosecutor getting salary from the Government is a government employee and holding of a civil post. Having regard to those judgments of the

Apex Court and by harmonious construction of the provisions of said Rule 49 read with Rule 58s 6 which is considered as a rule under Chapter II, we are of the view that both the writ petitioners suffered disability of removal of their names from the roll as soon as they voluntarily suspended their practice by engaging themselves in the full time salaried employment.

28. The meaning of the word "advocate" has been defined in Black's Law Dictionary, 8th edition by Bryan A. Garner. As per Black's Law Dictionary, the word Advocate is noun which means "a person who assists, defends, pleads or prosecutes for another.

29. The word advocacy means "the work or profession of an advocate", "an act of pleading for or actively supporting a cause or proposal". Having regard to the meaning of the word advocate as discussed, the definition of the word advocate u/s 2(a) of the advocates Act to be considered. From the definition of section 2(a) "advocate" accordingly has been defined "as an advocate" who has entered his name in the roll under the provision of advocates Act, 1961. For entering the name of any such type of person who intends to practice as an Advocate, Advocates Act, provides a procedure of filing application satisfying the conditions stipulated u/s 24 of the advocates Act. Section 24 sub-section (1) provides that subject to the provision of the advocates Act and the rule made thereunder, a person shall be qualified to be admitted as an advocate of a State roll if that person fulfils or satisfies the condition stipulated therein. On a reading of section 2(a) and section 24 of Advocates Act, it appears that the entering of the name in the roll as an advocate and thereby right to practice, stipulates two contingencies- one that gentleman should be considered for admission as an advocate and another as a recognition of such admission his name is placed in the State roll. Inclusion of any person as an advocate in the State roll presupposes the condition precedent that the person concerned should continue his function as an Advocate. As per Black's Law Dictionary. Advocate is the person who assists, defends, pleads or prosecutes for another. Hence if a person ceases to have those qualities or function in his functional activity, he ceases to identify himself as an advocate and as such on suspension of such work field, despite appearance of his name in the State roll, it does not provide him with the designation of an advocate. Advocacy in a Court of law or in other field, is a condition precedent and sine qua-non of material ingredients of an advocate by which its structural foundation is woven and a person when ceases to act accordingly in technical sense though he remains as an advocate in the State roll due to lapse of Bar Council to remove his name, but in all practical purposes he ceases to be an "advocate", as it is a professional qualification. Rule 49 of section VII when provide an embargo of employment and particularly when paragraphs 2 and 3 of it were deleted by resolution dated 22nd June, 2001 whereby earlier provision included Law Officers of Central Government or State or other persons as mentioned thereof who act and/or plead in any Court on behalf of the employer as exempted category from the provision of Rule 49, the issue could be looked into in the angle of Heydon's rule/mischief rule as cured by legislature by

deleting the paragraphs 2 & 3 from clause 49. It is an admitted position that both the writ petitioner/respondents in the present two appeals are in employment, one Sri Muhuri as a stamp reporter in the High Court at Calcutta and another Sri Das, a full time salaried Government employee holding the post of Assistant Public Prosecutor. As such both are attracted by Rule 49 aforesaid in terms of provision as now existing and as was existing on the date when advertisement of said examination was published.

30. When a statute specifically provides a debarring clause by stipulating that an advocate should not be a full time salaried employee of any person, Government, firm, Corporation or any concern, the purpose of the law should be applied in its true and proper perspective.

31. As already referred to that a Rule was framed by the High Court which is named and styled as West Bengal Civil Service (Judicial Recruitment) Rules. Under Rule 3(h) of the said Rule under the heading "qualification", it is provided that every candidate "must be enrolled as an Advocate in the roll of Bar Council of any State or Union Territory in India on the date of advertisement for examination." The very rule has two components, one that candidate must be an Advocate and another that he is enrolled in the roll of Bar Council of any State or Union Territory. The word advocate as per definition is a professional qualification which term is used in respect of a person who is lawfully entitled to practice the law in any Court of law by defending and/or assisting any litigant in a legal process and/or by drafting legal documents etc. A professional designation accordingly is given by designating the gentleman concerned as an Advocate considering his activity field. Hence when a person ceases to function the activities and performance of an Advocate in terms of its functional arena and qualitative ingredients of its activities touching that field, he cannot be said as an advocate. The word "Advocate" in said rule connotes as per our reading, a person who has passed the law degree and engaged in the profession of advocacy by dealing with the legal matter of the litigant either in any Court of law or in any other forum by enlisting his name in State Bar Council, a regulatory body, but when the functional activity of any Advocate is withdrawn voluntarily by that person and he engages himself in any employment either of any person or under Government or Corporation contrary to rule 49 aforesaid, a debarring clause, he ceases to be termed as a person with designation "an advocate".

32. On a reading of the Recruitment Rule accordingly it appears that the rule framing authority as per their wisdom purposely has used the word "an advocate enrolled in State Bar Council etc." which presupposes the meaning as "practicing advocate" and not a mere enrolment in the roll of the Bar Council, by engaging himself in full time salaried employment.

33. The meaning of the word "advocate" as appearing in the said Rule 3(h) is being considered by us as a practising advocate who is in functional activity of an advocate, is also clear from the history of such framing of the Rule which is nothing but implementation of the judgment passed by the Apex Court dealing

with the issue in the case All India Judges Association reported in Dr. Chandra Prakash and Others Vs. State of U.P. and Another, .

34. The history of framing of said recruitment rule:

Judgment dated November 13, 1991 was delivered by the Apex Court in the case All India Judges" Association Vs. Union of India and others, by formulating the guidelines to improve the service conditions of the members of the subordinate judiciary in the country by passing different directions about improvement of pay scale, accommodation facilities etc. as specifically dealt with in paragraph 63 which read such:

"63. We would now briefly indicate the directions we have given in the judgment:

(i) An All India Judicial Service should be set up and Union of India should take appropriate steps in this regard.

(ii) Steps should be taken to bring about uniformity in designation of officers both in civil and the criminal side by March 31, 1993.

(iii) Retirement age of judicial officers be raised to 60 years and appropriate steps are to be taken by December 31, 1992.

(iv) As and when the Pay Commissions/Committees are set up in the States and Union territories, the question of appropriate pay scales of judicial officers be specifically referred and considered.

(v) A working library at the residence of every judicial officer has to be provided by June 30, 1992. Provision for sumptuary allowance as stated has to be made.

(vi) Residential accommodation to every judicial officer has to be provided and until State accommodation is available, government should provide requisitioned accommodation for them in the manner indicated by December 31, 1992. In providing residential accommodation, availability of an office room should be kept in view.

(vii) Every District Judge and Chief Judicial Magistrate should have a State vehicle, judicial officers in sets of five should have a pool vehicle and others would be entitled to suitable loans to acquire two wheeler automobiles within different time limits as specified.

(viii) In-service Institute should be set up within one year at the Central and State or Union territory level."

35. The review petitions were filed by the Union of India and various states raising general objections as well as objections to the directions given in the said judgment dated 13th November, 1991 and it was disposed of by a judgment on hearing review petition as well as separate writ petition as filed under Article 32 of the Constitution of India on 24th August, 1993, a reported judgment, under cause title of All India Judges" Association and Others Vs. Union of India and Others, . In this judgment Court held that judicial service is not in the sense of

employment and Judges are not employees but they exercise sovereign judicial power of the State and they are holder of public office in the same way as the members of the council of Minister and the members of the legislature. While deciding the issue as raised the Court not only adjudicated the employment status of the judicial service but at the same time considered the minimum eligibility qualification for the post of Civil Judge-cum-Magistrate, First Class/ Magistrate, First Class/Munsiff Magistrate by directing that minimum 3 years practice as an advocate should be the minimum qualification in addition to degree in law for entry in this service. Paragraphs 20 and 52A provide such direction and inherent purpose of it which read such:

"20. It has, however, become imperative, in this connection, to take notice of the fact that the qualifications prescribed and the procedure adopted for recruitment of the Judges at the lowest rung are not uniform in all the States. In view of the uniformity in the hierarchy and designations as well as the service conditions that we have suggested, it is necessary that all the States should prescribe uniform qualifications and adopt uniform procedure in recruiting the judicial officers at the lowest rung in the hierarchy. In most of the States, the minimum qualifications for being eligible to the post of the Civil Judge-cum-Magistrate First Class/ Magistrate First Class/Munsiff Magistrate is minimum three years" practice as a lawyer in addition to the degree in law. In some States, however, the requirement of practice is altogether dispensed with and judicial officers are recruited with only a degree in law to their credit. The recruitment of raw graduates as judicial officers without any training or background of lawyering has not proved to be a successful experiment. Considering the fact that from the first day of his assuming office, the Judge has to decide, among others, questions of life, liberty, property and reputation of the litigants, to induct graduates fresh from the Universities to occupy seats of such vital powers is neither prudent nor desirable. Neither knowledge derived from books nor pre-service training can be an adequate substitute for the first-hand experience of the working of the Court-system and the administration of justice begotten through legal practice. The practice involves much more than mere advocacy. A lawyer has to interact with several components of the administration of justice. Unless the judicial officer is familiar with the working of the said components, his education and equipment as a Judge is likely to remain incomplete. The experience as a lawyer is, therefore, essential to enable the Judge to discharge his duties and functions efficiently and with confidence and circumspection. Many States have hence prescribed a minimum of three year"s practice as a lawyer as an essential qualification for appointment as a judicial officer at the lowest rung. It is, hence, necessary that all the States prescribe the said minimum practice as a lawyer as a necessary qualification for recruitment to the lowest rung in the judiciary. In this connection, it may be pointed out that Article 233(2) of the Constitution, no person is eligible to be appointed a District Judge unless he has been an advocate or a pleader for no less than seven years while Articles 217(2) (b) and 214(3)(b) require at least ten years" practice as an advocate of a High Court for

the appointment of a person to the posts of the judge of the High Court and the Judge of the Supreme Court, respectively. We, therefore, direct that all States shall take immediate steps to prescribe three years" practice as a lawyer as one of the essential qualifications for recruitment as the judicial officer at the lowest rung."

"52. To sum up, we hold as follows:

(a) The legal practice of three years should be made one of the essential qualifications for recruitment to the judicial posts at the lowest run in the judicial hierarchy.

Further, wherever the recruitment of the judicial officers at the lowest rung is made through the Public Service Commission, a representative of the High Court should be associated with the selection process and his advice should prevail unless there are strong and cogent reasons for not accepting it, which reasons should be recorded in writing.

The rules for recruitment of the judicial officers should be amended forthwith to incorporate the above directions."

36. As per the direction of the Apex Court aforesaid, High Court at Calcutta framed rule for recruitment of judicial officers by stipulating minimum eligibility criterion as a law degree and 3 years practising experience as an advocate.

37. Subsequently, the issue as to whether practising experience as an Advocate should be retained as 3 years as a minimum eligibility qualification along with degree of law for the said post was considered in the writ petition filed under Article 32 of the Constitution of India in the case by All India Judges Association & Ors. v. Union of India, which has been decided on 21st March, 2002. This is a reported judgment under cause title Dr. Chandra Prakash and Others Vs. State of U.P. and Another, . In the said case direction noted in paragraph 52A of All India Judges Association case of the year 1993 was re-considered in view of the factual position that minimum eligibility criterion of 3 years practising experience as an Advocate did not produce good result as the meritorious Advocates after experience of 3 years practice did not intend to join the judicial service. Accordingly, in paragraph 32 of said report of the year 2002 the Court considered the issue and decided accordingly which read such:

In All India Judges" Assn. Case (SCC at p. 314) this Court has observed that in order to enter the judicial service, an applicant must be an advocate of at least three years standing. Rules were amended accordingly. With the passage of time, experience has shown that the best talent which is available is not attracted to the judicial service. A bright young law graduate after 3 years of practice finds the judicial service not attractive enough. It has been recommended by the Shetty Commission after taking into consideration the views expressed before it by various authorities, that the need for an applicant to have been an advocate for at least 3 years should be done away with. After taking all the circumstances

into consideration, we accept this recommendation of the Shetty Commission and the argument of the learned amicus curiae that it should be no longer mandatory for an applicant desirous of entering the judicial service to be an advocate of at least three years" standing. We, accordingly, in the light of experience gained after the judgment in All India Judges case direct to the High Courts and to the State governments to amend their rules so as to enable a fresh law graduate who may not even have put in three years of practice, to be eligible to compete and enter the judicial service. We, however, recommend that a fresh recruit into the judicial service should be imparted training of not less than one year, preferably two years.

38. On a bare reading of said paragraph 32 it appears that the recommendation of Shetty Commission was considered whereby the Shetty Commission opined that need for practising experience of atleast 3 years should be done away with to bring the meritorious candidates in the judicial service. This recommendation was accepted by the Apex Court in the language "we accept this recommendation of the Shetty Commission and the argument of the Learned amicus curiae that it should be no longer mandatory for an applicant desirous of entering the judicial service to be an Advocate of atleast 3 years standing." Further more in the next line the Apex Court held "we direct to the High Court and to the State Government to amend their rules so as to enable fresh law graduate who may not even have put in 3 years of practice to be eligible to compete and enter the judicial service". On bare reading of the said paragraph 32 it appears that in the said judgment the Apex Court accepted the Shetty Commission recommendation about doing away with the minimum practicing experience as an Advocate of 3 years and Court accordingly held that minimum experience of 3 years should not be a mandatory but in the said judgment the Apex Court never said that only a fresh law graduate without enrolling himself as an Advocate and having no experience of practice would be eligible to appear in the judicial service examination. Modification of view, as per our reading was on span of practising experience only by holding that three years practice was not mandatory.

39. The High Court on the reflection of the aforesaid judgment amended the recruitment Rule which is the subject matter of the present litigation by deleting the Clause of "minimum 3 years practising experience" from the recruitment rule as earlier framed by incorporating the provision "must be enrolled as an advocate in the roll of Bar Council" which presupposes a practising advocate. Enrolment of any person's name as an advocate in the roll of Bar Council to designate the said person as an Advocate presupposes the condition that he will practice in the Court of law by fulfilling the functional activity of an advocate in terms of definition as discussed.

40. Considering that angle we are of the view that decision of the selection committee, constituted and framed by the Public Service Commission wherein the High Court is represented through nominee of the Chief Justice, a sitting

Judge of High Court, that persons who are already in employment since have ceased to engage themselves in practice as an Advocate would not be eligible due to non-satisfaction of the eligibility condition of Rule 3(h) of the Recruitment Rules, was valid and reasonable having regard to the statutory provision as discussed by us. Consequential effect of such was a communication of the Public Service Commission to the writ petitioners about their ineligibility as challenged in the writ applications, also was justified.

41. The argument of Mr. Ghosh and Mr. Dutta appearing for the respective writ petitioner/respondent in the respective appeals, accordingly are not legally sustainable.

42. The another point as raised that if Rule 3(d)(a), age relaxation provision, which provides that the candidates who have been in service of Government for at least 2 years would be eligible for age relaxation is applied to Rule 3(h), the implication of this provision upon Rule 3(h) would be that an employee, who is already enrolled in the roll of Bar Council does not require to be in actual practice. Mr. Ghosh and Mr. Dutta both have submitted that phrase "have been" indicates a situation existing and more preciously their contention is that the phrase "have been" has been used in the perfect continuous tense and not in the past perfect tense. On conjoint reading of said Rule 3(d) (a) and Rule 3(h), it is submitted by the respondent/writ petitioners that even a person in employment of the Government service on the date of advertisement for the said examination is eligible and both writ petitioners satisfied that eligibility condition.

43. To counter this argument Mr. S. Pal, learned senior counsel has referred two judgments one of the Apex Court passed in the case of State of Assam Vs. Horizon Union and Another, and another judgment of Allahabad High Court wherein said Apex Court judgment has been relied upon being the case Chandra Mohan Vs. State of U.P. and Others, Allahabad High Court interpreted the word "have been" in the service regulation. Paragraphs 8 and 9 of said report read such:

"8. It was urged that the words "has been" in, the phrase "if he has been for not less than 7 years an advocate or a pleader" signify that the eligibility is that the individual is an advocate or a pleader at the time when he is recommended by the High Court, or, on the date of his appointment. In substance, the argument is that a person must be a practising lawyer when he is appointed. In Rameshwar Dayal Vs. The State of Punjab and Others, , the Supreme Court held that Clause (20 of Article 233 provides a qualification for persons not already in service. The required qualification is that he should be an advocate or pleader of seven years" standing but that clause does not say how that seven years" standing has to be reckoned. The other authorities are also against Mr. Jagdish Swarup's contention.

In the second proviso to section 86(3) of the Representation of the People Act, 1951, a person who "has been" a Judge could be appointed as a member of the Election Tribunal. A Division Bench of this Court in Mubarak Mazdoor Vs. K.K.

Banerji, , held that this phrase meant a person who has, at some time, held office as a Judge, but it does not necessarily mean that the person must be holding office as a Judge at the time of the appointment as a member of the Tribunal. A retired Judge was eligible. The Bench observed that the argument that the words "has been" in the phrase "a person who has been a Judge" is a present perfect continuous tense, was incorrect. "Has been" when not followed by a participle is the present perfect tense of "to be" and accordingly indicates that the state of being has existed and may be (but not necessarily is) continuing. For example, the statement "A has been to Ceylon" indicates that A has visited Ceylon but is not there now; whereas the sentence "the baby has been ill all day" implies not only that the baby has been ill but is still ill. On the other hand, "Y has been a soldier" excludes neither the possibility that Y is still a soldier nor that he has ceased to be one. The line of reasoning of this authority is applicable. The qualification of seven years" standing need not necessarily be a continuing one till the appointment."

"9. Similarly, in *State of Assam Vs. Horizon Union and Another*,), the Supreme Court had occasion to consider a similar provision. Clause (as) added to section 7A (3) of the Industrial Disputes Act by the Industrial Disputes (Amendment) Act No. 36 of 1964, provided that a person shall not be qualified for appointment as a Presiding Officer of a Tribunal unless he has for a period of not less than three years been a District Judge or an Additional District Judge. The Supreme Court held that the requirement of this provision was satisfied in a case where a person held the post for the requisite period even though he had not actually worked in that post for that period.

In that case Sri Dutta was appointed as Presiding Officer on 7th December, 1965. Sri Dutta was appointed as a temporary Additional District Judge on 16th August, 1954. He worked as such till March 8, 1957, when he was appointed Registrar of the High Court of Assam in an officiating capacity. On 30th June, 1959, he retired from the office of the Registrar. It was held that Sri Dutta continued to hold the office of the Additional District Judge while he was working on the post of the Registrar and that period will be counted for the purpose of the required qualification. The period between 16th August, 1954 and 24th April, 1958, when Sri Dutta was confirmed, was held to be countable. Sri Dutta had been prior to his appointment on 7th December, 1965, the Presiding Officer of a Labour Court for about two years. He was hence not continuing to hold the post of the District Judge on the date of his appointment.

This was not held to be a disqualification. This decision is in line with the Division Bench of our Court. Clause (2) of Article 233 does not, in my opinion, restrict the field of eligibility to only such advocates or pleaders who were actively practising till the date of their appointment."

44. The Apex Court judgment of *Horizon Union* (supra) is also in the same line as relied upon in paragraph 9 quoted above.

45. Mr. Ghosh learned advocate appearing for the writ petitioner/respondent has simply in the written notes submitted that phrase "have been" is ordinarily used in the present perfect tense according to Wren & Martin English Grammar and definitely not in past perfect tense.

46. Having regard to the judgment as referred to namely Horizon Union (supra) and Chandramohan (supra) the phrase "have been" as appearing in clause 3(d) (a) of the present recruitment rule could be interpreted wherein the word have been used by the following sentence "the upper age limit being relaxable upto 2 years in case of candidate who have been in service of Government for atleast two years." The identical provision was considered by the Apex Court in the case Horizon Union (supra) wherein the rule provided under clause (aa) added to section 7(a)(3) of the Industrial Disputes Act by the Industrial Disputes (Amendment) Act No.36 of 1964 that "a person shall not be qualified for appointment as a Presiding Officer of a Tribunal unless he has for a period of not less than 3 years being a District Judge or an Additional District Judge." The Apex Court answered the point that the requirement of the said provision could be satisfied in a case where a person held the post for the requisite period earlier.

47. Due to the use of the words "for at least 2 years" in clause 3(d)(a) preceded by the words "have been", we are of the view that it does not indicate that candidate should be in the Government service on the date of advertisement but it is indicative of his past service, if any, could be considered to relax the age relying upon the said judgment of Chandramohan(supra) and Horizon Union(supra). Clause 3(d)(a) and clause 3(h) is required to be considered by rule of harmonious construction. It is a settled law of statutory interpretation that the Court should try to avoid the conflict between the provisions of a particular statute and if there is any possibility of harmonious construction by keeping the both provision intact, issue to be decided.

48. In the instant case it appears that under clause 3(h) as already observed by us the word "advocate" appearing thereto is indicative of a "practicing advocate" on the date of advertisement and not only an enrolled person in the Bar Council who is already employed causing a breach of Rule 49 of the Bar Council India Rule as referred to. Rule 3 (d) (a) if is interpreted that the existing Government employee also would be entitled by reading the use of the phrase "have been" as perfect continuous tense, there will be a conflict with rule 3(h) and that would also cause a conflict with the Apex Court views passed in the case All India Judges Association (supra) decided in the year 2002 by identifying the point that minimum professional qualification does not require satisfaction of 3 years practicing experience. Hence by applying the golden rule of interpretation the Rule 3(d) (a) to be considered on the reflection of clause 3(h) to this effect that the words "have been" as stipulated thereto has been used in the past perfect tense by providing age exemption of a candidate who in the past served the Government before joining the legal profession as an Advocate by enrolling himself in the roll of Bar Council. For application of harmonious construction

principle reliance is made to the case *Sultana Begum v. Prem Chand Jain*, reported in (1977)1 SCC 373, the case *Anwar Hasan Khan Vs. Mohammad Shafi and Others*, which has been relied in the case *A.N. Roy, Commissioner of Police and Another Vs. Suresh Sham Singh*, .

49. Before parting with, a point as has been raised by Mr. Ghosh to interpret the situation of the present case that his client Sri Mohuri is eligible as his name was not struck off from the roll of State Bar Council irrespective of the fact that he is in full time employment as Stamp Reporter and also the argument of Mr. Dutta about his client Sri Das who is in full time employment as Assistant Public Prosecutor whose name also has not been struck off, requires an answer.

50. Mr. Ghosh and Mr. Dutta both have submitted that even if there was voluntary suspension of practice by the writ petitioners, but their names as are appearing in the State roll, they have satisfied the clause 3(h). If this argument is considered we will reach to another fallacy which would make the submission untenable. As already discussed that u/s 35 of the Advocates Act and more particularly under sub section 3 clause (c) an advocate may suffer suspension to practice by the decision of the disciplinary committee dealing with the misconduct and such suspension would be for a specified period when the gentleman is disentitled to practice but his name remains in the roll of the Bar Council. If the argument of Mr. Ghosh is accepted then a situation may arise that an Advocate who has suffered a penalty for professional misconduct being a penalty u/s 35(3)(c) namely order suspending his practice for certain period, would be entitled also and would be eligible to apply for the post in judicial service. Such situation practically would be an absurd situation as an Advocate who has suffered penalty for professional misconduct would be considered as an eligible candidate to appear in a post of judicial service, a service which is not under the canopy of ordinary employment but an exercise of the sovereign power of the State in the judiciary wing, in terms of judgment of All India Judges Association (*supra*) case decided in 1993 as already quoted. So, the point as raised by Mr. Ghosh and Mr. Dutta learned advocates will lead an absurdity. Hence, it is not legally sustainable by application of rule of interpretation that absurdity to be avoided. Reliance is made to the case *Mahamadhusen Abdul Rahim Kalota Sheikh v. Union of India & Ors.*, reported in (2009) 2 SCC 1 wherein views of Lord Donovan "the object of construction of Statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended" passed in the case *Mangin v. IRC*, reported in 1971 A.C. 739 referred.

51. Having regard to the aforesaid findings and observation, we are of the view that the impugned judgments under appeals passed by the learned trial Judge are not legally sustainable and those accordingly stand set aside and quashed.

We are also not finding any merit in the writ application also and as a consequence thereof writ applications both stand dismissed. Appeals stand allowed. CAN applications stand disposed of accordingly.

Sadhan Kumar Gupta, J.

52. I agree.