

(2001) 08 AP CK 0096

In the Andhra Pradesh High Court

Case No : Writ Petition No. 17747 of 2001

Thota Padma

APPELLANT

Vs

High Court of A.P., Hyd. and another

RESPONDENT

Date of Decision : 29-08-2001

Acts Referred:

Andhra Pradesh State Higher Judicial Service Rules, 1964 — Rule 3
Andhra Pradesh State Prosecution Service Rules, 1992 — Rule 5
Bar Council of India Rules, 1975 — Rule 49
Constitution of India, 1950 — Article 233, 233(2), 309, 313
Criminal Procedure Code, 1973 (CrPC) — Section 24, 25

Citation : (2001) 5 ALD 571 : (2001) 6 ALT 796

Hon'ble Judges : S.B. Sinha, C.J.; V.V.S. Rao, J

Bench : Division Bench

Advocate : Mr. A. Sudershan Reddy, for the Appellant; Mr. Ramesh Ranganadham, A.A.G. and Mrs. N. Bhaskar Lakshmi, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, C.J.—The petitioner in this writ petition has, inter alia, prayed for the issuance of a writ in the nature of a mandamus directing the respondents herein not to give effect to an order dated 14-8-2001 passed by the 1st respondent.

2. The petitioner herein was enrolled as an advocate on 31-3-1993. She allegedly was practising in the Metropolitan Criminal Courts at Nampally. She was appointed as Assistant Public Prosecutor on 16-5-1998. She is still holding the said office. Pursuant to an advertisement issued by the State for recruitment to the posts of District and Sessions Judge Grade-II, the petitioner filed an application. The same had been rejected by reason of the impugned order on the ground that she had not completed seven years' practice as on 16-8-2000 i.e., the last date of receipt of applications.

3. The contention raised by the petitioner is that having regard to the provisions contained in Article 233(2) of the Constitution of India, the period during which

she had been holding the post of Assistant Public Prosecutor should also be counted towards her practice as a member of the Bar. Clause (2) of Article 233(2) reads thus:

"233. Appointment of District Judges: (1).....

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment".

4. Further, the Proviso to Article 309 of the Constitution of India reads thus:

"309. Recruitment and conditions of service of persons service the Union or a State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act".

5. The State has framed the A.P. State Higher Judicial Service Rules in exercise of the power conferred under Article 233(2) and the proviso to Article 309 read with Article 313 of the Constitution of India. Rule 3 of the said rules reads thus:

"3. Qualifications :--A person for appointment to Category II from Bar-

(a) shall be an advocate or a pleader of not less than seven years standing at the Bar;

(b) must not have completed forty five years of age on the first day of the month in which the notification inviting application for such appointment by direct recruitment is published in the A.P. Gazette;

(c) shall be of sound health and active habits and free from any bodily defect or infirmity which render him unfit for such appointment."

6. The Andhra Pradesh State Prosecution Service Rules were framed by the State Government in exercise of its power under the proviso to Article 309 of the Constitution of India read with Sections 24 and 25 of the Code of Criminal Procedure, which came into force on or before 30th March, 1992. Rule 5 of the said rules reads thus:

"Rule 5. Qualifications:---No person shall be eligible for appointment to the categories specified in column (1) of the Table below by the method specified in column (2) unless he possesses the qualifications specified in the corresponding entry in column (3) thereof:

Category Method of appointment Qualifications

(1) (2) (3)

5. Additional Public Prosecutor Grade II By direct recruitment or by promotion

(i) Must possess a Bachelor's Degree in any subject with a Bachelor's Degree in Law of a University in India established or incorporated by or under a Central Act a Provincial Act or a State Act or an Institution recognised by the University Grants Commission or an equivalent qualification.

(ii) Must have practised as an Advocate for not less than seven years for direct recruitment.

7. Assistant Public Prosecutor By direct recruitment

(i) Must possess a Bachelor's Degree in any subject with a Bachelor's Degree in Law of a University in India established or incorporated by or under a Central Act, Provincial Act or State Act or an Institution recognised by the University Grants Commission or an equivalent qualification; and

(ii) Must have practised as an Advocate and must have not less than 3 years active practice in criminal Courts in the State.

At this stage, we may also notice Rule 49 of the Bar Council of India Rules, which is in the following term:

"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 practise as an advocate so long as he continues in such employment.

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

Law Officer for the purpose of this rule means a person who so designated by the terms of his appointment and who by the said terms is required to act and/ or plead in Courts on behalf of his employer."

7. The question came up for consideration in Satya Narain Singh and Others Vs. High Court of Judicature at Allahabad and Others, , wherein it was held that the expression "service" in Article 233(2) of the Constitution of India would only mean judicial service.

8. A somewhat similar question also came up before the Supreme Court in Sushma Suri Vs. Govt. of National Capital Territory of Delhi and Another, , wherein the interpretation of the expression "from the Bar" came up for

consideration. The Apex Court considered the meaning of "advocate" in a general sense and held that a Law Officer of a Central or State Government, public corporation or of a body corporate, who is enrolled as an advocate under exception to Rule 49 of the Bar Council of India Rules and his practice before Courts/Tribunals for his employer, would also come within the meaning of an "advocate". It was held therein thus:

".....An advocate employed by the Government or a body corporate as its Law Officer even on terms of payment of salary would not cease to be an advocate in terms of Rule 49 if the condition is that such advocate is required to act or plead in Courts on behalf of the employer. The test, therefore, is not whether such person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to act or plead on its behalf in a Court of law as an advocate. In that event the terms of engagement will not matter at all. What is of essence is as to what such Law Officer engaged by the Government does - whether he acts or pleads in Court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer, then he ceased to be an advocate. If the terms of engagement are such that he does not have to act or plead, but does other kinds of work, then he becomes a mere employee of the Government or the body corporate. Therefore, the Bar Council of India has understood the expression "advocate" as one who is actually practising before Courts which expression would include even those who are Law Officers appointed as such by the Government or body corporate. (Paragraph 10)

"...We think it is in this manner that the expression used in Article 233(2) of the Constitution has to be understood and the rules framed by the Delhi Administration in this regard have to be read in the light of the constitutional provisions. The expression used "from the Bar" would only mean from the class or group of advocates practising in Courts of law. It does not have any other attribute". (Paragraph 11)

9. Having regard to the aforementioned authoritative pronouncement of the Apex Court, we are of the opinion that the impugned order cannot be sustained.

10. Learned Counsel appearing on behalf of the High Court however submits that the petitioner has not produced her practising certificate. That is not a ground stated in the impugned order. If that be the position, the Registry may place the application before the Scrutiny Committee and an appropriate order thereupon may be passed.

11. With the aforementioned observation, the writ petition is allowed. There shall be no order as to costs.