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HIGH COURT OF JUDICATURE AT ALLAHABAD

Dr. Kaushal Jayendra Thaker; Ajai Tyagi, JJ.

WRIT A No. 17936 of 2021; 22.03.2022

Bindu v. High Court of Judicature at Allahabad through Its R.G and Another

Constitution of India, 1950; Article 233 (2) - For seeking appointment as Judicial Officer / District Judge, an Advocate has to be in continuous practice for not less than 7 years [with no break in between] as on the cut-off date and at the time of appointment as District Judge.

Counsel for Petitioner:- Vijay Tripathi

Counsel for Respondent:- Ashish Mishra, Rahul Agarwal

1. Heard Sri Vijay Tripathi, learned counsel for the petitioner and Sri Rahul Agarwal, learned counsel for the High Court-respondents.

2. The petitioner has prayed for the following reliefs:

"I. issue a writ, order or direction in the nature of certiorari quashing the impugned rejection order dated 22/10/2021 (Annexure No.1 to this writ petition).

II. issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to allow the petitioner to participate in selection process of U.P. Higher Judiciary Services, 2020.

III. to issue any other writ, order or direction which this Hon'ble court may deem fit and proper in the facts and circumstances of the case."

3. The facts in nutshell for our purpose are that the petitioner applied for being appointed as a Judicial Officer in the U.P. State Higher Judicial Services, the clinching aspect which is under challenge is that the High Court after the petitioner had cleared the preliminary exam, she was not permitted to appear for final exams, on the ground that on interpretation of the rules and placing reliance on the judgment of the Apex Court in ***Deepak Aggrawal v. Keshav Kaushik and others, (2013) 5 SCC 277*** the committee found that the petitioner does not have continuous practice for seven years on date of exam/filling form. The High Court on its administrative side conveyed to the petitioner that she was not qualified as per rules.

3. Shri Jitendra Kumar holding brief of the counsel appearing on behalf of petitioner has contended that the petitioner has passed preliminary exams and is practicing as a public prosecutor since 2019. Learned counsel for petitioner also places reliance on the judgment of the Apex Court in ***Deepak Aggrawal (supra)***.

4. At this juncture, it would be relevant for us to verbatim refer to paragraphs no.101 and 102, of decision titled ***Deepak Aggawal*** (Supra) which we verbatim reproduce as under:

"101. The Division Bench has in respect of all the five private appellants – Assistant District Attorney, Public Prosecutor and Deputy Advocate General – recorded

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

102. As regards construction of the expression, "if he has been for not less than seven years an advocate" in Article 233(2) of the Constitution, we think Mr. Prashant Bhushan was right in his submission that this expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of 'has been'. The present perfect continuous tense is used for a position which began at some time in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as an advocate on the date of application"

5. While perusing the grounds of challenge, it is clear from the factual data that petitioner cannot seek appointment as Judicial Officer/District Judge in this calendar year as the petitioner does not fulfill the criteria fixed as per provisions of Articles 233, 234 and 236 of the Constitution of India and the rules for. The question is whether the break in practice of the petitioner can be condoned? The decision in Deepak Aggarwal (supra) will not help the petitioner as in our case the Rules categorically mention and has been interpreted to mean seven years in ***Satish Kumar Sharma v. Bar Counsel of HP, (2001) 2 SCC 365*** will have to be looked into. In our case, the petitioner herein from a period of 2017 to 2019 was employed and so there is brake in a legal practice. The Rules framed have to be construed so as to see that the purpose of the legislation is not **withered down**.

6. The term used "has been" is interpreted to mean seven years and has to be in present perfect continuous tense and not has been seven years during any period. This interpretation will not permit us to entertain this petition and grant the mandamus to permit the petitioner to appear in the exam.

7. The recent decision of the Division Bench of this Court titled ***Shashank Singh and others v. Hon'ble High Court of Judicature at Allahabad and another***, Writ-A No.27120 of 2018 decided on 3.12.2021 is also pressed in service by Shri Rahul Agarwal, learned counsel for the High Court-namely respondents where in it is held:

"The subject matter of the writ petition relates to the process of Direct Recruitment to the U.P. Higher Judicial Services-2018 (Part II). The Allahabad High Court issued a Notification dated 12.11.2018 inviting applications for direct recruitment to the Uttar Pradesh High Judicial Service-2018 (Part-II);

For appreciating the arguments raised on behalf of the writ petitioners, it would be appropriate to refer to Rule 5 of the U.P. Higher Judicial Service Rules 1975, which is reproduced as under:-

"5. Sources of recruitment.- The recruitment to the Service shall be made-

a) by promotion from amongst the Civil Judges (Senior Division) on the basis of Principle of merit-cum-seniority and passing a suitability test.

b) by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service;

c) by direct recruitment from amongst the Advocates of not less than seven years standing as on the last date fixed for the submission of application forms.

The U.P. Higher Judicial Service Rules, 1975 have been framed in exercise of the power conferred by the Proviso to Article 309 read with Article 233 of the Constitution of India.

The Article 233 of the Constitution of India has been recently interpreted by the Hon'ble Apex Court in the Civil Appeal No.1698 of 2020 (Dheeraj Mor Vs. Hon'ble High Court of Delhi) arising out of SLP (C) No.14156 of 2015 and other connected matters vide decision dated February 19th, 2020 reported in 2020 SCC online SC 213. The Hon'ble Apex Court after considering all aspects of the matter observed as under:-

"59. In view of the aforesaid interpretation of Article 233, we find that rules debarring judicial officers from staking their claim as against the posts reserved for direct recruitment from bar are not ultra vires as rules are subservient to the provisions of the Constitution.

60. We answer the reference as under:-

(i) The members in the judicial service of the State can be appointed as District Judges by way of promotion or limited competitive examination.

(ii) The Governor of a State is the authority for the purpose of appointment, promotion, posting and transfer, the eligibility is governed by the Rules framed under Articles 234 and 235.

(iii) Under Article 232(2), an Advocate or a pleader with 7 years of practice can be appointed as District Judge by way of direct recruitment in case he is not already in the judicial service of the Union or a State.

(iv) For the purpose of Article 233(2), an Advocate has to be continuing in practice for not less than 7 years as on the cut-off date and at the time of appointment as District

Judge. Members of judicial service having 7 years' experience of practice before they have joined the service or having combined experience of 7 years as lawyer and member of judiciary, are not eligible to apply for direct recruitment as a District Judge.

(v) The rules framed by the High Court prohibiting judicial service officers from staking claim to the post of District Judge against the posts reserved for Advocates by way of direct recruitment, cannot be said to be ultra vires and are in conformity with Articles 14, 16 and 233 of the Constitution of India.

(vi) The decision in Vijay Kumar Mishra (supra) providing eligibility, of judicial officer to compete as against the post of District Judge by way of direct recruitment, cannot be said to be laying down the law correctly. The same is hereby overruled.

61. In the case of Dheeraj Mor and others cases, time to time interim orders have been passed by this Court, and incumbents in judicial service were permitted to appear in the examination. Though later on, this Court vacated the said interim orders, by that time certain appointments had been made in some of the States and in some of the States results have been withheld by the High Court owing to complication which has arisen due to participation of the ineligible in-service candidates as against the post reserved for the practising advocates. In the cases where such in-service incumbents have been appointed by way of direct recruitment from bar as we find no merit in the petitions and due to dismissal of the writ petitions filed by the judicial officers, as sequel no fruits can be ripened on the basis of selection without eligibility, they cannot continue as District Judges.

They have to be reverted to their original post. In case their right in channel for promotion had already been ripened, and their juniors have been promoted, the High Court has to consider their promotion in accordance with prevailing rules. However, they cannot claim any right on the basis of such an appointment obtained under interim order, which was subject to the outcome of the writ petition and they have to be reverted."

8. In case on hand, the petitioner ceased to be an Advocate under the Advocates Act, 1961 in August 2017 when she got selected as EXAMINER OF TRADE MARK & G.I. It is submitted by learned counsel at that time she surrendered her practicing licence. Thereafter in the year 2019, she was selected as Public Prosecutor in CBI where she is still working. The petitioner is a Public Prosecutor at present but as Public Prosecutor, she has not put in continuous service of 7 years.

9. Hence, ***Deepak Aggarwal*** (supra) cannot be made applicable to this case. Paragraph 102 of the said decision which has been quoted above will not permit us to grant writ of mandamus for permitting the petitioner in the exam, as she is not qualified practicing period just when she applied in pursuance to the advertisement issued by the present respondents.

10. In view of these facts, this petition fails and is **dismissed**.

11. We are thankful to both the learned counsels for the parties for ably assisting us.