REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

SPECIAL LEAVE PETITION (C) NO.14156/2015

DHEERAJ MOR **PETITIONER(S)**

VERSUS

HON'BLE HIGH COURT OF DELHI **RESPONDENT(S)**

WITH
SLP(C) No. 14676/2015, SLP(C) No. 24219/2015,
SLP(C) No. 30556/2015, W.P.(C) No. 77/2016,
W.P.(C) No. 130/2016, W.P.(C) No. 171/2016,
W.P.(C) No. 405/2016, SLP(C) No. 15764/2016,
W.P.(C) No. 414/2016, W.P.(C) No. 423/2016,
SLP(C) No. 23823/2016, S.L.P.(C)...CC No. 15018/2016,
SLP(C) No. 24506/2016, S.L.P.(C)...CC No. 15304/2016,
W.P.(C) No. 600/2016, W.P.(C) No. 598/2016,
W.P.(C) No. 601/2016, W.P.(C) No. 602/2016,
W.P.(C) No. 733/2016, W.P.(C) No. 189/2017,
W.P.(C) No. 222/2017, W.P.(C) No. 334/2017,
W.P.(C) No. 1171/2017

O R D E R

1. The issues raised in these petitions pertain to the interpretation of Article 233 of the Constitution of India in the matter of appointment of District Judges by way of direct recruitment.

2. The petitioners have raised mainly two contentions - (i) in case a candidate has completed seven years of practice as an advocate, he/she shall be an eligible candidate despite the fact that on the date of the application/appointment, he/she is in the service of Union or State; (ii) the members who are in judicial service as Civil Judge, Junior Division or Senior Division, in case

they have completed seven years as Judicial Officers or seven years as Judicial Officer-cum-Advocate, they should be treated as eligible candidates.

3. Extensive reference has been made to various judgments of this Court which pertain to Article 233 of Constitution of India. To provide a complete picture of the matter, we shall briefly discuss the relevant cases.

4. The case of Rameshwar Dayal v. State of Punjab and others[1] pertains to eligibility for appointment as District Judge counting also the period of practice in Lahore High Court, before partition. At paragraphs 11 and 13, this Court made the following observations:

> **"11. This is the background against which we have to consider the argument of learned Counsel for the appellant. Even if we assume without finally pronouncing on their correctness that learned Counsel is right in his first two submissions, viz., that the word " advocate" in Cl. (2) of Art. 233 means an advocate of a Court in India and the appointee must be such an advocate at the time of his appointment, no objection on those grounds can be raised to the appointment of three of the respondents who were factually on the roll of Advocates of the Punjab High Court at the time of their appointment; because admittedly they were advocates in a Court in India and continued as such advocates till the dates of their appointment. The only, question with regard to them is whether they can count. in the period of seven years their period of practice in or under the Lahore High Court…"**
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> **xxx xxx xxx**
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> **13. … It is perhaps necessary to add that we must not be understood to have decided that the expression 'has been' must always mean what learned Counsel for the appellant says it means according to the strict rules of grammar. It may be seriously questioned if an organic Constitution must be so narrowly interpreted, and the learned Additional Solicitor-General has drawn our attention to other Articles of the Constitution like Art. 5(c) where in-the context the expression has a different meaning. Our attention has also been drawn to the decision of the Allahabad High Court in Mubarak**

1 AIR 1961 SC 816

> **Mazdoor v. K. K. Banerji AIR 1953 All 323 where a different meaning was given to a similar expression occurring in the proviso to sub-sec. (3) of S. 86 of the Representation of the People Act, 1951. We consider it unnecessary to pursue this matter further because the respondents we are now considering continued to be advocates of the Punjab High Court when they were appointed as district judges and they had a standing of more than seven years when so appointed. They were clearly eligible for appointment under Cl. 2 of Art. 233 of the Constitution."**
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> **(Emphasis Supplied)**

5. In Chandra Mohan v. State of Uttar Pradesh and others.[2], this Court interpreted the expression "the service" in clause 2 of Article 233 to mean judicial service.

6. In Satya Narain Singh v. High Court of Judicature at Allahabad and Others.[3], this Court considered the question as to whether judicial officers who had seven years standing at the Bar before entering service would be eligible for appointment as District Judges. To quote:

> **"1. The petitioners in the several writ petitions now before us as well as the appellants in Civil Appeal No. 548 of 1982 and the petitioners in Writ Petitions Nos. 6346-6351 of 1980 which we dismissed on October 11, 1984 were members of the Uttar Pradesh Judicial Service in 1980 when all of them, in response to an advertisement by the High Court of Allahabad, applied to be appointed by direct recruitment to the Uttar Pradesh Higher Judicial Service. They claimed that each of them had completed 7 years of practice at the bar even before their appointment to the Uttar Pradesh Judicial Service and were, therefore, eligible to be appointed by direct recruitment to the Higher Judicial Service. …"**
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> **(Emphasis Supplied)**

After referring to the text of Article 233, this Court held as

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2 AIR 1966 SCC 1987
3 (1985) 1 SCC 225

follows :-

> **"3. … It is only in respect of the persons covered by the second clause that there is a requirement that a person shall be eligible for appointment as District Judge if he has been an advocate or a pleader for not less than 7 years. In other words, in the case of candidates who are not members of a Judicial Service they must have been advocates or pleaders for not less than 7 years and they have to be recommended by the High Court before they may be appointed as District Judges, while in the case of candidates who are members of a Judicial Service the 7 years' rule has no application but there has to be consultation with the High Court. A clear distinction is made between the two sources of recruitment and the dichotomy is maintained. The two streams are separate until they come together by appointment. Obviously the same ship cannot sail both the streams simultaneously.."**
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> **(Emphasis Supplied)**

In Satya Narain Singh (supra), the Court specifically referred to Rameshwar Dayal (supra) to note that Article 233 is a self contained provision regarding appointment of District Judges. Finally, at paragraph 5, after discussing Chandra Mohan (supra), it was held that:

> **"5. Posing the question whether the expression "the service of the Union or of the State" meant any service of the Union or of the State or whether it meant the Judicial Service of the Union or of the State, the learned Chief Justice emphatically held that the expression "the service" in Article 233(2) could only mean the Judicial Service. But he did not mean by the above statement that persons who are already in the service, on the recommendation by the High Court can be appointed as District Judges, *overlooking* the claims of all other seniors in the Subordinate Judiciary contrary to Article 14 and Article 16 of the Constitution."**
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> **(Emphasis Supplied)**

7. In Deepak Aggarwal v. Keshav Kaushik and Others.[4], a

4 (2013) 5 SCC 277

three-judge Bench of this Court held that the appellants did not cease to be advocates while working as Assistant District Attorney/Public Prosecutor/Deputy Advocate General. In arriving at this decision, this Court also dealt with the expression, "if he has been for not less than 7 years an advocate" in Article 233(2). Paragraphs 51 and 102 read as follows :-

> **"51. From the above, we have no doubt that the expression, "the service" in Article 233(2) means the "judicial service". Other members of the service of the Union or State are as it is excluded because Article 233 contemplates only two sources from which the District Judges can be appointed. These sources are: (*i*) judicial service; and (*ii*) the advocate/pleader or in other words from the Bar. The District Judges can, thus, be appointed from no source other than judicial service or from amongst advocates. Article 233(2) excludes appointment of District Judges from the judicial service and restricts eligibility of appointment as District Judges from amongst the advocates or pleaders having practice of not less than seven years and who have been recommended by the High Court as such."**
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> **xxx xxx xxx**
>
> **"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 sometime 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."**
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> **(Emphasis Supplied)**

8. Vijay Kumar Mishra and Another. v. High Court of Judicature at Patna and Others.[5] is a case where an advertisement was issued

5 (2016) 9 SCC 313

inviting applications from eligible advocates for direct recruitment for the post of District Judge. Pursuant to the advertisement, the appellants appeared in the preliminary as well as main examination. In the meantime, the appellants qualified for the Subordinate Judicial Service of the State of Bihar and joined service in August, 2015. The result of the mains examination for the post of District Judge was declared in January, 2016 and the appellants qualified for the same. However, they were denied permission by the Registrar General of Patna High Court to appear for the interview in view of Article 233(2) of the Constitution, as they were already in the State Subordinate Judicial Service. To quote Chelameswar, J. :-

> **"7. It is well settled in service law that there is a distinction between selection and appointment. Every person who is successful in the selection process undertaken by the State for the purpose of filling up of certain posts under the State does not acquire any right to be appointed automatically. Textually, Article 233(2) only prohibits the appointment of a person who is already in the service of the Union or the State, but not the selection of such a person. The right of such a person to participate in the selection process undertaken by the State for appointment to any post in public service (subject to other rational prescriptions regarding the eligibility for participating in the selection process such as age, educational qualification, etc.) and be considered is guaranteed under Articles 14 and 16 of the Constitution.**
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> **8. The text of Article 233(2) only prohibits the appointment of a person as a District Judge, if such person is already in the service of either the Union or the State. It does not prohibit the consideration of the candidature of a person who is in the service of the Union or the State. A person who is in the service of either the Union or the State would still have the option, if selected, to join the service as a District Judge or continue with his existing employment. Compelling a person to resign from his job even for the purpose of assessing his suitability for appointment as a District Judge, in our opinion, is not permitted either by the text of Article 233(2) nor contemplated under the scheme of**

the Constitution as it would not serve any constitutionally desirable purpose."

(Emphasis Supplied)

9. This Court took note of the judgment in Satya Narain Singh (supra) but distinguished it holding that:

> **"10. In first of the abovementioned judgments, the appellant-petitioners before this Court were members of the Uttar Pradesh Judicial Service. In response to an advertisement by the High Court, they applied to be appointed by direct recruitment to the Uttar Pradesh Higher Judicial Service (District Judges). It appears from the judgment "as there was a question about the eligibility of the members of the Uttar Pradesh Judicial Service to appointment by direct recruitment to the higher Judicial Service …" (*Satya Narain case*, SCC p. 227, para 1), some of them approached the High Court by way of writ petitions which were dismissed and therefore, they approached this Court. It is not very clear from the judgment, as to how the question about their eligibility arose and at what stage it arose. But the fact remains, by virtue of an interim order of this Court, they were allowed to appear in the examination. The argument before this Court was that all the petitioners had practised for a period of seven years before their joining the Subordinate Judicial Service, and therefore, they are entitled to be considered for appointment as District Judges notwithstanding the fact that they were already in the Judicial Service.**
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> **11. It appears from the reading of the judgment in *Satya Narain Singh case* that the case of the petitioners was that their claims for appointment to the post of District Judges be considered under the category of members of the Bar who had completed seven years of practice ignoring the fact that they were already in the Judicial Service. The said fact operates as a bar undoubtedly under Article 233(2) for their *appointment* to the Higher Judicial Service. It is in this context this Court rejected their claim. The question whether at what stage the bar comes into operation was not in issue before the Court nor did this Court go into that question."**
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> **(Emphasis Supplied)**

This Court also held that the decision in Deepak Aggarwal

(supra) had no relevance to the issue at hand.

10. In the supplementing opinion, Sapre, J. made the following observations which are extremely pertinent in this context :-

> **21. Mr Ranjit Kumar, Solicitor General of India appearing for the respondent (High Court), however, contended that the word "*appointed*" occurring in Article 233(2) of the Constitution should necessarily include the entire selection process starting from the date of submitting an application by the person concerned till the date of his appointment. It was his submission that if any such person is found to be in service of the Union or the State, as the case may be, on the date when he has applied then such person would suffer disqualification prescribed in clause (2) of Article 233 and would neither be eligible to apply nor be eligible for appointment to the post of District Judge.**
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> **22. This submission though looks attractive, is not acceptable. Neither the text of Article and nor the words occurring in Article 233(2) suggest such interpretation. Indeed, if his argument is accepted, it would be against the spirit of Article 233(2). My learned Brother for rejecting this argument has narrated the consequences, which are likely to arise in the event of accepting such argument and I agree with what he has narrated.**
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> **23. In my view, there lies a subtle distinction between the words "*selection*" and "*appointment*" in service jurisprudence. (See *Prafulla Kumar Swain* v. *Prakash Chandra Misra*.) When the Framers of the Constitution have used the word "*appointed*" in clause (2) of Article 233 for determining the eligibility of a person with reference to his service then it is not possible to read the word "*selection*" or "*recruitment*" in its place. In other words, the word "*appointed*" cannot be read to include the word "*selection*", "*recruitment*" or "*recruitment process*".**
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> **24. In my opinion, there is no bar for a person to apply for the post of District Judge, if he otherwise, satisfies the qualifications prescribed for the post while remaining in service of the Union/State. It is only at the time of his appointment (if occasion so arises) the question of his eligibility arises. Denying such person to apply for participating in selection process when he otherwise fulfils all conditions prescribed in the advertisement by taking recourse to**

clause (2) of Article 233 would, in my opinion, amount to violating his right guaranteed under Articles 14 and 16 of the Constitution of India."

(Emphasis Supplied)

11. Some of the learned counsel have also invited our attention to All India Judges' Association and others v. Union of India and others[6] , Shri Kumar Padma Prasad v. Union of India and others[7] and State of Assam v. Horizon Union and another[8].

12. In the order dated 03.04.2017 in Sukhda Pritam and Anr v. Hon'ble High Court of Rajasthan and Anr which is one of the cases in the batch, there is also a reference to rules framed by certain states which provide that "in computing the period of seven years there shall be included a period during which he (a candidate) has held judicial office". This is also an issue which is required to be considered.

13. In view of the various decisions of this Court, one major issue arising for consideration is whether the eligibility for appointment as district judge is to be seen only at the time of appointment or at the time of application or both. Thus, having regard to the contentions and the materials placed before us and having regard to the ratio and observations in the cases referred to above, some of which are apparently diverse, we are also of the view that these cases involve substantial questions of law as to the interpretation of Article 233 of the Constitution of India. Therefore, we are of the opinion that this matter should be placed before Hon'ble the Chief Justice of India for constituting an appropriate Bench.

14. Learned counsel for the petitioners pointed out that all the petitioners herein, by virtue of interim orders, have appeared in the written examinations and in some cases they have also attended the interview. We are informed that in some of the cases, appointment of other eligible candidates is held up on account of pendency of these cases.

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6 (2002) 4 SCC 247
7 (1992) 2 SCC 428
8 [1967] 1 SCR 484

15. The Registry may seek appropriate orders from Hon'ble the Chief Justice of India having regard to the special circumstances referred to above, for an early posting.

.....J.
[KURIAN JOSEPH]

.....J.
[MOHAN M. SHANTANAGOUDAR]

NEW DELHI;
JANUARY 23, 2018.