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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 15.12.2022*

+ **W.P.(C) 17131/2022 & CM APPL. 54436/2022, 54437/2022
& 54438/2022**

PRAVEEN GARG

.....Petitioner

Through:

Mr. Prateek Gupta, Mr. Arnab
Kumar, Mr. Suprateek Neogi, Mr.
Gurudas Khurana & Mr. Harshil
Manchanda, Advs.

versus

THE HIGH COURT OF DELHI AND ORS.

.....Respondents

Through:

Asmita

Mr. Gautam Narayan & Ms.
Singh, Adv. for DHC.
Ms. Avnish Ahlawat, SC with Mr.
N K Singh, Ms. Palak R, Ms.
Laavanya Kaushik & Ms. Aliza
Alam, Advs. for R3.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR KAURAV

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition challenging the constitutional validity of Rule 9(2) of the Delhi Higher Judiciary Services Rules, 1970 (hereafter '**the Rules**') as amended on 08.02.2022. The petitioner claims that the said rule is ultra vires Article 233 (2) of the Constitution of India.

2. The petitioner claims that he had practiced as an advocate cumulatively for a period of 7 years and 2 months as on 12.03.2022 –

the last date to apply for the Delhi Higher Judicial Services Examination, 2022 (hereafter '**the DHJSE, 2022**'). He claims that, as such, he qualifies the eligibility criteria under Article 233(2) of the Constitution of India. However, Rule 9(2) of the Rules requires an applicant to be in continuous practice of at least 7 years as on the date of the application for being eligible for appointment to the Delhi Higher Judiciary Services. According to the petitioner, the same falls foul of Article 233(2) of the Constitution of India as the same does not expressly require a candidate to be in continuous practice of at least 7 years to be eligible to be appointed as a District Judge.

Factual Context

3. The petitioner was enrolled with the Bar Council of Punjab and Haryana on 24.07.2012 (License no. P/963/2012). He claims that he joined active practice as an advocate at the District and Sessions Court, Ambala and also became a member of the District Bar Association, Ambala, Haryana. In the year 2015, he appeared for the District Legal Aid Officer Exam, 2014 conducted by the High Court of Madhya Pradesh and was ranked on top of the list of successful candidates who had appeared for the said examination. He joined the services on 09.03.2015 as the District Legal Aid Officer, Morena, Madhya Pradesh. In the same year, he appeared for Civil Judge, Class-II Examination, 2015 conducted by the High Court of Madhya Pradesh. He was successful and selected as a Civil Judge, Class-II.

4. The petitioner claims that he resigned from the services as the District Legal Aid Officer on 28.07.2015 after serving four months and twenty days. And, immediately resumed his practice at the Bar,

Ambala, Haryana. The petitioner claims that, thereafter, he joined as judicial officer, Civil Judge, Class-II on 11.04.2016 and served the said post for a period of two years and one month.

5. He served one month's prior notice of his resignation to the High Court of Madhya Pradesh on 11.04.2018. His resignation was accepted and he was relieved from state judicial services of Madhya Pradesh on 10.05.2018.

6. The petitioner claims that immediately on his being relieved, he joined active practice as an advocate at Ambala, Haryana as well as at the Punjab and Haryana High Court.

7. On 23.02.2022, the establishment of this Court invited online applications from eligible candidates for filling up 45 (forty-five) vacancies by way of a direct recruitment in the Delhi Higher Judicial Services. The selection process entailed three stages: the preliminary examination, the main (written) examination, and viva voce. The last date for filing the online application was fixed as 12.03.2022.

8. The preliminary examination for the DHJSE, 2022 was held on 04.04.2022 and the results of the examination were declared on 22.04.2022. Since, the petitioner had secured 89.75 marks out of maximum of 151 marks; he qualified for appearing in the main (written) examination. He appeared for the said DHJS Mains examination conducted during the period from 14.05.2022 to 15.05.2022. The results of the DHJSE main examination were declared on 26.08.2022 and the successful candidates were called to submit their copies of their education certificates and experience certificates of practice at the Bar within a period of five days.

9. Although the petitioner claims that he practiced as an advocate for a cumulative period of over seven years as on 12.03.2022, he had not practiced continuously for the said period of seven years prior to filing his online application. Therefore, in terms of the Rule, he is ineligible for being appointed to the Delhi Higher Judicial Services.

10. The petitioner made a representation on 15.09.2022. While his representation was pending, the list of successful candidates who were admitted to the viva voce was published on 23.09.2022. The petitioner was interviewed (viva voce) on 12.10.2022. The final merit list for the DHJSE, 2022 was published on 10.11.2022.

11. The petitioner secured 584.5 marks out of maximum of 1000 marks which were higher than the marks secured by the candidate placed at the 32nd position on the select list. The petitioner's name was not included in the list of selected candidates on the ground that he had not qualified the eligibility criteria of a continuous practice of seven years as an advocate as on date of filing the online application.

Reasons and Conclusion

12. Article 233(2) of the Constitution of India reads as under:-

“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.”

13. In terms of Article 233(2) of the Constitution of India, a person who is not already in the service of the Union or the State would be

eligible to be appointed as a District Judge only if he has been an advocate or pleader for not less than seven years. Article 233(2) of the Constitution of India does not expressly specify that a person must be an advocate or a pleader for a continuous period of seven years. The present petition is founded on the basis that a person who has been an advocate or a pleader cumulatively (and not continuously) for a period of seven years prior to the date of application, would also qualify the criteria as specified in Article 233(2) of the Constitution of India.

14. Mr. Gautam Narayan, learned counsel who appears for the establishment of this Court, submits that the said question is no longer res integra. We find merit in this contention.

15. The Supreme Court, in the case of *Deepak Aggarwal v. Keshav Kaushik & Ors.*¹, found the merit in the submission that the expression “if he has been for not less than seven years as an advocate”, as used in Article 233(2) of the Constitution of India, must be read to mean seven years immediately preceding his appointment/application and not seven years at any time in the past. The said submissions of the counsel was noted by the Supreme Court in paragraph no.35 of the said judgement, which reads as under:-

“35. On the other hand, Mr Prashant Bhushan, learned counsel for the respondent, Keshav Kaushik (writ petitioner before the High Court) in the appeal preferred by Deepak Aggarwal, referred to Article 233(2) of the Constitution and submitted that in order to be eligible, the candidate must not be in the service of the Union or the State and must have been an advocate for

¹ (2013) 5 SCC 277

at least seven years. It was submitted that the expression, "if he has been for not less than seven years an advocate" must be read to mean seven years immediately preceding his appointment/application. It cannot mean any seven years any time in the past. If that interpretation were to be accepted it would mean that a person who is enrolled as an advocate for seven years and thereafter took up a job for the last twenty years would also become eligible for being appointed as District Judge. This would defeat the object of the qualification prescribed in Article 233(2)."

16. The aforesaid submission was accepted as is apparent from the following extract from the said decision:-

"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."

17. The decision in *Deepak Aggarwal v. Keshav Kaushik & Ors.*¹ was rendered on 21.01.2013.

18. The issue whether a candidate, who has completed seven years of practice as an advocate, would be eligible to be appointed as a District Judge in terms of Article 223(2) of the Constitution of India, despite being in service of the Union or the State as on the date of application/appointment came up for consideration once again in *Dheeraj Mor v. Hon'ble High Court of Delhi*². In its decision, the Supreme Court noted various decisions including the earlier decision in *Deepak Aggarwal v. Keshav Kaushik & Ors.*¹ and expressed the view that some of the observations made in the earlier decisions were apparently diverse and therefore, the Court expressed an opinion that the matter be placed before the Hon'ble Chief Justice for constituting an appropriate bench. Paragraph no.14 of the said order reads as under:-

“14. 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 the Hon'ble the Chief Justice of India for constituting an appropriate Bench.”

² (2018) 4 SCC 619

19. While the matter in the case of *Dheeraj Mor v. Hon'ble High Court of Delhi*² was pending, another writ petition, captioned *Rahul Singh v. Hon'ble High Court of Madhya Pradesh & Anr.*³, was moved before the Supreme Court. The petitioner in the said case was practising as an advocate which was followed by a short period of appointment as a judge before he was discharged during probation. The question arose whether the two periods spent at the bar should be taken together for the purpose of eligibility under Article 233 of the Constitution of India. After hearing the counsels, the Supreme Court, by an order dated 25.02.2019, expressed the prima facie view that the petitioner may have to wait for the verdict of the larger Bench. The said petition³ was again taken up on 22.04.2019. On the said date, the Court passed the following order:-

“The petitioner had passed the examination and interview as a result of which he is fit to be appointed as a Sessions Judge. However, the only question is as to whether the judgment in Deepak Aggarwal vs. Keshav Kaushik & Ors., reported in (2013) 5 SCC 277 is correct in which case the seven years experience of the petitioner prior to his being made a civil Judge on 04.06.2013 would not count for eligibility. This question is pending before a larger Bench in Special Leave Petition (C) No. 14156/2015 entitled Dheeraj Mor vs. Hon'ble High Court of Delhi.

We, therefore, direct that the petitioner be appointed provisionally as a Sessions Judge, subject to the result of the judgment of the larger Bench.

³ WP(C) No.1049/2018

Tag with Special Leave Petition(C) No.14156/2015.”

20. The matter in *Dheeraj Mor v. Hon’ble High Court of Delhi*⁴ was placed before the larger Bench of three Judges of the Supreme Court and was decided on 19.02.2020. Mr. Arun Mishra, J speaking for himself and Mr. Vineet Saran, J concurred with the decision rendered in *Deepak Aggarwal v. Keshav Kaushik & Ors.*¹ The relevant extract of the said decision is set out below:-

“23. In *Deepak Aggarwal* a three-Judge Bench of this Court considered the provisions of Article 233(2) and held that service in Article 233 to mean Judicial service and there is dichotomy of sources of recruitment, namely, (i) from judicial service; and (ii) from the advocate/pleader or in other words from the Bar. The meaning of the term advocate/pleader too has been considered by this Court. The expression "advocate" or "pleader" refers to the members of the Bar practising law. Relying upon *Sushma Suri v. State (NCT of Delhi)*, this Court further observed that members of the Bar meant classes of persons who were practising in a court of law as pleaders or advocates. This Court further held that in Article 233(2), if he has been for not less than seven years." the present perfect continuous tense is used for a position which began at some time in the past and is continuing. Therefore, one of the essential requirements is that such a person must with requisite period be continuing as an advocate on the date of application. This Court has observed: (*Deepak Aggarwal* case SCC pp. 316-17, 326-27 & 331, paras 70, 89 & 102)

⁴ (2020) 7 SCC 401

“70. A few decisions rendered by some of the High Courts on the point may also be noticed here. In Sudhakar Govindrao Deshpande v. State of Maharashtra the issue that fell for consideration before the Bombay High Court was whether the petitioner therein who was serving as Deputy Registrar at the Nagpur Bench of the Bombay High Court, was eligible for appointment to the post of the District Judge. The advertisement that was issued by the High Court inviting applications for five posts of District Judges, inter alia, stated that, 'candidate must ordinarily be an advocate or pleader who has practised in the High Court, Bombay or court subordinate thereto for not less than seven years on 1-10-1980. The Single Judge of the Bombay High Court considered Articles 233, 234 and 309 of the Constitution, relevant recruitment rules and noted the judgments of this Court in Chandra Mohan v. State of U.P., Satya Narain Singh v. High Court of Allahabad and Rameshwar Dayal v. State of Punjab. It was observed as follows: (Sudhakar case, SCC OnLine Bom para 17: Lab IC p. 715, para 16)

16.... the phrase "has been an advocate or a pleader" must be interpreted as a person who has been immediately prior to his appointment a member of the Bar, that is to say either an advocate or a pleader. In fact, in the above judgment, the Supreme Court has repeatedly referred to the second group of persons eligible for appointment under Article 233(2) as "members of the Bar" Article 233(2) therefore, when it refers to a person who has been for not less than seven years an advocate or pleader

refers to a member of the Bar who is of not less than seven years standing."

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89. We do not think there is any doubt about the meaning of the expression "advocate or pleader" in Article 233(2) of the Constitution. This should bear the meaning it had in law preceding the Constitution and as the expression was generally understood. The expression "advocate or pleader" refers to legal practitioner and, thus, it means a person who has a right to act and/or plead in court on behalf of his client. There is no indication in the context to the contrary. It refers to the members of the Bar practising law. In other words, the expression "advocate or pleader" in Article 233(2) has been used for a member of the Bar who conducts cases in court or in other words acts and/or pleads in court on behalf of his client. In Sushma Suri, a three-Judge Bench of this Court construed the expression "members of the Bar" to mean class of persons who were actually practising in courts of law as pleaders or advocates....

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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."

It is clear from the decision of Deepak Aggarwal that recruitment from the Bar is only from among practising advocates and those continuing as advocates on the date of appointment. The submission that the issue of eligibility of in-service candidates did not come up for consideration is of no consequence as provisions of Article 233(2) came up for consideration directly before this Court."

21. It is apparent from the above that for a candidate to be eligible to be appointed as a District Judge, in terms of the Article 233(2) of the Constitution of India, is required to be in practice as an advocate or a pleader for a continuous period of seven years as on the date of the application. Mr. S. Ravindra Bhat, J, penned down a concurring opinion, following the decision in the case of **Deepak Aggarwal v. Kehsav Kaushik & Ors.**¹ and expressly noticing paragraph nos.102 & 103 of the said decision.

22. Thereafter Rule 9(2) of the Rules was substituted by a notification dated 08.02.2022. Rule 9 of the Rules, as amended, reads as under:

“9. The qualifications for direct recruits shall be as follows:-

- (1) must be a citizen of India.
[(2) must have been continuously practising as an Advocate for not less than seven years as on the last date of receipt of applications.]
[(3) must have attained the age of 35 years and have not attained the age of 45 years on the 1st day of January of the year in which the applications for appointment are invited.]”

23. In view of the decision of the Supreme Court in *Dheeraj Mor v. Hon'ble High Court of Delhi*⁴, we are unable to accept that Rule 9(2) of the Rules, as set out above, falls foul of Article 233 of the Constitution of India. On the contrary, Rule 9(2) of the Rules is in conformity with the decision in the case of *Deepak Aggarwal v. Keshav Kaushik & Ors.*¹

24. This court is informed that a review petition has been filed seeking review of the decision in *Dheeraj Mor v. Hon'ble High Court of Delhi*⁴, however, that too is of little assistance to the petitioner as unless the decision is reviewed, it is a binding precedent.

25. The learned counsel had also referred to the order dated 31.08.2021 in *Ashutosh v. High Court of Judicature at Allahabad & Ors.*⁵, whereby directions were issued to tag the said petition with *Rahul Singh v. Hon'ble High Court of Madhya Pradesh & Anr.*³ The facts in that case are similar to the facts in the present case. In that case, the petitioner had practised as an advocate for more than nine years but there was break in between of two years as he was working for the government during the said period. It was submitted on behalf

⁵ WP(C) No.695/2021

of the petitioner, in that case, that the judgement in *Dheeraj Mor v. Hon'ble High Court of Delhi*⁴ was on the issue of requirement of seven years at the bar to be taken into consideration for being eligible for appointment. However, the said order dated 31.08.2021 is of little assistance to the petitioner as no decision has been rendered in that case.

26. It is also relevant to note that for submission of the online application form, the petitioner was to answer the question: “*you have continuous practice of seven years or more on the last date of receipt of application?*” The application would be processed only if the petitioner had answered in the affirmative. Thus, there is also merit in the submission made on behalf of the respondent that the petitioner, having applied on the basis of the Rules impugned in this petition and on confirming that he had been in continuous practice for a period of seven years or more on the last date of filing the application, is now estopped from challenging the said Rule or the eligibility criteria.

27. The petition is unmerited and accordingly dismissed.

भक्त्यमेव जयते

VIBHU BAKHRU, J

PURUSHAINDRA KUMAR KAURAV, J

DECEMBER 15, 2022
Ch