

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (S) No.2375 of 2014

Rajendra Prasad Kushwaha, Occupation Advocate, S/o Shri Ram Juthan Ram, aged about 44 years, R/o Ward No.18, Gadhelpara, Baikunthpur, P.S. Baikunthpur, District Korea (Chhattisgarh)

---- Petitioner

Versus

1. The High Court of Chhattisgarh, Through Registrar General, High Court of Chhattisgarh, Near Bodari, Chakarbhata, District Bilaspur (C.G.)
2. Dukhi Ram Dewangan, S/o Shri Chandu Ram Dewangan, Assistant District Public Prosecutor Officer, Office of Deputy Director Prosecution, Ambikapur, District Surguja (C.G.)

---- Respondents

For Petitioner: Mr. Sandeep Dubey, Advocate.

For Respondent No.1: Mr. Rajeev Shrivastava, Advocate.

For Respondent No.2: Mr. R.S. Patel, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

CAV Order

10/12/2015

1. Epochal question that falls for consideration is whether an Advocate who has put in seven years practice and thereafter, appointed as Assistant District Prosecution Officer, who is a full-time salaried employee of the State Government and governed by the statutory rules of the State, is eligible for appointment on the post of District Judge (Entry Level) under Article 233 (2) of the Constitution of India.
2. The High Court of Chhattisgarh – respondent No.1 issued

advertisement inviting applications for recruitment on the post of District Judge (Entry Level) by holding District Judge (Entry Level) Direct Recruitment Examination, 2013, laying down the eligibility criteria that a candidate is held to be eligible if he has been for at least seven years in continuous practice as an Advocate on the first day of January, 2013 in accordance with Article 233 (2) of the Constitution of India and Rule 7 (i) (c) of the Chhattisgarh Higher Judicial Service (Recruitment and Conditions of Service) Rules, 2006 (for short 'the HJS Rules, 2006').

3. The petitioner as well as respondent No.2 belonging to Other Backward Classes (OBC) category laid their candidature for the said post. Respondent No.2 submitted his experience certificate for the said post in which it is mentioned that from 5-9-2000 to 2-3-2008, he remained as an Advocate. In the meanwhile, he was appointed as Assistant District Public Prosecution Officer (ADPPO) on 23-2-2008 on which post he joined on 3-3-2008. He has also filed a certificate that he remained on the said post from 3-3-2008 up to 10-9-2013. His candidature was accepted finding the application in order and ultimately, he was selected on the post of District Judge (Entry Level) vide selection list published on 28-3-2014 and thereafter, he was appointed on 30-10-2014, whereas the petitioner remained as wait listed candidate No.1 in the waiting list prepared by respondent No.1.

4. The petitioner herein being wait-listed candidate No.1 has filed this writ petition stating inter alia that respondent No.2 herein did not have the requisite eligibility qualification for the post of District Judge (Entry Level) as he has not been in continuous practice as an Advocate for seven years as on 1st day of January, 2013, since he joined the post of ADPPO on 3-3-2008 and he got his license with the State Bar Council of Chhattisgarh suspended on 11-4-2008 and, therefore, he has not been an Advocate as on 1-1-2013 as such, he has illegally been held eligible by respondent No.1 High Court of Chhattisgarh for the post of District Judge (Entry Level) and, therefore, his selection and consequent appointment deserves to be quashed.
5. The High Court of Chhattisgarh – respondent No.1 has filed its return opposing the writ petition stating inter alia that respondent No.2 was fully eligible in terms of eligibility criteria prescribed by the High Court as he was having an experience of more than seven years as on 2-3-2008 and from 3-3-2008, respondent No.2 continued to be ADPPO. Thus, respondent No.2 being a State Government employee as ADPPO did not cease to be an Advocate and eligible to be appointed and as such, his period of service has rightly been counted for the purpose of eligibility for the post of District Judge (Entry Level) and, therefore, the writ petition deserves to be dismissed.
6. Respondent No.2 has filed his separate return stating inter alia

that he was fully eligible to be considered for the post of District Judge (Entry Level), as with effect from 3-3-2008 he was working as ADPPO and was regularly appearing on behalf of the State Government in criminal cases before the courts of Magistrate and as such, his service period as ADPPO has to be taken into account for the purpose of eligibility, it has rightly been taken by the respondent No.1 and he has rightly been held eligible for the said post. It has further been pleaded that the petitioner very well aware of all the facts including the eligibility of respondent No.2 based on his service as ADPPO from the day one i.e. the day on which respondent No.2 made his candidature, had decided to wait and watch and did not challenge the candidature / selection of respondent No.2 and took a calculated chance in appearing the examination and when the select list was ultimately published on 28-3-2014, then only the present writ petition was came to be filed on 7-5-2014, as such, the petitioner having appeared and unsuccessful in the selection process and finding the decision unpalatable as he remained as wait listed candidate, cannot turn around and question the method of selection and appointment of respondent No.2 as bad in law and, therefore, the writ petition deserves to be dismissed.

7. Mr. Sandeep Dubey, learned counsel appearing for the petitioner, would submit that respondent No.2 did not fulfill the eligibility as prescribed by Article 233 (2) of the Constitution of

India read with Rule 7 (i) (c) of the HJS Rules, 2006, as he ceased to be an Advocate on 11-4-2008 upon his license having been suspended on the request made by respondent No.2, as he had already joined as ADPPO on 3-3-2008 and, therefore, he ceased to be an Advocate for the purpose of Article 233 (2) of the Constitution of India read with Rule 7 (1) (c) of the HJS Rules, 2006 and his services as ADPPO cannot be counted for the purpose of continuous practice as stated in Rule 7 (1) (c) of the HJS Rules, 2006 and the advertisement consequently issued. Therefore, selection and consequent appointment of respondent No.2 deserves to be quashed. He relied upon a decision of the Supreme Court in the case of **Mallaraddi H. Itagi and others v. High Court of Karnataka and another**¹ to bring home his submission.

8. Mr. Rajeev Shrivastava, learned counsel for the High Court of Chhattisgarh – respondent No.1, while vehemently opposing the submissions of Mr. Sandeep Dubey, learned counsel for the petitioner, would submit that respondent No.2 did fulfill the eligibility as prescribed in the advertisement which requires that a candidate has to be an Advocate continuously for last seven years as on 1st day of January, 2013 which respondent No.2 fulfills, as he had been an Advocate from 5-9-2000 to 2-3-2008 and thereafter, from 3-3-2008, he has been working as ADPPO regularly appearing on behalf of the Government in

1 (2013) 5 SCC 332

criminal matters before the courts of Magistrate and as such, in view of the authoritative judgment laid down by the Supreme Court in the case of **Deepak Aggarwal v. Keshav Kaushik and others**², it cannot be held that he was not eligible and his service period cannot be counted for the purpose of seven years practice as required in eligibility criteria put in by the HJS Rules and in its advertisement by respondent No.1. Therefore, the writ petition deserves to be dismissed.

9. Mr. R.S. Patel, learned counsel for respondent No.2, while adopting the submissions made by Mr. Rajeev Shrivastava, learned counsel appearing on behalf of the High Court, would additionally submit that the petitioner having appeared in the examination, without challenging the eligibility qualification of respondent No.2 finding the decision unpalatable and finding his name in the wait-listed candidate, he cannot turn around and challenge the eligibility qualification of respondent No.2 in order to get himself appointed on the post of District Judge (Entry Level), as such, the writ petition suffers from delay and laches and the writ petition deserves to be dismissed.

10. I have heard learned counsel for the parties and given anxious consideration to their submissions raised therein and also gone through the record with utmost circumspection.

11. In order to answer the question involved and incorporated in

² (2013) 5 SCC 277

paragraph 1 of this order, it would be appropriate to notice Article 233 of the Constitution of India. Clause (2) of Article 233 of the Constitution of India reads as follows:-

“(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.”

12. A meaningful reading of Article 233 (2) of the Constitution of India would show that a person to be eligible to be appointed on the post of District Judge by direct recruitment shall not already in the judicial service of the Union or of the State and shall be an advocate or a pleader for not less than seven years.

13. Now, it would be apposite to notice the provisions contained in the HJS Rules, 2006 which provide eligibility for appointment on the category of District Judge (Entry Level) by direct recruitment. Clauses (a), (b) and (c) of sub-rule (i) of Rule 7 of the said Rules read as follows: -

“7. Qualification for direct recruitment under clause (c) of sub-rule 1 of rule 5 –

(i) No person shall be eligible for appointment by direct recruitment unless, he or she –

(a) --- --- ---

(b) --- --- ---

(c) has for at least seven years been an advocate on the first day of January of the year in which applications for appointment are invited;

Provided further that where a candidate who was eligible in age to apply for appointment in any calendar year in which vacancies were notified as per Rule 6 (A) and if for some reason

recruitment proceeding could not be initiated, such candidate shall be eligible in age to appear in the following recruitment proceedings.”

14. The High Court of Chhattisgarh has issued advertisement inviting applications for the post of District Judge (Entry Level) by its notification dated 9-9-2013. Paragraph Two of the said notification provides for Eligibility which reads as under: -

“Eligibility: -

No person shall be eligible for appointment to the post of District Judge (Entry Level) in Higher Judicial Service by direct recruitment unless, he or she:-

(a) --- --- ---

(b) --- --- ---

(c) has been for at least seven years in continuous practice as an Advocate on the first day of January 2013. The applicant shall furnish a certificate from the Registrar General of the High Court or Principal District & Sessions Judge concerned, bearing legible seal with date, month & year of issuance, that he/she is an advocate having practiced for not less than seven years as such in the format given at Annexure along with the application.

(d) --- --- ---”

15. Thus, a conjoint reading of Article 233 (2) of the Constitution of India read with Rule 7 (i) (c) of the HJS Rules, 2006 and the advertisement issued inviting applications would show that the candidate applying for the post of District Judge (Entry Level) must be an Advocate for at least seven years on the first day of January, 2013 in order to qualify for the post of District Judge (Entry Level), as it is essential under the above-stated provision that candidate must be with the requisite period continuing as an Advocate on the 1st day of January, 2013, as

applications are invited for appointment in the year 2013.

16. Section 2(1) of the Advocates Act, 1961 defines 'advocate' under clause (a) to mean an advocate entered in any roll under the provisions of the Act. Section 17 of the Advocates Act, 1961, inter alia, provides that every State Bar Council shall prepare and maintain a roll of advocates in which all persons who are admitted as advocates will be enrolled. Section 24 of the Advocates Act, 1961 is titled "Persons who may be admitted as advocates on a State roll" and states that subject to the provisions of the Act and the Rules made thereunder, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfills the conditions mentioned in clause (a) to (f) therein. Under clause (e) of Section 24, a person to be qualified to be admitted as an advocate on a State roll is required to fulfill such other conditions as may be specified in the rules made by the State Bar Council. Section 28(1) of the Advocates Act, 1961 confers power on the State Bar Council to make rules for carrying out the provisions of the Chapter and Section 28(2) provides that in particular, and without prejudice to the generality of the power under Section 28(1), such rules may provide for the matters specifically provided in clauses (a) to (e) of Section 28(2) of the Advocates Act, 1961. Under clause (d) of Section 28(2) of the Advocates Act, 1961, such rules made by the State Bar Council may provide for the conditions subject to which a person may be

admitted as an advocate on the roll of the State Bar Council.

17. Respondent No.2 herein enrolled as an Advocate vide his Enrollment No.3109/2000 on 5-9-2000 and practiced as Advocate till 2-3-2008 as apparent from the experience certificate (Annexure P-6) issued by the District and Sessions Judge, Janjgir-Champa. He was appointed as Assistant District Public Prosecution Officer (ADPPO) – Class-II post, on the pay scale of Rs.5500-175-9000/- by order dated 23-2-2008 in accordance with the statutory rules framed by the State Government known as the Chhattisgarh Public Prosecution (Gazetted) Services Recruitment and Promotion Rules, 2008 (for short 'the Rules of 2008'). Rule 8 of the Rules of 2008 provides eligibility for direct recruitment on the post of ADPPO and educational qualification for the post of ADPPO prescribed in Schedule-III enacted under Rule 8, which reads as under: -

“8. Conditions of eligibility of direct recruitment

—In order to be eligible to be selected/compete in examination a candidate must satisfy the following conditions, namely :-

(I) Age:-

(a) He must have attained the age specified in column (3) of Schedule-III and not attained the age specified in column (4) of the said Schedule-III on the first day of January next following the date of commencement of selection/examination;

(b) The upper age limit shall be relaxable up to a maximum of 5 (five) years if a candidate belongs to a Scheduled Castes, Scheduled Tribes and Other Backward Classes;

(c) The upper age limit shall be relaxable up to maximum of 5 (five) years if a candidate belongs to a Scheduled Caste, Scheduled

Tribe or other Backward Classes, widow, destitute and divorced women shall be given benefit of relaxation of additional five years in upper age limit apart from the women policy 1997 and in the case of physically handicapped the upper age limit shall relaxable up to ten years.

Note: The maximum relaxable for upper age limit shall not be more than 45 years after giving relaxation for one or more than one reasons in Government Service;

(d) The upper age limit shall also be relaxable in respect of the candidates who are or have been employees of the Chhattisgarh Government to the extent and subject to the conditions specified below: -

(i) A candidate who is a permanent or temporarily Government servant should not be more than 38 years of age;

(ii) A candidate holding a post temporarily and applying for another post should not be more than 38 years of age. The concession should also be admissible to the contingency paid employees, work charged employees and employees working in the Chhattisgarh Directorate of Prosecution Service.

(iii) A candidate who is a retrenched Government servant will be allowed to deduct from his age the period of all temporary service previously rendered by him to a maximum limit of 7 years even if it represent more than one spell provided that the resultant age does not exceed the upper age limit by more than three years.

Explanation – The terms “Retrenched Government Servant” denotes a person who was in temporary Government service of this state or of any of the constituent units for a continuous period of not less than six months and who was discharged because of reduction in establishment not more than three years prior to the date of his registration at the employment exchange or of application made otherwise for employment in

Government service.

(e) In case of ex-serviceman the total age should be reduce from his total service period but should not be more than 3 year of his maximum age limit.

Explanation— The ex-serviceman means those person was working in central government service continuous period of not less than 6 months and not more than 3 years period to the date of his registration at the employment exchange and who was discharge because of reduction in establishment.

(1) Ex-serviceman released under mustering out concessions;

(2) Ex-serviceman enrolled for the second time and discharged on,

(a) Completion or short term engagement;

(b) Fulfillment of the conditions of enrollment;

(3) Ex-personal of Madras Civil Unit;

(4) Officers (Military and Civil) discharged on completion of their contract (including short service regular commissioned officers);

(5) Officers discharged after working for more than six months continuously against leave vacancies;

(6) Ex-serviceman discharged on the ground that they are unlikely to become efficient soldiers;

(7) Ex-serviceman who is medically bearded out on account of gun-shot wounds etc.;

(8) Ex-serviceman invalidated out of service.

(f) The upper age limit shall be relaxed up to maximum of 2 years in respect of those candidates who are holding Green Cards under Family Welfare Programmed.

(g) The general upper age limit shall be relaxed up to 5 years in respect of superior caste partner of a couple under the Inter Caste Marriage Incentive Programmed of Tribal, Harijan and Backward Classes Welfare Department.

(h) The upper age limit shall be relaxed up to 5 years in respect of “Rajiv Pandey”, “Gundadhaur”, “Maharaja Praver Chandra Banjdev” Awarded Holders player and “National Young” Awarded candidates;

(i) The upper age limit shall be relaxed up to 38 years of age in respect of candidates who are employees of Chhattisgarh State Corporations/boards;

(ii) The upper age limit shall be relaxed in the case of swaimsevi. Home Guards and non-commissioned officers of Home Guards for the period of service rendered so by them subject to the limit of 8 years but in no case their age should exceed 38 years.

N.B.: Under sub-clause 1 (c), (g) and (2) Candidates who are admitted to the selection under the age concessions mentioned in sub-clause (ii) of clause 1, above will not be eligible for appointment if after submitting the application they resign from service either before or after selection. They will, however, continue to be eligible if they are retrenched from the service or post after submitting the applications. Departmental candidates must obtain previous permission from the appointing authority to appear for selection. Accordance with the instruction issued by Government of General Administrative Department from time to time.

(II) **Educational Qualifications**—The candidate must possess the educational qualifications prescribed for the service as shown in Schedule-III:

Provided that, candidates who are otherwise qualified but have taken degree from foreign universities being universities not specifically recognized by Government may also be considered for selection at the discretion of the Commission.

(III) **Fees**—He must pay the fees prescribed by the Commission.”

Schedule-III enacted under Rule 8 of these Rules provides for educational qualification for the post of ADPPO which reads as follows: -

“Bachelor of Law from any Government University

or Similar or First Division or 02 years experience person or Higher qualified person preferred.”

18. Respondent No.2 was appointed and joined on the post of ADPPO on 3-3-2008. Thereafter, he applied for the post of District Judge (Entry Level) stating that he practiced as Advocate from 5-9-2000 to 2-3-2008, till the date of making application for the post of ADPPO, and from 3-3-2008, he appeared on behalf of the State Government as ADPPO and conducted cases before the Courts of Magistrates regularly, as per the experience certificate issued by the Deputy Director (Prosecution) on 10-9-2013, therefore, he has been an Advocate for not less than ten years in terms of Article 233 (2) of the Constitution of India read with Rule 7 (i) (c) of the HJS Rules, 2006 and advertisement dated 9-9-2013 and thus, he claimed candidature for the post of District Judge (Entry Level). The High Court of Chhattisgarh accepted the application of respondent No.2 and held him eligible for the post of District Judge (Entry Level) thereafter, he was allowed to participate in the selection process and ultimately, he was selected on 28-3-2014 and was finally appointed on the post of District Judge on 30-10-2014.

19. The question for consideration would be whether respondent No.2 after having put in seven years' practice and thereafter, on full-time employment of the State Government as ADPPO under the Rules of 2008 was eligible to be considered for

District Judge (Entry Level).

20. Section 24 of the Code of Criminal Procedure, 1973 (for short 'the Code') deals with Public Prosecutors whereas, Section 25 deals with Assistant Public Prosecutors. Section 25 (1) of the Code provides that the State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates. There is great difference in role and position of the Public Prosecutor appointed under Section 24 of the Code and that of the ADPPO appointed under Section 25 of the Code, as ADPPO is not included in the definition of Public Prosecutor under Section 2 (u) of the Code.

21. In the matter of **Samarendra Das v. State of W.B.**³, Their Lordships of the Supreme Court have held that the post of Assistant Public Prosecutor is a civil post. Accepting this position, a three-Judge Bench of the Supreme Court in **State of U.P. v. Johri Mal**⁴ has observed as under in paragraph 38 of its judgment: -

“38. ... A distinction is to be borne in mind between appointment of a Public Prosecutor or Additional Public Prosecutor, on the one hand, and Assistant Public Prosecutor, on the other. So far as Assistant Public Prosecutors are concerned, they are employees of the State.”

22. Thus, so far as Public Prosecutors are concerned, they do not hold any post under the Government, whereas the ADPPOs

3 (2004) 2 SCC 274 : 2004 SCC (L&S) 402

4 (2004) 4 SCC 714

are full-time employees of the Government and they hold the civil post under the State Government duly appointed, as in the case in hand, under the Rules of 2008 and, therefore, their discipline and control lies with the State Government. Their function is to appear before criminal courts (Court of Magistrate) on behalf of the State Government regularly and to conduct cases particularly, after charge-sheet is filed by the investigating agency and thus, they are performing the job of an Advocate even after their full-time employment as ADPPO.

23. The question as to whether the ADPPOs appointed under the Rules of 2008 are in full-time employment of the State Government is covered by the expression “advocate” came to be considered recently before the Supreme Court in **Deepak Aggarwal** (supra) in which Their Lordships have clearly held that mode of appointment of Public Prosecutors under Section 24 of the Code and mode of appointment of Assistant Public Prosecutors under Section 25 of the Code, both of them are covered by the expression “advocate” and pertinently observed in paragraphs 86, 86.1 and 86.2 as under: -

“86. Despite these differences, for the purposes of Article 233 (2) there is not much difference in a Public Prosecutor and an Assistant Public Prosecutor and both of them are covered by the expression “advocate”. It is so for more than one reason:

86.1. In the first place, a Public Prosecutor under Section 24 is appointed by the State Government or the Central Government for conduct of prosecution, appeal or other proceeding on its behalf in the High Court or for a district and Assistant Public

Prosecutor is appointed under Section 25 by the State Government or the Central Government to conduct prosecution on its behalf in the courts of Magistrates. So the main function of the Public Prosecutor as well as the Assistant Public Prosecutor is to act and/or plead on behalf of the Government in a court; both of them conduct cases on behalf of the Government.

86.2 Secondly and remarkably, for the purposes of counting experience as an advocate as prescribed in Sections 24(7) and 24(8), the period, during which a person has rendered service as a Public Prosecutor or as an Assistant Public Prosecutor, is treated as being in practice as an advocate under Section 24(9) CrPC. In other words, the rendering of service as a Public Prosecutor or as an Assistant Public Prosecutor is deemed to be practice as an advocate.”

24. At this stage, it would be appropriate to notice Rule 49 of the Bar Council of India Rules (for short 'the BCI Rules') which provides as under: -

“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 practice 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 a State or of any Public Corporation or body constituted by statute who is entitled to be enrolled under the rules of the State Bar Council made under section 28(2)(d) read with section 24(1)(e) of the Act despite his being a full time salaried employee.

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

25. Rule 49 of the BCI Rules came to be considered before the Supreme Court in **Deepak Aggarwal** (supra). While

answering the question as to whether the ADPPO, who appears on behalf of the Government, is covered under the ambit of Rule 49 of the BCI Rules, Their Lordships of the Supreme Court have held that if continues to practice law, such employment is not covered by Rule 49 and observed as under in paragraph 98: -

“98. Admittedly, by the above resolution of the Bar Council of India, the second and third paragraphs of Rule 49 have been deleted but we have to see the effect of such deletion. What Rule 49 of the BCI Rules provides is that 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. The “employment” spoken of in Rule 49 does not cover the employment of an advocate who has been solely or, in any case, predominantly employed to act and/or plead on behalf of his client in courts of law. If a person has been engaged to act and/or plead in court of law as an advocate although by way of employment on terms of salary and other service conditions, such employment is not what is covered by Rule 49 as he continues to practise law but, on the other hand, if he is employed not mainly to act and/or plead in a court of law, but to do other kinds of legal work, the prohibition in Rule 49 immediately comes into play and then he becomes a mere employee and ceases to be an advocate. The bar contained in Rule 49 applies to an employment for work other than conduct of cases in courts as an advocate. In this view of the matter, the deletion of the second and third paragraphs by the Resolution dated 22-6-2001 has not materially altered the position insofar as advocates who have been employed by the State Government or the Central Government to conduct civil and criminal cases on their behalf in the courts are concerned.”

26. Further in **Deepak Aggarwal** (supra), Their Lordships have also laid down that if a person is practicing as an Advocate even after employment and he continues to act and plead in

the Court then he continues to be an Advocate and observed as under in paragraph 99: -

“99. ... In other words, if full-time service or part-time service taken by an advocate is consistent with his practising as an advocate, no such declaration is necessary. The factum of employment is not material but the key aspect is whether such employment is consistent with his practising as an advocate or, in other words, whether pursuant to such employment, he continues to act and/or plead in the courts. If the answer is yes, then despite employment he continues to be an advocate. On the other hand, if the answer is in the negative, he ceased to be an advocate.”

27. Their Lordships further concluded in paragraph 100 of the said report that the ADPPOs though they are in full-time employment with the Government and are subjected to discipline and control of the Government, but once he appears in the law court for conduct of a case or prosecution, he is still an officer of the court and will be an advocate within the meaning of Article 233 (2) of the Constitution of India.

28. Law laid down by the Supreme Court in the matter of **Deepak Aggarwal** (supra) has been followed very recently by Their Lordships of the Supreme Court in the matter of **Lakshmana Rao Yadavalli and another v. State of Andhra Pradesh and others**⁵. In that case, the High Court of Andhra Pradesh has held that Assistant Public Prosecutor being employee of the State holding civil post and answerable for their conduct to higher statutory authority, are governed by service rules framed by the State Government and they discharge public

5 (2014) 13 SCC 393

functions and certain statutory powers and bar under Article 233(2) of the Constitution of India applies and is attracted and, therefore, Assistant Public Prosecutor cannot be considered for District Judge by direct recruitment. While allowing the appeal filed by the candidates, it has been held by the Supreme Court that Assistant Public Prosecutor is also an advocate who is practicing at the Bar, and followed by the law laid down in **Deepak Aggarwal** (supra), observed as under: -

“6. In the abovereferred Deepak Aggarwal case a question that had been raised before the court was whether a Public Prosecutor / Assistant Public Prosecutor / District Attorney / Assistant District Attorney / Deputy Advocate General, who is in full-time employment of the Government, ceases to be an advocate or pleader within the meaning of Article 233(2) of the Constitution of India. Ultimately, this Court came to the conclusion that the appellant in the said case had been practising as an advocate, therefore, he was eligible for the judicial post. Similarly, in the case on hand the appellants were practising advocates though they were full-time employees and therefore, they are eligible to be appointed as Judges. In Deepak Aggarwal this Court has held that simply because a person has been appointed as an Assistant Public Prosecutor and as such he is in the employment of the Government, cannot be a ground for not selecting him to a judicial post on the ground that he was not an advocate practising at the Bar. The ratio of the said judgment is that an Assistant Public Prosecutor is also an advocate who is practising at the Bar.

7. In view of the aforesaid legal position, in our opinion, the High Court was not right in considering the appellants as disqualified candidates as they were in full-time employment of the Government.”

29. Thus, in view of the aforesaid judgments, crystallized legal position as on day is that an advocate who has put in seven

years practice and thereafter appointed as Assistant District Public Prosecution Officer as a full-time salaried employee of the State Government under the Rules of 2008 and thereafter, practicing law, is eligible to be considered and appointed on the post of District Judge (Entry Level) under Article 233(2) of the Constitution of India. Accordingly, it is held that a person who has been enrolled as an advocate under the Advocates Act, as Assistant District Public Prosecution Officer and by terms of his appointment continues to conduct cases on behalf of the State Government by appearing before criminal courts and continues to practice law notwithstanding that he is full-time salaried employee of the State Government, he does not cease to be an advocate within the meaning of Article 233(2) of the Constitution of India and Rule 7(i)(c) of the Chhattisgarh Higher Judicial Service (Recruitment and Conditions of Service) Rules, 2006, for recruitment to the post of District Judge (Entry Level) in the Chhattisgarh Higher Judicial Service. It is accordingly held.

30. Determination of the aforesaid legal position following and applying the statement of law laid down by Their Lordships of the Supreme Court in **Deepak Aggarwal** (supra) reiterated in **Lakshmana Rao Yadavalli** (supra), brings me back to the factual score of the present case. Respondent No.2 herein after his enrollment as an advocate vide Enrollment No.3109/2000, practiced as an advocate from 5-9-2000 to 2-3-

2008 as evident from Annexure P/6 certificate issued by the District and Sessions Judge, Janjgir-Champa and thereafter he was appointed as Assistant District Public Prosecution Officer as full-time salaried employee by the State Government on the pay scale of Rs.5500-175-9000/- with effect from 3-3-2008 as certified by the Deputy Director, Prosecution in its memo dated 10-9-2013 and thus, respondent No.2 as ADPPO continued to appear before criminal courts on behalf of the State Government and conducted cases and thereby, continued to practice law and, therefore, does not cease to be an "Advocate". Thus, respondent No.2 continued as an advocate for more than seven years and on the first day of January, 2013 as per the HJS Rules, 2006, he was working as Assistant District Public Prosecution Officer as a full-time salaried employee of the State Government appointed by the State Government under the Rules of 2008, he will be deemed to be an advocate who is practicing at the Bar for the purpose of Article 233(2) of the Constitution of India read with Rule 7(i)(c) of the HJS Rules, and he cannot be disqualified on the ground that he has been in full-time employment of the State Government on his appointment as ADPPO because, he was required to discharge his duties by pleading cases on behalf of the State Government before the courts of law.

31.Mr. Sandeep Dubey, learned counsel for the petitioner, has

placed heavy reliance on the decision of the Supreme Court in **Mallaraddi H. Itagi v. High Court of Karnataka**⁶, in that case Rule 2 of the Karnataka Judicial Services (Recruitment) Rules, 1983 read with the Schedule to the Rules prescribed that an applicant to be eligible to be considered for appointment as a District Judge must be, on the last date fixed for submission of the applications, enrolled as an advocate and must have so practiced for not less than seven years as on such date. The question before the Division Bench of the Karnataka High Court was that petitioners No.1 to 9 in that case who had been appointed as Assistant Public Prosecutors were eligible to be considered for appointment as District Judges, but it was held that petitioners No.1 to 9 before the date of their appointment as Assistant Public Prosecutors had surrendered their certificates of practice to the Karnataka State Bar Council and, therefore, after their appointment as Law Officers of the Company were not acting or pleading in courts on behalf of the employer as per the terms of their appointment and were not eligible for being considered for appointment to the post of District Judges and that the decision of the Supreme Court in **Sushma Suri** (supra) was not applicable to nine petitioners. Their Lordships of the Supreme Court also in **Deepak Aggarwal** (supra) have noticed **Mallaraddi H. Itagi** (supra) and it has been held that Karnataka Recruitment Rules

6 (2013) 5 SCC 332

provides for surrendering their certificate of practice and suspension of their practice on their appointment as Assistant Public Prosecutor and in terms of those rules, candidates therein had surrendered and suspended their certificate. In the case in hand, respondent No.2/ADPPO, as it is already been held that the ADPPOs are required by the terms of their appointment to appear and conduct cases on behalf of the State Government in criminal courts particularly courts of Magistrates, and further more there is no bar in the Chhattisgarh Public Prosecution (Gazetted) Services Recruitment and Promotion Rules, 2008 prescribing any such terms requiring surrendering and suspension of their certificate of practice and, therefore, mere suspension of his certificate, if any, by respondent No.2 will be inconsequential, as respondent No.2 was discharging his duties by pleading cases on behalf of the State Government before the court of law while holding the post of ADPPO during his employment, as such the submission raised in this behalf by Mr. Dubey, learned counsel for the petitioner, deserves to be rejected.

32. There is one additional reason for upholding the selection / appointment of respondent No.2 on the post of District Judge (Entry Level). The petitioner as well as respondent No.2 both appeared in the written examination held for the said post on 24-11-2013, they both were selected in the written examination and they both were called for interview, as both

were found eligible to be called for oral interview conducted by respondent No.1 and the petitioner as well as respondent No.2 both appeared in the oral interview conducted by respondent No.1. Up to this stage, there was no dispute between the parties. The petitioner took part in oral interview and took a calculated chance to get himself selected as successful candidate and when as a result of their combined performance both at written test and interview, final select list was published on 28-3-2014 and when the petitioner did not emerge as successful candidate and only got berth as a wait-listed candidate No.1, he turned around and questioned the eligibility qualification of respondent No.2 finding the selection of respondent No.2 unpalatable, which is impermissible in law.

33. It is trite law that a candidate taking a calculated chance by appearing in the examination after knowing fully well the procedural norms and eligibility qualification and only because the result of examination is not palatable to him, he cannot turn around and subsequently, question the method of selection / eligibility qualification. Their Lordships of the Supreme Court time and again in umpteen number of cases have laid down the law in this regard. Following judgments may be noticed usefully and profitably herein: -

34. In **Madan Lal v. State of J&K**⁷, in similar fact situation, Their Lordships of the Supreme Court have held that a candidate

⁷ (1995) 3 SCC 486 : 1995 SCC (L&S) 712 : (1995) 29 ATC 603

who consciously took part in the process of selection cannot turn around finding the decision unpalatable and question the method of selection. Paragraph 9 of the report states as under: -

“9. Before dealing with this contention, we must keep in view the salient fact that the Petitioners as well as the contesting successful candidates being Respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The Petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the Petitioners as well as the contesting Respondents concerned. Thus the Petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of [Om Prakash Shukla v. Akhilesh Kumar Shukla](#) (AIR 1986 SC 1043) it has been clearly laid down by a Bench of three learned Judges of this Court that when the Petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a Petitioner.”

35. Aforesaid judgment of the Supreme Court in **Madan Lal** (supra) has been followed with approval in **Dhananjay Malik and others v. State of Uttaranchal and others**⁸, **Vijendra Kumar Verma v. Public Service Commission, Uttarakhand**

8 (2008) 4 SCC 171

and others⁹, Ramesh Chandra Shah and others v. Anil Joshi and others¹⁰ and Madras Institute of Development Studies and another v. Dr. K. Sivasubramaniyan and others¹¹.

36. Accordingly, it is held that respondent No.1 High Court of Chhattisgarh is absolutely justified in holding respondent No.2 to be eligible for the purpose of recruitment to the post of District Judge (Entry Level) and rightly selected / appointed him on the said post {District Judge (Entry Level)} as a member of Higher Judicial Service. The petitioner is also estopped from questioning the eligibility qualification / selection of respondent No.2, as he participated in written examination as well as oral interview and thereafter, laid challenge to his selection as such, I do not find any jurisdictional error or illegality in the selection of respondent No.2 on the said post of District Judge (Entry Level).

37. As a fallout and consequence of aforesaid legal analysis, the writ petition filed by the petitioner is devoid of merit and deserves to be and is accordingly dismissed, but without imposition of cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

9 (2011) 1 SCC 150
10 (2013) 11 SCC 309
11 AIR 2015 SC 3643

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (S) No.2375 of 2014

Rajendra Prasad Kushwaha

- Versus -

The High Court of Chhattisgarh and another

HEAD NOTE

A person who has been an advocate for not less than seven years and thereafter appointed as ADPPO (full-time salaried employee) is entitled for selection on the post of District Judge (Entry Level).

कोई व्यक्ति जो कम से कम सात वर्ष की अवधि तक अधिवक्ता रहा हो और इसके पश्चात ए.डी.पी.पी.ओ. (पूर्णकालिक वैतनिक कर्मचारी) नियुक्त हुआ हो, जिला न्यायाधीश (प्रवेश स्तर) पद पर चयन का अधिकारी है।