

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

+ Writ Petition (Civil) No. 9303/2014

% Reserved on: 5th February, 2015
Date of Decision: 19th February, 2015

DHEERAJ MOR **...Petitioner**
Through Mr. Sudhir Nandrajog, Sr. Advocate
with Mr. Sunil Dalal & Mr. B.S. Mor,
Advocates.

Versus

THE HON'BLE HIGH COURT OF DELHI **...Respondent**
Through Mr. Rajiv Bansal with Ms. D. Ray
Chaudhary & Ms. Pallavi, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J.

The petitioner is a judicial officer, who joined Delhi Judicial Service on 8th September, 2009. He was enrolled as an Advocate with the Bar Council of India on 3rd August, 2002 and thereafter had worked as an Assistant Public Prosecutor from 2nd April, 2006 till 2nd April, 2008, when he joined Haryana Judicial Service. Thus, the petitioner claims that he has completed seven years of practice at the Bar.

2. The petitioner is not seeking promotion as an officer of the Delhi Judicial Service to the Delhi Higher Judicial Services Rules, 1970.

3. The petitioner applied for selection and appointment as a district judge for direct recruits to the Delhi Higher Judicial Service *vide* application dated 28th January, 2014, pursuant to the advertisement dated 30th December, 2013. The application stood rejected on the ground that the petitioner being a serving judicial officer was not eligible to apply as a direct recruit. Aggrieved, the petitioner approached the Supreme Court by way of Writ Petition (Civil) No. 256/2014. By order dated 31st March, 2014, the Supreme Court issued notice and permitted the petitioner to appear in the forthcoming preliminary examination for direct recruits to the Delhi Higher Judicial Service. The petitioner's result was directed to be kept in sealed cover awaiting further directions from the court. The petitioner appeared in the preliminary examination held on 6th April, 2014 and then in the main examination held on 9th August, 2014. The results of the said examinations of the petitioner have been kept in sealed cover. We had asked for the sealed cover and examined the same on 14th January, 2015.

4. On 16th December, 2014, Writ Petition (Civil) No. 256/2014 filed before the Supreme Court was allowed to be withdrawn with liberty to approach the High Court. In terms of the said order, the High Court is required to decide the case on merits without being influenced by any observation made by the Supreme Court in the previous writ petition filed by the petitioner before them.

5. In brief, the contention of the petitioner is that he meets the eligibility criteria of active practice as an Advocate for seven years and, therefore, he should be allowed to participate in the selection process of direct recruits for appointment as a district judge in the

Delhi Higher Judicial Service. It is asserted that the petitioner though an officer in the Delhi Judicial Service was/is not barred from participating in the selection process for appointment as a direct recruit to the Higher Judicial Service. His appointment and service in the Delhi Judicial service is not a disqualification. The petitioner if found to be meritorious after competing with others, should not be denied appointment to the Delhi Higher Judicial Service. According to the petitioner, this will be in consonance with Article 14 of the Constitution of India. Besides, it would also ensure that the best and the most worthy candidates are appointed to the Delhi Higher Judicial Service. Our attention is also drawn to Rule 7, 7C and 9 of Delhi Higher Judicial Service Rules, 1970, as amended with effect from 22nd October, 2008 to contend that the aforesaid Rules postulate that any person would be eligible to appear and be appointed to the Delhi Higher Judicial Service, if he has “practiced” as an Advocate for not less than 7 years. It is not necessary that the person should be in active practice on the date of the advertisement inviting applications for appointment or when the application is filed. We shall subsequently refer to the judgments relied upon by the petitioner. To avoid prolixity, we are at this stage refraining from exhaustively discussing the aforesaid judgments and their ratio.

6. As we perceive there are two aspects, which we need to examine. The first aspect relates to Article 233 of the Constitution of India and whether in terms of the said Article, the petitioner who is already an officer of Delhi Judicial Service is disqualified and, therefore, not eligible to appear in the direct recruitment selection examination. The second aspect relates to eligibility criteria prescribed and mentioned in the Delhi Higher Judicial Service Rules,

1970, as amended with effect from 22nd October, 2008. We feel that the writ petition can be decided and disposed of primarily on the first issue itself as it has to be held that the petitioner is not eligible to appear for selection as a direct recruit in view of the constitutional mandate prescribed under Article 233 of the Constitution of India. Article 233 of the Constitution reads as under:

“233. Appointment of district judges

(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State

(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.”

7. Clause (1) of the said Article stipulates that appointment of persons as District Judges by way of posting or by way of promotion shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. Interpreting the said Article, a Constitutional Bench of five Judges of the Supreme Court in the case of ***Chandra Mohan vs. State of Uttar Pradesh*** AIR 1966 SC 1987 had observed that Article 233(1) is nothing more than a declaration of the general power of the Government in the matter of appointment of District Judges. It does not lay down qualifications of the candidates to be appointed nor does it denote the source from which the recruitment is to be made. The said source of recruitment is to be indicated in clause (2) of Article 233 of the Constitution. Under clause (2), two sources are specified, namely (1) person in service of the Union or the State; or (2)

Advocate or Pleader. The said judgment also observes and holds that the second source relates to recruitment from members from the Bar. Learned senior counsel appearing for the petitioner has laid considerable emphasis on the aforesaid ratio expounded in the case of ***Chandra Mohan (supra)***, but we feel the said dictum is contrary to and negates the contention raised by the petitioner himself.

8. Sub-clause (2) refers to the two sources for posting and promotion of District Judges of any State. The first source relates to a person in service of the Union or the State and the second source is a person who has practiced for not less than 7 years as an Advocate or as a pleader. The persons to be appointed from either source should be recommended by the High Court to the Governor.

THE FIRST SOURCE:- A person in service of the Union or the State.

9. The term/expression ‘in the service of the Union or State’ as has been judicially interpreted in ***Chandra Mohan (supra)*** to mean ‘judicial service’ as separate and distinct from any other service of the State or the Union. Thus, members of Delhi Judicial Service alone are eligible for appointment by way of promotion to the Delhi Higher Judicial Service. Members or employees of the State or Central Government who are not in judicial service are not eligible. The aforesaid legal position was expressly affirmed and pronounced in ***Chandra Mohan’s case (supra)***. This enunciation was necessary, as prior to Independence persons from Indian Civil Service, provincial civil services or other executive services were also eligible and were appointed as district judges. The Supreme Court did not approve and

accept this source or the said officers as eligible. According to the Supreme Court, the term ‘service’ should be given a restricted meaning, so as to mean only persons in ‘judicial service’ and not service in the Executive. In order to expound the said ratio, reference was made to Article 237, which enables the Government to implement separation of Judiciary from the Executive. Thus, in *Chandra Mohan’s case* (supra), it has been held in clear and categorical terms that no person from the executive service can be promoted as a district judge.

THE SECOND SOURCE: A person who has been an advocate or pleader for not less than seven years.

10. Clause (2) of Article 233 begins with a negative prescription. It stipulates that a person not already in service of the Union or the State shall be eligible to be appointed as a District Judge if he has been an advocate or pleader for not less than seven years. Thus, clause (2) of Article 233 has two facets both positive and negative in respect of the second source. The positive condition is that the person should have been an advocate or pleader for seven years. There is also a negative covenant or condition that the said person should not already be in service of the Union or the State, which would mean that the person should not be in judicial service. A person who is already in judicial service, due to the negative caveat would not be eligible to be appointed as a direct recruit. A person belonging to judicial service can only be appointed by way of promotion as a District Judge but he cannot be appointed to the said post by reason or the fact that he fulfills the requirement of having worked as an advocate or pleader for seven years.

11. The aforesaid interpretation of Article 233 is not being made for the first time but has been ratio decidendi of several several decisions of the Supreme Court in *Deepak Aggarwal Vs. Keshav Kaushik & Ors.* (2013) 5 SCC 277 and *Satya Narain Singh vs. Allahabad High Court* (1985) 1 SCC 225. A decision of this Court in Writ Petition (Civil) No. 5197/2007 titled *Smt. Madhu Khanna vs. High Court of Delhi* decided on 20th July, 2007 is also conclusive.

12. In *Satya Narain Singh (supra)*, an identical question relating to eligibility disqualification for appointment as a direct recruit under clause 2 to Article 233, directly and squarely arose for consideration. The petitioners therein were members of the Uttar Pradesh Judicial Service and each one of them had completed seven years practice as an advocate before they were appointed to the State Judicial Service. They claimed that they were eligible for appointment by way of direct recruitment to the Higher Judicial Service notwithstanding the fact that they were already in judicial service. After quoting Article 233 of the Constitution, three Judges Bench of the Supreme Court observed as under:-

“Two point straightway project themselves when the two clauses of Art. 233 are read: The first clause deals with ‘appointments of persons to be, and the posting and promotion of, District Judges in any State’ while the second clause is confined in its application to persons ‘not already in the service of the Union or of the State’. We may mention here that Service of the Union or of the State’ has been interpreted by this Court to mean judicial service. Again while the first clause make consultation by the Governor of the State with the High Court necessary, the second clause requires that the High Court must recommend a person for appointment as a District Judge. 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 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 in both streams simultaneously.”

13. Learned Senior Advocate for the petitioner, herein submitted that the aforesaid observations were contrary to the decision of the Constitutional Bench in the case of ***Chandra Mohan (supra)***. The contention is untenable. The Supreme Court in ***Satya Narain Singh (supra)*** has analyzed and elucidated on the two clauses of Article 233 and has interpreted them. The issue raised before them was relating to clause (2) and what was the meaning of the expression ‘not already in service of the Union or the State’ and in that context, it was observed that an Advocate or a pleader would be eligible only if the said advocate or pleader was not already in judicial service of the Union or the State i.e. judicial service. The decision in the case of ***Chandra Mohan (supra)*** was specifically referred to, quoted and interpreted.

14. At this stage, it would be relevant to refer to the issue which was before the Supreme Court in the case of ***Chandra Mohan (supra)***. The primary contention raised related to the power of the Governor to make appointment of the persons to be, and the posting and promotion of District Judges. Article 233 of the constitution, it was urged by the writ petitioners, mandated consultation with the

committee constituted under the Rules enacted in exercise of power under Article 309 of the Constitution. The contention was rejected observing that the High Court is expected to know better than the Governor regarding the suitability or otherwise of a person belonging either to judicial service or to the Bar, to be appointed as a district judge. Therefore, the rules if any framed, would not be in accordance with the Article 233(1) of the Constitution. It was in this context and for the purpose of explaining the scope and authority of the High Court under Article 233 of the Constitution that the Constitutional Bench while interpreting Article 233(1) interpreted and held that the said Article was no more than a declaration of the general power of the Governor in the matter of appointment of district judges and that it neither lays down the qualification of candidates nor denotes the source from which the recruitment has to be made. The said dictum is in the said context. The ratio in *Satya Narain Singh (supra)* doesn't overshadow or contradict the earlier observations of the Constitutional Bench in *Chandra Mohan (supra)*. The relevant portion in Chandra Mohan (supra) reads:

"The gist of the said provisions may be stated thus: Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State. There are two sources of recruitment, namely, (i) service or the Union or of the State and (ii) members of Bar. The said judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district judges, they will be made by the Governor of the State in accordance with rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all the district courts and courts

subordinate thereto, subject to certain prescribed limitations."

Thus the two separate and mutually exclusive sources of recruitment to the post of district judges was accepted and mustered approval and asseveration in ***Chandra Mohan case (supra)***. This is what was appreciated and noticed by the Supreme Court in the case of ***Satya Narain Singh (supra)*** wherein the aforementioned paragraph from ***Chandra Mohan case (supra)*** was quoted and it was observed:

"Subba Rao, C.J., then proceeded to consider whether the Government could appoint as district judges persons from services other than the judicial service. After pointing out that Art. 233(1) was a declaration of the general power of the Governor in the matter of appointment of district judges and he did not lay down the qualifications of the candidates to be appointed or denoted the sources from which the recruitment had to be made, he proceeded to state:

"But the sources of recruitment are indicated in cl. (2) thereof. Under cl. (2) of Art. 233 two sources are given namely, (i) persons in the service of the Union or of the State, and (ii) advocate or pleader."

15. In ***Deepak Aggarwal (supra)*** referring to the words 'pleader' and 'advocate' occurring in Article 233(2), it was held that the candidate must not be in service of the Union or the State i.e. judicial service and must have been an Advocate for at least seven years. This is clear from paragraphs 42 and 43 of the aforesaid citation which read:

"42. Article 233 of the Constitution makes provision for appointment and qualification for District Judges.

42.1 Under clause (1) of Article 233 no special qualifications are laid down. The Governor can appoint a person who is already in service of the Union or of the State as a District Judge in consultation with the relevant High Court.

42.2 Clause (2) of Article 233 lays down three essentials for appointment of a person to the post of District Judge:

(i) a person shall not be in service of the Union or of the State;

(ii) he has been for not less than seven years an advocate or a pleader; and

(iii) his name is recommended by the relevant High Court for appointment.

In other words, as regards a person not already in service what is required is that he should be an advocate or pleader of seven years' standing and that his name is recommended by the High Court for appointment as District Judge.

43. We have to find out what is the meaning of the expression "the service" under Article 233 (2) of the Constitution. The expression "the service" occurring in clause (2) of Article 233 came up for consideration before a Constitution Bench of this Court in Chandra Mohan."

16. In paragraph 51 of the same decision at page 304, it was emphasized that there were two sources from which District Judges can be appointed (1) judicial service; (2) advocate or pleader or in other words members of the Bar. District Judges could not be appointed from any other source. On what is envisaged and meant by words 'advocate and pleader', it was held as under:

"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....."

Reference was also made to Rules 43 and 49 of Bar Council of India Rules.

17. In the case of ***Madhu Khanna (supra)***, a Division Bench of this Court noticed the two sources prescribed under Article 233 for appointment of district judges by posting and promotion i.e. persons who are already in judicial service of the State and other persons who have been advocates or pleaders for a period of seven years. The petitioner therein i.e. Madhu Khanna was already in judicial service, *albeit* in the State of Haryana and accordingly, it was held that she was ineligible to apply as direct recruit under clause (2) to Article 233 of the Constitution. Referring to the decision of the Supreme Court in ***Satya Narain Singh (supra)***, it was, *inter-alia*, held:

“The first question which needs determination is as to whether a person who is already in judicial service can be eligible for appointment as District Judge under Clause (2) of Article 233. Answer has to be in the negative. The opening words of Clause (2) of Article 233 of the Constitution clearly debar a person from competing for appointment as District Judge through this channel as is clear from the very language thereof which reads "a person not already in service of the Union or of the State shall only be eligible"

18. Now, we would like to deal with the remaining two contentions of the petitioner. The first contention is that prevailing interpretation of Art 233 Clause (2) negates and violates the right to equality enshrined in Article 14 of the Constitution. It results in hostile discrimination as judicial officers who have seven years of practice as an advocate should not be denied the right to compete and secure selection on merits. The second contention being that the Delhi Higher Judicial Service Rules after amendment with effect from 22nd October, 2008, do not bar or prohibit judicial officers in judicial

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service from being considered for direct recruitment to Higher Judicial Service and they are thus eligible.

19. The first contention has to be rejected for it is apparent that the similar argument was raised before the Supreme Court in the case of **Satya Narain Singh (supra)** and answered in the following manner:

“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 Art. 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.”

20. There are more reasons for rejecting the said argument. The petitioner had by choice appeared and joined Delhi Judicial Service. He is a judicial officer of the service and has been given a seniority slot. As per the constitutional mandate, he would be promoted and posted to the post of district judge as a member of the Delhi Judicial Service. Article 233(2) specifically prohibits and bars the members of the judicial service from being appointed under direct recruitment procedure. This negative condition would be applicable even if they have, before being appointed to judicial service, worked for seven years as an advocate or a pleader. Article 233 (2) cannot be declared as *ultra vires* and antithetical to Article 14, as it has been a part of the original Constitution since its adoption on 26th November, 1949. Relevant in this regard would be the observations made by a 9 Judge Bench of the Supreme Court in **IR Coelho, (Dead) by Legal Representatives v. State of Tamil Nadu**, 2007 (2) SCC 1. Para 54 thereof reads as under:

“The distinction is drawn by the author between the making of a Constitution by a Constituent Assembly which was not subject to restraints by any external authority as a plenary law-making power and a power to amend the Constitution, a derivative power derived from the Constitution and subject to the limitations imposed by the Constitution. *No provision of the Constitution framed in exercise of plenary law-making power can be ultra vires because there is no touchstone outside the Constitution by which the validity of provision of the Constitution can be adjudged. The power for amendment cannot be equated with such power of framing the Constitution.*”

(emphasis supplied)

Keeping in view the authoritative pronouncements in ***Satya Narain Singh*** (*supra*) and ***Deepak Aggarwal*** (*supra*) by the Supreme Court in relation to and interpreting Article 233, it would be inappropriate to apply the doctrine of reading down in the extant case.

21. It is also to be noted that after the decision of the Supreme Court in ***All India Judges’ Association vs. Union of India*** (1992) 1 SCC 119, which pertained to the working conditions of the subordinate judiciary throughout the country, Rule 7 of the Delhi Judicial Service Rules stands substituted. While emphasizing that the subordinate judiciary is the foundation of a robust judicial structure, the Supreme Court culled out two sources of promotion to the Higher Judicial Service (i.e. as district judge and additional district judge), which are as follows:

- (a) 50% of the posts in cadre of the district judge at the entry level to be filled up by promotion from amongst civil judges (Senior Division) having a minimum of 10 years service in a cadre of Delhi Judicial Service on the basis of merit cum seniority and on passing of the suitability test; and

- (b) 25% of the posts to be filled up by promotion directly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) not having less than 5 years of qualifying service.

22. The aforesaid percentage has undergone a change and the extant Rules now postulate that 65% of the posts in the cadre shall be filled by promotions and merit- cum- seniority and 10% by limited competitive examination. These directions were issued in order to give adequate representation to the subordinate judiciary in the Higher Judicial Service and to incentivize persons joining subordinate judiciary and was also in consonance with the recommendations of the Shetty Commission. The balance 25% of the posts are to be filled up by direct recruitment as per the procedure prescribed in Rule 7C, i.e. a person who has seven years practice at the Bar by way of a written examination and a viva-voce test. Thus, 75% of the posts in the Delhi Higher Judicial Service have to be filled up by way of promotion. The Rules take care of stagnation and sluggishness in promotions. The stipulation for filling up 25%/ 10% posts through limited departmental examination of Civil Judges with not less than 5 years qualifying services ensures expeditious promotions of junior but meritorious and worthy officers.

23. We have referred to the decision in the case of *Satya Narain Singh* (*supra*) which pertained to appointment to the Uttar Pradesh Higher Judicial Service. The contention of the petitioner that the applicable Rules were different has no substance for the said decision and the ratio proceeds on interpretation of Article 233 of the Constitution and not on interpretation of the applicable Rules. Article

233 prescribes the minimum eligibility norms/ conditions and also qualifications for recruitment from the two sources. Rules can prescribe and supplement but not erase the said qualification prescribed and the prohibition/ bar engraved by the Constitution, the *suprema lex*. A candidate must meet the eligibility criteria stipulated in Article 233 of the Constitution in the first instance and then the qualification and eligibility norms fixed by the applicable Recruitment Rules.

24. The decision in ***Madhu Khanna (supra)*** in the first portion proceeds on interpretation of Article 233 and not on the interpretation of the applicable Rules. The latter portion of the said judgment does interpret the then applicable Rule 7 of the Delhi Higher Judicial Service Rules, 1974. The said Rules now stand substituted with effect from 22nd October, 2008. We have examined the substituted Rules, but do not find any conflict between the substituted Rule 7, 7C and 9 and Article 233 of the Constitution. Rule 2 (c) of the Delhi Higher Judicial Service Rules is as under:-

“(c) “direct recruit” means a person who is appointed to the Service from the Bar;

25. The aforesaid definition clause defines the term ‘direct recruit’ to mean recruitment or appointment from the Bar and not appointment of a person who is already serving or an officer in judicial service. Accordingly, when we refer to the Rule 7 clause (c) and Rule 9 of the Rules, it would mean references to direct recruitment from the Bar. For the sake of convenience, we are reproducing Rule 7, 7C and 9:

“7. Regular recruitment.- (1) Recruitment to the posts in the cadre of District Judge at Entry Level shall be as under:-

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(c) 25 percent of the posts shall be filled by direct recruitment from amongst the persons eligible as per rule 7C on the basis of the written and viva voce test, conducted by the High Court.

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7 C. Selection for appointment by direct recruitment.- The High Court shall before making recommendations to the Administrator invite applications by advertisement and may require the applicants to give such particulars as it may prescribe and may further hold written examination and viva voce test in the following manner:-

- (i) Written Test - 750 marks.
- (ii) Viva voce - 250 marks.

Provided that a candidate shall be eligible to appear in viva-voce only in case he secures 50% marks in the Written Examination in the case of candidate of general category and 45% in the case of candidates of reserved categories:

Provided further that a candidate of general category must secure a minimum of 50% marks and a candidate of reserved categories must secure a minimum of 45% marks in viva-voce to be eligible for being recommended for appointment to the service.”

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

- (1) must be a citizen of India;
- (2) must have practiced as an Advocate for not less than seven years; and
- (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.”

Thus, when we read the expression ‘direct recruit/direct recruitment’ in terms of and as per the definition clause 2(c), there would be no difficulty in appreciating and understanding Rule 7 (c) and 7C and that the said expression refers to recruitment or appointment from the Bar and not of an officer who is already serving in the judicial service.

26. In the hearing held on 14th January, 2015, this Court had drawn attention of the counsel for the parties to the decision of this Court in Writ Petition (Civil) No. 2231/2001 dated 8th April, 2011 titled ***D.K. Sharma vs. Union of India & Ors.*** The said case relates to elevation to the position of a Judge in the High Court and the eligibility criteria stipulated in Article 217(2) of the Constitution of India. The difference amongst Article 124 relating to appointment of Judges of the Supreme Court, Article 217 relating to appointment of Judges of the High Court and Article 233 for promotion or posting to the post of district judges was highlighted in the case of ***Chandra Mohan case (supra)*** and it was observed that the provisions are different and not identical. This aspect was again highlighted and specifically rejected in the decision in the case of ***Satya Narain Singh (supra)*** in the following words:

“Clearly the Court was expressing the view that it was in the case of recruitment from the Bar, distinguished from Judicial Service that the requirements of Cl. (2) had to be fulfilled. We may also add here earlier the Court also expressed the view:

“...we do not think that Clause (2) of Art. 233 can be interpreted in the light of the Explanation added to Articles 124 and 217.”

Similar argument was raised in and ***Rameshwar Dayal vs. State of Punjab and Ors.*** AIR 1961 SC 816 and it was held that Article 124 of the Constitution relating to qualifications for appointment as a Judge of the Supreme Court and Article 217 relating to qualification for appointment as a Judge of the High Court were distinct from the requirements stipulated in Article 233. The Constitutional Bench of five Judges in the said case held that clause (2) of Article 233 cannot

be interpreted in light of explanation added to Articles 124 and 217 and that Article 233 is a self-contained provision for appointment of district Judges.

27. In addition to the aforesaid position, we would like to refer to paragraph 102 of the decision in the case of ***Deepak Aggarwal*** (**supra**) which reads:

“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.”

Thus, the petitioner cannot draw any advantage and support from the decision in the case of D.K. Sharma (*supra*). Articles 233, 217 and 124 operate in their own fields.

This petitioner is not in practice *in praesenti* i.e. on the date immediately preceding this application.

28. The submission that decision in ***Rameshwar Dayal’s case*** (**supra**) expounds a contrary ratio is fallacious and based upon misreading of the said judgment. In paragraph 11 of the said judgment, the Constitutional Bench broadly agreed with the counsel that clause (2) of Article 233 means an advocate of a court in India and the appointee must be such an advocate at the time of his appointment. In the written submissions filed before us, it is incorrectly asserted that two of the respondents therein, namely Harbans Singh and P.R. Sahney, were not advocates at the time of their appointment as district judges. The finding of the Supreme

Court was that the said respondents were entitled to practice in the Punjab High Court as they had automatically came on the roll of the said High Court.

29. Therefore, for several reasons and grounds discussed herein above, we have to hold that the present writ petition does not have any merit and should be dismissed. We order accordingly. In the facts of the case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(ASHUTOSH KUMAR)
JUDGE

February 19th, 2015
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