

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Appeal No. 21 of 2016**

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

---- Appellant

Versus

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

-----Respondents

For Appellant:	Shri Sandeep Dubey, Advocate.
For Respondent No.2:	Shri R.S. Patel, Advocate.

Hon'ble The Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Judgment on Board**Per Navin Sinha, Chief Justice****05/02/2016**

1. The appeal assails order dated 10.12.2015 dismissing Writ Petition (S) No.2375/2014. The Learned Single Judge rejected the challenge questioning the eligibility of Respondent No.2 for appointment as a District Judge (Entry Level) pursuant to selection. The Appellant is at serial 1 of the wait list and stands to be considered if the appointment of Respondent no.2 is held to be bad. Respondent no.2 has already joined the post and is working.
2. Learned Counsel for the Appellant submits that even if Respondent No.2 had practiced continuously for seven years from 5.9.2000 to 2.3.2008 he was not eligible to be considered under the advertisement mentioning the cut off date as the first of January 2014, in view of Article 233 (2) of the

Constitution read with Rule 7(i)(c) of the Chhattisgarh Higher Judicial Service (recruitment and conditions of Service) Rules 2006 (hereinafter referred to as 'the Rules'). The issue need not detain us and can be disposed in favour of the Appellant in view of (2013) 5 Supreme Court Cases 277 (Deepak Aggarwal vs. Keshav Kaushik).

3. Learned Counsel for the Appellant next submitted that pursuant to his selection as Assistant District Public Prosecution Officer (hereinafter referred to as 'ADPO') by the State Government on 23.2.2008, Respondent No.2 had requested for suspension of his license to practice and the State Bar Council suspended it on 11.4.2008. If his license to practice itself was suspended, Respondent No.2 apparently did not meet the requirement of Article 233 (2) of the Constitution read with the Rules, not having been an Advocate or a Pleader with not less than seven years experience as an Advocate on the date of the advertisement. Strong reliance was placed on (2013) 5 Supreme Court Cases 332 (MallaRaddi H. Itagi vs. High Court of Karnataka). Reliance was strenuously placed on the facts and discussions in the order of the Karnataka High Court in 2002 (4) KarLJ 76 (MallaRaddi H. Itagi vs. High Court of Karnataka) from which the appeal arose.

4. Counter affidavit was filed by Respondent No.2 to the Writ Petition but no rejoinder had been filed on behalf of the Appellant.

5. We have considered the submissions on behalf of the Appellant and have also been taken through the judgments relied upon.

6. The question of law arising for consideration, if the period that Respondent no.2 may have worked as ADPO would count to reckon the seven year period of eligibility under Article 233(2) read with Rule 7(1) (c) for appointment as District Judge (entry level) stands conclusively answered by a three judge bench of the Supreme Court in Deepak Agarwal (supra)

succinctly distinguishing a two bench decision in (MallaRaddi (supra)). But since Learned Counsel has strenuously sought to persuade us that the present case would be covered by the latter we deem it appropriate to deal the issues urged.

7. In MallaRaddi (supra) the Karnataka High Court held that the Petitioners had not placed any material to demonstrate that they were appearing and pleading in Courts in their capacity of Assistant Public Prosecutors. In support of the same, it was also noticed that their certificates of practice were suspended subsequent to their appointment as Assistant Public Prosecutors in accordance with the recruitment rules. The finding was thus arrived at that the object of surrendering certificate of practice and suspending the practice was to give up the right to practice before the Court. The Supreme Court, declined to interfere with the judgment of the Karnataka High Court, arriving at the finding that the candidates were holding a regular post in a regular pay scale, were being considered for promotion, were employed under the State Government Rules and were actually Government servants when they made applications for the post of District Judge.

8. The importance of role of the Public Prosecutor in Indian conditions was noticed in Deepak Agarwal (supra). Referring to (1999) 1 Supreme Court Cases 330 (Sushma Suri vs. Govt.(NCT of Delhi), it was observed that a Public Prosecutor or a Government Counsel, on the rolls of the Bar Council was entitled to practice, the view was approved. The conclusion was as follows:-

“103. Rule 11 of the HSJS Rules provides for qualifications for direct recruits in Haryana Superior Judicial Service. Clause (b) of this rule provides that the applicant must have been duly enrolled as an advocate and has practised for a period not less than seven years. Since we have already held that these five private appellants did not cease to be advocate while working as Assistant District Attorney/Public Prosecutor/Deputy

Advocate General, the period during which they have been working as such has to be considered as the period practising law. Seen thus, all of them have been advocates for not less than seven years and were enrolled as advocates and were continuing as advocates on the date of the application.”

9. Deepak Aggarwal (supra) has been followed in (2014) 13 Supreme Court Cases 393 (Lakshmana Rao Yadavalli And Another vs. State of Andhra Pradesh And Others) noticed by the Learned Single Judge.

10. The crux of the question is if Respondent No.2 after appointment as ADPO continued to appear and plead in Court on behalf of the government. We consider it appropriate to extract the following passage from Deepak Aggrawal (supra) :-

“99. What we have said above gets fortified by Rule 43 of the BCI Rules. Rule 43 provides that an advocate, who has taken a full-time service or part-time service inconsistent with his practising as an advocate, shall send a declaration to that effect to the respective State Bar Council within time specified therein and any default in that regard may entail suspension of the right to practice. 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 ceases to be an advocate.”

“100..... As noticed above, and that has been consistently stated by this Court, a Public Prosecutor is not a mouthpiece of the investigating agency. In our opinion, even though Public Prosecutor/Assistant Public Prosecutor is in full-time employ with the government and is subject to disciplinary control of the employer, but once he appears in the court for conduct of a case or prosecution, he is guided by the norms consistent with the interest of justice. His acts always remain to serve and protect the public interest. He has to discharge his functions fairly, objectively and within the framework of the legal provisions. It may, therefore, not be correct to say that an Assistant Public Prosecutor is not an officer of

the court. The view in Samarendra Das to the extent it holds that an Assistant Public Prosecutor is not an officer of the court is not a correct view.”

11. The Learned Single Judge has arrived at the finding of fact from materials placed before him that Respondent No.2 continued to appear before the criminal Courts on behalf of the State Government and conduct cases. In other words, he continued to act as an Officer of the Court as discussed in Deepak Aggrawal (supra) and did not cease to be an Advocate. The Appellant in his Writ Petition had annexed a certificate dated 10.9.2013 from the Office of the Deputy Director, Prosecution, Ambikapur that Respondent No.2 was conducting criminal prosecutions in the Court on behalf of the government. We are also informed at the Bar that in the State of Chhattisgarh, Assistant Public Prosecutor/Assistant District Public Prosecutor etc. appear in Courts regularly to conduct prosecutions on behalf of the State Government. The conclusion in Deepak Aggrawal (supra) therefore squarely applies and Respondent No.2 cannot be held to have been ineligible on the ground that he had been appointed as an Assistant District Public Prosecutor.

12. That brings us to the question regarding the Respondent no.2 having had his licence to practice suspended in 2008 consequent to his appointment as ADPO. We are in concurrence with the finding of the Learned Single Judge that in the facts of the case it was inconsequential. There was no compulsion for Respondent no.2 to have done so. He did it under some misconception but yet continued to appear and act as an officer of the Court. The conclusion was arrived at in exercise of the discretionary jurisdiction exercised by the Learned Single Judge. If under a wrong impression he got his license suspended but nonetheless continued to appear before the Court and conduct cases on behalf of the State Government as an Officer of the Court, we find no reason to interfere with the well reasoned discussion for exercise

of discretionary jurisdiction by the Learned Single Judge.

13. There is no merit in the appeal. The appeal is dismissed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE

Priya