

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Writ Petition No.35139 of 2016

Between

D.Venkateswarlu Naik
and 3 others

... Petitioners

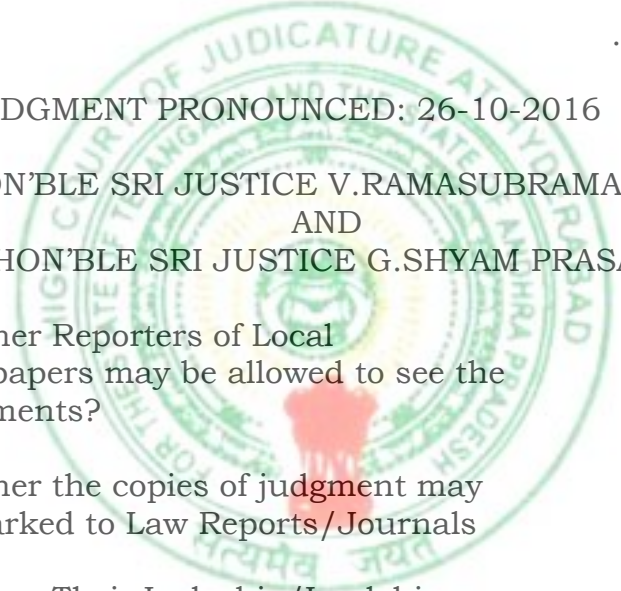
and

The High Court of Judicature at Hyderabad,
For the State of Telangana and
State of Andhra Pradesh, Hyderabad,
Rep. by Registrar General;
and 4 others

... Respondents

DATE OF JUDGMENT PRONOUNCED: 26-10-2016

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE G.SHYAM PRASAD

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- 1 Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/No
 - 2 Whether the copies of judgment may be marked to Law Reports/Journals Yes/No
 - 3 Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? Yes/No

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE G.SHYAM PRASAD

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... Petitioners

Vs.

\$ The High Court of Judicature at Hyderabad,
For the State of Telangana and
State of Andhra Pradesh, Hyderabad,
Rep. by Registrar General;
and 4 others

... Respondents

! Counsel for the Petitioners: Sri O.Manohar Reddy

Counsel for Respondents 1 to 3: Smt. Bobba Vijaya Lakshmi,
Standing Counsel.

Counsel for Respondents 4 and 5: Government Pleader for
General Admn. (A.P.)

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> Head Note:

? Cases referred:

1. (1985) 1 SCC 225
2. (2013) 5 SCC 277

**HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE G.SHYAM PRASAD**

Writ Petition No.35139 of 2016

Order: (per V.Ramasubramanian, J.)

The petitioners who are working as Civil Judges (Junior Division) in the States of Andhra Pradesh and Telangana have come up with the present writ petition challenging the rejection of their applications for direct recruitment to the posts of District Judges (entry level).

2. Heard Mr. O.Manohar Reddy, learned counsel for the petitioners.

3. Admittedly, the petitioners 1 to 4 herein enrolled as Advocates respectively in the years 1999, 2001, 2004 and 2003. The petitioners herein were later selected and appointed as Civil Judges (Junior Division) respectively on 22-9-2008, 13-9-2008, 17-8-2013 and 24-01-2013.

4. The Governments of Andhra Pradesh and Telangana issued Notifications on 22-8-2016 inviting applications for appointment to two posts of District Judges (entry level) by the method of direct recruitment, from the candidates belonging to the Scheduled Tribes. The petitioners herein submitted applications but those applications were rejected by the Registry of the High Court by proceedings dated 26-9-2016. The rejection was apparently on the ground that the petitioners herein have been in the service of the State for the past 3 to 8 years and that therefore they are ineligible to

apply. Challenging the said decision, the petitioners are before this Court.

5. The main contention of Mr. O.Manohar Reddy, learned counsel for the petitioners, is that the bar under Article 233(2) of the Constitution of India for a person already in the service of the State is only as to his appointment as a District Judge and that there is a lot of difference between appointment and consideration for appointment. According to the learned counsel for the petitioners, this issue is no longer *res integra* in view of the latest decision of the Supreme Court in **VIJAY KUMAR MISHRA v. HIGH COURT OF JUDICATURE AT PATNA**, dated 09-8-2016 in Civil Appeal No.7358 of 2016.

6. Very strong reliance is placed by the learned counsel for the petitioners on the observations contained in paragraph-8 of the opinion of *Hon'ble Justice Chelameswar, J.*, which reads as follows:

“The text of Article 233(2) only prohibits the appointment of a person as a District Judge, if such person is already in the service of either the Union or the State. It does not prohibit the consideration of the candidature of a person who is in the service of the Union or the State. A person who is in the service of either of the Union or the State would still have the option, if selected to join the service as a District Judge or continue with his existing employment. Compelling a person to resign his job even for the purpose of assessing his suitability for appointment as a District Judge, in our opinion, is not permitted either by the text of Art. 233(2) nor contemplated under the scheme of the constitution as it would not serve any constitutionally desirable purpose.”

7. Our attention is also drawn to the observations contained in paragraphs-11 and 12 of the separate but concurring opinion rendered by *Hon'ble Justice Abhay Manohar Sapre* in **VIJAY KUMAR MISHRA** (*supra*), which read as follows:

“11) In my view, there lies a subtle distinction between the words “**selection**” and “**appointment**” in service jurisprudence. (See : **Prafulla Kumar Swain vs. Prakash Chandra Misra & Ors.**, (1993) Supp. (3) SCC 181). When the framers of the Constitution have used the word “**appointed**” in clause (2) of Article 233 for determining the eligibility of a person with reference to his service then it is not possible to read the word “**selection**” or “**recruitment**” in its place. In other words, the word “**appointed**” cannot be read to include the word “**selection**”, “**recruitment**” or “**recruitment process**”.

12) In my opinion, there is no bar for a person to apply for the post of district judge, if he otherwise, satisfies the qualifications prescribed for the post while remaining in service of Union/State. It is only at the time of his appointment (if occasion so arises) the question of his eligibility arises. Denying such person to apply for participating in selection process when he otherwise fulfills all conditions prescribed in the advertisement by taking recourse to clause (2) of Article 233 would, in my opinion, amount to violating his right guaranteed under Articles 14 and 16 of the Constitution of India.”

8. At first blush, the contentions of the learned counsel for the petitioners appear to be formidable. But on a closer scrutiny, it appears that they are unsustainable in law. This can be seen from reading in context, (1) the decision of a three-member bench of the Supreme Court in **SATYA**

NARAIN SINGH v. ALLAHABAD HIGH COURT¹, (2) **DEEPAK AGGARWAL v. KESHAV KAUSHIK**² and (3) the decision in **VIJAY KUMAR MISHRA** (*supra*), in the chronological order.

9. Article 233(2) of the Constitution of India reads as follows:

“233. Appointment of district judges.—

(1)

(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.”

10. In **SATYA NARAIN SINGH** (1 *supra*), persons who were working in the Uttar Pradesh Judicial Service applied for direct recruitment to Uttar Pradesh Higher Judicial Service on the ground that before their appointment to the Uttar Pradesh Judicial Service, they had completed seven years of practice at the Bar and that therefore they were eligible to be considered. Some of them had approached the High Court first and suffered orders of dismissal and a few persons had directly approached the Supreme Court. The Supreme Court held that Clauses (1) and (2) of Article 233 of the Constitution of India deal with two different streams for appointment of District Judges and that their method of appointment and the eligibility for appointment were also different.

11. In **DEEPAK AGGARWAL** (2 *supra*) the question that fell for consideration was whether a Public Prosecutor/

¹ (1985) 1 SCC 225

² (2013) 5 SCC 277

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 or not. The Court held that these categories of practitioners never cease to be Advocates and that since they continue to be Advocates, they could not be considered to be in the service of the Union or the State, within the meaning of Article 233(2) of the Constitution of India.

12. In **VIJAY KUMAR MISHRA** (*supra*) the advertisement inviting applications for direct recruitment of District Judges was issued on 31-3-2015 and the cut-off date for determining eligibility was fixed as 5th February, 2015. Before the results of the main examination were published, some of them got selected to the Subordinate Judicial Service and they joined the service in August, 2015. Thereafter, the results of the main examination for direct recruitment to the post of District Judges were published on 22-01-2016, but the High Court did not issue permission to the Civil Judges (Junior Division) to appear for the interview, by putting the bar under Article 233(2) of the Constitution of India against them. Therefore, they approached the High Court but the High Court dismissed the writ petitions on the basis of Article 233(2) of the Constitution of India.

13. In other words, the issue that was taken to the Supreme Court in **VIJAY KUMAR MISHRA** (*supra*) was actually as to the correctness of the refusal of the Registry of

the Patna High Court to issue “No Objection Certificates” to its Subordinate Judicial Officers to attend interviews for direct recruitment to the posts of District Judges. This can be seen from two facts that could be culled out from paragraph-2 of the main opinion in **VIJAY KUMAR MISHRA** (*supra*).

The relevant portion reads as follows:

“The High Court published the detail of interview schedule and issued Call Letters for the interview to both the petitioners; but one of the conditions in the Interview Letter was ‘No-Objection Certificate of the Employer’. Therefore, the petitioners filed their representation before the Registrar General, Patna High Court, Patna, to appear in the interview. The requests were declined on 16th of February, 2016. The communication to one of the petitioners reads as under:-

“To,

The District & Sessions Judge,
Siwan

Dated, Patna the 16th February, 2016

Sir,

With reference to your letter no.80 dated 05-02-2016, I am directed to say that the Court have been pleased to reject the representation dated 05-02-2016 of Sri Vijay Kumar Mishra, Probationary Civil Judge (Junior Division), Siwan with regard to permission to appear in the interview in respect of District Judge Entry Level (Direct from Bar) Examination, 2015, in view of Article 233(2) of the Constitution of India, as he is already in the State Subordinate Judicial Service. However, he may choose to resign before participating in the interview, which resignation, once tendered, would not be permitted to be withdrawn.

The officer concerned may be informed accordingly.

Yours faithfully,

Sd/-

Registrar General

6. It is the said letter, which is subject matter of challenge in the present writ application, wherein the petitioners claim that since they were eligible on the date of inviting applications, the action of the High Court in not permitting them to appear in the interview is illegal.”

14. If we carefully analyse the decision in **VIJAY KUMAR MISHRA** (*supra*) two important aspects could be noticed. They are:

(1) The High Court of Patna had a dual role. The first was that of an institution dealing with third parties who had applied for direct recruitment to the post of District Judges. The second was that of an employer dealing with his own employees, who sought “No Objection Certificates” for appearing for interviews for direct recruitment to the post of District Judges. In the first role played by the High Court of Patna as an institution dealing with the applications of individuals for direct recruitment, the High Court did not reject the applications of **VIJAY KUMAR MISHRA** (*supra*) or anyone. This was due to the fact that neither on the date of notification, namely, 31-3-2015 nor on the cut-off date for determining eligibility, namely, 05-02-2015 nor on the date of the preliminary or main examinations, these candidates, namely, Vijay Kumar Mishra and others were in the service of the Subordinate Judiciary. It is only in the role of an employer that the High Court rejected the applications of the members of the Subordinate Judiciary for permission to appear for interview. In the role that they played in rejecting

the requests of its employees, the High Court could not have put the bar under Article 233(2) of the Constitution of India against its employees.

(2) The petitioners before the Supreme Court in **VIJAY KUMAR MISHRA** (*supra*) were not in the service of the Subordinate Judiciary either on the cut-off date, namely, 05-02-2015 for determining their eligibility, or on the date of notification for recruitment, namely, 31-3-2015. Therefore, there was no problem with regard to their very eligibility to apply. It was only after they applied by satisfying the eligibility criteria that a disqualification, if it can be called a disqualification, arose in August, 2015 when they were appointed to the Subordinate Judicial Service. The High Court put the clock back and relied upon Article 233(2) of the Constitution of India and this is what was found fault by the Supreme Court in **VIJAY KUMAR MISHRA** (*supra*).

15. Therefore, the decision in **VIJAY KUMAR MISHRA** (*supra*) cannot be sought to be extended by the petitioners even to the aspect of eligibility criteria. Two things are important for a person to be eligible for direct recruitment to the post of District Judges, in terms of Article 233(2) of the Constitution of India. They are (1) he should have been an Advocate for not less than seven years and (2) he should not have been already in the service of the Union or of the State.

16. Two expressions in Article 233(2) of the Constitution of India are of significance. They are (1) **“already in the**

“service” and (2) **“eligibility”**. Therefore, unless a person satisfies the eligibility criteria, he cannot even be considered for appointment.

17. ***If VIJAY KUMAR MISHRA (supra) is to be understood in the manner in which the petitioners want us to, then we would have to say that it is enough if a person completes seven years of standing at the Bar on the date of appointment.*** This is not the purport of the decision in **VIJAY KUMAR MISHRA (supra)**.

18. The matter can be looked at from another angle. Article 233(2) of the Constitution of India speaks about (1) a qualification and (2) a disqualification. Both should be reckoned with reference to the cut-off date indicated in the notification for direct recruitment. If after the cut-off date indicated in the notification for direct recruitment, a person gets appointed to the services of the Union or the State, the same cannot be put against them at the time of interview. This is how **VIJAY KUMAR MISHRA (supra)** has to be understood.

19. Our experience shows that many times direct recruitment to Civil Judges (Junior Division) and direct recruitment to the post of District Judges (entry level) take place either simultaneously or within short intervals of time. Many members of the Bar apply in response to both the notifications. There is no bar for a person to apply in response to both the Notifications, provided he is eligible to apply.

Once he is found eligible with reference to the cut-off date, he cannot be said to be disqualified with reference to Article 233(2) of the Constitution of India, on the basis of a subsequent event, namely, his selection to one service.

20. But unfortunately the petitioners herein have been in the Subordinate Judicial Service of the State for the past several years. Therefore, ***even on the cut-off date for eligibility, the bar under Article 233(2) of the Constitution of India had come into play, as it was a matter of disqualification. A matter of disqualification has a direct impact upon eligibility.*** If a person is ineligible on the cut-off date, his application cannot even be considered.

21. Moreover, the recruitment to the posts of District Judges, Senior Civil Judges and Civil Judges in the States of Telangana and Andhra Pradesh is governed by a set of statutory rules called "The Andhra Pradesh State Judicial Service Rules, 2007" issued by the Governor in exercise of the powers conferred by Articles 233, 234, 235, 237 read with the Proviso to Article 309 and proviso to clause (3) of Article 320. The Proviso to clause (b) of sub-rule (2) of Rule 4 of the said rules reads as follows:

"Provided that 25% of the cadre strength shall be filled up by direct recruitment ***from among eligible Advocates*** on the basis of written and viva voce tests as prescribed by the High court"

22. So long as the above rule is in force, direct recruitment to the post of District Judges can only be from among eligible Advocates. The continuance of a person as an Advocate on the cut off for determining eligibility is a sine quo non even for accepting his application. The reason is that it relates to eligibility criteria. Hence, the writ petition is devoid of merits. Therefore, it is dismissed. The miscellaneous petitions, if any, pending in this writ petition shall stand closed. No costs.

V.RAMASUBRAMANIAN, J

G.SHYAM PRASAD, J

Date: 26th October, 2016.

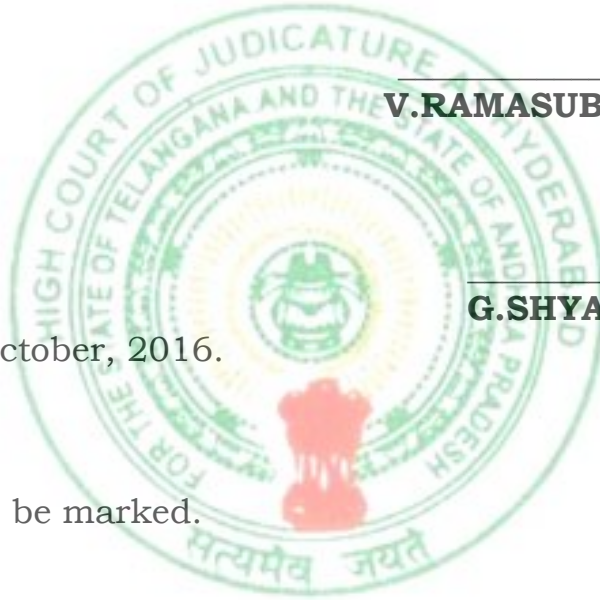
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Note:-

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**HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE G.SHYAM PRASAD**

Writ Petition No.35139 of 2016
(per VRS, J.)



26th October, 2016.
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