

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 7928 OF 2019

Shilpa Sudhakar Rao Dolharkar ... Petitioner.

V/s.

The State of Maharashtra & Ors. ... Respondents.

Mr. Amol Gatne, Advocate for the Petitioner.

Dr. Mrs. K. R. Kulkarni, AGP for the State - Respondent
Nos. 1 & 2.

Mr. Rahul Nerlekar, Advocate for Respondent No.3.

CORAM : R.M. BORDE & N.J. JAMADAR, JJ.

DATE : JULY 17, 2019.

PC :

1 Heard.

2 The Petitioner is praying for issuance of writ of mandamus or any other writ, order or direction in the nature of mandamus, directing the Respondent No. 3 i.e. the Registrar General, High Court, Mumbai, to accept the application form tendered by the Petitioner to facilitate her participating in the process of selection and appointment for the post of District Judge initiated in pursuance to the advertisement published by the Bombay High Court on 13.05.2019.

The Petitioner also prays for issuance of directions to the Respondents to permit her to participate / appear in the selection process for the post of District Judge. The Petitioner contends that she had enrolled herself as an Advocate on 09.05.2003 and thereafter commenced practise. The Petitioner contends that she has gained experience of about 15 years as a practising Advocate and as such is eligible to participate in the process of selection and for consequent appointment, if selected, as District Judge. The Petitioner contends that she has been appointed as a member of the District Forum on 21.05.2018 and as such is in employment. The Petitioner has invited our attention to the relevant qualification criteria, which prescribes that an Advocate would be eligible to participate in the process of selection and contends that she shall have to be permitted to appear for written test and viva-voce, since she holds necessary educational qualification and also has experience of practice as an Advocate for a period of not less than 7 years on the date of the advertisement. The petitioner has invited our attention to the judgment in the matter of **Vijay Kumar Mishra & Anr. vs. High Court of Judicature at Patna & Ors.**, reported in (2016) 9 Supreme Court Cases 313. It is the contention of the Petitioner that Article 233(2)

of the Constitution of India, only prohibits certain class of persons from securing appointment, however, it does not prescribe any qualification but lays down the disqualification. The distinction has to be made between the “selection” and “appointment”. Every person declared as successful in selection process does not acquire right to be appointed automatically and Article 233(2) bars only appointment of persons already in service of the State but not selection of such person. The Petitioner thus contends that he shall have to be permitted to participate in the selection process and if selected then only the question of making appointment will fall for consideration and the said question need not be determined at this stage. The contention raised by the Petitioner, relying upon the judgment cited at the bar, is unacceptable for the reason that the facts given rise to the issue before the Apex Court were distinct. In the matter decided by the Supreme Court the Petitioners therein were found to be fulfilling eligibility criteria on the date of the advertisement, however, during the continuance of process of selection for the post of District Judge, they were selected and joined subordinate judicial service of the State of Bihar. The candidature of the applicants before the Apex Court was rejected at the stage for holding the interviews by

the High Court, taking recourse to the Article 233(2) of the Constitution of India. In the given facts and circumstances, the Supreme Court interpreted the provisions of Article 233(2) and permitted participation of the petitioner before the Apex Court in the process of the interview.

3 In the instant matter, the Petitioner do not fulfill the eligibility criteria laid down under the Rules on the date of issuance of the advertisement. Rule 5 of the Maharashtra Judicial Service Rules, 2008 provides for method of recruitment lays down qualification and the age limit. Clause (c) of the Rule 5 provides that 25% of the posts shall be filled by nomination from amongst the eligible persons, practising as Advocates on the basis of a written and viva-voce test conducted by the High Court. Since the Petitioner has already joined service since 21.05.2018, she ceases to be the Advocate on the date of advertisement and as such does not fulfill the qualification criteria prescribed under Rule 5(1)(c). In the matter of **Vijay Kumar Mishra**, cited supra, the Supreme Court was considering the interpretation of provisions of Article 233(2), which was relied upon for turning down the claim of the Petitioner before the Apex Court. In the instant matter since the Petitioner

do not fulfill the qualification criteria laid down under Rule 5(c) of the Maharashtra Judicial Service Rules, 2008, the request made by the Petitioner, does not deserve any consideration.

4 So far as the legality and validity of the Rule is concerned, the issue has already been considered by the judgments of this court in writ petition no. 10690 of 2014 and writ petition no.10930 of 2014, decided on 27th November, 2014 and 4th December, 2014 respectively, and as such the challenge to the Rules, if any, does not deserve to be considered.

5 For the reasons recorded above, the writ petition stands rejected.

(N.J. JAMADAR, J.)

(R.M. BORDE,J.)

.....