

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 7/6/2019

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

Writ Petition No.29762 of 2018

Dr.E.Murugaesan

... Petitioner

Vs

1. The Registrar General
High Court of Madras
Chennai 600 104.

2. The Chief Secretary
Government of Tamil Nadu
The Secretariat, Fort St. George
Chennai 600 009.

3. The Secretary to Public
(Special - A) Department
Government of Tamil Nadu
The Secretariat, Fort St. George
Chennai 600 009.

.... Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of certiorarified mandamus to call for the records relating to ROC.No.46222/2017/B1 dated 23/10/2017 of Official Memorandum of the first respondent herein and quash the same and consequently direct the respondents 1 to 3 to amend the Tamil Nadu State Judicial Service (Cadre and Recruitment) Rule, 2007 to enable to the petitioner to participate the selection process of forthcoming direct recruitment to the post of District Judge (Entry Level) in the Tamil Nadu State Judicial Service.

For petitioner ... Mr.G.Rajan

For respondents ... Mr.B.Vijay
for R.1.
Mr.P.S.Sivashanmuga Sundaram
Special Government Pleader
for R.R.2 and 3.

O R D E R

(Order of the Court was delivered by S.Manikumar,J)

Instant writ petition, has been filed, praying to quash the records, relating to Roc.No.46222/2017/B1, dated 23/10/2017, Official Memorandum of the Registrar General, High Court, Madras, first respondent herein and and consequently, to direct the respondents 1 to 3, to amend the Tamil Nadu State Judicial Service (Cadre and Recruitment) Rule, 2007, so as to enable the petitioner, to participate in the selection process of the forthcoming direct recruitment, to the post of District Judge (Entry Level), in Tamil Nadu State Judicial Service.

2. Facts in nutshell are that on 22.10.2003, the Petitioner has enrolled as an advocate, in the Bar Council of Tamil Nadu & Puducherry. Petitioner, qualified for the National Eligibility Test (UGC-NET) for Lectureship in June 2006, conducted by the University Grants Commission (UGC) and further qualified the same test along with Junior Research Fellowship (UGC- JRF) in December' 2006. Petitioner was admitted as a full time research scholar, in Tamil Nadu Dr. Ambedhkar Law University. He was awarded a Doctoral degree in 2015.

3. Tamil Nadu Teachers Recruitment Board (TRB), called for an application, to fill up the posts of Lecturer (S.S), in Government Law Colleges, in Tamil Nadu, governed by the Tamil Nadu Legal Education Rules, in consonance with UGC Regulations, from time to time. Petitioner applied for the said post. After written examination and interview, petitioner was appointed as lecturer (S.S) in the subject of Constitutional Law and International Law, through G.O. (Ms) No.422 Law (LS), dated 09.07.2012 and joined duty in the Government Law College, Trichy, on 13.07.2012. The said G.O. states that the petitioner was appointed temporarily, subject to W.P. No. 17211/2011, which is pending before this Court.

4. Petitioner was working as an Assistant Professor of Constitutional & International Law, since 2012, in Tamil Nadu Legal Education Service and completed 6 years of service, in the Department of Law, Government of Tamil Nadu. Eventhough the appointment is temporary in nature, as per the above said Government Order, petitioner was properly recruited, through Tamil Nadu Teachers Recruitment Board and till date, no steps have been taken by the government, to bring finality to W.P.No.17211 of 2011.

5. Now, the petitioner wants to take part in the selection process of the forthcoming District Judge (Direct Recruitment) Exam, in the Tamil Nadu State Judicial Service Examination. However there is no bar, as provided in Article 233 of the Constitution that a person, who holds governmental service, under the Union and State government if they have fulfilled the mandate provided under it, because before he joined the government service, he has completed the mandate prescribed in Article 233(2) of the Constitution, wherein, it is stated that a person shall be eligible to be appointed as a District Judge, provided he should practice as an advocate for not less than seven years.

6. The petitioner has further submitted that his teaching experience in Tamil Nadu Legal Education Service, has also to be taken into consideration to count as experience in eligibility contemplated in the Article 233(2). Hence, he had completed seven years, since 22.10.2003, as an advocate, before he joined as an Assistant professor of International Law & Constitutional Law, on 13.07. 2012. Bar prescribed in Art.233 (2) of the Constitution of India would not attract the petitioner, because he has completed the required qualification and eligibility criteria. Bar contained in the said Article, states that a person, who is under government service, does not have the prescribed educational qualification and experience, as an advocate only are ineligible to be appointed and selected a District Judge. Hence, according to the petitioner, the bar in clause 2 of article 233 of the Constitution cannot be invoked against him.

7. One (Late) Selvi. S. Thamaraichelvi, who worked as a Lecturer (Senior Scale) on contract basis, was deputed to the post of Judge, Family Court, Chennai-104, from the Tamil Nadu Legal Education Service to the Tamil Nadu State Judicial Service. State of Kerala has allowed the law College teachers to hold the post of Judge in Subordinate courts. Similarly, States of Assam and Jarkhand also have allowed holding of similar post, in subordinate courts.

8. Referring to the above, petitioner has submitted a detailed representation, dated 28/5/2017, to the respondents 1 to 3, to amend the Tamil Nadu State Judicial Service (Cadre and Recruitment) Rules, 2007 and consequently, enable the petitioner to participate in the selection process of the forthcoming District judge (Entry Level) and Civil Judge post. The said representation was duly served on the respondents herein and that respondents 2 and 3 had failed to dispose of the representation. But the Registrar General, High Court, Madras, 1st respondent herein, considered the representation of the petitioner and through Official Memorandum Roc.No.46222/2017/B.1, dated 23.10.2017, by a non-speaking

order, rejected the same, stating that "the above request has been considered by the High Court of Madras and ordered that his request is not feasible for compliance."

9. Since the first respondent has brought out the amendment to the Tamil Nadu State Judicial Service (Cadre and Recruitment) Rules, through G.O.Ms.No.877 Home (Courts), dated 24th November 2017, petitioner has come forward with the instant writ petition, praying for the relief as stated supra.

10. On the above facts, Mr.G.Rajan, learned counsel appearing for the petitioner submitted as follows:

(i) Registrar General, High Court of Madras, Chennai, first respondent herein has failed to interpret clause (2) of Article 233 inconsonance with Article 16 of the Constitution.

(ii) First respondent has apparently failed to note that some of the States in India, have allowed law teachers to hold the post in subordinate judiciary through deputation manner. The petitioner has sought for permission to allow him to participate in the selection process for the post of District Judge (Entry Level) through open pool merit system and therefore, denial amounts to violation of Article 14 of the Constitution.

(iii) The 1st respondent has erred to hold that teaching law is ancillary to judicial post.

(iv) The 1st respondent has failed to interpret that teaching law under the expression of "the service", in clause 2 of Article 233 would mean ancillary service to judicial service.

(v) The 1st respondent has failed to consider that if the two provisions of the Constitution of India are directly in conflict with each other, such conflict has to be reconciled through liberal or harmonious interpretation and primacy must be given to the fundamental rights. Here, the petitioners fundamental right under Article 16 of Constitution of India, equal opportunity in public employment has been violated, even though the petitioner is having the qualification mentioned under Article 233 of the Constitution, by wrong interpretation of the words, "the service" under clause (2) of Article 233 of the Constitution.

(vi). While disposing of the representation, the first respondent has failed to note the the judgment of the Hon'ble Apex Court in Satya Narain Singh v. High Court of Judicature at Allahabad and Others reported in (1985) 1SCC 225. In the said judgment, it has been held as follows:

"3. ... 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 the 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 both the streams simultaneously. "

(vii). While disposing of the representation, the 1st respondent has failed to consider the judgment of the Hon'ble Apex Court in Vijay Kumar Mishra and Another, v. High Court of Judicature at Patna and Others reported in (2016) 9 SCC 313, wherein, it has been held that "Article 233(2) only prohibits appointment of a person who is already in service of the Union or the State, but not the selection of such a person. The right of such a person to participate in the selection process undertaken by the State for appointment to any post in public service (subject to other rational prescriptions regarding the eligibility for participating in the selection process such as age, educational qualification, etc.) and be considered is guaranteed under Articles 14 and 16 of the Constitution.

(viii). The 1st respondent has failed to consider that while disposing of the representation that disallowing the petitioner to participate in the selection process of direct recruitment for District Judge (Entry Level) is against the spirit of clause (2) of Article 233 of the Constitution. Neither the text of Article and nor the words occurring in Article 233 (2) suggest to disallow the petitioner to participate in the selection process.

(ix). The first respondent has failed to consider that while disposing of the representation that disallowing the petitioner to take part in the forthcoming recruitment would amount to violating the rights guaranteed under Articles 14, 16 and 21 of the Constitution of India.

11. In support of the above contentions, learned counsel for the petitioner has relied on the decisions in Rameshwar Dayal v. The State of Punjab & Others reported in AIR 1961 SC - 816 and Chandra Mohan Vs. State of Uttar Pradesh & Ors reported in AIR 1965 SC 1987. He also drew the attention of this Court to the Constituent Assembly Debates of Parliament.

Heard Mr.G.Rajan, learned counsel for the petitioner, Mr.B.Vijay for the first respondent and Mr.P.S.Sivashanmuga Sundaram, learned Special Government Pleader for the respondents 2 and 3.

12. Government of Tamil Nadu have framed Tamil Nadu Judicial Service (Cadre and Recruitment) Rules, 2007, for civil judges, senior civil judges and district judges (entry level/selection grade/supertime scale). We are concerned with recruitment and therefore, it is worthwhile to consider the relevant rule, as per Annexure I under Rule 5 of the said Rules. Rule 5 of the abovesaid Rules reads thus,

"5. METHOD OF APPOINTMENT, QUALIFICATION AND AGE:- In respect of each category of posts specified in column (1) of the Schedule below, the method of appointment and the qualifications shall be as specified in the corresponding entries in columns (2) and (3) thereof and the respective Annexure thereof:-

SCHEDULE

Sl. No.	Category	Method of Appointment	Qualification
1	District Judge (Supertime Scale)	By promotion by Selection on the basis of Merit cum Seniority from category 2 viz. District Judge (Selection Grade) by the High Court	Must have put in not less than 3 years of continuous service as District Judge (Selection Grade) provided 10% of the Cadre Strength of District judge shall be promoted to the Cadre of District (Supertime Scale).
2	District Judge (Selection Grade)	By promotion by Selection on the basis of Merit cum Seniority from Category 3 Viz., District Judge (Entry level) by the High Court	Must have put in 5 years of continuous service in category 3 i.e. as District Judge (Entry level) Provided 25% of Cadre strength of District Judge shall be promoted to the cadre of District Judge (Selection Grade)

Sl. No.	Category	Method of Appointment	Qualification
3	District Judge (Entry level)	i) 65 percent by promotion from amongst the Senior Civil Judges/Chief Judicial Magistrate/Chief Metropolitan Magistrate/Metropolitan Magistrate on the basis of principle of meritcum-seniority and suitability. The criteria to assess the merit and suitability are under the following heads:- a) Evaluation of Judgments rendered by the candidates in the preceding five years. b) Annual Confidential Reports inclusive of Vigilance Reports in the preceding five years. c) Work done during the preceding five years. d) Pendency of disciplinary proceedings, if any. Provided that in the event of non-availability of Senior Civil Judges ACP Scale II Stage, in claims of suitable candidates in the cadre of Senior Civil Judges ACP Scale I Stage will be considered. Provided further that in the event on non-availability of candidates in the cadre of Senior Civil Judges ACP Scale I Stage, the claims of suitable candidates	Must have completed five years of qualifying service in the category of Senior Civil Judge /Chief Judicial Magistrate/Chief Metropolitan Magistrate inclusive of ACP I and II Stage. 1. Must possess a Degree in Law of a University in India established or incorporate by or under a Central Act or a state Act or an institution recognized by the University Grants

Sl. No.	Category	Method of Appointment	Qualification
4	Senior Civil Judge / Chief Judicial Magistrate / Chief Metropolitan Magistrate / Metropolitan Magistrate (Assured Career Progression scale - II Stage)	Gradation subject to entries in Annual Confidential Reports inclusive of Vigilance Reports, if any	Must have completed five years of continuous service in the category of Senior Civil Judge ACP Scale I Stage)
5	Senior Civil Judge / Chief Judicial Magistrate / Chief Metropolitan Magistrate / Metropolitan Magistrate (Assured Career Progression scale - I Stage)	Gradation subject to entries in Annual Confidential Reports inclusive of Vigilance Reports, if any.	Must have completed five years of continuous service in the category of Senior Civil Judge.

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Sl. No.	Category	Method of Appointment	Qualification
6	Senior Civil Judge / Chief Judicial Magistrate / Chief Metropolitan Magistrate / Metropolitan Magistrate	By promotion by Selection on the basis of merit-cum-seniority from among the category of Civil Judges by the High Court. 1) Entries in the Annual Confidential Reports inclusive of Vigilance Reports, if any. 2) Evaluation of the judgement rendered by the candidate in the preceding five years. 3) Work done statement for preceding five years.	
7	Civil Judge (Assured Career Progression scale - II Stage)	Subject to entries in the Annual Confidential Reports inclusive of Vigilance Reports, if any	Must have completed five years of continuous service as Civil Judge (I Stage ACP scale)
8	Civil Judge (Assured Career Progression scale - I Stage)	Subject to entries in the Annual Confidential Reports inclusive of Vigilance Reports, if any	Must have completed five years of continuous service as Civil Judge

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Sl. No.	Category	Method of Appointment	Qualification
9	Civil Judge	By direct recruitment on the basis of written examination and vivavoce Examination conducted by the Tamil Nadu Public Service Commission in accordance with the rules specified in the Annexure II to these Rules.	1. Must possess a Degree in Law of a University in India established or incorporate by or under a Central Act or a state Act or an institution recognized by the University Grants Commission, or any other equivalent qualification and got enrolled in the Bar Council of Tamil Nadu; and in the case of candidates enrolled in the Bar Councils of other States, they should submit proof of transfer of their enrollment to the Bar Council of Tamil Nadu. (and) 2. Must be practicing as an advocate or Pleader in the High Court or Courts subordinate thereto and must have so practiced for not less than 3 years on the date of the Commission's Notification for recruitment to the post. (or) Must be an Assistant Public Prosecutor having not less than 3 years of

13. Request of the writ petitioner has been rejected, vide impugned proceedings of the Registrar General, High Court, Madras, in ROC.No.46222/2017/B1, dated 23.10.2017, as hereunder:

"Thiru (Dr.) E.Murugesan, S/o.S.Edanga Gounder, Assistant Professor (S.S.) Government Law College, K.K.Nagar, Madurai 625 020, in the letter under reference cited, has prayed to amend the Tamil Nadu State Judicial Service (Cadre and Recruitment) Rules, 2007 and consequently, enable him to participate the selection process of the forthcoming District Judge (Entry Level) and Civil Judge post in Tamil Nadu State Judicial Service Examination of District Judge (Entry Level) and Civil Judge in the guise of the Hon'ble Apex Court judgement mentioned therein.

The above request has been considered by the High Court of Madras and ordered that his request is not feasible for compliance."

14. Correctness of the same is challenged on the grounds, stated supra. At this juncture, we hereby note that the validity of the rules, has not been tested, but the writ petitioner has also sought or a prayer, directing respondents 1 to 3 to amend the Tamil Nadu State Judicial Service (Cadre and Recruitment) Rule, 2007, so as to enable to him, to participate in the selection process of forthcoming direct recruitment to the post of District Judge (Entry Level) in the Tamil Nadu State Judicial Service.

15. It is trite law that Courts cannot issue directions, directing the Government to enact a law. It is worthwhile to consider a decision in DIVISIONAL MANAGER, ARAVALI GOLF CLUB AND ANOTHER {2008 (1) SCC - 683}, the Hon'ble Supreme Court, at paragraphs Nos.17, 19, 20 and 22, held thus:-

"17. Before parting with this case, we would like to make some observations about the limits of the powers of the judiciary. We are compelled to make these observations because we are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions. In our opinion this is clearly unconstitutional. In the name of judicial activism judges cannot cross their limits and try to take over functions which belong to another organ of the State.

19. Under our Constitution, the legislature, the executive and the judiciary all have their own broad spheres of operation. Ordinarily, it is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction.

20. Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like emperors. There is broad separation of powers under the Constitution and each organ of the State - the legislature, the executive and the judiciary - must have respect for the other and must not encroach into each other's domains.

22. In *Tata Cellular Vs. Union of India* (vide AIR para 113 : SCC para 94), this Court observed that the modern trend points to judicial restraint in administrative action. The same view has been taken in a large number of other decisions also, but it is unfortunate that many Courts are not following these decisions and are trying to perform legislative or executive functions. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimisation of the Judges' preferences. The Court must not embarrass the administrative authorities and must realise that administrative authorities have expertise in the field of administration while the Court does not. In the words of Neely (SCC p.681, para 82).

"82.... I have very few illusions about my own limitations as a Judge ... I am not an accountant, electrical engineer, financier, banker, expect Judges intelligently to review a 5000 page record addressing the intricacies of a public utility operation." It is not the function of a Judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator."

16. In *Chandra Mohan v. State of Uttar Pradesh* reported in AIR 1966 SC 1987, the Hon'ble Apex Court considered a case, dealing with the procedure for recruiting district judges in the State of U.P., as prescribed by the U.P. Higher Judicial Service Rules, framed under Article 309 of the Constitution of India. The Allahabad High Court called for applications from the members of the bar with more than seven years standing and from judicial officer, who were members of the executive department, discharging some revenue and magisterial duties. Rules empowered the recruitment of district judges, from such judicial officers. The Selection Committee recommended 6 candidates, 3 from the bar and 3 from judicial services to High Court. A member of the U.P. Civil Services Judicial bench and others filed writ petitions in the High Court for issuance of a writ, directing the Government not to make appointment. Pursuant to the selection, writ petitions were dismissed. On appeal, the Hon'ble Apex Court, which considering the issue, as to whether, rules empowering the Hon'ble Governor, to appoint persons in Government service,

Central or State, as stated in Article 233 of the Constitution of India, means persons, in judicial service only and accordingly, held as follows:

"The third point raised is one of far-reaching importance. Can the Governor after the Constitution, directly appoint persons from a service other than the judicial service as district judges in consultation with the High Court? Can he appoint "judicial officers" as district judges? The expression "judicial officers" is a misleading one. It is common case that they belong to the executive branch of the Government, though they perform certain revenue and magisterial functions. The relevant article on which both the parties rely upon in support of their respective contentions is Art. 233. It reads:

"(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 as 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."

While the learned counsel for the appellant contends that the said article must be read along with the group of articles embodied in Ch. VI of Part VI of the Constitution and also in the background of the history of said provisions and that, if so read, it would be clear that the Governor can only appoint district judges either from the judicial service or from the Bar, the learned counsel for the respondents, on the other hand, argues that Art. 233 is expressed in general terms and that there is no warrant to restrict the scope of the said article by construction or otherwise.

Before construing the said provisions, it should be remembered that the fundamental rule of interpretation is the same whether one construes the provisions of the Constitution or an Act of Parliament, namely, that the court will have to find out the expressed intention from the words of the Constitution or the Act, as the case may be. But, "if, however, two constructions are possible then the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory." The Indian

Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States; it constitutes a High Court for each State, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue writs to keep all tribunals, including in appropriate cases the Governments, within bounds and gives to it the power of superintendence over all courts and tribunals in the territory over which it has jurisdiction. But the makers of the Constitution also realised that "it is the Subordinate Judiciary in India who are brought most closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of the superior Judges." Presumably to secure the independence of the judiciary from the executive, the Constitution introduced a group of articles in Ch. VI of Part VI under the heading "Subordinate Courts". But at the time the Constitution was made, in most of the States the magistracy was under the direct control of the executive. Indeed it is common knowledge that in pre-independent India there was a strong agitation that the judiciary should be separated from the executive and that the agitation, was based upon the assumption that unless they were separated, the independence of the judiciary at the lower levels would be a mockery. So article 50 of the Directive Principles of Policy states that the State shall take steps to separate the judiciary from the executive in the public services of the States. Simply stated, it means that there shall be a separate judicial service free from the executive control.

With this background, if the following provisions of the Constitution are looked at, the meaning of the debated expressions therein would be made clear:

We have already extracted Art. 233. Article 234.- Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

Article 235. The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing

in this Article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

Article 236. In this Chapter-

(a) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge:

(b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

Article 237. The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed in the judicial service of the State subject to such exceptions and modifications as may be specified in the notification.

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 of the Union or of the State, and (ii) members of the 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.

So far there is no dispute. But the real conflict rests on the question whether the Governor can appoint as district judges persons from services other than the judicial service; that is to say, can he appoint a person who is in the police, excise, revenue or such other service as a district judge? The acceptance of

this position would take us back to the pre-independence days and that too to the conditions prevailing in the Princely States. In the Princely States one used to come across appointments to the judicial service from police and other departments. This would also cut across the well-knit scheme of the Constitution and the principle underlying it, namely, the judiciary shall be an independent service. Doubtless, if Art. 233(1) stood alone, it may be argued that the Governor may appoint any person as a district judge, whether legally qualified or not, if he belongs to any service under the State. But Art. 233(1) is nothing more than a declaration of the general power of the Governor in the matter of appointment of district judges. It does not lay down the qualifications of the candidates to be appointed or denote the sources from which the recruitment has to be made. 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. Can it be said that in the context of Ch. VI of Part VI of the Constitution "the service of the Union or of the State" means any service of the Union or of the State or does it mean the judicial service of the Union or of the State? The setting, viz., the chapter dealing with subordinate courts, in which the expression "the service" appears indicates that the service mentioned therein is the service pertaining to courts. That apart, Art. 236 (b) defines the expression "judicial service" to mean a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior Sup.C.1/66-7 to the post of district judge. If this definition, instead of appearing in Art. 236, is placed as a clause before Art. 233(2), there cannot be any dispute that "the service" in Art. 233(2) can only mean the judicial service. The circumstance that the definition of "judicial service" finds a place in a subsequent Article does not necessarily lead to a contrary conclusion. The fact that in Art. 233(2) the expression "the service" is used whereas in Arts. 234 and 235 the expression "judicial service" is found is not decisive of the question whether the expression "the service" in Art. 233(2) must be something other than the judicial service, for, the entire chapter is dealing with the judicial service. The definition is exhaustive of the service. Two expressions in the definition bring out the idea that the judicial

service consists of hierarchy of judicial officers starting from the lowest and ending with district judges. The expressions "exclusively" and "intended" emphasise the fact that the judicial service consists only of persons intended to fill up the posts of district judges and other civil judicial posts and that is the exclusive service of judicial officers. Having defined "judicial service" in exclusive terms, having provided for appointments to that service and having entrusted the control of the said service to the care of the High Court, the makers of the world Constitution not have conferred a blanket power on the Governor to appoint any person from any service as a district judge.

Reliance is placed upon the decision of this court in *Rameshwar Dayal v. State of Punjab*(1) in support of the contention that "the service" in Art. 233(2) means any service under the State. The question in that case was, whether a person whose name was on the roll of advocates of the East Punjab High Court could be appointed as a district judge. In the course of the judgment *S. K. Das, J.*, speaking for the Court, observed:

"Article 233 is a self contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under cl. (1) the Governor can appoint such a person as a district judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in cl. (2) and all that is required is that he should be an advocate or pleader of seven years' standing."

This passage is nothing more than a summary of the relevant provisions. The question whether "the service" in Art. 233(2) is any service of the Union or of the State did not arise for consideration in that case nor did the Court express any opinion thereon.

We, therefore, construe the expression "the service" in cl. (2) of Art. 233 as the judicial service.

But, it is said that this construction ignores Art. 237 of the Constitution. We do not see how Art. 237 helps the construction of Art. 233 (2). Art. 237 enables the Governor to implement the separation of the judiciary from the executive. Under this Article, the Governor may notify that Arts. 233, 234, 235 and 236 of the Constitution will apply to magistrates subject to certain modifications or exceptions; for instance, if the Governor so notifies,

the said magistrates will become members of the judicial service, they will have to be appointed in the manner prescribed in Art. 234, they will be under the control of the High Court under Art. 235 and they can be appointed as District Judges by the Governor under Art. 233(1). To state it differently, they will then be integrated in the judicial service which is one of the sources of recruitment to the post of district judges. Indeed, Art. 237 emphasises the fact that till such an integration is brought about, the magistrates are outside the scope of the said provisions. The said view accords with the constitutional theme of independent judiciary and the contrary view accepts a retrograde step.

The history of the said provisions also supports the said conclusion. Originally the posts of district and sessions judges and additional sessions judges were filled by persons from the Indian Civil Service. In 1922 the Governor-General-in-Council issued a notification empowering the local government to make appointments to the said service from the members of the Provincial Civil Service (Judicial Branch) or from the members of the Bar. In exercise of the powers conferred under S. 246(1) and s. 251 of the Government of India Act, 1935, the Secretary of State for India Framed rules styled Reserved Posts (Indian Civil Service) Rules, 1938. Under those Rules, the Governor was given the power of appoint to a district post a member of the judicial service of the Province or a member of the Bar. Though s. 254(1) of the said Act was couched in general terms similar to those contained in Art. 233(1) of the Constitution, the said rules did not empower him to appoint to the reserved post of district judge a person belonging to a service other than the judicial service. Till India attained independence, the position was that district judges were appointed by the Governor from three sources, namely,

(i) the Indian Civil Service, (ii) the Provincial Judicial Service, and (iii) the Bar. But after India attained independence in 1947, recruitment to the Indian Civil Service was discontinued and the Government of India decided that the members of the newly created Indian Administrative Service would not be given judicial posts. thereafter district judges have been recruited only from either the judicial service or from the Bar. There was no case of a member of the executive having been promoted as a district judge. If that was the factual position at the time the Constitution came into force, it is

unreasonable to attribute to the makers of the Constitution, who had so carefully provided for the independence of the judiciary, an intention to destroy the same by an indirect method. What can be more deleterious to the good name of the judiciary than to permit at the level of district judges, recruitment from the executive departments? Therefore, the history of the services also supports our construction that the expression "the service" in Art. 233(2) can only mean the judicial service.

For the aforesaid reasons, we hold that the Rules framed by the Governor empowering him to recruit district judges from the "judicial officers" are unconstitutional and, therefore, for that reason also the appointment of respondents 5, 6 and 7 was bad.

In this view, it is not necessary to express our view on the last two questions.

In the result, we hold that the U.P. Higher Judicial Service Rules providing for the recruitment of district judges are constitutionally void and, therefore, the appointments made thereunder were illegal. We set aside the order of the High Court and issue a writ of mandamus to the 1st respondent not to make any appointment by direct recruitment to the U.P. Higher Judicial Service in pursuance of the selections made under the said Rules. The last respondent will pay the costs of the appellant. The other respondents will bear their own costs."

17. In *Satya Narain Singh v. High Court of Judicature at Allahabad* reported in 1985 (1) SCC 225, appellants therein were members of Judicial Service. They claimed that they have completed seven years of practice at the bar before their appointment to Uttar Pradesh judicial service and thus, eligible for appointment by direct recruitment to higher judicial service. Writ petitions filed in the High Court were dismissed. Though by virtue of the interim order, they appeared in the examination, subject to the result of the civil appeal, and the writ petitions were dismissed. However, there were other writ petitions, pending on the file of the Hon'ble Apex Court. On the remaining writ petitions, taking note of the dismissal of the earlier civil appeals and the writ petitions on 11.10.1984, the Hon'ble Supreme Court, was not inclined to re-open the issue, but on the submission of the learned senior counsel appearing for the parties, at Paragraphs 2 to 6, held as follows:

"2. The submission of Shri Lal Narain Sinha and Shri K.K. Venugopal was that there was no constitutional inhibition against members of any Subordinate Judicial Service seeking to be appointed as District Judges by direct recruitment provided they had completed 7 years' practice at the bar. The

submission of the learned counsel was that members of the Subordinate Judiciary, who had put in 7 years' practice at the bar before joining the Subordinate Judicial Service and who had gained experience as Judicial Officers by joining the Subordinate Judicial Service ought to be considered better fitted for appointment as District Judges because of the additional experience gained by them rather than be penalised for that reason. The learned counsel submitted that a construction of Article 233 of the Constitution which would render a member of the Subordinate Judicial Service ineligible for appointment to the Higher Judicial Service because of the additional experience gained by him as a Judicial Officer would be both unjust and paradoxical. It was also suggested that it would be extremely anomalous if a member of the Uttar Pradesh Judicial Service who on the present construction of Article 233 is ineligible for appointment as a District Judge by direct recruitment, is nevertheless eligible to be appointed as a Judge of the High Court by reason of Article 217 (2) (aa). On the other hand Shri Gopal Subramaniam, learned counsel for the respondent, urged that there was a clear demarcation in the Constitution between two sources of recruitment namely: (1) those who were in the service of a State or Union, and (2) those who were not in such service. He contended that the second clause of Article 233 was attracted only to the second source and in respect of candidates from that source the further qualification of 7 years as an advocate or a pleader was made obligatory for eligibility. According to Mr Gopal Subramaniam, a plain reading of both the clauses of Article 233 showed that while the second clause of Article 233 was applicable only to those who were not already in service, the first clause was applicable to those who were already in service. He urged that any other construction would lead to anomalous and absurd consequences such as a junior member of the Subordinate Judicial Service taking a leap, as it were, over senior members of the Judicial Service with long records of meritorious service. Both sides relied upon the decisions of this Court in *Rameshwar Dayal v. State of Punjab* [AIR 1961 SC 816 : (1961) 2 SCR 874 : (1961) 2 SCJ 285] and *Chandra Mohan v. State of Uttar Pradesh* [AIR 1966 SC 1987 : (1967) 1 SCR 77 : (1967) 1 LLJ 412] .

3. Article 233 is as follows:

233. (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.

Two points straightway project themselves when the two clauses of Article 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 makes 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 the 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 both the streams simultaneously. The dichotomy is clearly brought out by S.K. Das, J. in *Rameshwar Dayal v. State of Punjab* [AIR 1961 SC 816 : (1961) 2 SCR 874 : (1961) 2 SCJ 285] where he observes:

"Article 233 is a self contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under clause (1) the Governor can appoint such a person as a district judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in clause (2) and all that is required is that he should be an

advocate or pleader of seven years' standing."

Again dealing with the cases of Harbans Singh and Sawhney it was observed:

"We consider that even if we proceed on the footing that both these persons were recruited from the Bar and their appointment has to be tested by the requirements of clause (2), we must hold that they fulfilled those requirements."

Clearly the Court was expressing the view that it was in the case of recruitment from the Bar, as distinguished from Judicial Service that the requirements of clause (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 Article 233 can be interpreted in the light of Explanations added to Articles 124 and 217".

4. In *Chandrn Mohan v. State of Uttar Pradesh* [AIR 1966 SC 1987 : (1967) 1 SCR 77 : (1967) 1 LLJ 412] Subba Rao, C.J. after referring to Articles 233, 234, 235, 236 and 237 stated:

"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 of the Union or of the State, and (ii) members of the 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." (emphasis supplied)

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 Article 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 clause (2) thereof. Under clause (2) of Article 233 two sources are given, namely, (i) persons in the

service of the Union or of the State, and (ii) advocate or pleader."

5. 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 Article 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.

6. Thus we see that the two decisions do not support the contention advanced on behalf of the petitioners but, to the extent that they go, they certainly advance the case of the respondents. We therefore, see no reason to depart from the view already taken by us and we accordingly dismiss the writ petitions."

18. In *Vijay Kumar Mishra v. High Court of Judicature at Patna* reported in 2016 (9) SCC 313, the Hon'ble Supreme Court tested the correctness of a judgement of the Patna High Court, which dismissed a writ petition, filed challenging the communication of the Registrar General, Patna High Court, whereby,

"1. The challenge in the present writ application is to the communication, dated 16-2-2016, whereby representation of the petitioners to appear in interview for the post of District Judge Entry Level (Direct from Bar) Examination, 2015, was rejected and a condition was imposed that petitioners will have to tender their rejection, first, from the Subordinate Judicial Service of the State of Bihar and only, thereafter, they could appear in the interview.

2. Advertisement No. 01/2015 was issued inviting applications from eligible advocates for direct recruitment in respect of 99 vacancies as on 31-3-2015. The cut-off date for the eligibility was 5-2-2015. The petitioners appeared in the preliminary as well as in the mains examination pursuant to such advertisement.

3. In the meantime, the petitioners qualified for the Subordinate Judicial Service of the State of Bihar in 28th batch. The petitioners accordingly joined the Subordinate Judicial Service of the State of Bihar in August 2015.

4. The result of the mains examination of the District Judge Entry Level (Direct from Bar) was published on 22-1-2016. Both the petitioners qualified in the mains examination.

5. 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 16-2-2016. The communication to one of the petitioners reads as under:

"To,
The District and Sessions Judge
Siwan
Dated, Patna 16-2-2016
Sir,

With reference to your Letter No. 80 dated 5-2-2016, I am directed to say that the Court have been pleased to reject the representation dated 5-2-2016 of Shri 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."

2. The High Court repelled the challenge holding that to permit the appellant to participate in the interview would be breaching the mandate of Article 233(2):

"11. ... Since before the date of interview, the petitioners joined the Judicial Service, the petitioners, cannot, in terms of clause (2) of Article 233 of the Constitution, be permitted to continue with

the selection process for District Judge Entry Level (Direct from Bar) as they are, now, members of the Judicial Service. Therefore, the petitioners have rightly not called for interview." (Vijay Kumar case [Vijay Kumar Mishra v. High Court of Judicature at Patna, 2016 SCC OnLine Pat 4063], SCC OnLine Pat para 11)

Hence, the appeal."

After considering Articles 233 and 236 of the Constitution of India and a catena of decisions, the Hon'ble Mr. Justice Jasti Chelameswar, for the Bench, at Paragraphs 6 to 14, ordered as follows:

"6. Article 233(1)

"233. Appointments 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." [stipulates that appointment of District Judges be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. However, Article 233(2) ["233. (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." declares that only a person not already in the service of either the Union or of the State shall be eligible to be appointed as District Judge. The said Article is couched in negative language creating a bar for the appointment of certain class of persons described therein. It does not prescribe any qualification. It only prescribes a disqualification.

7. It is well settled in service law that there is a distinction between selection and appointment. [Prafulla Kumar Swain v. Prakash Chandra Misra, 1993 Supp (3) SCC 181 at p. 190, paras 29-30 : 1993 SCC (L&S) 960 : (1993) 25 ATC 242] 29. At this stage, we will proceed to decide as to the meaning and effect of the words "recruitment" and "appointment". The term "recruitment" connotes and clearly signifies enlistment, acceptance, selection or approval for appointment. Certainly, this is not actual appointment or posting in service. In contradistinction the word "appointment" means an actual act of posting a person to a particular office.³⁰ Recruitment is just an initial process. That may lead to eventual appointment

in the service. But, that cannot tantamount to an appointment." Every person who is successful in the selection process undertaken by the State for the purpose of filling up of certain posts under the State does not acquire any right to be appointed automatically. [State of Bihar v. Secretariat Asstt. Successful Examinees Union 1986, (1994) 1 SCC 126 at p. 129, para 8 : 1994 SCC (L&S) 274 : (1994) 26 ATC 500] 8. It is now well settled that a person who is selected does not, on account of being empanelled alone, acquire any indefeasible right of appointment. Empanelment is at the best a condition of eligibility for purposes of appointment, and by itself does not amount to selection or create a vested right to be appointed unless relevant service rule says to the contrary. [See Shankarsan Dash v. Union of India, (1991) 3 SCC 47 : 1991 SCC (L&S) 800 : (1991) 17 ATC 95 and Babita Prasad v. State of Bihar, 1993 Supp (3) SCC 268 : 1993 SCC (L&S) 1076 : (1993) 25 ATC 598.] Textually, Article 233(2) only prohibits the appointment of a person who is already in the service of the Union or the State, but not the selection of such a person. The right of such a person to participate in the selection process undertaken by the State for appointment to any post in public service (subject to other rational prescriptions regarding the eligibility for participating in the selection process such as age, educational qualification, etc.) and be considered is guaranteed under Articles 14 and 16 of the Constitution.

8. 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 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 from 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 Article 233(2) nor contemplated under the scheme of the Constitution as it would not serve any constitutionally desirable purpose.

9. The respondents relied upon two judgments of this Court in a bid to sustain the judgment under appeal, Satya Narain Singh v. High Court of Judicature at Allahabad [Satya Narain Singh v. High Court of

Judicature at Allahabad, (1985) 1 SCC 225 : 1985 SCC (L&S) 196] and Deepak Aggarwal v. Keshav Kaushik [Deepak Aggarwal v. Keshav Kaushik, (2013) 5 SCC 277 : (2013) 3 SCC (Civ) 26 : (2013) 2 SCC (Cri) 978 : (2013) 2 SCC (L&S) 88] .

10. In first of the abovementioned judgments, the appellant-petitioners before this Court were members of the Uttar Pradesh Judicial Service. In response to an advertisement by the High Court, they applied to be appointed by direct recruitment to the Uttar Pradesh Higher Judicial Service (District Judges). It appears from the judgment "as there was a question about the eligibility of the members of the Uttar Pradesh Judicial Service to appointment by direct recruitment to the higher Judicial Service ..." (Satya Narain case [Satya Narain Singh v. High Court of Judicature at Allahabad, (1985) 1 SCC 225 : 1985 SCC (L&S) 196] , SCC p. 227, para 1), some of them approached the High Court by way of writ petitions which were dismissed and therefore, they approached this Court. It is not very clear from the judgment, as to how the question about their eligibility arose and at what stage it arose. But the fact remains, by virtue of an interim order of this Court, they were allowed to appear in the examination. The argument before this Court was that all the petitioners had practised for a period of seven years before their joining the Subordinate Judicial Service, and therefore, they are entitled to be considered for appointment as District Judges notwithstanding the fact that they were already in the Judicial Service.

11. It appears from the reading of the judgment in Satya Narain Singh case [Satya Narain Singh v. High Court of Judicature at Allahabad, (1985) 1 SCC 225 : 1985 SCC (L&S) 196] that the case of the petitioners was that their claims for appointment to the post of District Judges be considered under the category of members of the Bar who had completed seven years of practice ignoring the fact that they were already in the Judicial Service. The said fact operates as a bar undoubtedly under Article 233(2) for their appointment to the Higher Judicial Service. It is in this context this Court rejected their claim. The question whether at what stage the bar comes into operation was not in issue before the Court nor did this Court go into that question.

12. In Deepak Aggarwal [Deepak Aggarwal v. Keshav Kaushik, (2013) 5 SCC 277 : (2013) 3 SCC (Civ) 26 : (2013) 2 SCC (Cri) 978 : (2013) 2 SCC (L&S) 88] , the question before this Court was: (SCC p. 305, para 52)

"52. The question that has been raised before us is 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."

On an elaborate examination of the various aspects of the legal profession, the provisions of the Bar Council Act, etc., this Court concluded that Public Prosecutors, etc. did not cease to be advocates, and therefore, they could not be considered to be in the service of the Union or the State within the meaning of Article 232.

"101. ... In our view, none of the five private appellants, on their appointment as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, ceased to be "advocate" and since each one of them continued to be "advocate", they cannot be considered to be in the service of the Union or the State within the meaning of Article 233(2). The view of the Division Bench [Keshav Kaushik v. State of Haryana, 2010 SCC OnLine P&H 5043] is clearly erroneous and cannot be sustained." (SCC p. 331, para 101) and finally held that they are not debarred under Article 233. A judgment which has no relevance to the issue before us.

13. We are of the opinion that neither of the cases really dealt with the issue on hand. Therefore, in our opinion, neither of the above two judgments is an authority governing the issue before us.

14. For the abovementioned reasons, the appeal is allowed. Consequently, the writ petition (CWJC No. 3504 of 2016) filed by the appellants also stands allowed directing the respondents to permit the appellants to participate in the selection process without insisting upon their resigning from their current employment. If the appellants are found suitable, it is open to the appellants to resign their current employment and opt for the post of District Judge, if they so choose."

Hon'ble Mr. Justice Abay Manohar Sapre, in the supplementing judgement, at Paragraphs 18 to 23, held as follows:

"18. Article 233 deals with appointment, posting and promotion of the District Judges in the State. Clause (1) provides that appointment, posting and promotion of the 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. Clause (2) of Article 233 with which we are concerned here provides that a person not already in service of the Union or of the State shall only be eligible to be appointed as a District Judge if he has been for not less than 7 years as an advocate or a pleader and is recommended by the High Court for appointment.

19. Article 236(a) defines the words "District Judge" occurring in Chapter VI.

20. Reading of clause (2) of Article 233 shows that the "eligibility" of a person applying for the post of District Judge has to be seen in the context of his appointment. A fortiori, the eligibility of a person as to whether he is in the service of the Union or the State is required to be seen at the time of his appointment for such post and not prior to it.

21. Mr Ranjit Kumar, Solicitor General of India appearing for the respondent (High Court), however, contended that the word "appointed" occurring in Article 233(2) of the Constitution should necessarily include the entire selection process starting from the date of submitting an application by the person concerned till the date of his appointment. It was his submission that if any such person is found to be in service of the Union or the State, as the case may be, on the date when he has applied then such person would suffer disqualification prescribed in clause (2) of Article 233 and would neither be eligible to apply nor be eligible for appointment to the post of District Judge.

22. This submission though looks attractive, is not acceptable. Neither the text of Article and nor the words occurring in Article 233(2) suggest such interpretation. Indeed, if his argument is accepted, it would be against the spirit of Article 233(2). My learned Brother for rejecting this argument has narrated the consequences, which are likely to arise in the event of accepting such argument and I agree with what he has narrated.

23. In my view, there lies a subtle distinction between the words "selection" and "appointment" in service jurisprudence. (See Prafulla Kumar Swain v. Prakash Chandra Misra [Prafulla Kumar Swain v. Prakash Chandra Misra, 1993 Supp (3) SCC 181 : 1993 SCC (L&S) 960 : (1993) 25 ATC 242] .) 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".

19. Though Mr.G.Rajan, learned counsel for the petitioner invited the attention of this Court, to the distinction made in selection and appointment in service jurisprudence, as held in Prafulla Kumar Swain v. Prakash Chandra Misra reported in 1993 Supp. (3) SCC 181, considered in Vijay Kumar Mishra's case and contended that there is no inhibition in participating in the selection process of District Judge (Entry Level) in Tamil Nadu, on the facts of the case on hand, the said judgment is inapposite for the reason that in Vijaya Kumar Mishra's case, the participants therein were from judicial service of the State of Bihar. The words "the service" in Article 233(2) of the Constitution of India, means only judicial service. Contention of the petitioner teaching law in college is ancillary to judicial service, cannot be accepted.

20. In the light of the above decisions and discussion, prayer sought for, cannot be granted. Writ Petition is dismissed.

sd/-

Assistant Registrar(insp.cell)

// True Copy//

Sub Assistant Registrar

mvs/skm

To

1. The Registrar General
High Court of Madras
Chennai 600 104.
2. The Chief Secretary
Government of Tamil Nadu
The Secretariat, Fort St. George
Chennai 600 009.
3. The Secretary to Public
(Special - A) Department
Government of Tamil Nadu
The Secretariat, Fort St. George
Chennai 600 009.

W.P.No.29762 of 2018

SV(CO)

RMP(08/07/2019)