



W.A.(MD)No.991 of 2015

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 22.08.2023

PRONOUNCED ON: **22.12.2023**

CORAM:

THE HONOURABLE **DR.JUSTICE ANITA SUMANTH**

AND

THE HONOURABLE **MR.JUSTICE R.VIJAYAKUMAR**

W.A.(MD)No.991 of 2015

and

M.P.(MD)No.3 of 2015

The Tamil Nadu Public Service Commission,
Rep. by its Secretary,
No.1, Greams Road,
Commercial Taxes Annexe Building,
(Now functioning at Frazer Bridge Road,
V.O.C.Nagar, Chennai – 600 003.)

...Appellant

/Vs./

1.N.Paranthaman

2.State of Tamil Nadu,
Rep. by its Secretary,
Law Department,
Secretariat, Fort St.George,
Chennai – 600 009.

...Respondents

PRAYER:- Writ Appeal - filed under Clause XV of Letters Patent Act, to



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allow this Writ Appeal by setting aside the order dated 09.06.2014 passed in W.P.(MD)No.8989 of 2012 on the file of this Court.

For Appellant : Mr.J.Anandkumar
Standing Counsel
For Respondents : Mr.K.P.S.Palanivelrajan
Senior Counsel
for Mr.K.Prabhakaran (R1)
Mr.K.S.Selvaganesan (R2)
Additional Government Pleader

JUDGMENT

(Judgment of the Court was made by **DR.ANITA SUMANTH, J.**)

The appellant is the Tamil Nadu Public Service Commission (TNPSC) and has challenged an order passed on 09.06.2014 in a Writ petition filed by the first respondent, a law graduate.

2. The facts as relevant to decide this matter are that the writ petitioner, a law graduate, had enrolled himself with the Bar Council of Tamil Nadu (BCTN) on 14.12.2001. He was in practice as a lawyer till June 2008. His father was a Government servant employed in the



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Meenakshi Government Arts College for Women, Madurai and had passed away in harness. This paved the way for the compassionate appointment of the Writ petitioner and hence, post June 2008, he had ceased practice.

3. While in service, TNPSC had called for applications for the post of Assistant Public Prosecutor Grade-II through open recruitment and the Writ petitioner had applied. Though he passed the written examination, he had not been called for an interview and the reason adduced was the bar under 5(B) of the TNPSC Notification.

4. That clause stipulated the eligible qualifications, which were that the applicant must possess a Bachelor of Law Degree of any University or Institution recognized by the University Grants Commission (UGC) for the purpose of its grants and must be a Member of the Bar with an active practice in Criminal Courts for a period of not less than five years.

5. The order challenged in Writ Petition reads thus,

*“The attention of Thiru. Paranthaman.N
(Reg.No.01003147) is drawn to the reference cited and*



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he is informed that his application for appointment by direct recruitment to the post of Assistant Public Prosecutor, Grade-II in the Tamil Nadu General Service, 2009-2010 is rejected subsequently as he is inemployment as Typist in the Government Arts College, Melur with effect from 18.01.2008 and he is not a member of the Bar on the date of Commission's Notification viz. 12.02.2011 as prescribed in Para 5(B) of the said Notification."

6. The Notification also stipulated that a No Objection Certificate (NOC) be obtained from the employer of persons in certain categories of employment and the Writ petitioner had obtained such NOC from his employer, that is, the Principal, Government Arts College, Melur. The specific bar put against the Writ petitioner is that he was not a 'Member of the Bar' at the time he had applied, since admittedly, he had surrendered his 'certificate of practice' when he opted for Government employment.

7. The Writ Court has allowed the Writ petition on the ground that the applicant had been permitted to write the qualifying examination in which he had been successful and moreover had obtained an NOC



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from his employer. The impugned order was set aside and the appellants were directed to issue notice to the Writ petitioner for an interview, if he was otherwise eligible, within a stipulated time. It is as against that order, that the TNPSC is in appeal.

8. Mr.J.Anand Kumar, learned Standing Counsel for TNPSC would point out that the Writ petitioner had admittedly suspended practice on 18.01.2008, when he took up employment in the Government Arts College. The date of Notification issued by TNPSC is 15.03.2011. Though, admittedly, the Writ petitioner had completed five years of practice even prior to the suspension of the same, he is expected to be a member of the Bar as on the date of issuance of Notification, meaning thereby that he was to have been in active practice on the aforesaid date.

9. In the present case, the Writ petitioner had suspended practice on 18.01.2008 and thereafter, has admittedly, not resumed practice at all. He is thus not entitled to apply for the post of Assistant Public Prosecutor Grade-II.

10. The appellant argues that the object behind the



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requirement that the applicant must be a Member of the Bar at the time of application, is continuity of practice, to ensure that the candidate for a public office is well versed with the law and up to date with all developments. He relies on the decision of this Court in *K.Pradeep V. The Secretary to Government Public (Special-A) Department*¹ in support of his submission that, there must be continuity of practice to enable an applicant to apply for a post of Public office or Judge.

11. He also relies on a decision in *Saumya M.S V. State of Kerala and ors*². that deals with the impact of voluntary suspension of practice. The Division Bench has held there that, bearing in mind the Rules of the Bar Council of India, once an advocate suspends his practice he ceases to have the right to practice so long as the voluntary suspension is in force.

12. He refers to a decision of a learned Single Judge of this Court in *S.Balasubramanian V. The Secretary, Tamil Nadu Public Service Commission*³ and *K. Thaimanavar V. Government of Tamil Nadu*

¹ 2004-1-L.W.285

² OP (KAT).No.39 of 2022 dated 15.03.2022

³ W.P.(MD).No.237 of 2014, decision dated 13.12.2018



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*and ors.*⁴ where the Court considered the interpretation of the phrase ‘active practice’ under the Advocate’s Act, 1961 among other questions.

13. He also relies on the decision in *Deepak Aggarwal V. Keshav Kaushik and ors.*⁵, specifically para 23 thereof, which also dealt with appointment of Public Prosecutors. Reliance is also placed on the judgment in *Dheeraj Mor V. Hon’ble High Court of Delhi* [2020-5-L.W. 604] particularly paragraph 45 thereof, which according to him is straight on the point arising in this case.

14. Per contra, Mr. K.P.S.Palanivelrajan, learned Senior Counsel who appears for the respondent, would defend the order passed by the Writ Court stating that it has been passed on a proper appreciation of the matter. The Writ petitioner has filed a compilation containing certain documents relating to the appointments of Tmt.Muthuvalli and Tmt.Rameshwari.

15. Both those individuals are stated to have been working as Section Officer and Executive Officer in HR and CE Department till 09.01.2013 and 29.01.2013 respectively. The TNPSC Notification in the

⁴ W.P.No.17802 of 2015, decision dated 31.07.2015

⁵ (2013) 2 AD (SC) 177



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present case has been issued on 15.03.2011 and hence according to the Writ petitioner their appointments have been made on the identical factual position as arise in this matter. He thus urges that the same interpretation be accorded to the present matter also.

16. We are not impressed with this argument for the reason that the eligibility or otherwise of an applicant must be based on a proper interpretation of the Notification and Rules concerned and no person can demand parity with other appointments sans such a verification. If, at the end of the day, we conclude adverse to the writ petitioner, it is for the authorities to take appropriate action in those matters in accordance with law.

17. Writ Petitioner also relies on the decision in *S.Kasiramalingam V. The Chief Secretary, Government of Tamil Nadu*⁶ specifically paragraph 28, which refers, in turn, to the Judgment of the Hon'ble Supreme Court in *Mahesh Chandra Gupta V. Union of India*⁷ and an order of the Division Bench of the Delhi High Court, *D.K.Sharma*

⁶ 2012 (5) CTC 829

⁷ [2009 (8) SCC 273]



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*V. Union of India*⁸, in the context of the Article 217(2)(b) of the Constitution of India.

18. We have heard learned counsel in extenso and have devoted our anxious considerations to the rival contentions advanced. The admitted position in the matter is that Writ petitioner had enrolled as an advocate on 14.12.2001 and was in active practice till 18.01.2008, when he voluntarily suspended practice, preferring instead to join Government employment. He has been in such employment thereafter continuously and no material has been brought before us to indicate that he had revoked the suspension and had practiced as an advocate for any period after 18.01.2008.

19. The Notification of the TNPSC is dated 15.03.2011. The Writ Court has accepted the submission of the Writ petitioner that, with the production of the NOC from his employer and the period of practice till 18.01.2008, his eligibility for application stands confirmed. The relevant clauses in the Notification and the instructions to candidates which form part of the Notification calling for applications are extracted

⁸ W.P.(C).No.2231 of 2011



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below:-

“5. QUALIFICATIONS:-

.....

(B) EDUCATIONAL QUALIFICATION:-

Candidates should possess the following or its equivalent qualification on the date of this Notification, viz 12.02.2011

(i) B.L.Degree of any University or Institution recognized by the University Grants Commission for the purpose of its grant

AND

(ii) Must be a Member of the Bar and must have had active practice in Criminal Courts for a period of not less than 5 years.”

“11. NO OBJECTION CERTIFICATE:-

For details please refer to paragraph 15(g) of the Commission’s Instructions, etc. to candidates.

No Objection Certificate

Persons who are in the service of the Indian Union or a State in India or in the employment of Local Bodies or Universities, or Quasi Government Organizations constituted under the authority of the Government of India or of a State in India whether in regular service or in a temporary service need not send their applications through their Head of Department of Employer. Instead, they may directly apply to the Commission duly informing their Employer in writing that they are applying for the



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particular recruitment and with the condition that they should produce “No Objection Certificate” in the form prescribed below, from an authority not below their next Superior Officer.”

20. The above clause has to be read in conjunction with Clause 2 of the General Eligibility Conditions which states in sub-clause (d) as follows:

“2.GENERAL ELIGIBILITY CONDITIONS:

.....

(d) CANDIDATES IN UNION/STATE GOVERNMENT SERVICE:

that on the date of Notification for the purpose of direct recruitment he was not in the service of the Indian Union or of a State in India.

Note:-

For the purpose of this clause a person will be deemed to be not in the service of the Indian Union or of a State in India.

(i) If a period of five years has not elapsed since his first appointment to a service of the Indian Union or of a State in India.

(ii) If he belongs to one of the Scheduled Castes or Scheduled Tribes or to one of the MBC/DC and Backward Classes.”

21. The Writ petitioner has obtained a certificate from the employer dated 27.06.2012 to the effect that he has been in service from



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18.01.2008 till 27.06.2012. Clause 2(d) states that candidates in Union/State Government service must provide a certificate from the employer that he was not in the service of the Indian Union or of a State in India and the note below states that, a person will be deemed to not be in the service of the Indian Union or the State if a period of five years had not elapsed since his first appointment to the service of the Indian Union or State.

22. The second deeming Clause relates to the applicant belonging to Scheduled Caste/Schedule Tribe/Most Backward Class (MBC)/DC/Backward class, and the benefit thereof is specifically available in this case as the Writ petitioner admittedly belongs to the DC. Since the certificate issued by the employer reveals that the employment in the Government Arts College, Melur is only for a period of four years and five months (Approx.), it is less than five years and hence, the Writ petitioner is deemed not to be in the service of the State.

23. This position will enure to the benefit of the Writ petitioner. But the question is whether that is sufficient to demolish the



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argument of the applicant to the effect that the TNPSC cannot employ anyone other than a practicing advocate, under the Notification in question, and this issue would call for an answer. The Writ petitioner has voluntarily surrendered his practice on 18.01.2008. He had, admittedly not resumed practice as an advocate thereafter. We must thus arrive at a decision as to the consequences of the surrender.

24. For this purpose, one would have to refer to the relevant provisions in the Advocates Act, 1961 (in short 'Act') as well as the Rules framed by the Bar Council of India and the State Bar Council. Section 2 (1)(a) of the Act defines an 'Advocate' to mean '*an advocate entered in any roll under the provisions of this Act*'. Section 2(1)(k) of the Act defines 'Roll' to mean '*a roll of advocates prepared and maintained under the Act*' and Section 2(1)(n) defines 'State roll' to mean '*a roll of advocates prepared and maintained by State Bar Council under Section 17 of the Act*', which mandates that the State Bar Council so maintains a Role of advocates.

25. Upon enrollment, a certificate of enrollment is issued by



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the State Bar Council as required under Section 22 of the Act. Section 30 adumbrating the rights of the Advocates states that advocates have the right to practice throughout the territories to which the Act applies, in all Courts including the Supreme Court, before a Tribunal, before a person legally authorized to take evidence or before any other authority or person before whom the advocate can practice by virtue of the law in force for the time being.

26. There is a bar on any other person practicing the profession of law and Section 33 of the Act expressly bars such activity by any person unless he is enrolled as an advocate under that Act. In the event of any malpractice as aforesaid, Section 35 of the Act provides for necessary action to be taken by the disciplinary committee of the State Bar Council. Importantly, Section 35(4) of the Act states that where an advocate is suspended from practice under Clause (c) of sub section (3), he shall, during the period of suspension, be debarred from practicing in any court or before any authority or person in India.

27. Section 41 of the Act deals with alteration in roll of



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Advocates and states that where an order is made reprimanding or suspending an advocate or removing an advocate from practice, his name shall be struck off from the State roll and the certificate of practice issued to him will be recalled.

28. The Bar Council of India Rules set out a bar to the effect that an advocate shall not be a full time salaried employee of any person, Government, Firm, Corporation or concern, as long as he continues to practice, and shall, on taking up any employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practice as an advocate so long as he continues in such employment.

29. Rule 43 stipulates that where an advocate has taken up full time/part time service or engages in business or any avocation which is inconsistent with the practice as an advocate, he shall make a declaration to that effect to the respective State Bar Council where he is enrolled and if no such declaration is made, Bar Council may pass orders suspending his practice. The original certificate of enrollment would have to be sent to the State Bar Council with the intimation of his suspension of



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practice.

30. Rule 5(2) envisages that where an advocate who has suspended practice desires resumption of his service, he may apply to the Secretary of the State Bar Council for such resumption in line with the requirements of that Rule. This Rule assumes importance in this case.

31. The phrase used in clause 5(B)(ii) is 'member of the Bar' which, in our considered view, connotes an individual who, at the time of responding to the call under the Notification, must satisfy the requirement that he is a member of the Bar. An individual who has surrendered his certificate of practice cannot, in our view, be considered to be a member of the Bar.

32. Moreover the procedure for resumption of practice is stipulated in the Rules. Rule 5(3) provides for the Enrolment Committee of the State Bar Council to permit resumption of practice and return of enrolment certificates to the individual with necessary endorsement if the advocate has not incurred any of the disqualifications to such practice in the interim. The cumulative effect of the above provisions



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and Rules is that once an advocate voluntarily suspends his practice following the procedure laid down there is a specific procedure that he has to follow in order to resume practice.

33. In the present case, the voluntary surrender of practice has been on 18.01.2008 and admittedly the Writ petitioner has not sought resumption of practice prior to applying to the post of Assistant Public Prosecutor Grade –II. Hence, we are of the considered view that he cannot be considered as ‘a member of the Bar’ as on the date of the Notification.

34. It is true that the clause stipulating the requirement of the NOC indicates, at first blush, that there are certain situations that would form an exemption to the requirement of membership in the Bar as on date of Notification. This is the clause which has appealed to the Writ Court in allowing the Writ petition. Why else would the Notification contain a clause for the applicant to produce a NOC from his employer, if the intention was not to consider the application of candidates in employment on the date of Notification?



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requirement, which would endow, by itself, the applicant with the requisite qualification but is to be seen and read along with clause 2(d) of the Instructions to candidates and the notes. The applicant has still to satisfy the condition of ‘membership of the Bar’ independently.

39. A combined reading of the statutory provisions and Rules as noticed in the paragraphs supra would conclusively establish that the Writ petitioner is not a member of the Bar as on the date of the Notification as admittedly, the he has not resumed his certificate of practice.

40. In *Dheeraj Mor* (supra) the question that arose related to whether officers in judicial services of States who held posts below that of District Judges could compete with the members of the Bar with seven or more year practice, for direct recruitment to the post of District Judge.

41. Three judges of the Hon’ble Supreme Court referred to the judgment in *Chandra Mohan V. State of Uttar Pradesh and Ors*⁹ to the effect that those who held Civil posts under the State of the Union are rendered ineligible for appointment under Article 233(2) to the post of

⁹ AIR 1966 SC 1987



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District Judge. Equally, those holding posts other than District Judge are not entitled to consideration on account of the negative phraseology used in Article 233 (2) expressly debarring those persons in the service of the Union or State.

42. At paragraph 27, it is stated as follows:-

“27.The upshot of the above discussion is that the Constitution makers clearly wished to draw a distinction between the two sources of appointment to the post of District Judge. For one, i.e. Advocates, eligibility was spelt out in negative phraseology, i.e. not less than seven years’ practice; for judicial officers, no eligibility condition was stipulated in Article 233 (2): this clearly meant that they were not eligible to be appointed (by direct recruitment) as they did not and could not be considered advocates with seven years’ practise, once they entered the judicial service. The only channel for their appointment, was in accordance with rules framed by the High court, for promotion (as District Judges) of officers in the judicial service (defined as those holding posts other than District Judges, per Article 236[b]).”

The conclusion at paragraph 45 is as follows:-

“45.In view of the aforesaid discussion, we are of the opinion that for direct recruitment as District Judge as against the quota fixed for the



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advocates/pleaders, incumbent has to be practicing advocate and must be in practice as on the cutoff date and at the time of appointment he must not be in judicial service or other services of the Union or State. For constituting experience of 7 years of practice as advocate, experience obtained in judicial service cannot be equated/combined and advocate/pleader should be in practice in the immediate past for 7 years and must be in practice while applying on the cutoff date fixed under the rules and should be in practice as an advocate on the date of appointment. The purpose is recruitment from bar of a practicing advocate having minimum 7 years' experience."

43. In the decision in the case of *K.Pradeep* (supra), the Division Bench of this Court poetically, likens the law, not to still water, but to a running stream, thus, necessitating a lawyer to be in continuous practice so has to be eligible to become a Judge at any level in the judiciary. They refer to the judgment in *Sushma Suri V. Govt. of National Capital Territory of Delhi*¹⁰ to the effect that, quite apart from the minimum experience required, the candidates should have been advocates practicing at the time when such appointment is sought.

44. In the case of *Deepak Aggarwal* (Supra), three judges of

¹⁰ 1999 (1) SCC 330



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the Hon'ble Supreme Court considered the correctness or otherwise of the selection of certain candidates to the post of Additional District and Sessions Judge in the Haryana Superior Judicial Service. The candidates had been holding the posts of District Attorney/Additional District Attorney/Public Prosecutor/Assistant Public Prosecutor/Assistant Advocate General and the question was whether they were eligible for appointment to the post of District Judge under Article 233 of the Constitution of India.

45. The candidates were full time employees of the Government. Their service was regulated by the statutory Rules of the State and they had been appointed by direct recruitment through the Public Service Commission.

46. In that case, the candidates were in regular Government service with either the Union or the State as Deputy Advocate General/ Assistant District Attorney/Prosecutor or Law Officers appointed as advocates for conducting cases in the Court. The arguments advanced on their behalf was that, the nature of their functions would remain the



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same, as they were always officers of the Court.

47. The Bench assessed their eligibility in the following terms

holding as follows:-

“87. The Division Bench has in respect of all the five private appellants – Assistant District Attorney, Public Prosecutor and Deputy Advocate General – recorded undisputed factual position that they were appearing on behalf of their respective States primarily in criminal/civil cases and their appointments were basically under the C.P.C. or Cr.P.C. That means their job has been to conduct cases on behalf of the State Government/C.B.I. in courts. Each one of them continued to be enrolled with the respective State Bar Council. In view of this factual position and the legal position that we have discussed above, can it be said that these appellants were ineligible for appointment to the office of Additional District and Sessions Judge? Our answer is in the negative. The Division Bench committed two fundamental errors, first, the Division Bench erred in holding that since these appellants were in full-time employment of the State Government/Central Government, they ceased to be ‘advocate’ under the 1961 Act and the BCI Rules, and second, that being a member of service, the first essential requirement under Article 233(2) of the Constitution that such person should not be in any service under the Union or the State was attracted. 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 is clearly erroneous and cannot be sustained.

88. As regards construction of the expression, “if he has been for not less than seven years an advocate” in Article 233(2) of the Constitution, we think Mr. Prashant Bhushan was right in



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his submission that this expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of 'has been'. The present perfect continuous tense is used for a position which began at some time in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as an advocate on the date of application.

89. 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."

48. The conclusion was that all the applicants fulfilled the criteria as on the date of the application, as they had never ceased to be advocates and had continued their Membership in the Bar despite their employment in various capacities.

49. In light of the discussion as above, we are inclined to intervene in the order of the Writ Court and proceed to set aside the same. This Writ appeal is allowed. No costs. Connected Miscellaneous



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petition is closed.

[A.S.M.J.] & [R.V.J.,]
22.12.2023

Index : Yes/No
Speaking order/Non-Speaking order
Neutral Citations: Yes/No
mpl

TO

1. The Secretary,
Law Department,
Secretariat, Fort St. George,
Chennai – 600 009.

DR.ANITA SUMANTH, J.
AND
R.VIJAYAKUMAR, J.
mpl



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Pre-delivery Judgment made in
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Dated: 22.12.2023