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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 16555/2022, CM APPLs.52062/2022 AND 13863/2023**

MS. NEETU NAGAR

..... Petitioner

Through: Mr. Abhaya K. Behera, Sr. Adv. with
Mr. Ankur Chhibber, Advocate.

versus

GOVT. OF NCT OF DELHI AND ANR.

..... Respondents

Through: Mrs. Avnish Ahlawat, SC with Ms.
Tania Ahlawat, Mr. Nitesh Kumar
Singh, Ms. Palak Rohmetra, Ms.
Laavanya Kaushik and Ms. Aliza
Alam, Advocates for R-1.
Dr. Amit George, Mr. Amol Acharya,
Mr. Arkaneil Bhounik, Mr. Piyo
Harold Jaimon and Mr. Rayadurgam
Barath, Advocates for R-2/DHC.

Reserved on : 20th April, 2023

Date of Decision: 24th April, 2023

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CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE SAURABH BANERJEE

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J U D G M E N T

MANMOHAN, J:

ISSUE

1. The issue that arises for consideration in the present writ petition is whether the past service rendered by the petitioner as a Civil Judge (Junior Division) with the Haryana Civil Service (Judicial Branch) ('HCS') can be counted for the purpose of calculating the qualifying service viz. ten years as Civil Judge (Junior Division), for appointment to the Delhi Higher Judicial Service ('DHJS') by promotion on the basis of merit through Limited Departmental Competitive Examination ('LDCE') in terms of Rule 7(1)(b) of the Delhi Higher Judicial Services Rules, 1970 ('DHJS Rules')

FACTS

2. The facts germane to the present case are that the petitioner joined the HCS on 27th June, 2012 as a Civil Judge (Junior Division). Subsequently, the petitioner successfully participated in the Delhi Judicial Service Examination, 2015 and joined the Delhi Judicial Service ('DJS') on 11th May, 2018 through proper channel i.e., after getting relieved on 10th May, 2018 from the post of Civil Judge (Junior Division)-cum-Judicial Magistrate First Class, Kurukshetra, Haryana.

3. Based on her past service in the HCS, the petitioner was exempted from undergoing mandatory induction training upon her request and was given benefit of her past service in HCS for the limited purpose of being exempted from training in the DJS, carry forward of leave, Leave Travel Concession ('LTC') and pay protection.

4. The petitioner vide letter dated 26th July, 2022 requested this Court to allow her to appear for the LDCE 2022 for promotion to the DHJS by counting her past service with the HCS towards the qualifying service of ten years as Civil Judge (Junior Division). The petitioner's request was placed before the Examination Committee of this Court.

5. The Committee, in its meeting held on 29th August, 2022, rejected the representation of the petitioner. By this Court's letter dated 7th September, 2022, the petitioner was informed through the concerned learned Principal District and Sessions Judge that her request had been considered and rejected by this Court.

6. By means of the present petition, the petitioner seeks to challenge the aforesaid decision of the Committee.

ARGUMENTS ON BEHALF OF THE PETITIONER

7. Learned senior counsel for the petitioner stated that the petitioner was initially appointed in the HCS on 6th June, 2012 and in continuation had joined DJS, without even a single day's break. He emphasised that the level of pay held by the petitioner both in HCS and DJS was the same i.e. 27,700-44,770/-. Consequently, according to him, the petitioner had made a lateral entry in DJS.

8. He stated that the provision for making Civil Judge (Junior Division) with ten years qualifying service eligible for promotion in ten per cent LDCE quota for DHJS came into effect only from 19th April, 2022 by virtue of judicial order of the Supreme Court of India in ***All India Judges Association Vs. UOI & Ors., (2022) 7 SCC 494***. He contended that the competent authority whilst taking the impugned decision in the Minutes of

the Meeting dated 29th August, 2022 had not considered the above judgment of the Supreme Court.

9. He stated that this is despite the respondents have clearly admitted that the petitioner is entitled to the following benefits on account of the past service rendered by the petitioner:-

- a. Exemption from training in DJS considering her judicial experience/training at HCS.
- b. Carry forward of leave.
- c. Carry forward of LTC.
- d. Protection of pay.
- e. For the purposes of pension.

10. He contended that the aforesaid benefits have been given to the petitioner only by applying the DOP&T O.M. dated 17th August, 2016, meant for corresponding level of Central Govt employees. According to him, the same was done by applying Rules 33 and 27 of Delhi Judicial Service Rules, 1970 ('DJS Rules') and DHJS Rules which respectively deal with the 'Residuary Matters' and lay down that if no provision or insufficient provision is available in the rules or any matter, the same shall be governed by the instructions of Central Government pertaining to persons "... ..holding corresponding posts in connection with the affairs of Union of India... ..". He submitted that there is no credible reason as to why the benefit of past service be given in respect of other conditions of service and not for qualifying service for promotion.

11. He emphasised that the Government of India for all its employees have issued O.M. dated 1st September, 1998 for counting of past service for completion of qualifying service of promotion in the new

department/organisation. He submitted that the interpretation of O.M. dated 1st September, 1998 is no more *res integra* as it has been interpreted by the Apex Court in consonance with the claim of the petitioner in ***Renu Mullick vs. Union of India, (1994) 1 SCC 373.***

12. He stated that a Committee of this Court dealing with the issue of complaints of sexual harassment against officers of DHJS and DJS had on an earlier occasion itself applied the residuary provisions of DHJS and DJS. Similarly, this Court in ***P.K. Jain, Distt. & Sessn. Judge v Government of NCT of Delhi, C.W. No. 542 of 1994*** had also applied the same residuary provisions in matters relating to medical attendance for District Judge.

13. Consequently, he stated that by applying the same Rule 33 of DJS Rules, the petitioner became eligible to count her past service for the purposes of competing in the ten per cent LDCE quota in DHJS.

14. He lastly stated that there is an urgency in the matter as the interview of the petitioner has been fixed for 24th April, 2023.

ARGUMENTS ON BEHALF OF THE RESPONDENT NO.2

15. *Per contra*, learned counsel for the respondent No.2 stated that the judicial officers appointed to HCS and DJS are governed by different service rules and controlled by different High Courts and thus, the conditions of service of persons governed by different rules cannot be sought to be equated as a matter of right.

16. He submitted that Rule 2(e) of the DJS Rules categorically defines the word ‘service’ as the ‘*Delhi Judicial Service*’ and there is nothing in the DJS Rules or the DHJS Rules which stipulates that the service rendered as a judicial officer in another State is to be counted for calculating the qualifying service viz. ten years as Civil Judge (Junior Division) for

appointment to the DHJS by promotion on the basis of merit through LDCE in terms of Rule 7(1)(b) of the DHJS Rules. He further stated that in the present case, there is nothing to the contrary in either the DJS Rules or the DHJS Rules in relation to the meaning of the term ‘service’ in the context of the controversy that is the subject matter of the present petition.

17. He stated that the argument that since the first stage of the Assured Career Progression Scheme (‘ACPS’) scale in the grade of Civil Judge (Junior Division) was granted to certain officers of DJS after counting the time spent by them in the judicial service of another state, therefore, the same yardstick should be used to recognise the past service of the petitioner with the HCS for the purpose of qualifying service for the LDCE is contrary to law. He pointed out that the ACPS Committee for promotion to Civil Judge (Senior Division) of the High Court of Delhi in its meeting held on 10th August, 2015 considered the matter with regard to grant of first stage of ACPS scale in the grade of Civil Judge (Junior Division) to the officers of the DJS, including those officers who had served in the judicial service of another state. The said Committee granted them the benefit of past service while granting the first stage of ACPS scale. However, he emphasised that a categorical caveat was entered while granting the benefit, which is reproduced hereinbelow:-

“...It is however, made clear that the grant of 1st stage of ACP Scale in the grade of Civil Judge (Junior Division) after counting their past service would not confer any right of seniority to the aforesaid officers either for the purpose of grant of the grade of Civil Judge (Sr. Division) or for promotion to Delhi Higher Judicial Service either under 65% promotion quota or under 10% limited departmental competitive examination quota.”

(emphasis supplied)

18. He submitted that the petitioner cannot seek advantage of the aforesaid decision to the extent it favours her, while jettisoning the unpalatable part. Yet further, according to him, the very grant of ACPS scale is intended to compensate for the lack of promotional avenues, and the petitioner's argument is contrary to the very underlying rationale of the ACPS.

19. He contended that the benefits of carry forward of leave, LTC, and pay protection, all of which fall within the monetary *genre*, were granted to the petitioner in accordance with the guidelines provided in O.M. dated 17th August, 2016 of the Government of India. He clarified that due to the shortage of DJS officers for holding vacant courts, induction training is exempted in case the officer concerned has undergone induction training in another State and has held Court in another State. Thus, the exemption from induction training of the petitioner has no relation whatsoever with counting of the past service for meeting the eligibility criteria for the LDCE. He also pointed out irrespective of the above, the petitioner was not and could not be extended benefits qua eligibility or seniority or promotion as these were *de hors* the DJS Rules

20. He submitted that the entire edifice of the petitioner's case is contrary to the well settled principle of law that the essential qualification for a post is solely for the employer to determine.

21. He stated that the unarticulated premise of the petitioner's case is to effectively seek a *mandamus* to amend the rules in a particular manner. He submitted that it is a settled principle of law that under Article 226 of the Constitution of India, no *mandamus* can be issued to a rule-making authority to formulate a new rule or to amend or modify an existing rule in a particular

manner. Similarly, no *mandamus* can be issued to undertake the task of legislation under Article 309 of the Constitution of India.

ARGUMENTS ON BEHALF OF THE RESPONDENT NO.1

22. Respondent No.1 adopted the arguments addressed by the learned counsel for Respondent No.2 and did not advance any arguments from their side

REJOINDER ARGUMENTS

23. In rejoinder, learned senior counsel for the petitioner reiterated that the petitioner has been holding the same/identical position in the same/identical pay scale both in HCS (Judicial Branch) and DJS without even a single day's break. He emphasised that the respondents have given the benefit of past service in respect of continuous service in DJS by applying the O.M. of Government of India dated 17th August, 2016 by applying Rule 33 of the DJS Rules.

24. He submitted that Government is bound to follow the rules and standards they themselves had set on pain of their action being invalidated. In support of his submission, he relied upon the judgment of the Supreme Court in ***Ramana Dayaram Shetty vs. International Airport Authority of India & Ors., (1979) 3 SCC 489.***

25. He stated that the respondents' reliance upon a Full Court Resolution of this Court dated 10th August, 2015 is misconceived and it does not deal with the issue of qualifying service but deals with the issue of grant of ACP benefits by counting past service only. So, the said minutes cannot be said to be a conscious decision regarding counting of past service for the purpose of qualifying service. Furthermore, the said decision is clearly and distinctly contrary to Rule 27 of the DHJS Rules. Even further, the said

decision at the most is confined to the grant of seniority which the petitioner is not claiming in the instant writ petition. Hence, according to him, the contention involved in the present writ petition needs to be considered afresh and not to be confined to the said minutes of meetings.

COURT'S REASONING

HCS AND DJS ARE NOT DEPARTMENTS OF AN ALL INDIA JUDICIAL SERVICE. THE PETITIONER HAD TO COMPLETE THE PRESCRIBED ELIGIBILITY CRITERIA OF SERVICE IN THE FEEDER GRADE i.e. DJS.

26. Having heard learned counsel for the parties, this Court is of the view that the assumption and presumption underlying the arguments of the petitioner that there is an All India Judicial Service for judicial officers. However, HCS and DJS are distinct judicial services of two different States governed by different service rules and controlled by different High Courts. The Constitutional Scheme as reflected in Articles 233 and 235 is that each High Court of the State has a control over certain Courts under its jurisdiction. Consequently, this differentiation is constitutionally sanctioned.

27. In the present case, the petitioner has voluntarily resigned from a distinct judicial service i.e. HCS and thereafter freshly joined another distinct service i.e. DJS after clearing the examination. Pertinently, the case of petitioner is neither of absorption nor of compassionate appointment nor of deputation nor of transfer but that of *simpliciter resignation*. Furthermore, since DJS and HCS are not departments of an All India Judicial Service, the petitioner had to complete the prescribed eligibility criteria of service in the feeder grade i.e. DJS. Consequently, the assumption and presumption underlying the arguments of the petitioner that there is an All India Judicial Service for judicial officers is contrary to facts and untenable in law.

28. It is settled law that the eligibility for sitting in the examination has to be determined in accordance with the Rule which prescribes the criteria for eligibility. The Supreme Court in ***Maharashtra Public Service Commission vs. Sandeep Shriram Warade and Ors., (2019) SCC 362*** has held as under:-

“9. The essential qualifications for appointment to a post are for the employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work. The court cannot lay down the conditions of eligibility, much less can it delve into the issue with regard to desirable qualifications being on a par with the essential eligibility by an interpretive re-writing of the advertisement. Questions of equivalence will also fall outside the domain of judicial review.....”

29. Admittedly, the condition precedent for participating in the LDCE examination is the fulfilment of ten years of qualifying service. As rightly pointed out by the learned counsel for the respondent according to Rule 2(e) of the DJS Rules ‘service’ means the Delhi Judicial Service. There being no provision for inter-changeability or counting of previous service in any other service in the said DJS Rules, this Court cannot extend such benefit beyond the prescribed purview thereof.

30. Further, no instance has been shown to this Court where the service rendered as a judicial officer in another State has been counted towards the qualifying services [ten years of Civil Judge (Junior Division)] for appointment to the DHJS. Consequently, the judgment of the Supreme Court in ***Ramana Dayaram Shetty*** (supra) has no application and a judicial officer can sit in the LDCE examination only if he/she has completed ten years of service in the Delhi Judicial Service.

THE RULES ARE CATEGORICAL AND PROVIDE FOR EXCEPTION, THEREFORE ONE CANNOT RELY UPON THE RESIDUARY RULE TO IMPORT ANY OTHER OM

31. Explanation to Rule 5 of DJS Rules provides the only exception for calculating the period of past service. The said Explanation reads as under:-

“EXPLANATION.-For calculating the period of five years of service for the purpose of this rule with respect to officers appointed to the Service at the time of its initial constitution, the service rendered by them in the cadre to which they belonged at the time of the initial recruitment to the Service which was counted for determining the seniority shall be counted.”

32. It is a settled principle of law that the benefit of past service cannot be sought in the absence of an express enabling provision when the person has accepted appointment in the new service on his/her own violation. Clearly, Rule 33 of the DJS Rules and of Rule 27 of the DHJS Rules themselves state that they being residuary provisions are only applicable when there are either “no provision” or “insufficient provision” in the said respective Rules and not otherwise. In the present scenario where both the DJS Rules and the DHJS Rules are clear, specific and self-contained, the residuary provisions, i.e. Rule 33 of the DJS Rules and of Rule 27 of the DHJS Rules, have no role to play. Moreover, as there is no challenge to the legality and validity of either DJS and/or DHJS Rules and as the said rules are categorical and provide for exceptions, this Court is of the view that it has no power to rely upon the residuary Rule to import any other O.M. The Rajasthan High Court in ***L.R. Bairwa vs. State of Rajasthan & Ors., 2006 SCC OnLine Raj 303*** has held that, “being a direct recruit, recruited on the basis of competitive examination, he cannot claim benefit of past service rendered under the RBI, in the absence of any rule.”

33. This Court is also of the view that the petitioner's professed interpretation is contrary to the principle that the intention of the Legislature should be gathered from the plain language used in the statute and that a term should be understood in the plain context within which it is used thereby eschewing a cross-contextual application. This Court is also in concurrence with the contention of learned counsel for the Respondent No.2 to the effect that no *mandamus* can be issued to a rule-making authority to formulate a new rule or to amend or modify an existing rule in a particular manner and similarly no *mandamus* can be issued to undertake the task of legislation under Article 309 of the Constitution of India.

JUDGMENT IN RENU MULLICK (SUPRA) HAS NO APPLICATION

34. The judgment of the Supreme Court in ***Renu Mullick*** (supra) has no application to the present case as it was not a case of resignation from one service and joining of another service. In ***Renu Mullick*** (supra) the employee, seeking transfer on her own request and despite moving from one department to another had remained an employee of the Central Government. In the present case, the petitioner has written a new exam, taken a fresh oath and joined a distinct service.

RELIANCE ON THE O.M. DATED 1st SEPTEMBER, 1998 IS MISPLACED AS THERE IS NO LATERAL ENTRY.

35. The petitioner's reliance on the O.M. dated 1st September, 1998 is misplaced, inasmuch as, it is concerned with the counting of past service at the time of lateral entry on a direct recruitment basis. In the instant case, the petitioner was appointed in the DJS at the entry level on the basis of the DJS examination and not through lateral entry. Further, the O.M. itself stipulates that past service can be counted only if one has completed the prescribed

eligibility service in the immediate feeder grade, which the petitioner is admittedly lacking. Furthermore, the O.M. itself stipulates that past service will not be counted for seniority in the new organisation.

IN ALL INDIA JUDGES ASSOCIATION V. UOI & ORS. (SUPRA), THERE IS NO DIRECTION STIPULATING THAT THE SERVICE RENDERED AS A JUDICIAL OFFICER IN ANOTHER STATE IS TO BE COUNTED TOWARDS THE QUALIFYING SERVICES

36. This Court is of the view that the petitioner's reliance on the judgment of the Supreme Court in *All India Judges Association v. UOI & Ors.* (supra) is untenable in law. In the said judgment, there is no direction or in-principle determination, explicit or implicit, stipulating that the service rendered as a judicial officer in another State is to be counted towards the qualifying services [ten years of Civil Judge (Junior Division)] for appointment to the DHJS by promotion on the basis of merit through LDCE in terms of Rule 7(1)(b) of the DHJS Rules and as held therein the purpose of LDCE is with respect to officers ".....to improve and to compete with each other.....".

PERMITTING PETITIONER TO APPEAR IN THE LDCE WOULD AMOUNT TO PERMITTING HER TO TAKE A LEAP OVER OTHER JUDICIAL OFFICERS WHO ARE OTHERWISE HER SENIORS.

37. The O.M. dated 17th August, 2016 nowhere provides for the counting of past services for meeting the eligibility criteria for the LDCE. Grant of pay protection, carry forward of leave and LTC will not *ipso facto* vest any actionable right with the petitioner to carry forward the benefit of past service for counting of seniority in the new post. Consequently, this Court is of the opinion that permitting the petitioner to appear in the LDCE on the basis of her past service with the HCS would amount to permitting her to take a leap over other judicial officers who are otherwise her peers, or are

senior to her, in the DJS but are unable to appear in the exam on account of not having the requisite years of service in the DJS. Reliance by the petitioner upon the residuary provisions of the DJS Rules and the DHJS Rules when the rest of the provisions in the Rule(s) are clear, specific and self-contained is misplaced. The petitioner, thus cannot be allowed to steal a march over the already existing candidates of the DJS. The Supreme Court in ***K.P. Sudhakaran & Anr. vs. State of Kerala & Ors., (2006) 5 SCC 386*** has held as under:-

“11. This is because a government servant getting transferred to another unit or department for his personal considerations, cannot be permitted to disturb the seniority of the employees in the department to which he is transferred, by claiming that his service in the department from which he has been transferred, should be taken into account. This is also because a person appointed to a particular post in a cadre, should know the strength of the cadre and prospects of promotion on the basis of the seniority list prepared for the cadre and any addition from outside would disturb such prospects. The matter is, however, governed by the relevant service rules.”

38. In fact, accepting the petitioner’s prayer would *inter alia* disturb the seniority in the cadre – which the petitioner herself admits that she is not entitled to.

CONCLUSION

39. Keeping in view the aforesaid findings, this Court is of the view that there is no merit in the present writ petition. Accordingly, the present writ petition along with applications stands dismissed, but with no order as to cost.

MANMOHAN, J

SAURABH BANERJEE, J

APRIL 24, 2023/TS