

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.10432 of 2023

Saleha Sabiha Wife of Ghufraan Ahmad, Resident of R K Nagar, F C I Road,
P.O. and P.S.- Phulwarisharif, District- Patna, Pin Code- 801505.

... .. Petitioner/s

Versus

1. The State of Bihar through the Secretary, Law Department, Bihar, Patna.
2. High Court of Judicature at Patna, through its Registrar General.
3. Registrar General, High Court of Judicature at Patna.
4. Kamal Kumar S/o Ram Dhyanjee Pal, R/o Flat No. 602, Shreyas Garden Apartment, Abhiyanta Nagar, Bailey Road, P.S.-Rupaspur, Dist-Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Abhinav Srivastava, Advocate Mr. Pushkar Bharadwaj, Advocate
For the State	:	Mr. Binay Kumar, AC to SC 10
For the Intervener	:	Mr. Kumar Kaushik, Advocate
For the High Court	:	Mr. Piyush Lall, Advocate

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE RUDRA PRAKASH MISHRA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 25-01-2024

The present petition has been filed by the petitioner under Article-226 of the Constitution of India in which the petitioner has prayed for the following relief/s:

“(i) Issuance of a direction, order or writ, including writ in the nature of certiorari quashing the letter dated 19/07/2023 bearing memo no. 46294/AD (Apptt) issued by the Registrar General, Hon'ble Patna High Court, by which the petitioner has been informed that the permission granted to her to participate in the interview for consideration of her case for appointment in the Bihar



Superior Judicial Service pursuant to the District Judge (Entry Level) Direct from Bar Examination, 2021 in furtherance of advertisement no. BSJS/1/2021 has been cancelled;

(ii) Issuance of a direction, order or writ, including writ in the nature of mandamus commanding the concerned respondent authorities under the Hon'ble Patna High Court to allow the petitioner to participate in the interview for consideration of her case for appointment against District Judge (Entry Level) pursuant to District Judge (Entry Level) Direct from Bar Examination, 2021, which is scheduled to be held between 31/07/2023 to 04/08/2023;

(iii) Issuance of a declaration holding that the petitioner is entitled to participate in the interview on the basis of her performance in the process of selection conducted pursuant to the District Judge (Entry Level) Direct from Bar Examination, 2021 for being considered to be appointed in the Bihar Judicial Superior Authority pursuant to advertisement no. BSJS/I/2021;

(iv) Issuance of an ad interim direction upon the concerned respondent authorities to allow the petitioner to participate in the interview to be held on 04/08/2023 for consideration of her case for appointment in the Bihar Superior Judicial Service on the basis of District Judge (Entry Level) Direct from Bar Examination, 2021;

(v) Any other relief that the petitioner may be found to be entitled to in the facts and circumstances of the present case.”

2. The factual matrix of the present case is as under:

2.1 By advertisement No.4/2020 dated 09.03.2020,



published by the concerned respondents under Bihar Public Service Commission, Patna (hereinafter referred to as “Commission”) were invited from eligible candidates for participating in 31st Bihar Judicial Services Competitive Examination for consideration of cases of the candidates for appointment against a total of 221 vacant posts of Civil Judge (Junior Division) in the State of Bihar. It is the case of the petitioner that she, being eligible, submitted her application in the prescribed manner for participation in the process of selection to be conducted pursuant to the advertisement.

2.2. In the meantime, advertisement No. BSJS/1/2021 dated 08.12.2021 was issued by the concerned authorities under the High Court of Judicature at Patna inviting applications from eligible candidates to participate in the District Judge (Entry Level), Direct From Bar Examination-2021 (hereinafter referred as ‘2021 Examination’) for consideration of their cases for direct recruitment against a total of 18 vacancies in the Bihar Superior Judicial Service. It is the case of the petitioner that petitioner, being eligible in all respect and fulfilling the eligibility criteria as prescribed in the aforesaid advertisement, submitted her application in the prescribed manner for participation in the aforesaid 2021



Examination for consideration of her case for appointment in Bihar Superior Judicial Service.

2.3. At this stage, it is stated by the petitioner that although the process of selection pursuant to the advertisement dated 09.03.2020 issued by the Commission in respect of 31st Bihar Judicial Service Competitive Examination had been initiated, no final result in respect of the same had been published at the time of issuance of advertisement No. BSJS/1/2021 dated 08.12.2021. Thus, it is the case of the petitioner that the petitioner was eligible and entitled for participating in both the processes of selection, as she fulfilled requisite qualification and eligibility criteria.

2.4. It is further stated that while the process of selection pursuant to advertisement No. 4/2020 for appointment against the post of Civil Judge (Junior Division) was underway, the petitioner participated in the preliminary test conducted in respect of District Judge (Entry Level) Direct From Bar Examination of 2021 on 06.03.2021, following which model key (answers) of question sets in respect of the said examination was published by the concerned authority under the Patna High Court. The same was published on 10.03.2022 inviting objections from the candidates in respect of the said



model key (answers), if any. At this stage, it is stated that on the basis of the objection so invited with respect to the model key (answers) published by the concerned authorities under the High Court, after due deliberation, a notice dated 09.05.2022 was issued by which revised model answer key in respect of seven questions were published. Four questions were decided to be deleted from the purview of evaluation and it was also decided to award three marks to the candidates in respect of one question No. 92 and it was also notified that all other objections stood disposed of.

2.5. Thereafter, a notice dated 26.05.2022 was published by Patna High Court containing result of the preliminary test in respect of District Judge (Entry Level) Direct From Bar Examination, 2021 wherein, amongst other candidates, the petitioner had also been short-listed for being allowed to participate in the mains (written) examination to be conducted by the concerned authorities. The petitioner participated in the mains (written) examination which was conducted on 24.07.2022.

2.6. In the meantime, after publication of the aforesaid notice dated 26.05.2022, a writ petition being C.W.J.C. No. 9089 of 2022 was filed before this Court by which



a challenge was made with regard to the validity of the model answer in respect of question No.54. A Division Bench of this Court vide order dated 11.08.2022 disposed of the said petition with an observation to refer the matter with regard to Question No. 54 under challenge to the then existing Expert Committee for re-consideration of question No.54 and model answer key in respect of the said question. This Court further directed that if the Expert Committee found that the model answer key was incorrect, then it was directed to conduct fresh mains (written) examination for 10 candidates whose results were to be published simultaneously with the result of the mains (written) examination which was held on 24.07.2022.

2.7. At this stage, it is pointed out by the petitioner that, in the meantime, on the basis of the performance of the candidates, including the petitioner, in the 31st Bihar Judicial Service Competitive Examination conducted by the Commission pursuant to advertisement No.4/2020, final result containing names of the successful candidates was published on 10.10.2022 by the Commission. The petitioner was declared to be successful for consideration of her case for appointment against the post of Civil Judge (Junior Division). The petitioner was appointed against the post of Civil Judge (Junior Division)



in the State of Bihar as her name found place at serial No. 153 in the list of candidates contained in the notification dated 26.12.2022 issued by the concerned authorities under the General Administration Department of the State Government. Petitioner joined the post of Civil Judge (Junior Division) on probation on 16.02.2023 under the concerned Judgeship in the district of Patna and she started discharging her duties.

2.8. At this stage, it is further pointed out by the petitioner that on the basis of the direction issued by a Division Bench of this Court vide order dated 11.08.2022 passed in C.W.J.C. No. 9089 of 2022, the concerned authority carried out the exercise and the model answer key of question No.54 was changed and by notice dated 15.02.2023, revised result of preliminary test held on 06.03.2022 in respect of District Judge (Entry Level) Direct from Bar Examination, 2021 was published by the establishment of Patna High Court. Thereafter, another written examination was conducted on 19.03.2023. However, as the petitioner had already participated in the mains (written) examination 24.07.2022, she did not participate in the subsequent mains (written) examination conducted with respect of 24 additional candidates who had been declared successful in the preliminary test on the basis of the revised result.



2.9. Thereafter, on 04.07.2023, a notice was issued by the concerned authorities under the Patna High Court by which the result of the mains (written) examination held in two phases pursuant to District Judge (Entry Level) Direct from Bar Examination, 2021 was published by which all together 29 candidates were declared to be successful for participating in the interview for consideration of their cases for appointment against the post of District Judge (Entry Level) under Bihar Superior Judicial Service pursuant to the examination of 2021. Name of the petitioner was included in the list of the successful candidates at serial No.26. Thereafter, further notice dated 15.07.2023 was issued by the concerned authorities of the Patna High Court whereby the schedule for conducting interview in respect of the aforesaid post was published. Petitioner was to participate in the interview to be held on 04.08.2023 at the prescribed venue and time.

2.10. It is also stated that as the petitioner had joined in the capacity of Civil Judge (Junior Division) under Danapur Judgeship on 16.02.2023 on the basis of her selection against the said post, she submitted an application for grant of permission before the establishment of Patna High Court to allow her to participate in the interview to be conducted by the



concerned authority. The Registrar General of Patna High Court, vide letter dated 18.07.2023 granted permission to the petitioner to appear in the interview. However, thereafter on the next day, i.e. on 19.07.2023, a communication was addressed by the Registrar General of Patna High Court to the petitioner whereby the petitioner was informed that permission granted to the petitioner for participating in the interview to be conducted pursuant to the examination of 2021 has been cancelled in view of the judgment rendered by the Hon'ble Supreme Court in the case of Dheeraj Mor Vs. High Court of Delhi, rendered in Civil Appeal No. 1698 of 2020.

2.11. Petitioner has, therefore, preferred the present petition challenging the said communication dated 19.07.2023 and also prayed for the further reliefs as observed hereinabove.

3. At this stage, it is pertinent to note that in the present petition, vide order dated 26.07.2023, a direction was given to the High Court to permit the petitioner to participate in the interview as scheduled earlier, subject to final disposal of the writ petition, as a result of which now the petitioner has participated in the interview. However, one post of the concerned category is kept vacant.

4. Heard Mr. Abhinav Shrivastava assisted by Mr.



Pushkar Bharadwaj, learned counsels for the petitioner, Mr. Binay Kumar, A.C. to S.C. 10 for the respondent State, Mr. Piyush Lall, learned counsel for the respondent Patna High Court and Mr. Kumar Kaushik, learned counsel for the intervener.

5. Learned advocate Mr. Abhinav Shrivastava appearing for the petitioner would mainly submit that the petitioner was practising as an advocate when the on-line applications were invited for direct recruitment in respect of 18 vacancies of District Judge (Entry Level) Direct From Bar Examination, 2021 vide advertisement No. BSJS/1/2021. It is further submitted that as per Clause-4 of the said advertisement, the cut-off date for the purpose of consideration of eligibility of the applicants is 20th January, 2022 when, as per Clause-2 of the said advertisement, candidates qualifying in the written test shall be required to give declaration of appearance in at least 24 cases per year in the last 3 years preceding the year of advertisement which is 2020-2021. Learned counsel, therefore, urged that on the cut-off date, i.e. on 20th January, 2022, when the petitioner participated in the said process, she was practising as an advocate and, therefore, she was eligible for the post in question, despite which, by wrongly relying upon the decision



rendered by the Hon'ble Supreme Court in the case of Dheeraj Mor Vs. High Court of Delhi, reported in (2020) 7 SCC 401, the permission was denied to the petitioner to participate in the interview and, therefore, the said impugned communication is required to be quashed and set aside. Learned counsel, at this stage, has further submitted that the facts of the case of Dheeraj Mor (supra) are different and, therefore, the ratio laid down in the said decision would not be applicable to the present case. Learned counsel further submits that the petitioner participated in the recruitment process with regard to the Civil Judge (Junior Division) pursuant to the advertisement issued on 09.03.2020. When the said process was going on, advertisement dated 08.12.2021 was issued for District Judge (Entry Level) Direct from Bar Examination of 2021. It is submitted that the petitioner appeared in the preliminary test in respect of the District Judge (Entry Level) Direct from Bar Examination, 2021. Thereafter on 06.03.2022, model key (answers) of questions in respect of said examination was published by the concerned authority on 10.03.2022 inviting objections in respect of the said model answers and thereafter revised modal answer key was published on 09.05.2022. Thereafter, petitioner had been short-listed for being allowed to appear in the mains



(written) examination. Petitioner participated in the mains (written) examination which was conducted on 24.07.2022. It is further submitted that, in the meantime, the decision of the authority was challenged with regard to the validity of the model answers in respect of question No. 54 by filing petition before this Court and a Division Bench of this Court vide order dated 11.08.2022 disposed of the said petition with certain observations. It is submitted that because of the said direction, the process of selection for District Judge (Entry Level) Direct from Bar Examination, 2021 was delayed and, in the meantime, the petitioner was selected as Civil Judge (Junior Division) pursuant to the advertisement issued on 09.03.2020. It is further submitted that petitioner is still on probation and, therefore, it cannot be said that the petitioner is in service, as contended by the respondents.

6. Learned counsel for the petitioner further submitted that now the Hon'ble Supreme Court has, in similar case, after considering the decision, rendered in the case of Dheeraj Mor (supra) has rendered a decision in the case of Sunil Kumar Verma Vs. State of Bihar & Ors. and allowed the S.L.P. filed by the concerned appellant and similar decision taken by the High Court was set aside. Learned counsel has produced the



copy of the said decision rendered by the Hon'ble Supreme Court.

6.1. Learned counsel, therefore, urged that when the issue is squarely covered by the aforesaid decision rendered in the case of Sunil Kumar Verma (supra), this petition be allowed and appropriate direction be issued to the respondents.

7. Learned counsel would thereafter submit that in the present proceeding, the respondent High Court has filed a counter affidavit. Learned counsel has referred to para-11 of the said counter affidavit. After referring to the averments made in the said paragraph, it is submitted that, at the most petitioner can be asked to resign from the post on which she is serving and thereafter petitioner can regain her status as an advocate. Further, the result can be declared thereafter so that on the date of appointment, petitioner can be treated as a practising advocate. Learned counsel, therefore, urged that this petition be allowed and appropriate direction be issued.

8. On the other hand, Mr. Piyush Lall, learned counsel appearing for the respondent Patna High Court has vehemently opposed this petition. At the outset, learned advocate has referred to the Bihar Civil Service (Judicial Branch)(Recruitment) Rules, 1955. Learned counsel has more



particularly referred Rule-1(b)(vii) which provides the definition of service. Learned advocate has also referred Rules-19 to 21 and 24 of the said Rules.

9. At this stage, learned counsel has also referred to The Bihar Superior Judicial Service Rules, 1951 and more particularly referred Rule-2(d) which provides the definition of service and also placed reliance on Rule-5(a) & 5(c) of the said Rules of 1951. At this stage, learned counsel also referred Appendix-C of the said Rules which provides the eligibility/qualification for appointment as a District Judge (Entry Level) Direct From Bar.

10. At this stage, learned counsel also referred to the provisions contained in Article-233 of the Constitution of India.

11. After referring to the aforesaid provisions of law, learned counsel for the respondent Patna High Court has submitted that 25% of the posts in Bihar Superior Judicial Service shall be filled up by direct recruitment from amongst the eligible advocates on the basis of the written and *viva voce* test conducted in accordance with the decision/direction of the High Court of Judicature at Patna.

12. He has further submitted that any applicant



who has not completed 7 years of practice on the last date of receipt of application, as specified in the advertisement, is ineligible. He has further submitted that as per Article-233 of the Constitution of India, 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 seven years, an advocate or a pleader and is recommended by the High Court for appointment.

13. At this stage, learned counsel has placed reliance upon the decision rendered by the Hon'ble Supreme Court in the case of Dheeraj Mor (supra), reported in (2018) 4 SCC 619. It is submitted that in the said case, Two Judge Bench of the Hon'ble Supreme Court, after referring the facts and various decisions, referred the issue to the Hon'ble Chief Justice of India for constituting an appropriate Bench for deciding the issue "whether the eligibility of appointment as a District Judge is to be seen only at the time of appointment or at the time of application or both".

13.1. At this stage, learned counsel has referred to the decision rendered by Three Judge Bench of the Hon'ble Supreme Court in the case of Dheeraj Mor Vs. High Court of Delhi, reported in (2020) 7 SCC 401. Learned counsel has more



particularly referred para Nos.12 to 14, 19, 20, 28 and 45 of the said decision. Learned counsel submits that the issue involved in the present petition is covered by the aforesaid decision rendered by the Three Judge Bench of the Hon'ble Supreme Court in the case of Dheeraj Mor (supra). Learned counsel for the respondent Patna High Court has thereafter contended that the latter decision in the case of Sunil Kumar Verma (supra) is not applicable to the facts of the present case and the Hon'ble Supreme Court gave the said decision in peculiar facts of the said case and, therefore, the petitioner has wrongly placed reliance upon the said decision rendered in the case of Sunil Kumar Verma (supra).

14. At this stage, learned counsel for the respondent High Court has referred the decision rendered by the Hon'ble Supreme Court in the case of Vijay Kumar Mishra and Another Vs. High Court of Judicature at Patna And Others, reported in (2016) 9 SCC 313. Learned counsel has referred the facts of the said case and thereafter referred para Nos. 8 and 13 of the said decision. It is submitted that, in similar type of facts, the Hon'ble Supreme Court has allowed the petition filed by the concerned candidate/petitioner and direction was issued to the High Court to permit the said appellants to participate in the



selection process without insisting upon their resigning from their current employment. It was further observed in the said case that if the appellants are found suitable, it is open for the appellants to resign their current employment and opt for the post of District Judge, if they so choose.

14.1. At this stage, it is submitted that the aforesaid decision rendered in the case of Vijay Kumar Mishra (supra) has been overruled by the Hon'ble Supreme Court in the case of Dheeraj Mor (supra). Learned counsel has referred para-88 of the said decision of Dheeraj Mor (supra). Learned counsel for the respondent High Court has, therefore, urged that the petitioner is not entitled to claim the reliefs prayed for in the present petition. Therefore, this petition be dismissed.

15. Mr. Kumar Kaushik, learned counsel appearing for the intervener/newly joined private party has also opposed the present petition. Learned counsel for the private respondent has submitted that the decision rendered in the case of Sunil Kumar Verma (supra) would not be applicable in the present case. It is further submitted that in similar case of Vijay Kumar Mishra (supra), the Hon'ble Supreme Court has taken the decision in favour of the concerned candidate. However, now the said decision has been overruled by the Hon'ble Supreme



Court in the case of Dheeraj Mor (supra). Learned counsel has referred para-24 of the said decision. Learned counsel for the private respondent has also adopted the submissions canvassed by the learned counsel for the respondent High Court and submitted that the present petition be dismissed.

16. Having heard learned counsels appearing for the parties and having gone through the material placed on record, it would emerge that the petitioner participated in the process of selection pursuant to the advertisement No.4/2020 in respect of 31st Bihar Judicial Service Competitive Examination published by the Commission. She had participated on 09.03.2020 and in the meantime another advertisement No. BSJS/1/2021 dated 08.12.2021 came to be published in respect of the District Judge (Entry Level) Direct From Bar Examination, 2021 for appointment in the Bihar Superior Judicial Service. Petitioner participated in the said process also. Petitioner cleared preliminary test conducted in respect of District Judge (Entry Level) Direct From Bar Examination, 2021 which was conducted on 06.03.2022. However, certain dispute arose with regard to correctness of the model answer key and, therefore, petition was preferred before this Court and because of the same, the process of appointment pursuant to



Examination of 2021 was delayed. Now it is the case of the petitioner that in the meantime she was selected and appointed on the post of Civil Judge (Junior Division) in the State of Bihar and she has joined the said post and she is on probation. It is further revealed from the petition that petitioner thereafter participated in the mains (written) examination which was conducted on 24.07.2022 with respect to the Examination of 2021 and she has also cleared the said mains (written) examination. The Registrar General of Patna High Court, therefore, issued a letter on 18.07.2023 whereby the permission was granted to the petitioner to appear in the interview with respect to Examination of 2021. However, on the very next day i.e. on 19.07.2023, such permission was withdrawn, relying upon the decision of Hon'ble Supreme Court in the case of Dheeraj Mor (supra). Petitioner has, therefore, preferred the present petition and by way of interim order this Court has permitted her to appear in the interview, subject to final outcome of the present petition.

17. Thus, in the present petition, facts are not in dispute and, therefore, this Court has to consider whether the decision rendered by the Hon'ble Supreme Court in the case of Dheeraj Mor (supra) would be applicable or the decision



rendered in the case of Sunil Kumar Verma (supra) would be applicable in the facts and circumstances of the present case and whether the petitioner is entitled for appointment on the post of District Judge pursuant to examination of 2021 or not.

18. At the outset, we would like to refer the relevant provisions of Rules of 1955 and 1951 as well as the provisions contained in the Constitution of India. Rule-1(b)(vii) of Rules of 1955 provides that service means The Bihar Civil Service (Judicial Branch), which includes the post of Civil Judge (Senior Division) and Civil Judge (Junior Division).

18.1. Rule-2(d) of Rules of 1951 provides that service means the Bihar Superior Judicial Service.

18.2. Rule-5 of the Rules of 1951 provides that appointments to the Bihar Superior Judicial Service, which shall, in the first instance, ordinarily be to the post of Additional District and Sessions Judge, shall be made by the Governor in consultation with the High Court--(a) from direct recruitment, from among persons qualified and recommended by the High Court for appointment under Clause-2 of Article-233 of the Constitution.

18.3. Rule-5(c) of the Rules of 1951 further provides that 25% of the post shall be filled by the direct



recruitment from amongst the eligible Advocate on the basis of the written and Viva-voce test conducted in accordance with decision, direction of the High Court of Judicature, Patna.

18.4. Thus, from the aforesaid, it is revealed that the recruitment on the post of Civil Judge (Junior Division) and for the post of District Judge are governed by two different Rules.

19. Article-233 of the Constitution provides as under:

“233. Appointment 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.

(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.”

20. At this stage, we would refer the decision rendered in the case of Vijay Kumar Mishra (supra). In para-1 of the said decision, the Hon’ble Supreme Court has narrated the facts which read as under:

“Leave granted. To explore the true purport of Article 233(2) of the Constitution of India is the task of this Court in this appeal.



The facts of the case are very elegantly narrated in the first six paragraphs of the judgment [Vijay Kumar Mishra v. High Court of Judicature at Patna, 2016 SCC OnLine Pat 4063] under appeal. They are: (Vijay Kumar case [Vijay Kumar Mishra v. High Court of Judicature at Patna, 2016 SCC OnLine Pat 4063] , SCC OnLine Pat paras 1-6)

“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.”

21. From the aforesaid decision rendered by the Hon’ble Supreme Court, it is revealed that the facts of the said case were identical to the present case. In the said case, the communication whereby the representation of the petitioners to appear in the interview for the post of District Judge (Entry Level) with respect to Examination of 2015 was rejected and a condition was imposed that the petitioners will have to tender their resignation first from the subordinate judicial service of Bihar and only thereafter they could appear in the interview. In the said case, the petitioners were qualified for Subordinate Judicial Service of the State of Bihar and joined the said services in August, 2015. Thereafter, result of mains (written) examination of District Judge (Entry Level) Direct from Bar Examination, 2021 was published in January, 2016 and petitioners were qualified in the mains examination. The letter of the High Court was under challenge before the High Court. The High Court dismissed the petition and, therefore, the concerned petitioners preferred an S.L.P. before the Hon’ble Supreme Court. The Hon’ble Supreme Court in the said case held that Article-233(2) only prohibits appointment to the post



of District and Sessions Judge, if such person is in the service of either Union or the State. It does not prohibit the consideration of candidature of a person who is in service of the Union or of the State. Such person would still have the option, if selected, to join the services as a District Judge or continue with his current employment. Compelling a person to resign from his job, even for the purpose of assessing his suitability for the appointment as a District Judge is not permitted nor contemplated under the scheme of Constitution and by virtue of Article-233(2).

22. At this stage, it is pertinent to note that later on similar type of issue arose in the case of Dheeraj Mor (*supra*), reported in (2018) 4 SCC 619. In the said case also, two contentions were raised before the Court:-

(1) In case a candidate has completed 7 years as an advocate, he/she shall be an eligible candidate despite the fact that on the date of the application/appointment, he/she is in the service of the Union or the State;

(2) The members who are in judicial service as a Civil Judge (Junior Division) or (Senior Division), in case they have completed 7 years as Judicial Officers or 7 years as a Judicial Officer-cum-advocate, they should be treated as eligible candidates.



22.1. The Hon'ble Supreme Court in the said case referred the major issue for consideration, i.e. "whether the eligibility for appointment as District Judge is to be seen only at the time of appointment or at the time of application or both". The Two Judge Bench of the Hon'ble Supreme Court referred the matter to the Hon'ble Chief Justice of India for constituting an appropriate Bench for deciding the said issue.

23. Thereafter, Three Judge Bench of the Hon'ble Supreme Court in the case of Dheeraj Mor (supra), reported in (2020) 7 SCC 401, has considered the relevant provisions of the concerned Rules, Constitution of India and various decisions rendered by the Hon'ble Supreme Court. The Hon'ble Supreme Court has observed in para Nos. 1, 12 to 14, 19, 20, 24, 28, 45 and 88 to 90 as under:

"A Division Bench of this Court has referred [*Dheeraj Mor v. High Court of Delhi*, (2018) 4 SCC 619 : (2018) 2 SCC (L&S) 79] the matters. The question involved in the matters is the interpretation of Article 233 of the Constitution of India as to the eligibility of members of the subordinate judicial service for appointment as District Judge as against the quota reserved for the Bar by way of direct recruitment. The petitioners who are in judicial service, have claimed that in case before joining judicial service a candidate has completed 7 years of practice as an advocate, he/ she shall be eligible to stake claim as against



the direct recruitment quota from the Bar notwithstanding that on the date of application/appointment, he or she is in judicial service of the Union or State. Yet another category is that of the persons having completed only 7 years of service as judicial service. They contend that experience as a Judge be treated on a par with the Bar service, and they should be permitted to stake their claim. The third category is hybrid, consisting of candidates who have completed 7 years by combining the experience serving as a judicial officer and as advocate. They claim to be eligible to stake their claim against the above quota.

12. Article 233(1) provides for appointments by way of posting and promotion. It is apparent from Article 233 that the appointing authority, the Governor has to exercise the power of appointment in consultation with the High Court. The term “appointment” is broader and includes appointment by way of direct recruitment or by way of promotion, and sometimes it may also include, if so provided in the rules, by way of absorption.

13. Article 233(2) starts with a negative stipulation that a person who is not already in the service of the Union or the State, shall be eligible only to be appointed as District Judge if he has been an advocate or a pleader for not less than 7 years and is recommended by the High Court for appointment. The expression “in the service of the Union or of the State” has been interpreted by this Court to mean the judicial service. A person from judicial service can be appointed as a District Judge. However, Article 233(2) provides that a person who is not in the service of the Union, shall be eligible only if he has been in practice, as an advocate or a pleader for 7 years; meaning thereby, persons who are in service are distinguished category from the incumbent who can be appointed as District Judge on 7 years' practice as an advocate or a pleader. Article 233(2) nowhere provides eligibility of in-service candidates for



consideration as a District Judge concerning a post requiring 7 years' practice as an advocate or a pleader. Requirement of 7 years' experience for advocate or pleader is qualified with a rider that he should not be in the service of the Union or the State. Article 233 provides two sources of recruitment, one from judicial service and the other from advocates or pleaders. There are two separate streams provided; one is for persons in judicial service, and the other is for those not in judicial service of the Union or the State and have practised for seven years. The expression "in service of the Union or the State" has been interpreted in *Chandra Mohan* [*Chandra Mohan v. State of U.P.*, (1967) 1 SCR 77 : AIR 1966 SC 1987] to mean judicial service, not any other service of the Union or the State. Thus, it is clear that the members of the judicial service alone are eligible for appointment as against the post of District Judge as the only mode provided for the appointment of in-service candidates is by way of promotion. They can stake their claim as per rules for promotion or merit promotion as the case may be. This Court has excluded the persons from the Indian Civil Service, the Provincial Judicial Service, or other Executive Services, before Independence, recruitment to the post of District Judge was provided from other services also. In *Chandra Mohan* [*Chandra Mohan v. State of U.P.*, (1967) 1 SCR 77 : AIR 1966 SC 1987], this Court held that no person from the Executive Service can be promoted as District Judge. There is separation of the judiciary in terms of Article 50 of the Constitution of India. It mandates the State to take steps to separate the judiciary from the executive in the public services of the State. Article 50 is extracted hereunder:

"50. Separation of judiciary from executive.—

The State shall take steps to separate the judiciary from the executive in the public services of the



State.”

14. Article 233(2) provides that if an advocate or a pleader has to be appointed, he must have completed 7 years of practice. It is coupled with the condition in the opening part that the person should not be in service of the Union or State, which is the judicial service of the State. The person in judicial service is not eligible for being appointed as against the quota reserved for advocates. Once he has joined the stream of service, he ceases to be an advocate. The requirement of 7 years of minimum experience has to be considered as the practising advocate as on the cut-off date, the phrase used is a continuous state of affair from the past. The context “has been in practice” in which it has been used, it is apparent that the provisions refer to a person who has been an advocate or pleader not only on the cut-off date but continues to be so at the time of appointment.

19. It is apparent from the decision in *Chandra Mohan v. State of U.P.* [*Chandra Mohan v. State of U.P.*, (1967) 1 SCR 77 : AIR 1966 SC 1987] that this Court has laid down that concerning District Judges recruited directly from the Bar, the Governor can appoint only advocates recommended by the High Court and Rule 14 which provided for judicial officers to be appointed as direct recruits was struck down by this Court to be ultra vires. Thus, the decision is squarely against the submission espoused on behalf of in-service candidates. In the abovementioned para 11 of *Chandra Mohan* [*Chandra Mohan v. State of U.P.*, (1967) 1 SCR 77 : AIR 1966 SC 1987] , the position is made clear. In *Chandra Mohan* [*Chandra Mohan v. State of U.P.*, (1967) 1 SCR 77 : AIR 1966 SC 1987] the Court held that only advocates can be appointed as direct recruits, and inter alia Rule 14 providing for executive officers' recruitment was struck down. This Court has held that the expression “service of State or Union” means judicial service, it only refers to the



source of recruitment. Dichotomy of two sources of recruitment/appointment has been culled out in the decision.

20. Reliance has also been placed on the decision in *Rameshwar Dayal v. State of Punjab* [*Rameshwar Dayal v. State of Punjab*, (1961) 2 SCR 874 : AIR 1961 SC 816]. The question which arose for consideration there was as to the eligibility of persons on the roll of advocates of the East Punjab High Court before the Partition of India in 1947 for appointment as a District Judge. This Court held that the period of practice before the Lahore High Court could be counted as against the required period of 7 years for appointment as District Judge. This Court laid down that practice rendered in or before the Lahore High Court before Partition was not open to objection under Article 233(2) of the Constitution. Even if the word “advocate” in clause (2) of Article 233 meant an advocate of a court in India, and the appointee must be such an advocate at the time of his appointment, no objection can be raised on this ground because being factually on the roll of Advocates of the Punjab High Court at the time of appointment, the candidate was admittedly an advocate in a court in India and continued as such till the date of his appointment. This Court also considered the principle applied to the East Punjab High Court. An advocate of the Lahore High Court was entitled to practise in the new High Court counted his seniority on the strength of his standing in the Lahore High Court. It was held that a person who continued as an advocate at the time of his appointment as District Judge fulfilled the requirement of Article 233. Emphasis was laid by this Court that such a practice was recognised under Clause 6 of the High Court of Punjab Order, 1947. Earlier, the High Court used to maintain the rolls of advocates. The question which arose for consideration was whether Respondents 2 to 6 fulfilled the requirements of having



been for 7 years an advocate or pleader. The submission made was that practice rendered outside the territory of India cannot be counted as practice for counting 7 years. This Court interpreted Article 233 distinguishing it from Article 124 and Article 217 and held that under clause (1), the Government can appoint such a person who is already in the service of the Union or State. No special qualifications were prescribed under clause (1) of Article 233. The Governor can appoint such a person as District Judge. However, as to a person not already in service, the qualification prescribed in Article 233 is that he should be an advocate or a pleader of 7 years' standing. This Court answered the question thus : (*Rameshwar Dayal case* [*Rameshwar Dayal v. State of Punjab*, (1961) 2 SCR 874 : AIR 1961 SC 816] , AIR pp. 821-22, paras 11-14)

“11. This is the background against which we have to consider the argument of learned counsel for the appellant. Even if we assume without finally pronouncing on their correctness that learned counsel is right in his first two submissions viz. that the word “advocate” in clause (2) of Article 233 means an advocate of a court in India and the appointee must be such an advocate at the time of his appointment, no objection on those grounds can be raised to the appointment of three of the respondents who were factually on the roll of Advocates of the Punjab High Court at the time of their appointment; because admittedly they were advocates in a court in India and continued as such advocates till the dates of their appointment. The only question with regard to them is whether they can count in the period of seven years their period of practice in or under the Lahore High Court. The answer to this question is clearly furnished by Clause 6(2) of the High Courts (Punjab) Order,



1947, read with Section 8(3) of the Bar Councils Act, 1926. That clause lays down that the right of audience in the High Court of East Punjab shall be regulated in accordance with the principle in force in the Lahore High Court immediately before the appointed day. The relevant rule in the Lahore High Court Rules laid down that Advocates who are Barristers shall take precedence inter se according to the date of call to the Bar; Advocates who are not Barristers, according to the dates when they became entitled to practice in a High Court. *The same principle applied to the East Punjab High Court, and an advocate of the Lahore High Court who was recognised as an advocate entitled to practise in the new High Court counted his seniority on the strength of his standing in the Lahore High Court. He did not lose that seniority, which was preserved by the Bar Councils Act, 1926, and we see no reasons why for the purpose of clause (2) of Article 233 such an advocate should not have the same standing as he has in the High Court where he is practising.*

12. The learned counsel for the appellant has also drawn our attention to Explanation I to clause (3) of Article 124 of the Constitution relating to the qualifications for appointment as a Judge of the Supreme Court and to the explanation to clause (2) of Article 217 relating to the qualifications for appointment as a Judge of a High Court, and has submitted that where the Constitution makers thought it necessary they specifically provided for counting the period in a High Court which was formerly in India. Articles 124 and 217 are differently worded and refer to an additional qualification of citizenship which is not a



requirement of Article 233, and *we do not think that clause (2) of Article 233 can be interpreted in the light of Explanations added to Articles 124 and 217. 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. The clause does not say how that standing must be reckoned and if an Advocate of the Punjab High Court is entitled to count the period of his practice in the Lahore High Court for determining his standing at the Bar, we see nothing in Article 233 which must lead to the exclusion of that period for determining his eligibility for appointment as District Judge.*

13. What will be the result if the interpretation canvassed for on behalf of the appellant is accepted? Then, for seven years beginning from 15-8-1947, no member of the Bar of the Punjab High Court would be eligible for appointment as District Judge—a result which has only to be stated to demonstrate the weakness of the argument. We have proceeded so far on the first two submissions of learned counsel for the appellant, and on that basis dealt with his third submission. It is perhaps necessary to add that we must not be understood to have decided that the expression “has been” must always mean what learned counsel for the appellant says it means according to the strict rules of grammar. It may be



seriously questioned if an organic Constitution must be so narrowly interpreted, and the learned Additional Solicitor General has drawn our attention to other Articles of the Constitution like Article 5(c) where in the context the expression has a different meaning. Our attention has also been drawn to the decision of the Allahabad High Court in *Mubarak Mazdoor v. K.K. Banerji* [Mubarak Mazdoor v. K.K. Banerji, 1957 SCC OnLine All 196 : AIR 1958 All 323] , where a different meaning was given to a similar expression occurring in the proviso to sub-section (3) of Section 86 of the Representation of the People Act, 1951. We consider it unnecessary to pursue this matter further because the respondents we are now considering continued to be advocates of the Punjab High Court when they were appointed as District Judges and they had a standing of more than seven years when so appointed. They were clearly eligible for appointment under clause (2) of Article 233 of the Constitution.

14. We now turn to the other two respondents (Harbans Singh and P.R. Sawhney) whose names were not **factually** on the roll of Advocates at the time they were appointed as District Judges. What is their position? We consider that they also fulfilled the requirements of Article 233 of the Constitution. Harbans Singh was in service of the State at the time of his appointment, and Mr Viswanantha Sastri appearing for him has submitted that clause (2) of Article 233 did not apply. 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. *They were Advocates enrolled in the Lahore High Court; this is not disputed.* Under Clause 6 of the High Courts (Punjab) Order, 1947, they were recognised as Advocates entitled to practise in the Punjab High Court till the Bar Councils Act, 1926, came into force. *Under Section 8(2)(a) of that Act it was the duty of the High Court to prepare and maintain a roll of advocates in which their names should have been entered on the day on which Section 8 came into force, that is, on 28-9-1948.* The proviso to sub-section (2) of Section 8 required them to deposit a fee of Rs 10 payable to the Bar Council. Obviously such payment could hardly be made before the Bar Council was constituted. We do not agree with learned counsel for the appellant and the interveners (B.D. Pathak and Om Dutt Sharma) that the proviso had the effect of taking away the right which these respondents had to come automatically on the roll of advocates under Section 8(2)(a) of the Act. We consider that the combined effect of Clause 6 of the High Courts (Punjab) Order, 1947 and Section 8(2)(a) of the Bar Councils Act, 1926, was this : from 15-8-1947, to 28-9-1948, they were recognised as Advocates entitled to practise in the Punjab High Court and after 28-9-1948, they automatically came on the roll of advocates of the Punjab High Court but had to pay a fee of Rs 10 to the Bar Council. They did not cease to be advocates at any time or stage after 15-8-1947, and they continued to be advocates of the Punjab High Court till they were appointed as District Judges. They also had the necessary standing of seven years to be eligible under clause (2) of Article 233 of the Constitution.”

24. The decision of *Vijay Kumar Mishra v. High Court of*



Patna [Vijay Kumar Mishra v. High Court of Patna, (2016) 9 SCC 313 : (2016) 2 SCC (L&S) 606] , has also been referred in which judicial officers staked their claim as against the post reserved for the members of the Bar i.e. advocates/pleaders. The High Court repelled [*Vijay Kumar Mishra v. High Court of Patna, 2016 SCC OnLine Pat 4063*] the challenge; hence appeal was filed in this Court. A two-Judge Bench of this Court observed that a person who is not in service shall be eligible to be appointed as a District Judge. After that, the Bench distinguished between “selection” and “appointment”. It was observed that Article 233(2) prohibits the appointment of a person who is already in service of the Union or the State, but not selection of such a person. Even if a person, who is already in service, is selected, still he has an option to be a District Judge or continue with the existing employment. The relevant portion of the observations made is extracted hereunder : (*Vijay Kumar Mishra case [Vijay Kumar Mishra v. High Court of Patna, (2016) 9 SCC 313 : (2016) 2 SCC (L&S) 606]* , SCC pp. 219-21, paras 6-8 & 11)

“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. 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. 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.

11. It appears from the reading of the judgment in *Satya Narain Singh case* [*Satya Narain Singh v. High Court of 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.”

(emphasis in original)

We find ourselves unable to agree with the proposition laid down in *Vijay Kumar Mishra* [*Vijay Kumar Mishra v. High Court of Patna*, (2016) 9 SCC 313 : (2016) 2 SCC (L&S) 606] . In our opinion, in-service candidates cannot apply as against the post reserved for the advocates/pleaders as he has to be in continuous practice in the past and at the time when he has applied and appointed. Thus, the decision in *Vijay Kumar Mishra* [*Vijay Kumar Mishra v. High Court of Patna*, (2016) 9 SCC 313 : (2016) 2 SCC (L&S) 606] cannot be said



to be laying down the law correctly.

28. It is apparent from the decision of *All India Judges Assn. [All India Judges Assn. (3) v. Union of India*, (2002) 4 SCC 247 : 2002 SCC (L&S) 508] that in order to prove the merit of in-service candidates, a limited departmental competitive examination has also been provided, so that they can take march to hold the post of District Judges on the basis of their merit. They are not deprived of any opportunity in their pursuit once they have joined the judicial stream, they are bound to follow the provisions. It was open to them not to join the subordinate services. They could have staked a claim by continuing to be an advocate to the Higher Judicial Service as against the post of District Judge. However, once they chose to be in service, if they had seven years' experience at Bar before joining the judicial service, they are disentitled to lay a claim to the 25% quota exclusively earmarked for Advocates; having regard to the dichotomy of different streams and separate quota for recruitment. Opportunities are provided not only to in-service candidates but also to practising candidates by the constitutional scheme to excel and to achieve what they aspire i.e. appointment as District Judge. However, when someone joins a particular stream i.e. a judicial service by his own volition, he cannot sail in two boats. His chance to occupy the post of District Judge would be by a twofold channel, either in the 50% seniority/merit quota, by promotion, or the quota for limited competitive examination.

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 advocates/pleaders, incumbent has to be practising advocate and must be in practice as on the cut-off 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 cut-off 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 practising advocate having minimum 7 years' experience.

88. This Court is of the opinion that the decision in *Vijay Kumar Mishra* [*Vijay Kumar Mishra v. High Court of Patna*, (2016) 9 SCC 313 : (2016) 2 SCC (L&S) 606] , as far as it makes a distinction between consideration, of a candidate's eligibility, at the stage of selection, and eligibility reckonable at the time of appointment, is incorrect. There is clear authority to the proposition that eligibility of any candidate is to be reckoned, not from the date of his or her selection, but in terms of the rules, or the advertisement for the post. In *Ashok Kumar Sharma v. Chander Shekhar* [*Ashok Kumar Sharma v. Chander Shekhar*, (1997) 4 SCC 18 : 1997 SCC (L&S) 913] , a three-Judge Bench of this Court held as follows : (*Ashok Kumar Sharma case* [*Ashok Kumar Sharma v. Chander Shekhar*, (1997) 4 SCC 18 : 1997 SCC (L&S) 913] , SCC pp. 21-22, para 6)

“6. ... The proposition that where applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well-established one. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement or notification issued/published calling for application constitutes a representation to the public and the authority issuing it is bound by such representation.



It cannot act contrary to it. One reason behind this proposition is that if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the interview, other similarly placed persons could also have applied. Just because some of the person had applied notwithstanding that they had not acquired the prescribed qualifications by the prescribed date, they could not have been treated on a preferential basis. Their applications ought to have been rejected at the inception itself. This proposition is indisputable and in fact was not doubted or disputed in the majority Judgment. This is also the proposition affirmed in *Rekha Chaturvedi v. University of Rajasthan* [*Rekha Chaturvedi v. University of Rajasthan*, 1993 Supp (3) SCC 168 : 1993 SCC (L&S) 951] . The reasoning in the majority opinion that by allowing the 33 respondents to appear for the interview, the recruiting authority was able to get the best talent available and that such course was in furtherance of public interest is, with respect, an impermissible justification. It is, in our considered opinion, a clear error of law and an error apparent on the face of the record. In our opinion, R.M. Sahai, J. (and the Division Bench of the High Court) was right in holding that the 33 respondents could not have been allowed to appear for the interview.”

This reasoning is similar to other decisions, such as *U.P. Public Service Commission v. Alpana* [*U.P. Public Service Commission v. Alpana*, (1994) 2 SCC 723 : 1994 SCC (L&S) 742] and *Bhupinderpal Singh v. State of Punjab* [*Bhupinderpal Singh v. State of Punjab*, (2000) 5 SCC 262 : 2000 SCC (L&S) 639] . Therefore, the observation



in *Vijay Kumar Mishra* [*Vijay Kumar Mishra v. High Court of Patna*, (2016) 9 SCC 313 : (2016) 2 SCC (L&S) 606] that : (SCC p. 320, para 7)

“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.”

is not correct. With respect, the distinction sought to be made, between “selection” and “appointment” in the context of eligibility, is without foundation. A selection process begins with advertisement, calling for applications from eligible candidates. Eligibility is usually defined with reference to possession of stipulated qualifications, experience, and age, as on the last date (of receipt of applications, or a particular specified date, etc.). Anyone fulfilling those eligibility conditions, with reference to such date, would be ineligible (*sic* eligible). Therefore, the observation that the right to participate in the selection process, without possessing the prescribed eligibility conditions, is guaranteed, is not correct; the right is guaranteed only if the candidate concerned fulfils the requisite eligibility criteria, on the stipulated date. As pointed out by the three-Judge Bench decision, if the contrary is correct, one acquiring the stipulated qualifications subsequent to the prescribed date cannot be considered. Also, one not fulfilling the conditions cannot be allowed to participate, because, as held in *Ashok Kumar Sharma* [*Ashok Kumar Sharma v. Chander Shekhar*,



(1997) 4 SCC 18 : 1997 SCC (L&S) 913] , if it were known, that such ineligible candidates can be considered, those who do not apply, but are better placed than the ineligible candidates who are allowed to participate, would be left out. Moreover, the authority publishing the advertisement/notification represents to the members of the public that it is bound by such representation.

90. In the light of the foregoing discussion, it is held that under Article 233, a judicial officer, regardless of her or his previous experience as an Advocate with seven years' practice cannot apply, and compete for appointment to any vacancy in the post of District Judge; her or his chance to occupy that post would be through promotion, in accordance with the Rules framed under Article 234 and proviso to Article 309 of the Constitution of India.”

24. From the aforesaid decision rendered by the Hon’ble Supreme Court, it can be said that the decision rendered in the case of Vijay Kumar Mishra (supra) has been overruled. Further, it is clear that once an advocate or a pleader, who has 7 years of practice, can be appointed as District Judge by way of direct recruitment in case he is not already in the judicial service of the Union or the State. Further, for the purpose of Article-233(2), an advocate has to be continuing in practice for not less than seven years on the cut-off date and at the time of appointment as District Judge. It is further held that members of Judicial Service having seven years experience of



practice before they have joined the service or having combined experience of seven years as a lawyer and member of Judiciary are not eligible to apply for direct recruitment as a District Judge.

25. Now, at this stage, we would also like to refer the decision rendered by this Court in the case of Sunil Kumar Verma, reported in 2021 SCC OnLine Pat 766. In the said case, the concerned petitioner was the Judicial Officer who challenged the letter dated 18.05.2020 and letter dated 01.06.2020 by which a show cause notice was issued to the petitioner in view of judgment of the Hon'ble Supreme Court in the case of Dheeraj Mor (supra) as to why his services from the post of Additional District and Sessions Judge be not terminated assigning reason that the petitioner was not a practising advocate on the date of preliminary test, main test, interview and declaration of final result as well as on the date of appointment as an Additional District and Sessions Judge. In the said case, the petitioner was already appointed on the post of Additional District and Sessions Judge and thereafter the aforesaid communication was addressed by the High Court relying upon the decision rendered in the case of Dheeraj Mor (supra). This Court relying upon the decision rendered in the



case of Dheeraj Mor (supra), which was subsequently rendered in the year 2020, dismissed the petition.

25.1. The facts of the said case are recorded in para-3 of the said decision as under:

“3. The short fact of this case is that the petitioner has enrolled himself in Bar Council of Uttar Pradesh vide Enrollment No. 7938 of 07 dated 5.12.2007 and joined the State High Court Bar Association, Allahabad on 5.12.2007 and remained in practice till 15.1.2017. During that period, he was appearing in various competitive examination such as PCS-J and District Judge (Entry Level) Direct from Bar Exams at different States. This High Court had issued an advertisement for recruitment of suitable candidates to the post of District Judge (Entry Level), Direct From Bar Exam-2016 on its website dated 22.8.2016 notifying 98 vacancies as on 31.3.2017. One of the terms and conditions was mentioned therein that the candidates must possess 7 years practice including his appearance at least in 24 cases per annum preceding three years on the last date of receipt of the application as specified in the advertisement and further condition was provided that the candidate must have completed 35 years of age and who has not completed the 50 years as on 1.1.2016, shall be eligible for consideration. The cut off date for the purpose of consideration of eligibility of the application was fixed as on 16.9.2016. In pursuance of the advertisement, the petitioner applied for the said post on 31.8.2016 before the last date i.e. 16.9.2016. While filling up the form, he has also obtained experience certificate from the Registrar, High Court showing his professional experience of seven years on or before the cut off date. It has to be noted that the petitioner had also applied in U.P. Judicial Services (Junior Division), where he was selected on 16.1.2017 and,



accordingly, he joined the judicial services (Junior Division) in the state of Uttar Pradesh and, as per petitioner, on or before the cut off date, he was not in any service either judicial or otherwise. Further that the condition does not stipulate in the advertisement that candidate who has joined judicial service or in any services later on would be made ineligible for the consideration of the said post. The petitioner succeeded in preliminary examination as well as in the main examination. After the main examination, this Court published notice in its website dated 9.2.2018, giving liberty to the candidates to remove defects and discrepancies in the application form. In the notice, it has been mentioned that on scrutiny of the application forms and documents uploaded by the candidates who have qualified in the main (Written) examination of District Judge (Entry Level), Direct from Bar, 2016, certain discrepancies have been found. The same have been indicated against respective candidates in the chart attached herewith.”

26. Petitioner challenged the said decision and High Court dismissed the petition.

27. Against the aforesaid decision rendered by the High Court, the concerned petitioner Sunil Kumar Verma filed an S.L.P. before the Hon’ble Supreme Court. The Hon’ble Supreme Court in the case of Sunil Kumar Verma (supra) has recorded the facts in para-5 to 5.7 and thereafter observed that the law laid down in the case of Dheeraj Mor (supra) is not applicable in the peculiar facts and circumstances of the case. Thereafter, it was also observed that, in the facts and



circumstances of the case, High Court was not justified in dismissing the petition.

27.1. We may observe, at this stage, that in the said case, at the relevant point of time, the concerned advocate having completed practice of more than seven years was eligible for applying for the post of Additional District and Sessions Judge and, therefore, applied for the said post on 16.09.2016. The selection process could not proceed further on account of certain exigencies. In the meantime, State of Uttar Pradesh had invited applications for the post of Civil Judge (Junior Division). The appellant had applied for the said post and after being successful in the selection process, he was appointed on 16th January, 2016 as a Civil Judge (Junior Division). Thereafter, the selection process for selection in the Bihar Superior Judicial Service proceeded further. The concerned appellant, after obtaining the requisite permission from the High Court of Judicature at Allahabad, participated in the selection process conducted by the High Court of Judicature at Patna for the post of Additional District and Sessions Judge. On 7th August, 2018, appellant was offered appointment. Therefore, he obtained permission from the High Court of Judicature at Allahabad for resigning from Uttar Pradesh



Judicial Service so as to join the service as an Additional District and Sessions Judge in the State of Bihar. Consequently, the petitioner joined Bihar Judicial Service with effect from 21.08.2018. At this stage, it is pertinent to note that thereafter the judgment of the Hon'ble Supreme Court in the case of Dheeraj Mor (supra) was delivered on 19th January, 2020 wherein the Hon'ble Supreme Court has held that a Judicial Officer, regardless of his/her previous experience as advocate for seven years, cannot apply and qualify for appointment as an Additional District and Sessions Judge in the direct recruitment quota for advocates. On the basis of the said judgment, the High Court of Judicature at Patna issued a show cause notice and after considering the reply, the High Court of Patna recommended the cancellation of the appellant's candidature which was communicated to the appellant on 4th of January, 2021. Therefore, he challenged the same before the High Court.

28. As observed hereinabove, in the said case, the concerned appellant, after obtaining the requisite permission from the High Court of Judicature at Allahabad, participated in the selection process and when he was selected, he applied to the High Court of Judicature at Allahabad for grant of



permission to resign so that he may join State of Bihar as a District Judge. Thus, in the facts and circumstances of the said case, the Hon'ble Supreme Court has observed that the appellant was neither in the service of Bihar Judicial Service on the date on which he applied and, secondly, nor he was in service of Bihar Subordinate Judicial Service on the date when he was selected and, thus, in the said case, it was held that decision in the case of Dheeraj Mor (supra) was not applicable. It is also pertinent to note that in the said case, the concerned appellant was selected in the year 2018 on the post of Additional District and Sessions Judge and, subsequently, relying upon the decision rendered in the case of Dheeraj Mor (supra) in the year 2020, his appointment came to be cancelled. Thus, we are of the view that this decision rendered by the Hon'ble Supreme Court in the case of Sunil Kumar Verma (supra) would not render any assistance to the present petitioner, in the facts and circumstances of the present case.

29. Thus, we are of the view that when the Hon'ble Supreme Court, in the case of Dheeraj Mor (supra) has specifically held that under Article-232(2) an Advocate or a pleader with 7 years of practice can be appointed as District Judge by way of direct recruitment in case he is not already in



the judicial service of the Union or a State and further for the purpose of Article-233(2), an Advocate has to be continuing in practice for not less than 7 years as on the cut-off date and at the time of appointment as District Judge.

30. In the present case, as discussed hereinabove, it is not in dispute that though the petitioner was continuing in practice for not less than 7 years as on cut-off date, she was not continuing in practice at the time of appointment as District Judge and, therefore, the case of the petitioner is covered by the decision rendered in the case of Dheeraj Mor (supra). Further, it is required to be noted that the petitioner is, though on probation, serving as on date as a Civil Judge (Junior Division) and till date, she has not resigned from the service. Therefore also, it cannot be said that she is continuing in practice. Further contention of the learned counsel for the petitioner that the petitioner, at this stage, would be allowed to resign from the post of Civil Judge (Junior Division) and thereafter she be permitted to obtain the status of advocate and at that stage her case be considered for appointment to the post of District and Sessions Judge is also misconceived.

31. In view of the aforesaid discussion, we are of the view that the decision rendered by the Hon'ble Supreme



Court in the case of Dheeraj Mor (supra) would be applicable to the facts of the present case. As observed hereinabove, the facts of the present case are different from the case of Sunil Kumar Verma (supra). Thus, the petitioner is not entitled for appointment on the post of District and Sessions Judge pursuant to examination of 2021. Hence, the petitioner is not entitled to claim the relief/s as prayed for in the present petition.

32. Therefore, this petition stands dismissed.

(Vipul M. Pancholi, J)

(Rudra Prakash Mishra, J)

K.C.Jha/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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