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W.A.No.813 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.07.2024

CORAM :

THE HON'BLE MR.R.MAHADEVAN, ACTING CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE MOHAMMED SHAFFIQ

W.A. No.813 of 2024
and C.M.P. No.5586 of 2024

D.Almas Banu

... Appellant

Vs.

1.Tamil Nadu Public Service Commission,
rep. By its Secretary,
V.O.C Nagar, Park Town, Chennai 600 003,
Tamil Nadu.

2.A.Dhilshath

... Respondents

Prayer: Appeal under Clause 15 of the Letters Patent praying to set aside the order of this Court in W.P.No.32753 of 2022 dated 22.02.2024.

For the Appellant
(in all Appeals)

: Mr.V.Raghavachari
Senior Counsel
for Mr.N.Beulah John Selvaraj

For the Respondents
(in all Appeals)

: Mr.R.Bharanidaran for R1
(for TNPSC)
Mr.L.Chandrakumar
(for R2 Caveator)



W.A.No.813 of 2024

JUDGMENT

(Judgment of the Court was delivered by MOHAMMED SHAFFIQ, J.)

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The present writ appeal is filed challenging the order of the learned Single Judge dated 22.02.2022 in W.P.No. 32753 of 2022 insofar as it finds that the appellant herein is not eligible to apply for the post of Assistant Public Prosecutor Grade II in terms of the Notification dated 25.08.2021.

2. Brief facts:

2.1. The appellant was a Law graduate and enrolled as an Advocate with the Bar Council of Tamil Nadu and Puducherry on 22.09.2010. Since then, it is submitted that the appellant was practicing in all Courts including High Court and Subordinate Court in Chennai for more than 5 years. While so, the appellant was appointed as Assistant Manager (Legal) on contract basis by Chennai Metro Rail Ltd (in short “CMRL”) on 17.09.2016.

2.2. The 1st respondent issued Notification No.10/2021 dated 25.08.2021, calling for applications for the post of Assistant Public



W.A.No.813 of 2024

Prosecutor Grade II, in the Prosecution Department in the Tamil Nadu General Service. Preliminary Examination and Main Written Examination were held on 06.11.2021, 07.05.2022 and 08.05.2022. The appellant cleared the said examinations. Thereafter, Oral Test by way of an interview was held on 01.12.2022 and 02.12.2022. When the appellant appeared for the Oral Test, a question was put to her by the 1st respondent as to whether the appellant suspended her practice in terms of BCI Rules 43 and 49 during her employment with CMRL. The appellant answered in the negative. The 1st respondent then orally informed the appellant of rejection of her application.

2.3. A writ petition was filed before this Court in W.P.No.32753 of 2022, to direct the first respondent to consider the appellant for appointment for the post of Assistant Public Prosecutor Grade II pursuant to the Notification No.10/2021 dated 25.08.2021. The above writ petition stood dismissed by the learned Judge. The present writ appeal is against the said order of the learned Judge.



W.A.No.813 of 2024

3. Order of the learned Judge:

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The learned Judge found that the appellant does not satisfy the requisite eligibility criteria to apply to the post of Assistant Public Prosecutor Grade II, in terms of the Notification dated 25.08.2021 *inter alia* for the following reasons:

a. The appellant while submitting the application suppressed material facts inasmuch as on being appointed as Assistant Manager (Legal) in CMRL, she ought to have, but failed to temporarily suspend her practice with the Bar Council of Tamil Nadu and Puducherry.

b. In terms of Rule 49 of BCI Rules, an advocate on taking up employment must intimate the same to the Bar Council and shall thereupon cease to practise as an advocate so long as the advocate continues in such employment. Failure to inform her employment with CMRL, to the Bar Council is a gross violation of Rule 49 of the Bar Council of India Rules thereby rendering the appellant ineligible to apply to the post of Assistant Public Prosecutor Grade II in terms of the Notification.

c. That the appellant was only assisting the Advocate appearing for CMRL in terms of the Work Allocation made by CMRL, which cannot be



W.A.No.813 of 2024

understood / treated / equated with practice by the appellant. It was also found that the appellant had not filed any vakalat on behalf of CMRL, again indicative of the fact that the appellant was not a practising advocate.

d. The issuance of the “No Objection Certificate” by her former employer viz., CMRL would not in any way cure the disqualification in terms of not complying / satisfying the experience criteria prescribed under the notification.

4. Case of the appellant:

Aggrieved by the above order of the learned Judge, the appellant has challenged the same *inter alia* on the following grounds:

a. That the finding that the appellant had suppressed material fact and that she made false claims, overlooks the fact that the appellant had obtained “No Objection Certificate”, from the employer which would constitute disclosure of the factum of her legal service rendered for a Government organization. In any view, the appellant had disclosed in her application that she had been working as an Assistant Manager (Legal) in CMRL. The above finding is thus contrary to the evidence on record.



W.A.No.813 of 2024

b. That suspension of practice is a curable defect and BCI Rules enable resumption of practice as well, for which the appellant cannot be deprived of her employment.

c. The finding that the appellant was a non-practitioner is contrary to Rule 4(j) of the Certificate and Place of Practice (Verification) Rules, 2015 which defines the expression “Non-practicing Advocate”, which reads as under:

“Rule 4(j): A non-practicing advocate means an advocate enrolled with any State Bar Council, but is not in actual practice of law and is engaged in some other public or private job, business, contract, etc. not related to the Legal profession: and who has been so declared under Rule 13 and Rule 20.2 of these Rules and whose name stands published under Rule 20.4”.

The appellant being a Law officer of CMRL thus related to legal profession would not be hit by Rule 4(j) of the BCI Rules.

d. The appellant possessed the prescribed qualifications in terms of Notification No.10/2021 dated 25.08.2021

- 1) Possessed a B.L degree,
- 2) Was a Member of the Bar,
- 3) Possessed adequate knowledge in Tamil and



W.A.No.813 of 2024

4) Had an active practice in Criminal Courts for 5 years.

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e. That the learned Judge ought to have applied the rule of harmonious construction and followed the beneficial rule of interpretation to clear off the ambiguity in the Notification. The notification should only be read to preserve the benefit and not in a manner that takes away the benefit.

f. That the petitioner is a topper in her class and to go down to select a person of lesser quality is not advantageous to Courts or to the nature of work to which the appellant and rest have been called upon to work.

5. Case of the respondents:

To the contrary, it was submitted by the learned counsel for the respondents that order of the learned Judge does not warrant interference *inter alia* for the following reasons:

a. It is trite law that once a notification prescribes the eligibility criteria, the same must be strictly adhered to and there cannot be any relaxation.

b. The notification under the head "experience" prescribed that the



W.A.No.813 of 2024

candidate must “have had active practice in Criminal Courts for a period of not less than 5 years”. The notification appears to lay emphasis on practice. This would be clear from the fact that the notification employs the expression “active practice” in criminal Courts. The appellant was engaged by CMRL on a contract basis and allocated the following works.

- i) Attending all Court cases other than High Court and Supreme Court.
- ii) Attending hearing of cases in person and report compliance regularly without any deviation.
- iii) Updating Court cases regularly to District Revenue Officer and Deputy Collector.

The above work would not constitute practice much less “active practice”.

6. Heard both sides. Perused the material on record.

7. Against the above background, the following question would arise for consideration viz., whether the appellant who was employed by CMRL



W.A.No.813 of 2024

as Assistant Manager (Legal) albeit temporarily can be stated to be in “active practice in Criminal Courts”, which is an eligibility criterion in terms of the notification No.10/2021.

A. Legal Profession – Role of APP:

8. Before we proceed to examine the question, it may be relevant to understand the role of Assistant Public Prosecutor in the “Criminal Justice Delivery System”. Legal profession is essentially a service-oriented profession. The nature of the service rendered by the lawyers was private till the Government and the public bodies started engaging them to conduct cases on their behalf. The Government and the public bodies engaged the services of the lawyers purely on a contractual basis either for a specified case or for a specified or unspecified period.¹ The Assistant Public Prosecutor is appointed by the State Government to conduct prosecution on its behalf before the Court of Magistrate. The primary function of the Assistant Public Prosecutor *“is to act and plead on behalf of the Government by conducting cases on behalf of the Government”*. The Assistant Public Prosecutor plays a vital role in conducting cases on behalf

¹ State of U.P. v. U.P. State Law Officers' Assn., reported in (1994) 2 SCC 204



W.A.No.813 of 2024

of the State. He is an officer of the Court entrusted with the duties of protecting the interest of society at large. He is in a sense the representative of the society entrusted with the duty of ensuring that the offenders / culprit / law breakers, face the consequences for the offence committed in accordance with law. The Assistant Public Prosecutor is under an obligation to discharge his functions fairly objectively and within the framework of the legal provisions and as stated above, the Assistant Public Prosecutor is an officer of the Court and has a major / crucial role in the dispensation of justice. It may also do well to remind ourself of the fact that unlike civil dispute which is adversarial in nature, a criminal offence is one against the society at large. Assistant Public Prosecutor is the representative not of an ordinary party to a controversy, but of a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.² They are not only officers of the court but also the representatives of the State. The court reposes a great deal of confidence in them. Their opinion in a matter carries great weight. They are

² Berger v. United States, reported in 295 US 78 (1935)



W.A.No.813 of 2024

supposed to render independent, fearless and non-partisan views before the court irrespective of the result of litigation which may ensue.³ Therefore when the State prescribes certain eligibility criteria for such appointment, the same must be strictly construed.

B. Qualification under Notification – Work Allocated to applicant by its employer viz., CMRL:

9. With the above broad view of the role of APP, we shall proceed to examine the eligibility criteria in terms of Notification dated 25.08.2021.

(i) Eligibility Criteria:

9.1. The notification dated 25.08.2021 prescribed the following qualifications:

- a. Must possess B.L. Degree
- b. Must be the member of the Bar
- c. Must possess adequate knowledge of Tamil
- d. Experience: Must have had active practice in Criminal Courts for a period of not less than 5 years.

10. Importantly, the notification also requires the applicant to furnish

³ State of U.P. v. Johri Mal, reported (2004) 4 SCC 714



W.A.No.813 of 2024

a certificate in the format prescribed under Annexure II, which is to be obtained from a Senior Advocate or from a Presiding Officer or from Court in support of the applicant's claim of active practice in criminal courts. The format of the experience certificate to be furnished by the applicants reads as under:

ANNEXURE II
FORMAT FOR EXPERIENCE CERTIFICATE

*This is to certify that Mr/Mrs/Miss
Son/Daughter/Wife ofAge permanently residing at
No.....Mr/Mrs/Miss.....was enrolled as an Advocate
on.....and has been continuously practicing from.....(date)
to till date*. He/She has been regularly appearing in.....Courts,
conducting cases on her/his own. She/He has passed B.L.M.L.,
degree.....year from theCollege/University.*

**Notification date*

<i>Date:</i>	<i>Signature,</i>	<i>Name</i>	<i>and</i>
<i>Designations of the</i>			
<i>Station:</i>	<i>Presiding</i>	<i>Officer/Competent</i>	
<i>Authority</i>			

Seal of the Court/ Officer

Note:

*1. A certificate in the format prescribed in Annexure II should be obtained from a Senior Advocate or from the **Presiding Officer**.*



W.A.No.813 of 2024

ofCourt in support of the applicant's claim regarding the period of active practice in Criminal Courts.

2. The term "Senior Advocate" **herein** includes Additional Public Prosecutor/Public Prosecutor, President/Secretary of the Bar Associations and Advocates practicing for ten years and more in Taluks and Districts, besides Senior Advocates practicing in the High Court and in the Supreme Court.

C. Experience Certificate Furnished by Appellant – Reveals the Ineligibility:

11. The certificate furnished by the appellant is extracted hereunder:

ANNEXURE-II

EXPERIENCE CERTIFICATE

This is to certify that Mrs. D.ALMAS BANU Daughter of Mr.Dawood Basha, aged about 33 years, permanently residing at No.6/62, 3rd Floor, Saf Ruby Nest Apartments, Bakers Street Choolai, Chennai 600 112, has been actively practicing as an Advocate since 22 September, 2010 in all Courts. As such she has completed 5 years, 11 months and 23 days of practice as on 04.09.2021. She has been regularly appearing in High Court and all the Subordinate Courts, conducting cases on her own. She has passed M.L., Degree in the year 2016, from the Dr.B.R.Ambedkar Late University

Date 04.09.2021

Station Chennai



W.A.No.813 of 2024

WEB COPY

11.1. A reading of the certificate furnished by the appellant would show that it covers the period from 22.09.2010 to 13.09.2016. Notification No.10/2021 calling for applications was issued on 25.08.2021. Thus, from 13.09.2016 until the date of her application, there is no certificate to show that the appellant was in active practice in criminal court, as evident from the expressions "must have had active criminal practice in Criminal Courts for a period not less than 5 years" employed in Notification No.10/2021.

12. One of the essential requirements mandated in Notification No.10/2021 dated 25.08.2021 is that the applicant must be having active practice in Criminal Courts for a period of not less than 5 years as an Advocate on the date of application. In this regard, it may be relevant to refer to the judgment of the Supreme Court in *Deepak Aggarwal v. Keshav Kaushik*, reported in (2013) 5 SCC 277:

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



WEB COPY



W.A.No.813 of 2024

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

13. Though the judgment in Deepak Agarwal (*Supra*) considered the expression “*has been*”, while the impugned notification uses the expression “*have had*”, we would think it would not make any material difference. While the expression “*has been*” considered by the Supreme Court in Deepak Agarwal is present perfect continuous, the expression “*have had*” employed in Notification No.10/2021 is in present perfect tense, which is also used to convey an act / event which started occurring in the past and still happening. The present perfect tense is formed by the present tense of the helping verb “*have*” followed by a second verb in the past participle form, which we can summarize as follows:

present perfect have/has + past participle

The present perfect is used to describe actions that have occurred continuously or repeatedly from some time in the past right up to the present moment (sometimes with the implication that these actions will continue



W.A.No.813 of 2024

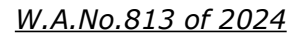
into the future).⁴ In other words, the expression “has been” and “have had”

both look to an act / event which has commenced in the past and continuing.

Applying the above requirement/test, it would be clear that the appellant fails to satisfy the eligibility criteria viz., “*he must have had active practice in criminal court for a period of not less than 5 years*”, inasmuch as even in terms of the certificate furnished by the appellant, it only covers the period 22.09.2010 to 13.09.2016, whereas the requirement was that the candidate ought to be in active practice for a period of not less than 5 years immediately preceding the date of the application which the appellant fails to satisfy thereby rendering herself ineligible.

14. Thus on a grammatical construction of the eligibility criteria in terms of the notification, the experience that is required is that the applicant must have had active practice in the last five years preceding the date of the application.

⁴ *The McGraw-Hill Education Handbook of English Grammar and Usage (Third Edition)*



“Lawyer A enrolls in the year 2000 as a 23 year old practises until 2005 i.e., until 28 years. Thereafter applies for the post when he is 34 years, 6 years later.”

D. Rule 49 – Whether attracted:



W.A.No.813 of 2024

16. To answer the above question, it may be necessary to examine Rule 49 of BCI Rules. Rule 49 as it originally stood and subsequent to the amendment in 2001 is extracted hereunder:

Rule 49 as it originally stood reads as under:

“49. An advocate shall not be a full-time salaried employee of any person, Government, firm, corporation or concern, so long as he continues to practise and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practise as an advocate so long as he continues in such employment.

Nothing in this Rule shall apply to a Law Officer of the Central Government or the Government of a State or of any public corporation or body constituted by statute who is entitled to be enrolled under the Rules of his State Bar Council made under Section 28(2)(d) read with Section 24(1)(e) of the Act despite his being a full-time salaried employer.”

“Law Officer” for the purpose of this Rule means a person who is so designated by the terms of his appointment and who, by the said terms, is required to act and/or plead in courts on behalf of his employer.”

Rule 49 in its present form reads as under:

“49. An advocate shall not be of full-time salaried employee of any person, Government, firm, corporation or concern, so long as he continues to practise, and shall on taking up any such employment,



W.A.No.813 of 2024

intimate the fact to the Bar Council on whose roll his name appears and shall thereupon cease to practise as an advocate so long as he continues in such employment."

16.1. The above rule as it originally stood was considered by the Supreme Court in the judgments :

(i) The Supreme Court in *Sushma Suri v. Govt. of National Capital Territory of Delhi*, reported in (1999) 1 SCC 330, considered the meaning of the expression "advocate" occurring in Article 233(2) of the Constitution and unamended Rule 49 of the BCI Rules. In para 6 of the Report the Supreme Court held as under:

"6. If a person on being enrolled as an advocate ceases to practise law and takes up an employment, such a person can by no stretch of imagination be termed as an advocate. However, if a person who is on the rolls of any Bar Council is engaged either by employment or otherwise of the Union or the State or any corporate body or person practises before a court as an advocate for and on behalf of such Government, corporation or authority or person, the question is whether such a person also answers the description of an advocate under the Act. That is the precise question arising for our consideration in this case."

.....

"10. Under Rule 49 of the Bar Council of India Rules, an advocate shall not be a full-time employee of any person, Government, firm, corporation or concern and on taking up such employment, shall intimate such fact to the Bar Council concerned and shall cease to practise as long as he is in such employment. However, an exception is made in such cases of law officers of the Government and corporate bodies despite his being a full-time salaried employee if such law officer is required to act or plead in court on behalf of others. It is only to those who fall into other



WEB COPY



W.A.No.813 of 2024

categories of employment that the bar under Rule 49 would apply. An advocate employed by the Government or a body corporate as its law officer even on terms of payment of salary would not cease to be an advocate in terms of Rule 49 if the condition is that such advocate is required to act or plead in courts on behalf of the employer. The test, therefore, is not whether such person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to act or plead on its behalf in a court of law as an advocate. In that event the terms of engagement will not matter at all. What is of essence is as to what such law officer engaged by the Government does-whether he acts or pleads in court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. If the terms of engagement are such that he does not have to act or plead, but does other kinds of work, then he becomes a mere employee of the Government or the body corporate. Therefore, the Bar Council of India has understood the expression 'advocate' as one who is actually practising before courts which expression would include even those who are law officers appointed as such by the Government or body corporate."

(emphasis supplied)

(ii) Satish Kumar Sharma v. Bar Council of H.P., reported in (2001) 2

SCC 365 :

"17. Looking to the various appointment/promotion orders issued by the Board to the appellant and regulation of business relating to Legal Cell of the Board aforementioned, we can gather that:

(1) the appellant was a full-time salaried employee at the time of his enrolment as an advocate and continues to be so, getting fixed scales of pay;

(2) he is governed by the conditions of service applicable to the employees of the Board including disciplinary proceedings. When asked by us, the learned counsel for the appellant also confirmed the same;

(3) he joined the services of the Board as a temporary Assistant (Legal) and continues to head the Legal Cell after promotions, a wing in the Secretariat of the Board;

(4) his duties were/are not exclusively or mostly to act or plead in courts; and



WEB COPY



W.A.No.813 of 2024

(5) promotions were given from time to time in higher pay scales as is done in case of other employees of the Board on the basis of recommendation of Departmental Promotion Committee.

18. On a proper and careful analysis, having regard to the plain language and clear terms of Rule 49 extracted above, it is clear that:

(i) the main and opening paragraph of the rule prohibits or bars an advocate from being a full-time salaried employee of any person, Government, firm, corporation or concern so long as he continues to practice and an obligation is cast on an advocate who takes up any such employment to intimate the fact to the Bar Council concerned and he shall cease to practice so long as he continues in such employment;

(ii) para 2 of the rule is in the nature of an exception to the general rule contained in main and opening paragraph of it. The bar created in para 1 will not be applicable to Law Officers of the Central Government or a State or any public corporation or body constituted by a statute, if they are given entitlement under the rules of their State Bar Council. To put it in other way, this provision is an enabling provision. If in the rules of any State Bar Council, a provision is made entitling Law Officers of the Government or authorities mentioned above, the bar contained in Rule 49 shall not apply to such Law Officers despite they being full-time salaried employees;

(iii) not every Law Officer but only a person who is designated as Law Officer by the terms of his appointment and who by the said terms is required to act and/or plead in courts on behalf of his employer can avail the benefit of the exception contained in para 2 of Rule 49.”

(iii) The Supreme Court in the case of Deepak Aggarwal v. Keshav

Kaushik, reported in (2013) 5 SCC 277 considered the effect of deletion of

Para 2 and 3 of Rule 49 and it was explained as under:

“98. What Rule 49 of the BCI Rules provides is that an advocate shall not be a full-time salaried employee of any person, Government, firm, corporation or concern so long as he continues to practise. The “employment” spoken of in Rule 49 does not cover the employment of an advocate who has been solely or, in any case,



WEB COPY



W.A.No.813 of 2024

predominantly employed to act and/or plead on behalf of his client in courts of law. If a person has been engaged to act and/or plead in court of law as an advocate although by way of employment on terms of salary and other service conditions, such employment is not what is covered by Rule 49 as he continues to practise law but, on the other hand, if he is employed not mainly to act and/or plead in a court of law, but to do other kinds of legal work, the prohibition in Rule 49 immediately comes into play and then he becomes a mere employee and ceases to be an advocate. The bar contained in Rule 49 applies to an employment for work other than conduct of cases in courts as an advocate. In this view of the matter, the deletion of the second and third paragraphs by the Resolution dated 22-6-2001 has not materially altered the position insofar as advocates who have been employed by the State Government or the Central Government to conduct civil and criminal cases on their behalf in the courts are concerned.

99.What we have said above gets fortified by Rule 43 of the BCI Rules. Rule 43 provides that an advocate, who has taken a full-time service or part-time service inconsistent with his practising as an advocate, shall send a declaration to that effect to the respective State Bar Council within the time specified therein and any default in that regard may entail suspension of the right to practice. In other words, if full-time service or part-time service taken by an advocate is consistent with his practising as an advocate, no such declaration is necessary. The factum of employment is not material but the key aspect is whether such employment is consistent with his practising as an advocate or, in other words, whether pursuant to such employment, he continues to act and/or plead in the courts. If the answer is yes, then despite employment he continues to be an advocate. On the other hand, if the answer is in the negative, he ceases to be an advocate.”

(emphasis supplied)

16.2. From a reading of the above judgments it is clear that under Rule 49 of the BCI Rules both as it originally stood and after its amendment, the factum of employment is not material but the key aspect is whether such employment is consistent with his practicing as an advocate or



W.A.No.813 of 2024

in other words, whether pursuant to such employment, *he / she continues to act and / or plead in the courts*. If the answer is 'yes', then despite employment, he / she continues to be an advocate. On the other hand, if the answer is in the negative he / she ceases to be an advocate.

17. Now let us apply the above test to the appellant by looking at the Work Allocation by CMRL to the appellant. The following clauses in the appointment letter are relevant:

"Chennai Metro Rail Limited

(A Joint Venture of Govt. of India and Govt. of Tamil Nadu)

Order No.378/CMRL/HR/OFFER/2016

i) The appointment of Tmt.D.Almas Banu, Assistant Manager (Legal) on the following under the contract appointment category.

ii) This appointment as Assistant Manager (Legal) shall be for a period of two years from the date of her joining.

.....

iv) She shall be paid a consolidated salary of Rs.60,000/- per month (Sixty Thousand only) and will not be paid any other additional payments nor eligible for any allowance.

.....

vi) She shall attend the office on all working days.



W.A.No.813 of 2024

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xii) *She shall be eligible for 15 days leave only in a calendar year."*

18. The learned Senior Advocate for the appellant would place reliance on the work allocated to the appellant and submit that it is consistent with practicing as an advocate and thus satisfies the eligibility in terms of the notification. It is further submitted by placing reliance on the appointment order that the employment is on a contract basis and for a temporary period of two years apart from the fact that the work performed as allocated to the appellant was consistent with the practice of an advocate. It was submitted that the learned Judge erred in finding that failure to inform her employment with CMRL to the Bar Council is a gross violation of Rule 49 of the Bar Council of India Rules and had the appellant complied with Rule 49 of BCI Rules, she would have had to cease her practice as a Advocate, so long as she continues in such employment thereby rendering her ineligible to apply to the post of Assistant Public Prosecutor Grade II in terms of the Notification. It was contended that the learned Judge failed to see that the appellant was engaged on a “temporary basis” for a term of two



W.A.No.813 of 2024

years without any avenue for promotion, whereas the bar under Rule 49 would get attracted only to “full time employment”. We are unable to agree with the above contention of the appellant for the test under Rule 49 is not as to whether the employment is temporary or permanent instead whether it is full time or part time. In the case of a part time employment the employee is at liberty to engage to take up any other work/assignment/job outside the working hours unlike a full time employment. A full time employee is not supposed to take any other employment outside his assignment. It is this fundamental distinction between a full time and a part time job which is to be borne in mind. Now, keeping this in mind, if we look at the appointment letter of the appellant, there is hardly any indication that employment is on a part time basis. Moreover, from a reading of the work allocation it would be clear that the appellant was only required to "attend court cases" and not "conduct cases" and thus, cannot be stated to be in “active practice” which is the eligibility in terms of the appointment. We cannot be unmindful of the distinction between “attending cases” and “conducting cases”. A reading of the decision in *Deepak Agarwal v. Keshav Kaushik*, reported in (2013) 5 SCC 277 would show that the Supreme Court found at more than one place that a



W.A.No.813 of 2024

Public Prosecutor or an Assistant Public Prosecutor is engaged for “conducting cases” and not “attending cases”. Conducting cases in the present context would mean to act or plead on behalf of her client. Attending cases, on the other hand, only denotes physical appearance in Court. An officer briefing or instructing an advocate cannot be understood as conducting cases on her own though it may be possible to take a view that such presence may constitute attending cases. The following extracts wherein the Supreme Court found that APP was engaged in conducting cases would be of significance:

“11. Section 25 CrPC deals with Assistant Public Prosecutors for conducting prosecutions in the court of Magistrates. Section 25-A was brought in the CrPC by Act 25 of 2005.

.....

56. In S.B. Shahane v. State of Maharashtra [1995 Supp (3) SCC 37 : 1995 SCC (Cri) 787 : (1995) 30 ATC 519] , this Court held in para 12 as under: (SCC p. 43)

“12. When Assistant Public Prosecutors are appointed under Section 25 of the Code for conducting prosecutions in courts of Magistrates in a district fairly and impartially, separating them from the police officers of the Police Department and freeing them from the administrative or disciplinary control of officers of the Police Department, are the inevitable consequential actions required to be taken by the State Government which appoints such Assistant Public Prosecutors, inasmuch as, taking of such actions are statutory obligations impliedly imposed upon it under sub-section (3) thereof.

.....



W.A.No.813 of 2024

64.*In State of U.P. v. Johri Mal [(2004) 4 SCC 714] , a three-Judge Bench of this Court while dealing with the nature of the office of the District Government Counsel, held in paras 71, 72, 73 and 74 as under: (SCC pp. 774-75)*

“71.The District Government Counsel appointed for conducting civil as also criminal cases hold offices of great importance. They are not only officers of the court but also the representatives of the State. The court reposes a great deal of confidence in them. Their opinion in a matter carries great weight. They are supposed to render independent, fearless and non-partisan views before the court irrespective of the result of litigation which may ensue.

.....

76.Section 24 CrPC provides that for every High Court the Central Government or the State Government shall appoint a Public Prosecutor. The Central Government or the State Government may also appoint one or more Additional Public Prosecutor for conducting in such court, any prosecution, appeal or other proceedings on their behalf. The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district or local area.”

19. However, there is nothing in the affidavit filed by the appellant nor is there any evidence to show that the appellant conducted cases i.e., acted / pleaded on behalf of the client on her own over a period of 5 years preceding the application, in the form of filing of vakalat or order in the name of the appellant. Hence, we are unable to agree with the submission of the learned Senior Advocate for the appellant.



W.A.No.813 of 2024

20. Yet another reason why we are unable to agree with the contention put forth by the appellant is in view of the settled legal position that fixing of eligibility criteria is a prerogative of the employer.⁵ Thus in the event of any doubt with regard to the eligibility criteria the benefit of such doubt must be interpreted in favour of the employer. As a matter of fact even in the grounds raised by the appellant in particular Ground 19 it is stated that there is ambiguity in the notification and that the benefit must be extended to the applicant. The above submission is liable to be rejected for there is no ambiguity in the eligibility criteria. Thus the question of interpretation may not even arise. Fixing of eligibility criteria being the prerogative of the employer, assuming there is ambiguity, consistent with the above rule the construction placed by the employer must prevail.⁶ Thus once the employer has clarified the meaning and scope of the eligibility criteria viz., that the candidate / applicant must have been in practice by way of acting or pleading on behalf of the client and such a view being plausible, we see no reason not to accept the same.

⁵ Askush Sharma v. Union of India, reported in 2018 SCC OnLine Cal 4684

⁶ R.Malaikumar v. General Manager (HR), reported in 2024 SCC OnLine Cal 3769



W.A.No.813 of 2024

F. Topper in class – Irrelevant:

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21. It was submitted by the learned Senior Counsel for the appellant that the appellant is a topper in her class and to go down to select a person of lesser quality is not advantageous to Courts or to the nature of work for which the applications were called for.

22. We are unable to agree with the above submission inasmuch as even a brilliant student in college cannot be entrusted with the functions of an APP if he does not possess the requisite experience. It is important to appreciate that a lawyer's practice in Court refines him while making him acquainted with the ethics, tenets and also appreciate his role in the justice delivery system.⁷

23. To sum up:

a. The eligibility criteria fixed for appointment of APP must be strictly adhered to.

b. The experience certificate furnished by the appellant regarding active practice for a period 5 years is in respect of the period 22.09.2010 to 13.09.2016 i.e., 5 years prior to the date of the application. The same may

⁷ Somi Reddy Chandra Mohan Reddy v. Government of Andhra Pradesh, reported in 2010 SCC OnLine AP 938



W.A.No.813 of 2024

not satisfy the terms of the notification which would require the applicant to be in active practice for a period of five years immediately preceding the date of application.

c. The work allocation to the appellant by CMRL does not reveal that the appellant was required to act / plead on its behalf. Neither has the appellant let in any evidence in the form of vakalat nor produced orders of Criminal Court in her name during the relevant period to show that she was in active practice in criminal courts.

24. In the light of the above findings, we find no merit in the present writ appeal and thus the appeal stands dismissed. Consequently, connected miscellaneous petition is closed. No costs.

[R.M.D., A.C.J.] [M.S.Q., J.]

12.07.2024

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W.A.No.813 of 2024

To

The Secretary,
Tamil Nadu Public Service Commission,
V.O.C Nagar, Park Town, Chennai 600 003,
Tamil Nadu.



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W.A.No.813 of 2024

THE HON'BLE ACTING CHIEF JUSTICE
AND
MOHAMMED SHAFFIQ, J.

Shk/ mka

W.A. No.813 of 2024
and C.M.P. No.5586 of 2024

12.07.2024