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W.A.(MD)NO.575 OF 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 25.08.2025

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

AND

THE HON'BLE MR.JUSTICE K.RAJASEKAR

W.A.(MD)No.575 of 2021

The Secretary,
Tamil Nadu Public Service Commission,
Frazer Bridge Road, V.O.C.Nagar,
Chennai – 600 003.

... Appellant / Respondent

Vs.

S.Balasubramanian

... Respondent / Petitioner

Prayer: Writ Appeal filed under Clause 15 of Letters Patent, to set aside the order made in W.P.(MD)No.237 of 2014 dated 13.12.2018 by allowing the above writ appeal on the grounds raised above and the appellants further reserve its right to raise additional grounds if any at the time of hearing of the above writ appeal with the leave of this Court.

For Appellant : Mr.J.Anandkumar,
Standing counsel for TNPSC.

For Respondent : Mr.M.P.Senthil,
for Mr.D.Venkatesh.

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J U D G M E N T**(Order of the Court was delivered by G.R.SWAMINATHAN, J.)**

Heard both sides.

2. The respondent herein (writ petitioner) applied in response to the recruitment notification issued by TNPSC (appellant) calling for applications from eligible candidates for the post of Assistant Public Prosecutor Grade II in Tamil Nadu General Service. The notification was issued on 02.04.2012. The writ petitioner was successful in the written test as well as in the interview. However, he was not appointed to the post since the recruiting agency came to know that the writ petitioner was working as Development Officer of LIC of India in Tirunelveli since 2009. Hence, the order dated 19.11.2013 was issued cancelling the provisional selection of the writ petitioner. Challenging the same, W.P.(MD)No.237 of 2014 was filed. The learned single Judge vide order dated 13.12.2018 allowed the writ petition in the following terms:-

“74.The present writ petition thus stands partly allowed. Thus, impugned Memo No5934/OTD-C2/2011 dated 19.11.2013 is quashed



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with a direction to the respondent to call the petitioner to interview for appointment to the post of the Assistant Public Prosecutor Grade II subject to availability of the vacancies and the petitioner producing relevant Certificate of Practice. No cost. Consequently, connected miscellaneous petitions are closed.”

Challenging the same, TNPSC has filed this appeal.

3. The recruitment notification itself reads that the applicant must be a member of bar and must have had active practice in criminal courts for a period of five years. The expression “must have had active practice” was recently interpreted by the Hon'ble Division Bench in ***W.A.No.813 of 2024 dated 12.07.2024 (D.Almas Banu V. Tamil Nadu Public Service Commission)*** in the following terms:-

“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



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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 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



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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 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



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have had active practice in the last five years preceding the date of the application.

15. In any event, any attempt to suggest that the requirement of 5 years of active practice in criminal courts would be satisfied if it is shown that the applicant / candidate had practised for a period of 5 years, sometime in the past, though not presently in active practice, would produce results which are abnoxious and absurd as could be seen from the following illustration:

“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.”

15.1. In terms of the above construction, the above candidate would be eligible. In other words, someone who is out of touch, not in sync with the court proceedings would satisfy the eligibility criteria. This would frustrate the purpose of calling for applicants to the post of APP which is to attract the best talent. The post of APP is sensitive and of great importance in the criminal justice delivery system as could be seen from the discussion supra under the head role of APP. This is yet another reason why such a construction ought to be eschewed / rejected.



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D. Rule 49 – Whether attracted:

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.”



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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, 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.” ”

In paragraph No.16.2 of the aforesaid decision, it was held as follows:-

“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 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.”

Applying the ratio laid down by the Hon'ble Division Bench, one can conclude that the applicant must have been in practice on the date



when he submitted the application. Admittedly, in the case on hand, the writ petitioner had joined the LIC of India as Development Officer in the year 2009 and that he was not in active practice in criminal courts on the date when he submitted the application.

4. There was also some debate as to what the expression “member of the bar” would mean. We are more than satisfied that only a person whose membership status as an Advocate has not been suspended alone can be called as a member of the bar. The person who had joined some other avocation or job ceases to be an Advocate. Therefore, he may not be called as a member of the bar. TNPSC rightly cancelled the writ petitioner's provisional selection. These aspects were not taken note of by the learned single Judge. The order passed by the learned single Judge is set aside. This writ appeal stands allowed. No costs.

(G.R.SWAMINATHAN, J.) & (K.RAJASEKAR, J.)
25th August 2025

NCC : Yes / No
Index : Yes / No
Internet : Yes/ No
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