

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

SWP No.1735/2010
CMP No.2424/2010

Date of Decision:14.09.2010

Achal Sethi v. High Court of J&K and anr.

Coram:

Mr. Justice J. P. Singh, Judge.

Appearing Counsel:

For Petitioner(s) : Mr. K.S.Johal, Advocate.
For Respondent(s) : M/S A.V.Gupta, Sr. Advocate with
H.A.Siddiqui and Aditya Gupta, Advocates.

- | | | | |
|-----|--|---|-----|
| i) | Whether approved for reporting
in Press/Journal/Media | : | Yes |
| ii) | Whether to be reported in
Digest/journal | : | Yes |
-

The petitioner, a Deputy Secretary to the Government of Jammu and Kashmir in the Law Department, wishes to compete for the post of District Judge and thus participate in the selection process initiated pursuant to High Court of Jammu and Kashmir, Srinagar's Notification No.264-A dated 25.06.2010.

Rule 5 (2)(b) of the Jammu and Kashmir Higher Judicial Service Rules, 2009, in terms whereof, a candidate must be a practicing Advocate in Courts of Civil and Criminal Jurisdiction on the last date of receipt of applications and must have been in actual practice for a period of not less than seven years, debars him to compete.

Thus, disabled to compete, he has filed this Writ Petition seeking issuance of a Writ of Certiorari to quash rule 5 (2)(b) of the Jammu and Kashmir Higher Judicial Service Rules, 2009, hereinafter to be referred as “the rules”, besides a Command to the respondents to permit him to compete and participate in the selection process.

The case set up in the Writ Petition by him is that having remained in active practice as an advocate in the High Court of Jammu and Kashmir and the District Courts at Jammu for more than seven years, he was entitled to compete and participate in the selection process, for the post of District Judge, And rule 5(2)(b) of the rules, entitling only those to participate in the selection process and compete for the post, who were actually practicing in the Courts of civil and criminal jurisdiction, on the last date of receipt of applications, was violative of the provisions of Section 109 of the Constitution of Jammu and Kashmir.

His learned counsel, Sh. K.S.Johal submitted that the word ‘service’ appearing in Article 233 (2) of the Constitution of India which was in *pari materia* with Section 109(2) of the Constitution of Jammu and Kashmir, having been interpreted by Hon’ble Supreme Court of India as ‘judicial service’, the petitioner, not being in judicial service, was entitled to compete for the post in terms of the provisions of the Constitution of Jammu and Kashmir, for his being in service of the State in the

Law Department, would not render him ineligible for the post. Rule 5(2)(b) of the rules, which debars him from competing for the post, was, therefore, violative of the provisions of Section 109 of the Constitution of Jammu and Kashmir, says the learned counsel.

Opposing the Motion, Sh. A.V.Gupta, learned Senior Advocate, appearing for the High Court of Jammu and Kashmir, submitted that the phraseology used in, and the intention underlying Section 109 of the Constitution of Jammu and Kashmir would not permit any person having not less than seven years' practice as an Advocate or Pleader, to compete for the post of District Judge, unless he was in active practice at the time of filing application for such selection. According to him, rule 5(2)(b) did not suffer from the vice of unconstitutionality as alleged because it was in line with the spirit and intention underlying Section 109 of the Constitution which additionally supported the mandate of the Constitution to keep the Judiciary separate from the Executive, in not permitting the members of the Executive to join the Judicial service.

Both the learned counsel, relied heavily on *Chandra Mohan versus State of U.P. and others*, reported as AIR 1966 SC, 1987, the Constitution Bench Judgment of the Hon'ble Supreme Court of India, besides *Sushma Suri versus Government of National Capital Territory of Delhi and another*,

reported as 1999 (1) SCC, 330, to support their respective submissions.

I have considered the submissions of learned counsel for the parties and gone through the case law cited at the Bar.

To deal with the submissions advanced at the Bar, regard needs to be had to the provisions of Article 233 of the Constitution of India and Section 109 of the Constitution of Jammu and Kashmir, which for facility of reference are reproduced hereunder:-

“Article 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.

Section 109-

Appointment of district Judges-

(1) Appointment of persons to be, and the posting and promotion of, district Judges in the State shall be made by the Governor in consultation with the High Court.

(2) A person not already in the service 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 pleader and is recommended by the High Court for appointment.”

The phraseology employed in the above two provisions being same, except for the absence of word ‘Union’, in the State Constitution, the expression ‘service of the State’

appearing in Section 109 of the Constitution of Jammu and Kashmir needs to be understood as 'Judicial Service of the State' to deal with the submissions, for, in view of the law laid-down in the Constitution Bench Judgment (*supra*) and followed in latter judgments of the Apex Court, the legal position that the expression 'service' appearing in Article 233 and Section 109, means 'Judicial service', is well settled.

Thus, proceeding on the premise that the expression 'service of the State' appearing in Section 109 of the Constitution of Jammu and Kashmir means 'Judicial Service of the State', the issue that falls for consideration is as to whether or not, those in the service of the State, other than the Judicial service, having minimum seven years of practice, as an Advocate or Pleader, to their credit, before joining the service, were entitled to compete for the post of District Judge?

A careful reading of Section 109 of the Constitution of Jammu and Kashmir demonstrates the intention of the Constitution Makers to permit only the Advocates or Pleaders having not less than seven years' practice as such to compete for appointment as District Judge, and it is, in this context that a person already in Judicial Service of the State, is indicated in Section 109 not entitled to compete for such direct recruitment. This would not, however, mean that persons in service of the State, other than judicial service, were entitled to compete, in that, Section 109 contemplates only two sources for entry into

the Higher Judicial Service of the State i.e. the cadre of District Judges viz (1) by direct appointment from amongst Advocates/Pleaders, having not less than seven years practice, and (2) by promotion from the State subordinate judicial service. This is so because while interpreting one or the other provisions of the Constitution, all relevant provisions appearing in the Constitution in regard thereto, demonstrating the intention of the Constitution Makers, needs to be kept in view.

Therefore, while understanding the provisions of Section 109 of the Constitution and the spirit underlying therein, the provisions of Section 18 of the Constitution cannot be lost sight of, in terms whereof, the State is duty bound to take steps to separate the Judiciary from the Executive in the public services to secure a Judicial system which was humane, cheap, certain, objective and impartial whereby justice would be done and shall be seen to be done and shall strive to ensure efficiency, impartiality and incorruptibility of its various organs of justice, administration and public utility.

Permitting persons who were already serving in the Executive, to compete for the District Judge's post, in my opinion, would be interference with the Constitutional mandate aforementioned.

No further discussion on the issue may be necessary in view of the observations made by the Constitution Bench of the

Apex Court in Chandra Mohan's case (supra), on the issue, which for facility of reference is reproduced hereunder:-

“Till India attained independence, the position was that district Judges were appointed by the Governor from three sources, namely, (i) the Indian Civil Service, (ii) the Provincial Judicial Service, and (iii) the Bar. But after India attained independence in 1947, recruitment to the Indian Civil Service was discontinued and the Government of India decided that the members of the newly created Indian Administrative Service would not be given judicial posts. Thereafter district Judges have been recruited only from either the judicial service or from the Bar. There was no case of a member of the executive having been promoted as a district Judge. If that was the factual position at the time the constitution came into force, it is unreasonable to attribute to the makers of the Constitution, who had so carefully provided for the independence of the judiciary, an intention to destroy the same by an indirect method. What can be more deleterious to the good name of the judiciary than to permit at the level of district Judges, recruitment from the executive departments?”

Even otherwise, a person desirous of competing for the post of District Judge, has to be a practicing Advocate or Pleader with minimum seven years of practice at the time of his seeking such consideration, for the expression, **“if he has been”** appearing in the Section, **indicates his continuance, as such, in the profession** at the time of applying, and **not his past experience** as such. An Advocate, ceases to be a member of the Noble profession, the moment he joins service, in view of the rules framed by the Bar Council of India under the Indian Advocates Act and in this view of the matter, being in service of the State Government, since 2006, the petitioner has ceased to be an Advocate in terms of the provisions of the

Advocates Act, hence disentitled to compete for the post of the District Judge.

The petitioner's learned counsel's plea that rule 5(2)(b) of the Jammu and Kashmir Higher Judicial Service Rules, 2009, was violative of the Constitution of Jammu and Kashmir, is, therefore, found without merit.

In view of the law laid-down by the Constitution Bench Judgment of Hon'ble Supreme Court of India and the view taken, I do not find any case to have been made out for admission of the Writ Petition to hearing and thus the petitioner's learned counsel's plea, raised during consideration of the Petition, that the defect in the petitioner's Writ Petition of not impleading the State of Jammu and Kashmir, as a party respondent, be permitted to be remedied, by amendment, may not thus need consideration.

Bereft of substance, this Petition is, accordingly, dismissed in limine.

(J. P. Singh)
Judge

JAMMU:-
14.09.2010
Vinod