REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.7358 OF 2016
(Arising out of SLP (C) No. 17466 of 2016)

Vijay Kumar Mishra and Another … Appellants

Versus

High Court of Judicature at Patna and Others … Respondents

JUDGMENT

Chelameswar, J.

1. Leave granted.

2. To explore the true purport of Art. 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 under appeal. They are:

> "The challenge in the present writ application is to the communication, dated 16th of February, 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. An Advertisement No. 01/2015 was issued inviting applications from eligible Advocates for direct recruitment in respect of 99 vacancies as on 31st of March, 2015. The cut off date for the eligibility was 5th of February, 2015. The petitioners appeared in the Preliminary as well as in the Mains Examination pursuant to such advertisement.

3. In the meantime, 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 22nd of January, 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 16th of February, 2016. The communication to one of the petitioners reads as under:-

"To,

The District & Sessions Judge
Siwan

Dated, Patna the 16th February, 2016

Sir,

With reference to your letter no. 80 dated 05.02.2016, I am directed to say that the Court have been pleased to reject the representation dated 05.02.2016 of Sri 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."

The High Court repelled the challenge holding that to permit the appellant to participate in the interview would be breaching the mandate of Art. 233(2).

> "11….. Since before the date of interview, the petitioners joined the Judicial Service, the petitioners, cannot, in terms of Clause (2) of Article 233 of the Constitution, be permitted to continue with the selection process for District Judge Entry Level (Direct from Bar) as they are, now, members of the Judicial Service. Therefore, the petitioners have rightly not called for interview."

Hence the appeal.

3. Unfortunately, it was neither argued nor did the High Court examine the true meaning and purport of Article 233(2). The appellants' argument before the High Court appears to be that notwithstanding the fact that they are the members of the judicial service, the eligibility for competing for the post of District Judges should be considered on the basis of the facts as they existed on the "cut off date", and the subsequent events are not be taken into consideration for determining the

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question whether the appellants are barred from appearing in the interview.

> "…intervening fact of the petitioners joining the Judicial Service will not act as bar for their appearance in the interview."[1]

We are afraid that the entire enquiry before the High Court was misdirected. The real question which arises in the case on hand is whether the bar under Article 233(2) is only for the appointment or even for the participation in the selection process.

4. The High Court believed in its administrative facet that Article 233(2) would not permit the participation of the appellant in the selection process because of his existing employment. The High Court came out with a 'brilliant' solution to the problem of the appellant i.e., the appellant may resign his membership of the subordinate judicial service if he aspires to become a district judge. But the trouble is the tantalizing caveat. If the appellant tenders resignation, he would not be permitted to withdraw the same at a later stage.

1 See Para 9 of the Judgment under appeal

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5. For any youngster the choice must appear very cruel, to give up the existing employment for the uncertain possibility of securing a better employment. If the appellant accepted the advice of the High Court but eventually failed to get selected and appointed as a District Judge, he might have to regret his choice for the rest of his life. Unless providence comes to the help of the appellant to secure better employment elsewhere or become a successful lawyer, if he chooses to practice thereafter the choice is bound to ruin the appellant. The High Court we are sure did not intend any such unwholesome consequences. The advice emanated from the High Court's understanding of the purport of Art. 233(2). Our assay is whether the High Court's understanding is right.

6. Article 233(1)[2] 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)[3] declares that only a person not

[2] 233 (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

[3] 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

already in the service of either the Union or of the State shall be eligible to be appointed as District Judges. 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.[4] 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.[5] 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

[4] (1993) Supp (3) SCC 181 at pg 190 "29. At this stage, we will proceed to decide as to the meaning and effect of the words "recruitment" and "appointment". The term "recruitment" connotes and clearly signifies enlistments, acceptance, selection or approval for appointment. Certainly, this is not actual appointment or posting in service. In contradistinction the word "appointment" means an actual act of posting a person to a particular office. 30. Recruitment is just an initial process. That may lead to eventual appointment in the service. But, that cannot tantamount to an appointment."

[5] (1994) 1 SCC 126 at pg 129 "8. "It is now well settled that a person who is selected does not, on account of being empanelled alone, acquire any indefeasible right of appointment. Empanelment is at the best a condition of eligibility for purposes of appointment, and by itself does not amount to selection or create a vested right to be appointed unless relevant service rule says to the contrary. (*See Shankarsan Dash v. Union of India* and *Sabita Prasad and Ors. v. State in Bihar and Ors*"

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 Art. 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 of 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 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 Art. 233(2) nor contemplated under the scheme of the constitution as it would not serve any constitutionally desirable purpose.

9. The respondents relied upon two judgments of this Court in a bid to sustain the judgment under appeal, ***Satya Narain***

Singh Vs. High Court of Judicature at Allahabad and Others (1985) 1 SCC 225 and ***Deepak Aggarwal Vs. Keshav Kaushik and Others*** (2013) 5 SCC 277.

10. In first of the above-mentioned judgments, the petitioners/appellants before this Court were members of the Uttar Pradesh Judicial Service. In response to an advertisement by the High Court, they applied to be appointed by direct recruitment to the Uttar Pradesh Higher Judicial Service (District Judges).

It appears from the judgment "as there was a question about the eligibility of the members of the Uttar Pradesh Judicial Service to appointment by direct recruitment to the higher judicial service…….", some of them approached the High Court by way of writ petitions which were dismissed and therefore, they approached this Court. It is not very clear from the judgment, as to how the question about their eligibility arose and at what stage it arose. But the fact remains, by virtue of an interim order of this Court, they were allowed to appear in the examination. The argument before this Court was that all the petitioners had practiced for a

period of seven years before their joining the subordinate judicial service, and therefore, they are entitled to be considered for appointment as District Judges notwithstanding the fact that they were already in the judicial service.

It appears from the reading of the judgment 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.

11. In the case of ***Deepak Aggarwal*** (supra), the question before this Court was;

> "52. The question that has been raised before us is whether a Public Prosecutor/Assistant Public Prosecutor/District Attorney/Assistant District Attorney/Deputy Advocate General, who is in full-time

> employment of the Government, ceases to be an advocate or pleader within the meaning of Article 233(2) of the Constitution."

On an elaborate examination of the various aspects of the legal profession, the provisions of the Bar Council Act etc., this Court concluded that public prosecutors etc. did not cease to be advocates, and therefore, they could not be considered to be in the service of the Union or the State within the meaning of Article 232.

> "101. ….In our view, none of the Attorney/Public Prosecutor/Deputy Advocate General, ceased to be "advocate" and since each one of them continued to be "advocate", they cannot be considered to be in the service of the Union or the State within the meaning of Article 233(2). The view of the Division Bench is clearly erroneous and cannot be sustained."

and finally held that they are not debarred under Article 233. A judgment which has no relevance to the issue before us

12. We are of the opinion that neither of the cases really dealt with the issue on hand. Therefore, in our opinion, neither of the above two judgments is an authority governing the issue before us.

13. For the above-mentioned reasons, the Appeal is allowed. Consequently, the Writ Petition (CWJC No. 3504 of 2016) filed by the appellants also stands allowed directing the

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respondents to permit the appellants to participate in the selection process without insisting upon their resigning from their current employment. If the appellants are found suitable, it is open to the appellants to resign their current employment and opt for the post of District Judge, if they so choose.

……………………………….J.
(J. Chelameswar)

……………………………….J.
(Abhay Manohar Sapre)

New Delhi;
August 9, 2016

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Vijay Kumar Mishra and Another ....Appellant(s)

VERSUS

High Court of Judicature at Patna
& Others
......Respondent(s)

J U D G M E N T

Abhay Manohar Sapre, J.

1) I have had the advantage of going through the elaborate, well considered and scholarly draft judgment proposed by my esteemed Brother Jasti Chelameswar J. I entirely agree with the reasoning and the conclusion, which my erudite Brother has drawn, which are based on remarkably articulate process of reasoning. However, having regard to the issues involved, which were ably argued by learned counsel

appearing in the case, I wish to add few lines of concurrence.

2) I need not set out the facts, which are not in dispute and set out in the order proposed by my learned Brother.

3) The short question, which arises for consideration in this appeal, is what is the true object, purport and scope of Article 233 (2) of the Constitution of India and, in particular, the words "**eligible to be appointed as district judge**" occurring in the Article?

4) Chapter VI of the Constitution of India deals with the **subordinate courts** in the State. Articles 233 and 236, which are part of Chapter VI, read 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.**

236. *Interpretation.* – In this Chapter-
(a) The expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge;

(b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge."

5) Article 233 deals with appointment, posting and promotion of the district judges in the State. Clause (1) provides that appointment, posting and promotion of the 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.

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6) Clause (2) of Article 233 with which we are concerned here provides that 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 7 years as an advocate or a

pleader and is recommended by the High Court for appointment.

7) Article 236 (a) defines the word "**district judge**" occurring in Chapter VI.

8) Reading of clause (2) of Article 233 shows that the "**eligibility**" of a person applying for the post of district judge has to be seen in the context of his appointment. *A fortiori,* the eligibility of a person as to whether he is in the service of Union or State is required to be seen at the time of his appointment for such post and not prior to it.

9) Mr. Ranjit Kumar, Solicitor General of India appearing for the respondent (High Court), however, contended that the word "**appointed**" occurring in Article 233(2) of the Constitution should necessarily include the entire selection process starting from the date of submitting an application by the person concerned till the date of his appointment. It was his submission that if any such person is found to be in service of Union or State, as the case may be, on the

date when he has applied then such person would suffer disqualification prescribed in clause (2) of Article 233 and would neither be eligible to apply nor be eligible for appointment to the post of district judge.

10) This submission though look attractive is not acceptable. Neither the text of Article and nor the words occurring in Article 233(2) suggest such interpretation. Indeed, if his argument is accepted, it would be against the spirit of Article 233(2). My learned Brother for rejecting this argument has narrated the consequences, which are likely to arise in the event of accepting such argument and I agree with what he has narrated.

11) In my view, there lies a subtle distinction between the words "**selection**" and "**appointment**" in service jurisprudence. (See : **Prafulla Kumar Swain vs. Prakash Chandra Misra & Ors.,** (1993) Supp. (3) SCC 181). When the framers of the Constitution have used the word "**appointed**" in clause (2) of Article 233 for determining the eligibility of a person with

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reference to his service then it is not possible to read the word "**selection**" or "**recruitment**" in its place. In other words, the word "**appointed**" cannot be read to include the word "**selection**", "**recruitment**" or "**recruitment process**".

12) In my opinion, there is no bar for a person to apply for the post of district judge, if he otherwise, satisfies the qualifications prescribed for the post while remaining in service of Union/State. It is only at the time of his appointment (if occasion so arises) the question of his eligibility arises. Denying such person to apply for participating in selection process when he otherwise fulfills all conditions prescribed in the advertisement by taking recourse to clause (2) of Article 233 would, in my opinion, amount to violating his right guaranteed under Articles 14 and 16 of the Constitution of India.

13) It is a settled principle of rule of interpretation that one must have regard to subject and the object for which the Act is enacted. To interpret a Statue in a

reasonable manner, the Court must place itself in a chair of reasonable legislator/author. So done, the rules of purposive construction have to be resorted to so that the object of the Act is fulfilled. Similarly, it is also a recognized rule of interpretation of Statutes that expressions used therein should ordinarily be understood in the sense in which they best harmonize with the object of the Statute and which effectuate the object of the legislature. (See-**Interpretation of Statues 12th Edition, pages 119 and 127 by G.P.Singh**). The aforesaid principle, in my opinion, equally applies while interpreting the provisions of Article 233(2) of the Constitution.

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14) With these few words of mine, I agree with the reasoning and the conclusion arrived at by my learned Brother.

……………………………………..J.
[ABHAY MANOHAR SAPRE]

New Delhi;
August 09, 2016