2020 INSC 209

(REPORTABLE)

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL/INHERENT JURISDICTION

CIVIL APPEAL NO. 1698 OF 2020
[ARISING OUT OF S.L.P. (C) NO.14156 OF 2015]

DHEERAJ MOR ... APPELLANT(S)

VERSUS

HON'BLE HIGH COURT OF DELHI ... RESPONDENT(S)

WITH

CIVIL APPEAL NO. 1699 OF 2020
[ARISING OUT OF S.L.P. (C) No. 14676/2015]

CIVIL APPEAL NO. 1700 OF 2020
[ARISING OUT OF S.L.P. (C) No. 24219/2015

CIVIL APPEAL NO. 1701 OF 2020
[ARISING OUT OF S.L.P. (C) No. 30556/2015
W.P. (C) No. 77/2016

W.P. (C) No. 130/2016

W.P. (C) No. 405/2016

W.P. (C) No. 414/2016

CIVIL APPEAL NO. 1702 OF 2020
[ARISING OUT OF S.L.P. (C) No. 15764/2016
W.P. (C) No. 423/2016
CIVIL APPEAL NO. 1707 OF 2020
[@ SPECIAL LEAVE PETITION (C) NO. 4781 OF 2020]
[ARISING OUT OF S.L.P. (C)...CC No. 15018/2016]

CIVIL APPEAL NO. 1703 OF 2020
[ARISING OUT OF S.L.P. (C) No. 23823/2016]

CIVIL APPEAL NO. 1704 OF 2020
[ARISING OUT OF S.L.P. (C) No. 24506/2016]

CIVIL APPEAL NO. 1706 OF 2020
[@ SPECIAL LEAVE PETITION (C) NO. 4778 OF 2020]
[ARISING OUT OF S.L.P. (C)...CC No. 15304/2016]

W.P. (C) No. 600/2016

W.P. (C) No. 598/2016

W.P. (C) No. 601/2016

W.P. (C) No. 602/2016

W.P. (C) No. 733/2016

W.P. (C) No. 189/2017

W.P. (C) No. 222/2017

W.P. (C) No. 316/2017

W.P. (C) No. 334/2017

W.P. (C) No. 371/2017

W.P. (C) No. 96/2018

W.P. (C) No. 102/2018

W.P. (C) No. 103/2018

T.P. (C) No. 272/2018

W.P. (C) No. 108/2018

W.P. (C) No. 110/2018

W.P. (C) No. 106/2018

W.P. (C) No. 146/2018

W.P. (C) No. 123/2018

W.P. (C) No. 124/2018

W.P. (C) No. 138/2018

W.P. (C) No. 155/2018

W.P. (C) No. 145/2018

W.P. (C) No. 158/2018

W.P. (C) No. 174/2018

CIVIL APPEAL NO. 1705 OF 2020
[ARISING OUT OF S.L.P. (C) No. 8480/2018]
W.P. (C) No. 291/2018

W.P. (C) No. 287/2018

W.P. (C) No. 344/2018

W.P. (C) No. 352/2018

W.P. (C) No. 387/2018

W.P. (C) No. 392/2018

W.P. (C) No. 396/2018

W.P. (C) No. 530/2018

W.P. (C) No. 519/2018

W.P. (C) No. 535/2018

W.P. (C) No. 581/2018

W.P. (C) No. 578/2018

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W.P. (C) No. 629/2018

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W.P. (C) No. 616/2018

W.P. (C) No. 632/2018

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W.P. (C) No. 624/2018

W.P. (C) No. 631/2018

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W.P. (C) No. 650/2018

W.P. (C) No. 644/2018

W.P. (C) No. 658/2018

W.P. (C) No. 659/2018

W.P. (C) No. 680/2018

W.P. (C) No. 671/2018

W.P. (C) No. 677/2018

W.P. (C) No. 681/2018

W.P. (C) No. 686/2018

W.P. (C) No. 703/2018

W.P. (C) No. 696/2018

W.P. (C) No. 717/2018

W.P. (C) No. 728/2018

W.P. (C) No. 726/2018

W.P. (C) No. 727/2018

W.P. (C) No. 1272/2018

W.P. (C) No. 1302/2018

W.P. (C) No. 656/2019

W.P. (C) No. 744/2019

W.P. (C) No. 999/2019

W.P. (C) No. 1054/2019

W.P. (C) No. 1053/2019

W.P. (C) No. 1080/2019

W.P. (C) No. 1073/2019

W.P. (C) No. 1089/2019

W.P. (C) No. 1086/2019

W.P. (C) No. 1150/2019

CONMT.PET. (C) No. 1023/2019 in W.P.(C) No. 414/2016

W.P. (C) No. 1266/2019

J U D G M E N T

ARUN MISHRA, J.

1. A Division Bench of this Court has referred 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 at 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.

2. The central argument advanced is that Article 233(2) provides two sources of recruitment; one is from judicial service, and the other

is from Bar. Thus, a person in judicial service with experience of 7 years practice at the Bar, before joining service (or combined with service as a judicial officer), can stake a claim under Article 233(2) as against the posts reserved for those having experience of 7 years as an advocate/pleader. Reliance has been placed on the decisions of this Court in *Rameshwar Dayal v. State of Punjab & Ors.*, AIR 1961 SC 816 and in *Chandra Mohan v. State of Uttar Pradesh & Ors.*, (1967) 1 SCR 77 = AIR 1966 SC 1987 to submit that under Article 233(2) there are two sources of direct recruitment to the higher judicial service; one from the Bar and the other from service. The decisions of Constitution Bench in *Chandra Mohan* (supra) and *Rameshwar Dayal* (supra) are binding. The decision to the contrary in *Satya Narain Singh v. High Court of Judicature at Allahabad & Ors.,* (1985) 1 SCC 225 taking a departure negating the right of the member of the judicial service and confining the direct recruitment from the Bar through practicing advocates effectively whittle down the law laid down in *Chandra Mohan* (supra) and *Rameshwar Dayal* (supra).

3. It is argued that articles 233(1) and 233(2) *inter alia* deal with direct recruitment, as is apparent from the Constitution Bench decision of this Court in the *High Court of Punjab & Haryana v. State of Haryana*, (1975) 1 SCC 843. The rules framed by various High Courts disqualifying the members of subordinate judicial service from

direct recruitment to the higher judicial service are not in consonance with the law laid down in *Chandra Mohan* (supra) and *Rameshwar Dayal* (supra) and the provisions contained in Article 233. The rules, which completely cut off one stream and provide only one stream of direct recruitment then the High Court's rules would have to be declared ultra vires being violative of Article 233. It was further submitted that the rules framed by various High Courts arbitrarily discriminate between advocates and the members of the judicial service in the matter of direct recruitment, the rules suffer from the vice of arbitrariness. It was also submitted that the decision in *All India Judges' Association v. Union of India*, (2002) 4 SCC 247 has been rendered by a Bench of three Judges. The decision cannot overturn the two earlier Constitution Bench judgments of this Court. In *All India Judges' Association case* (supra), the Court proceeded on the basis that there was only one source of direct recruitment to the higher judicial service, which is violative of the dictum laid down by a larger Bench of this Court in *Rameshwar Dayal* (supra) and *Chandra Mohan* (supra). The decision in *All India Judges' Association case* (supra) is inadvertent and cannot be said to be binding. The quota system from the service and the Bar would apply to those who apply within the quota. The quota system cannot override the constitutional scheme of Article 233(1) and (2).

4. Reliance has also been placed on behalf of the petitioners upon the decision in *Vijay Kumar Mishra & Anr. v. High Court of Judicature at Patna & Ors.*, (2016) 9 SCC 313 in which it has been held that the bar prescribed under Article 233(2) prohibits only the appointment of persons in service of Central/State Government and not their participation in the recruitment process. It is the constitutional right of such persons as well to participate in the selection process. In case they are selected, they can resign and join the post.

5. On the other hand, it was submitted on behalf of various High Courts as well as on behalf of the practicing advocates that Article 233(2) contemplates direct recruitment only from the Bar and the person should not be in judicial service for the post of direct recruitment. They can only be promoted. By their volition they can join the subordinate judicial service. Having done so, they can only be promoted to the higher judicial service as provided in the rules. It was further submitted that the decisions in *Rameshwar Dayal* (supra) and *Chandra Mohan* (supra) rather than espousing the submissions on behalf of in-service candidates, negate the same. The decision in *Satya Narain Singh* (supra) has also considered the aforesaid decisions and has opined that there are two different streams, and the candidates from the judicial service cannot stake their claim as against the posts reserved for direct recruitment from the Bar. Similar

is the law laid down by this Court in the case of *Deepak Aggarwal v. Keshav Kaushik & Ors.*, (2013) 5 SCC 277. It was further submitted that the decision in *All India Judges Association* (supra) has prescribed a quota for merit promotion from the in-service candidates and 25% of the quota for direct recruitment from the Bar. Also, the quota for limited competitive examinations fixed was reduced to 10% in *All India Judges' Association v. Union of India*, (2010) 15 SCC 170. It was further submitted that there is a separate quota provided under the rules framed by various High Courts, but now there is a roster system as well. Roster system has also been made applicable for fixing the seniority of the incumbents recruited from in-service candidates as well as directly from the Bar. In this regard reference has been made to the decision of this Court in *Punjab & Haryana High Court v. State of Punjab*, (2018) SCC OnLine SC 1728.

6. The main question for consideration is the interpretation of Article 233 of the Constitution of India, and based upon its interpretation, the question concerning the rules being ultra vires of the same has to be examined. Rules of various High Courts, as existing preclude members of the judicial service from staking their claim as against the posts reserved for direct recruitment from the Bar. Article 233 is extracted hereunder:

"**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."

7. The *Hindi* version of Article 233 has also been relied upon. The same is extracted hereunder:

" अध्याय 6- अधीनस्थ न्यायालय

233. जिला न्यायाधीशों की नियुक्ति - (1) किसी राज्य में जिला न्यायाधीश नियुक्त होने वाले व्यक्तियों की नियुक्ति तथा जिला न्यायाधीश की पदस्थापना और प्रोन्नति उस राज्य का राज्यपाल ऐसे राज्य के संबंध में अधिकारिता का प्रयोग करने वाले उच्च न्यायालय से परामर्श करेगा।

(2) वह व्यक्ति, जो संघ की या राज्य की सेवा में पहले से ही नहीं है, जिला न्यायाधीश नियुक्त होने के लिए केवल तभी पात्र होगा जब वह कम से कम सात वर्ष तक अधिवक्ता या प्लीडर रहा है और उसकी नियुक्ति के लिए उच्च न्यायालय ने सिफारिश की है।"

8. It was submitted that Article 394A had been inserted by way of the Constitution (Fifty-eighth Amendment) Act, 1987. The same provides as under:

"**394A. Authoritative text in the Hindi language**.-- (1) The President shall cause to be published under his authority,--

(a) the translation of this Constitution in the Hindi language, signed by members of the Constituent Assembly, with such modifications as may be necessary to bring it in conformity with the language, style and terminology adopted in the authoritative texts of Central Acts in the Hindi language, and incorporating therein all the amendments of this Constitution made before such publication; and

(b) the translation in the Hindi language of every amendment of this Constitution made in the English language.

(2) The translation of this Constitution and of every amendment thereof published under clause (1) shall be construed to have the same meaning as the original thereof,

> and if any difficulty arises in so construing any part of such translation, the President shall cause the same to be revised suitably.
>
> (3) The translation of this Constitution and of every amendment thereof published under this article shall be deemed to be, for all purposes, the authoritative text thereof in the Hindi language."

9. The *Hindi* translation of the Constitution signed by the members of the Constituent Assembly was published in 1950 under the authority of the President of the Constituent Assembly. The translation of the Constitution shall be deemed to be the authoritative text thereof in the *Hindi* language.

10. Crawford in *The Construction of Statutes*, 202 (1940) has also been referred to, especially the following observations:

> "In some jurisdictions statutes may be enacted in more than one language. Where this is the situation, both texts constitute the law and each must be considered in ascertaining the meaning of the legislature."

11. Considering the version in the *Hindi* language as well as in the English language, the meaning is the same, and interpretation does not change. There is no room for any confusion that they are two different sources of appointment provided in Article 233.

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 practiced for seven years. The expression 'in service of the Union or the State' has been interpreted in *Chandra Mohan* (supra) 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* (supra), 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 refers 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.

15. Reliance has been placed on *Chandra Mohan v. State of U.P.*, (supra) by both the sides, facts of which reflect that Allahabad High Court called for applications for recruitment to 10 vacancies in the Uttar Pradesh Higher Judicial Service from Barristers, Advocates, Vakils and pleaders of more than 7 years' standing and from judicial officers. Six incumbents were selected - three advocates and three judicial officers. The Selection Committee sent two lists, one comprising the names of the three advocates and the other comprising the names of three judicial officers to the High Court. There was agreement that the selection from the Bar was good. The question arose about the legality of the appointment of judicial officers. The question arose was whether the incumbents who were not members of

the judicial service could have been appointed as District Judges under Rule 14. This Court while striking down the Rules interpreted Article 233 thus:

> "7. The first question turns upon the provisions of Art. 233 of the Constitution. Article 233(1) reads:
>
> > "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."
>
> We are assuming for the purpose of these appeals that the "Governor" under Art. 233 shall act on the advice of the Ministers. So, the expression "Governor" used in the judgment means Governor acting on the advice of the Ministers. The constitutional mandate is clear. The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of district judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the "judicial service" or to the Bar, to be appointed as a district judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him. This mandate can be disobeyed by the Governor in two ways, namely, (i) by not consulting the High Court at all, and (ii) by consulting the High Court and also other persons. In one case he directly infringes the mandate of the Constitution and in the other he indirectly does so, for his mind may be influenced by other persons not entitled to advise him. That this constitutional mandate has both a negative and positive significance is made clear by the other provisions of the Constitution. Wherever the Constitution intended to provide more than one consultant, it has said so: see Arts. 124(2) and 217(1). Wherever the Constitution provided for consultation of a single body or individual it said so: see Art. 222. Art. 124(2) goes further and makes a distinction between persons who shall be consulted and persons who may be consulted. These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein. To state it differently, if A is empowered to appoint B in consultation with C, he will not be exercising the power in the manner prescribed if he appoints B in consultation with C and D."

This Court in *Chandra Mohan v. State of U.P.* (supra) also observed, concerning recruitment from the Bar under Article 233(2), the Governor can appoint only advocates recommended by the High Court to the judicial service. This Court has held:

> "11. The position in the case of district judges recruited directly from the Bar is worse. Under Art. 233(2) of the Constitution, the Governor can only appoint advocates recommended by the High Court to the said service. But under the Rules, the High Court can either endorse the recommendations of the Committee or create a deadlock. The relevant rules, therefore, clearly contravene the constitutional mandates of Art. 233(1) and (2) of the Constitution and are, therefore, illegal."
>
> (emphasis supplied)

16. Rule 14 of U.P. Rules which came up for consideration of this Court in *Chandra Mohan* (supra) is extracted hereunder:

> "Rule 14. Direct Recruitment.-(1) Applications for direct recruitment to the service shall be called for by the Court and shall be made in the prescribed form which may be obtained from the Registrar of the Court.
>
> (2) The applications by barristers, advocates, vakils or pleaders, should be submitted through the District Judge concerned and must be accompanied by certificates of age, character, nationality, and domicile, standing as a legal practitioner, and such other documents as may be prescribed in this behalf by the Court. Applications from Judicial Officers should be submitted in accordance with the rules referred to in clause 2(b) of rule 5 of these Rules. The District Judge or other officer through whom the application is submitted shall send to the Court, along with the application, his own estimate of the applicant's character and fitness for appointment to the service."

17. After having answered the question about recruitment from the Bar, the further question considered in *Chandra Mohan* (supra) was whether the Governor could directly appoint persons from service other than judicial service as District Judges in consultation with the High Court. They belonged to the executive branch of the Government

and performed certain revenue and ministerial functions. This Court took note of the fact that in the pre-Independence era, there was a demand that the judiciary should be separated from the Executive, and that was based upon the assumption that unless they were separated, independence of the judiciary at the lower level would be a mockery. Thus, Article 50 of Directive Principles of State Policy provides that States to take steps to separate judiciary from the executive in public services of the State. There shall be separate judicial service from the executive service. This Court considered the provisions of Articles 234, 235, 236 and 237 and observed that there are two sources of recruitment, services of the Union or State and members of the Bar. This Court observed thus:

> "15. With this background, if the following provisions of the Constitution are looked at, the meaning of the debated expressions therein would be made clear:
>
> We have already extracted Art. 233.
>
> Article 234. Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.
>
> Article 235. The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district Judges shall be vested in the High Court; but nothing in this Article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.
>
> Article 236. In this Chapter-

> (a) the expression "district judge" includes judges 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.
>
> Article 237. The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification.
>
> The gist of the said provisions may be stated thus: 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. <u>There are two sources of recruitment, namely, (i) service of the Union or of the State, and (ii) members of the Bar. The said judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court.</u> But in the case of appointments of persons to the judicial service other than as district judges they will be made by the Governor of the State in accordance with rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all the district courts and courts subordinate thereto, subject to certain prescribed limitations."
>
> (emphasis supplied)

As to the question whether persons from other services can be appointed as District Judges, the expression service of Union or State, has been held to be construed to be judicial service in Article 233(2) thus:

> "16. So far there is no dispute. But the real conflict rests on the <u>question whether the Governor can appoint as district judges persons from services other than the judicial service; that is to say, can he appoint a person who is in the police, excise, revenue or such other service as a district judge</u>? The

acceptance of this position would take us back to the pre-independence days and that too to the conditions prevailing in the Princely States. In the Princely States one used to come across appointments to the judicial service from police and other departments. This would also cut across the well-knit scheme of the Constitution and the principle underlying it, namely, the judiciary shall be an independent service. Doubtless if Art. 233(1) stood alone, it may be argued that the Governor may appoint any person as a district judge, whether legally qualified or not, if he belongs to any service under the State. But Art. 233(l) is nothing more than a declaration of the general power of the Governor in the matter of appointment of district judges. It does not lay down the qualifications of the candidates to be appointed or denote the sources from which the recruitment has to be made. But the sources of recruitment are indicated in cl. (2) thereof. Under cl. (2) of Art. 233 two sources are given, namely, (i) persons in the service of the Union or of the State, and (ii) advocate or pleader. Can it be said that in the context of Ch. VI of Part VI of the Constitution "the service of the Union or of the State" means any service of the Union or of the State or does it mean the judicial service of the Union or of the State? The setting, viz., the chapter dealing with subordinate courts, in which the expression "the service" appears indicates that the service mentioned therein is the service pertaining to courts. That apart, Art. 236(2) defines the expression "judicial service" to mean 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. If this definition, instead of appearing in Art. 236, is placed as a clause before Art. 233(2), there cannot be any dispute that "the service" in Art. 233(2) can only mean the judicial service. The circumstance that the definition of "judicial service" finds a place in a subsequent Article does not necessarily lead to a contrary conclusion. The fact that in Article 233(2) the expression "the service" is used whereas in Arts. 234 and 235 the expression "judicial service" is found is not decisive of the question whether the expression "the service" in Art. 233(2) must be something other than the judicial service, for, the entire chapter is dealing with the judicial service. The definition is exhaustive of the service. Two expressions in the definition bring out the idea that the judicial service consists of hierarchy of judicial officers starting from the lowest and ending with district judges. The expressions "exclusively" and "intended" emphasise the fact that the judicial service consists only of persons intended to fill up the posts of district judges and other civil judicial posts and that is the exclusive service of judicial officers. Having defined "judicial service" in exclusive terms, having provided for appointments to that service and having entrusted the control of the said service to the care of the High Court, the makers of the Constitution would not have conferred a blanket power on the Governor to appoint any person from any service as a district judge.

> 18. We, therefore, construe the expression "the service" in cl. (2) of Art. 233 as the judicial service."
>
> (emphasis supplied)

18. In *Chandra Mohan v. State of U.P.* (supra), this Court further noted the history that the Governor-General in Council had issued a notification in 1922 empowering the local Government to make appointments to the said service from the members of the Provincial Civil Service (Judicial Branch) or the members of the Bar. This Court had also noted that earlier till India attained Independence, the Governor-General made appointments of District Judges from three sources: (i) Indian Civil Service; (ii) Provincial Judicial Service; and (iii) the Bar. After India attained freedom, recruitment from Indian Civil Service was discontinued by the Government of India, and it was decided that the members of the newly created Indian Administrative Service would not be given judicial posts. Thereafter District Judges were appointed only from either the judicial service or from the Bar. The rules framed by the Governor empowering him to recruit District Judges from the judicial officers were held to be unconstitutional. This Court has observed thus:

> "20. The history of the said provisions also supports the said conclusion. Originally the posts of district and sessions judges and additional sessions judges were filled by persons from the Indian Civil Service. In 1922 the Governor-General-in-Council issued a notification empowering the local government to make appointments to the said service from the members of the Provincial Civil Service (Judicial Branch) or from the members of the Bar. In exercise of the powers conferred under S. 246(1) and S. 251 of the Government of India Act, 1935, the Secretary of State for India Framed rules styled Reserved Posts (Indian Civil Service) Rules, 1938. Under those Rules, the Governor

was given the power to appoint to a district post a member of the judicial service of the Province or a member of the Bar. Though S. 254(1) of the said Act was couched in general terms similar to those contained in Art. 233(1) of the Constitution, the said rules did not empower him to appoint to the reserved post of district judge a person belonging to a service other than the judicial service. 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? Therefore, the history of the services also supports our construction that the expression "the service" in Art. 233(2) can only mean the judicial service.

(21) For the aforesaid reasons, we hold that the Rules framed by the Governor empowering him to recruit district judges from the "judicial officers" are unconstitutional and, therefore, for that reason also the appointment of respondents 5, 6 and 7 was bad.

(23) In the result, we hold that the U.P. Higher Judicial Service Rules providing for the recruitment of district judges are constitutionally void and, therefore, the appointments made thereunder were illegal. We set aside the order of the High Court and issue a writ of mandamus to the 1st respondent not to make any appointment by direct recruitment to the U.P. Higher Judicial Service in pursuance of the selections made under the said Rules. The 1st respondent will pay the costs of the appellant. The other respondents will bear their own costs."

(emphasis supplied)

19. It is apparent from the decision in *Chandra Mohan v. State of U.P.*, (supra) that this Court has laid down that concerning District Judges recruited directly from the Bar, 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* (supra), the position is made clear. In *Chandra Mohan* (supra) the Court held that only advocates can be appointed as direct recruits, and *inter alia* the 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 U.P.*, AIR 1961 SC 816. The question which arose for consideration there was as to the eligibility of persons on the roll of advocates of 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 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 practice 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 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 respondent Nos.2 to 6 fulfilled the requirements of having been 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:

> **"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 Art. 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 S. 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 cl. (2) of Art. 233 such an advocate should not have the same standing as he has in the High Court where he is practising.
>
> **12.** Learned counsel for the appellant has also drawn our attention to Explanation I to cl. (3) of Art. 124 of the Constitution relating to the qualifications for appointment as a Judge of the Supreme Court and to the explanation to cl. (2) of Art. 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 Art. 233, and we do not think that cl. (2) of Art. 233 can be interpreted in the light of explanations added to Arts. 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 cl. (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 cl. (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 Art. 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 August 15, 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 Art. 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,* AIR 1958 All 323, where a different meaning was given to a similar expression occurring in the proviso to sub-sec. (3) of S. 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 cl. 2 of Art. 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 Art. 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 cl. (2) of Art. 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 cl.(2), we must hold that they fulfilled those requirements. They were Advocates enrolled in the Lahore High Court; this is not disputed. Under Cl. 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 S.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 S. 8 came into force, that is, on September 28, 1948. The proviso to sub-sec. (2) of S.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 S. 8(2)(*a*) of the Act. We consider that the combined effect of Cl. 6 of the High Courts (Punjab) Order, 1947, and S. 8(2)(*a*) of the Bar Councils Act, 1926, was this: from August 15, 1947, to September 28,1948, they were recognised as Advocates entitled to practise in the Punjab High Court and after September 28, 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 August 15, 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 Cl.(2) of Art. 233 of the Constitution."

(emphasis supplied)

21. Much was tried to be made based on the facts of Harbans Singh and P.R. Sawhney in the decision of *Rameshwar Dayal* (supra). Harbans Singh and P.R. Sawhney were having the following qualifications as noted in the judgment:

"5. x x x

(2) Respondent 3 (Harbans Singh, J.) was also called to the Bar and then enrolled as an Advocate of the Lahore High Court on March 5, 1937. He worked as an Additional District and Sessions Judge, Ferozepore, from July 2, 1947, to February

> 22, 1948. He then returned to practice at Simla for a short while. On March 15, 1948, he worked as Deputy Custodian, Evacuee Property, till April 17, 1950. On April 18, 1950, he was appointed as District and Sessions Judge and on August 11, 1958, he was appointed as an Additional Judge of the Punjab High Court.
>
> (5) Respondent 6 (P.R. Sawhney) was called to the Bar on November 17, 1930, and was enrolled as an Advocate of the Lahore High Court on March 10, 1931. After partition he shifted to Delhi and worked for sometime as Legal Adviser to the Custodian, Evacuee Property, Delhi. Then he practised for sometime at Delhi; he then accepted service under the Ministry of Rehabilitation as an Officer on Special Duty and Administrator, Rajpura Township. On March 30, 1949, he became the Chairman, Jullundur Improvement Trust. On May 6, 1949, he got his licence to practise as an Advocate suspended. On April 6, 1957, he was appointed as District and Sessions Judge."

Two of them were not in judicial service as on the date of their appointment; they had practised earlier for the requisite period as advocates and later were appointed as District & Sessions Judge. Harbans Singh was working as Deputy Custodian, Evacuee Property till 1950, when he was appointed as District & Sessions Judge. In 1958, he was appointed as an Additional Judge of the Punjab High Court. At the relevant time, when the appointments were made, recruitments were permissible from executive services too. Their eligibility to be appointed as District & Sessions Judge was tested. The question which came up for consideration was not whether they could have been appointed being in service of Custodian of Evacuee Property or the Improvement Trust. What was held by this Court concerning interpretation of Article 233 in the abovementioned para 12 of *Rameshwar Dayal* (supra), by a Constitution Bench of Court, goes

squarely against the submissions raised on behalf of the in-service candidates.

22. In *Satya Narain Singh* (supra), a similar question arose. The members of Uttar Pradesh Judicial Service applied for appointment by way of direct recruitment to the Uttar Pradesh Higher Judicial Service claiming that they had completed 7 years of practice at the Bar before their appointment to the Uttar Pradesh Judicial Service. Therefore, they were eligible to be appointed by direct recruitment to the Higher Judicial Service, i.e., to the post of District Judge. It was submitted that it would be extremely anomalous to interpret Article 233 in a way to render judicial officers eligible for appointment as a District Judge by direct recruitment. This Court rejected the submission and observed thus:

> "3. ...Two points straightway project themselves when the two clauses of Article 233 are read: The first clause deals with "appointments of persons to be, and the posting and promotion of, District Judges in any State" while the second clause is confined in its application to persons "not already in the service of the Union or of the State". We may mention here that "service of the Union or of the State" has been interpreted by this Court to mean Judicial Service. Again while the first clause makes consultation by the Governor of the State with the High Court necessary, the second clause requires that the High Court must recommend a person for appointment as a District Judge. It is only in respect of the persons covered by the second clause that there is a requirement that a person shall be eligible for appointment as District Judge if he has been an advocate or a pleader for not less than 7 years. In other words, in the case of candidates who are not members of a Judicial Service they must have been advocates or pleaders for not less than 7 years and they have to be recommended by the High Court before they may be appointed as District Judges, while in the case of candidates who are members of a Judicial Service the 7 years' rule has no application but there

> has to be consultation with the High Court. A clear distinction is made between the two sources of recruitment and the dichotomy is maintained. The two streams are separate until they come together by appointment. Obviously the same ship cannot sail both the streams simultaneously."
>
> (emphasis supplied)

This Court has relied upon *Rameshwar Dayal* (supra) and *Chandra Mohan* (supra) to hold:

> **"5.** Posing the question whether the expression "the service of the Union or of the State" meant any service of the Union or of the State or whether it meant the Judicial Service of the Union or of the State, the learned Chief Justice emphatically held that the expression "the service" in Article 233(2) could only mean the Judicial Service. But he did not mean by the above statement that persons who are already in the service, on the recommendation by the High Court can be appointed as District Judges, overlooking the claims of all other seniors in the Subordinate Judiciary contrary to Article 14 and Article 16 of the Constitution.
>
> **6.** Thus we see that the two decisions do not support the contention advanced on behalf of the petitioners but, to the extent that they go, they certainly advance the case of the respondents. We therefore, see no reason to depart from the view already taken by us and we accordingly dismiss the writ petitions."
>
> (emphasis supplied)

The cases of *Harbans Singh and Sawhney* were considered and explained in the aforesaid decision. This Court relied upon the decision of *Rameshwar Dayal* (supra) to hold that as to a person not already in-service, a qualification is that he should be an advocate or pleader of seven years' standing. The same clinches the issue against in-service candidates and negates their claim therefor.

23. In *Deepak Aggarwal* (supra) a three-Judge Bench of this Court considered the provisions of Article 233(2) and held that service in Article 233 to mean judicial service and there is dichotomy of sources

of recruitment, namely, (i) from judicial service; and (ii) from the advocate/pleader or in other words from the Bar. The meaning of the term advocate/pleader too has been considered by this Court. The expression "advocate" or "pleader" refers to the members of the Bar practicing law. Relying upon *Sushma Suri v. Govt. (NCT of Delhi)*, (1999) 1 SCC 330, this Court further observed that members of the Bar meant classes of persons who were practicing in a court of law as pleaders or advocates. This Court further held that in Article 233(2), "if he has been for not less than seven years," the present perfect continuous tense is used for a position which began at some time in the past and is continuing. Therefore, one of the essential requirements is that such a person must with requisite period be continuing as an advocate on the date of application. This Court has observed:

> "**70.** A few decisions rendered by some of the High Courts on the point may also be noticed here. In *Sudhakar Govindrao Deshpande v. State of Maharashtra*, 1986 Lab IC 710 (Bom) the issue that fell for consideration before the Bombay High Court was whether the petitioner therein who was serving as Deputy Registrar at the Nagpur Bench of the Bombay High Court, was eligible for appointment to the post of the District Judge. The advertisement that was issued by the High Court inviting applications for five posts of District Judges, inter alia, stated that, "candidate must ordinarily be an advocate or pleader who has practised in the High Court, Bombay or court subordinate thereto for not less than seven years on 1-10-1980". The Single Judge of the Bombay High Court considered Articles 233, 234 and 309 of the Constitution, relevant recruitment rules and noted the judgments of this Court in *Chandra Mohan v. State of U.P.,* AIR 1966 SC 1987, *Satya Narain Singh v. High Court of Judicature of Allahabad,* (1985) 1 SCC 225 and *Rameshwar Dayal v. State of Punjab*, AIR 1961 SC 816. It was observed as follows: (*Sudhakar case*, Lab IC p. 715, para 16)

> "*16.* … the phrase 'has been an advocate or a pleader' must be interpreted as a person who has been immediately prior to his appointment a member of the Bar, that is to say either an advocate or a pleader. In fact, in the above judgment, the Supreme Court has repeatedly referred to the second group of persons eligible for appointment under Article 233(2) as 'members of the Bar'. Article 233(2) therefore, when it refers to a person who has been for not less than seven years an advocate or pleader refers to a member of the Bar who is of not less than seven years' standing."

> **89.** We do not think there is any doubt about the meaning of the expression "advocate or pleader" in Article 233(2) of the Constitution. This should bear the meaning it had in law preceding the Constitution and as the expression was generally understood. The expression "advocate or pleader" refers to legal practitioner and, thus, it means a person who has a right to act and/or plead in court on behalf of his client. There is no indication in the context to the contrary. It refers to the members of the Bar practising law. In other words, the expression "advocate or pleader" in Article 233(2) has been used for a member of the Bar who conducts cases in court or, in other words acts and/or pleads in court on behalf of his client. In *Sushma Suri v. Govt. (NCT of Delhi)*, (1999) 1 SCC 330, a three-Judge Bench of this Court construed the expression "members of the Bar" to mean class of persons who were actually practising in courts of law as pleaders or advocates. …

> **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."

(emphasis supplied)

It is clear from the decision of *Deepak Aggarwal* (supra) that recruitment from the Bar is only from among practicing advocates and those continuing as advocates on the date of appointment. The submission that the issue of eligibility of in-service candidates did not

come up for consideration is of no consequence as provisions of Article 233(2) came up for consideration directly before this Court.

24. The decision of *Vijay Kumar Mishra and Anr. v. High Court of Judicature at Patna and Ors.*, (2016) 9 SCC 313, 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 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:

> **"6.** Article 233(1) 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) 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 v. High Court of Judicature of Allahabad,* (1985) 1 SCC 225, 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."

We find ourselves unable to agree with the proposition laid down in *Vijay Kumar Mishra* (supra). 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 (supra) cannot be said to be laying down the law correctly.

25. A person in judicial service is eligible to be appointed as District Judge, but it is only by way of promotion or by way of merit promotion, which concept has been evolved in *All India Judges Association and Ors. v. Union of India and Ors.,* (2002) 4 SCC 247, in which recommendations of the Shetty Commission were considered by this Court as to the method of recruitment to the post of the cadre of Higher Judicial Service – District Judges and Additional District Judges. This Court took note of the fact that at that moment, there were two sources for recruitment to the Higher Judicial Service, namely, (i) by promotion; and (ii) by direct recruitment. In order to strengthen the lower judiciary and to make them more efficient, the establishment of Judicial Academies was suggested. This Court approved the recommendations of Shetty Commission that the recruitment to the Higher Judicial Service, i.e., the District Judge cadre from amongst the advocates should be 25 percent and the process of recruitment should be by a competitive examination including both written and viva voce tests. 75 percent should be by way of promotion and 25 percent by direct recruitment. This Court further ordered that 50 percent of the total post in the Higher Judicial Services must be filled by promotion on the basis of principle of merit-cum-seniority and 25 percent of the posts in the service shall be filled

by promotion strictly on the basis of merit through the limited departmental competitive examination for which the qualifying service as a Civil Judge (Senior Division) should be not less than five years. The High Courts were directed to frame rules in this regard. This Court also held that quota in relation to the post is necessary, which is the basic principle on the basis of which the 40-point roster works, it was held, seniority should be maintained on the basis of the roster principle. The existing seniority had to be protected, but the roster was to be evolved for the future. This Court observed thus:

> "**27.** Another question which falls for consideration is the method of recruitment to the posts in the cadre of Higher Judicial Service i.e. District Judges and Additional District Judges. At the present moment, there are two sources for recruitment to the Higher Judicial Service, namely, by promotion from amongst the members of the Subordinate Judicial Service and by direct recruitment. The subordinate judiciary is the foundation of the edifice of the judicial system. It is, therefore, imperative, like any other foundation, that it should become as strong as possible. The weight on the judicial system essentially rests on the subordinate judiciary. While we have accepted the recommendation of the Shetty Commission which will result in the increase in the pay scales of the subordinate judiciary, it is at the same time necessary that the judicial officers, hard-working as they are, become more efficient. It is imperative that they keep abreast of knowledge of law and the latest pronouncements, and it is for this reason that the Shetty Commission has recommended the establishment of a Judicial Academy, which is very necessary. At the same time, we are of the opinion that there has to be certain minimum standard, objectively adjudged, for officers who are to enter the Higher Judicial Service as Additional District Judges and District Judges. While we agree with the Shetty Commission that the recruitment to the Higher Judicial Service i.e. the District Judge cadre from amongst the advocates should be 25 per cent and the process of recruitment is to be by a competitive examination, both written and viva voce, we are of the opinion that there should be an objective method of testing the suitability of the subordinate judicial officers for promotion to the Higher Judicial Service. Furthermore, there should also be an incentive amongst the relatively junior and other officers to improve and to compete

with each other so as to excel and get quicker promotion. In this way, we expect that the calibre of the members of the Higher Judicial Service will further improve. In order to achieve this, while the ratio of 75 per cent appointment by promotion and 25 per cent by direct recruitment to the Higher Judicial Service is maintained, we are, however, of the opinion that there should be two methods as far as appointment by promotion is concerned: 50 per cent of the total posts in the Higher Judicial Service must be filled by promotion on the basis of principle of merit-cum-seniority. For this purpose, the High Courts should devise and evolve a test in order to ascertain and examine the legal knowledge of those candidates and to assess their continued efficiency with adequate knowledge of case-law. The remaining 25 per cent of the posts in the service shall be filled by promotion strictly on the basis of merit through the limited departmental competitive examination for which the qualifying service as a Civil Judge (Senior Division) should be not less than five years. The High Courts will have to frame a rule in this regard.

28. As a result of the aforesaid, to recapitulate, we direct that recruitment to the Higher Judicial Service i.e. the cadre of District Judges will be:

(1)(*a*) 50 per cent by promotion from amongst the Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test;

(*b*) 25 per cent by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years' qualifying service; and

(*c*) 25 per cent of the posts shall be filled by direct recruitment from amongst the eligible advocates on the basis of the written and viva voce test conducted by respective High Courts.

(2) Appropriate rules shall be framed as above by the High Courts as early as possible.

****

29. Experience has shown that there has been a constant discontentment amongst the members of the Higher Judicial Service in regard to their seniority in service. For over three decades a large number of cases have been instituted in order to decide the relative seniority from the officers recruited from the two different sources, namely, promotees and direct recruits. As a result of the decision today, there will, in a way, be three ways of recruitment to the Higher Judicial Service. The quota for promotion which we have prescribed is 50 per cent by following the principle "merit-cum-seniority", 25 per cent strictly on merit by limited departmental competitive examination and 25 per cent by direct recruitment. Experience has also shown that the least amount of litigation in the country, where quota system in recruitment exists, insofar as seniority is concerned, is where a roster system is followed. For

> example, there is, as per the rules of the Central Government, a 40-point roster which has been prescribed which deals with the quotas for Scheduled Castes and Scheduled Tribes. Hardly, if ever, there has been a litigation amongst the members of the service after their recruitment as per the quotas, the seniority is fixed by the roster points and irrespective of the fact as to when a person is recruited. When roster system is followed, there is no question of any dispute arising. The 40-point roster has been considered and approved by this Court in *R.K. Sabharwal* v. *State of Punjab*, (1995) 2 SCC 745. One of the methods of avoiding any litigation and bringing about certainty in this regard is by specifying quotas in relation to posts and not in relation to the vacancies. This is the basic principle on the basis of which the 40-point roster works. We direct the High Courts to suitably amend and promulgate seniority rules on the basis of the roster principle as approved by this Court in *R.K. Sabharwal case* as early as possible. We hope that as a result thereof there would be no further dispute in the fixation of seniority. It is obvious that this system can only apply prospectively except where under the relevant rules seniority is to be determined on the basis of quota and rotational system. The existing relative seniority of the members of the Higher Judicial Service has to be protected but the roster has to be evolved for the future. Appropriate rules and methods will be adopted by the High Courts and approved by the States, wherever necessary by 31-3-2003."
>
> (emphasis supplied)

It is apparent from the aforesaid decision that 25 percent of the posts in the cadre of District Judge have to be filled by direct recruitment amongst the advocates based on a competitive examination, both written and viva voce. The decision is in tune with the various decisions of this Court such as Rameshwar *Dayal, Chandra Mohan, Satya Narain Singh and Deepak Aggarwal* (supra). The direction issued by this Court of 25 percent of the post to be filled by limited departmental competitive examination has been reduced to 10 percent by this Court in *All India Judges Association and Anr. v. Union of India (II),* (2010) 15 SCC 170.

26. Reliance has been placed on *O.P. Garg v. State of U.P.,* 1991 Supp. (2) SCC 51, wherein question was of fixation of seniority. This Court has observed that there should be equal opportunity to enter the service for all the sources of recruitment. If recruitment rules give unwarranted preference to one source, the seniority rule is bound to become unworkable. Therefore, there should be equality of opportunity to all the sources.

27. In *Punjab and Haryana High Court v. State of Punjab*, 2018 SCC OnLine SC 1728 [Civil Appeal Nos.5518-5523 of 2017 decided on 3.10.2018] the question which arose was with respect to inter se seniority dispute between three streams of Punjab Superior Judicial Service, *i.e.*, 50 percent by promotion based on merit-cum-seniority, 25 percent by limited departmental competitive examination and remaining 25 percent to be filled by direct recruitment from amongst eligible advocates. The facts indicate that the *All India Judges Association* (2002) decision had been implemented, and seniority is being maintained as directed.

28. It is apparent from the decision of *All India Judges Association* 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 practicing 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 two-fold channel, either in the 50% seniority/merit quota, by promotion, or the quota for limited competitive examination.

29. The recruitment from the Bar also has a purpose behind it. The practicing advocates are recruited not only in the higher judiciary but in the High Court and Supreme Court as well. There is a stream (of appointment) for in-service candidates of higher judiciary in the High Court and another stream clearly earmarked for the Bar. The members of the Bar also become experts in their field and gain expertise and have the experience of appearing in various courts. Thus, not only in the higher judiciary, in-service candidates of

subordinate judiciary are given the opportunity as against 75 percent to be appointed by way of promotion as provided in *All India Judges Association case*, and the members of the Bar are given the opportunity as against 25 percent of the post having 7 years' standing at Bar.

30. The makers of the Constitution visualised and the law administered in the country for the last seven decades clearly reveals that the aforesaid modes of recruitment and two separate sources, one from in-service and other from the Bar, are recognised. We do not find even a single decision supporting the cause espoused on behalf of candidates, who are in judicial service, to stake their claim as against the posts reserved for advocates/pleaders. In all the cases right from beginning from *Rameshwar Dayal* (supra) to date, a dichotomy has been maintained, and we find absolutely no room to entertain submission of discrimination based on Articles 14 and 16.

31. We are not impressed by the submission that when this Court has interpreted the meaning of service in Article 233(2) to mean judicial service, judicial officers are eligible as against the posts reserved for the advocates/pleaders. Article 233(2) starts with the negative "not," which disentitles the claim of judicial officers against the post reserved for the practicing advocates/pleaders. They can be promoted to that post as per the rules; this Court has further laid down a wider horizon to in-service candidates in the *All India Judges*

Association as against the 75 percent of the post by including merit promotion. The argument that merit should prevail and they should be given due opportunity under the rules to prove their merit and to excel, in our opinion, cannot prevail. Such judicial officer cannot claim merit in violation of the provisions of rules framed under Article 234 of the Constitution. The two classes are different. In terms of the prevalent rules in-service candidates lack eligibility. They cannot contend that they are discriminated against and their merit is ignored and overlooked.

32. Consistently, this Court in its previous judgments has taken the view which we now take. We find absolutely no reason to take a different view, though it was urged that mistakes committed earlier should not continue. We find the argument to be devoid of substance and based upon misapprehensions. We have found that the aforesaid decisions are vivid and clear, and there is no room to entertain such a submission then for a moment. Even otherwise, when the law has been administered in this country after Independence in the manner mentioned above on the principle of *stare decisis* and rules framed by various High Courts, we find ourselves unable to accept the submission raised on behalf of in-service candidates. The decisions in *Satya Narain Singh* (supra), *Deepak Aggarwal* (supra) and *All India Judges Association case* (supra) also cannot be said to be contrary to

the provisions of Article 233. We unhesitatingly reject the submission to the contrary.

33. It was submitted that promotion is no substitute for direct recruitment, as against the post reserved for direct recruitment, an incumbent can apply throughout India, whereas an in-service candidate can be promoted within the State, and there is no definite period for coming into the zone of consideration for promotion in Higher Judicial Service. Thus, it was urged that direct recruitment is altogether different from promotion and having practiced for 7 years, they have basic eligibility to stake their claim for the post reserved for advocates/pleaders, and they have additional experience of acting as a judge also. We find no room to accept the submissions. Once the Constitution envisages separate sources of recruitment, no case can be made out of deprivation of the opportunity. Once service is joined, one has to go by the service rules, and it was open to such an incumbent to practice and stake claim in various States while remaining in practice. It is a matter of two different streams for recruitment which is permissible, such an argument cannot be accepted.

34. In *P. Ramakrishnam Raju v. Union of India and Ors.,* (2014) 12 SCC 1, this Court has observed that experience and knowledge gained by a successful lawyer at the Bar can never be considered to be less important from any point of view vis-à-vis the experience gained by a

judicial officer. If service of a judicial officer is counted for fixation of pension, there is no valid reason as to why the experience at the Bar cannot be treated as equivalent for the same purpose. In *Government of NCT of Delhi and Ors. v. All India Young Lawyers' Association and Anr.,* (2009) 14 SCC 49, this Court has directed that a certain number of years as an advocate to be added to the judicial service for pension. Thus, in our opinion, experience as an advocate is also important, and they cannot be deprived of their quota, which is kept at 25 percent only in the Higher Judicial Service.

35. It was submitted that ultimately the appointment of the Bar member is also made under Article 233(1). In *The State of Assam and Anr. v. Kuseswar Saikia and Ors.,* AIR 1970 SC 1616, this Court observed that both appointment and promotion are included in Article 233(1). Following observations have been made:

> **"5.** The reading of the article by the High Court is, with respect, contrary to the grammar and punctuation of the article. The learned Chief Justice seems to think that the expression "promotion of" governs "District Judges" ignoring the comma that follows the word "of". The article, if suitably expanded, reads as under:
>
> "Appointments of persons to be, and the posting and promotion of (persons to be), District Judges etc."
>
> It means that appointment as well as promotion of persons to be District Judges is a matter for the Governor in consultation with the High Court and the expression "District Judge" includes an additional District Judge and an Additional Sessions Judge. It must be remembered that District Judges may be directly appointed or may be promoted from the subordinate ranks of the judiciary. The article is intended to take care of both. It concerns initial appointment and initial promotion of persons to be either District Judges or any of the categories included in it. …."

The decision is of no avail as the question in the present case is different. Though the appointment is made under Article 233(1), but the source and the channel for judicial officers is the promotion, and for the members of the Bar is by direct recruitment.

36. The 116th Report of Law Commission on All India Judicial Services published in November 1986 has been referred to, which observed that chances of promotion of the subordinate ranks will be proportionately reduced to the extent direct recruitment is made. The Law Commission was not considering the provisions of Article 233 but had made certain observations, and there is no formation of the All India Judicial Service so far what would be the provisions when it is constituted, will have to be considered when they are formulated. Thus, no benefit can be derived on the basis of certain observations and suggestions made by the Law Commission as to what may happen in case All India Judicial Service is formed.

37. Certain recommendations of the Shetty Commission have been referred to, but after their consideration in the *All India Judges' Association* case, there is no scope for considering the provisions of the Constitution to provide eligibility for in-service candidates for direct recruitment for the post of District Judge. The existing provisions are

not restrictive but provide wider choice to improve and strengthen the judicial system and in tune with Articles 14 and 16.

38. Reference has been made to the decision in *All India Judges' Association v. Union of India and Ors.*, (1992) 1 SCC 119, in which following observations have been made:

> **"9.** We shall first deal with the plea for setting up of an All India Judicial Service. The Law Commission of India in its Fourteenth Report in the year 1958 said:
>
> "If we are to improve the personnel of the subordinate judiciary, we must first take measures to extend or widen our field of selection so that we can draw from it really capable persons. A radical measure suggested to us was to recruit the judicial service entirely by a competitive test or examination. It was suggested that the higher judiciary could be drawn from such competitive tests at the all-India level and the lower judiciary can be recruited by similar tests held at State level. Those eligible for these tests would be graduates who have taken a law degree and the requirement of practice at the bar should be done away with.
>
> Such a scheme, it was urged, would result in bringing into the subordinate judiciary capable young men who now prefer to obtain immediate remunerative employment in the executive branch of government and in private commercial firms. The scheme, it was pointed out, would bring to the higher subordinate judiciary the best talent available in the country as a whole, whereas the lower subordinate judiciary would be drawn from the best talent available in the State.
> …."

A further recommendation was made for the formation of the All India Judicial Service. The suggestion was made that practice at Bar for induction at the lower level should be done away with. Be that as it may. The prescription of the practice period of 3 years, has been changed time to time, but the facts remain that when it comes to the eligibility and recruitment from the Bar to the post of District Judge, practicing advocates from the Bar can be inducted by way of direct

recruitment as against the quota fixed for them. The question involved in the matter is not whether the practice is necessary to join the subordinate judiciary.

39. In *All India Judges' Association and Ors. v. Union of India and Ors.,* (1998) 8 SCC 771, this Court has considered the question of permitting the Legal Assistants working in different institutions other than the courts for the purpose of appointments in the judiciary. This Court observed that Legal Assistants do not get experience and exposure, which is important for manning judicial posts. The observations made are extracted hereunder:

> "**1.** The question of permitting the Legal Assistants working in different institutions other than the courts for the purpose of appointments on the ground that they should be treated as having experience at the Bar cannot be entertained. The Legal Assistants working in different institutions and bodies do not get the experience and exposure which is important for the purpose of manning judicial posts, and it is not possible to lay down guidelines on the basis of a few appearances but what is important is not mere appearance but actual intimate knowledge and association with the system itself. We, therefore, reject the applications."

40. The decision in *A. Pandurangam Rao v. State of Andhra Pradesh and Ors.*, AIR 1975 SC 1922, has been referred to, in which question arose as to the appointment of District Judges by direct recruitment from the Bar. The Court held that a candidate for direct recruitment from the Bar does not become eligible for the appointment of District Judges in any State without the recommendation of the High Court. The final authority is the Government in the matter of appointment.

There is no dispute with the aforesaid proposition, the decision also indicates that direct recruitment is from the Bar. Obviously, the appointment has to be made by the Government. The decision rather than supporting defeats the cause espoused on behalf of in-service candidates.

41. The decision in *Chandra Mohan v. State of U.P. and Ors. (II),* AIR 1976 SC 1482, has also been referred to in which question arose of seniority only. This Court has taken note that Rules 8, 13, 14, 15, 17, and 19 of the U.P. Higher Judicial Service Rules (1953) were held to be unconstitutional as offending Article 233. The question arose of determining seniority in accordance with Rule 20. The decision is not an authority on the question of interpretation of Article 233 but was rather a fallout of *Chandra Mohan-I* (supra).

42. It was also submitted that practice as an advocate and service as a judicial officer for 10 years is to be treated at par as per *explanation* added to Articles 124 and 217 of the Constitution of India. In *Rameshwar Dayal* (supra), this question has been considered, and this Court held that Article 233(2) could not be interpreted in view of the *explanations* added to Articles 124 and 217. In *Satya Narain Singh* (supra) the aforesaid decision has been considered, and following observations have been made:

> "**3**. ...Again dealing with the cases of Harbans Singh and Sawhney it was observed:

> "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."

Clearly, the Court was expressing the view that it was in the case of recruitment from the Bar, as distinguished from Judicial Service, that the requirements of Clause (2) had to be fulfilled. We may also add here earlier the Court also expressed the view:

> "... we do not think that Clause (2) of Article 233 can be interpreted in the light of Explanations added to Articles 124 and 217"."

Reliance placed on *Prof. Chandra Prakash Aggarwal v. Chaturbhuj Das Parikh and Ors.*, (1970) 1 SCC 182, dealing with the interpretation of Article 217, is of no avail.

43. The argument has been raised with respect to the violation of basic human rights. The findings of the Advisory Panel on Judicial Diversity in the U.K. in 2010 have been referred to as under:

> "22. Equal opportunities. All properly qualified people should have an equal opportunity of applying and of being selected for judicial office. Well-qualified candidates for judicial office should be selected on their merits and should not be discriminated against, either directly or indirectly.
>
> 23. Inherent in the concept of human equality is the principle that talent is randomly and widely distributed in society, and not concentrated in particular racial or other groups. It therefore follows that the more widely one searches for talent, the more likely it is that the best candidates will be identified.
>
> "You should not be looking for unusual talent, but looking for talent in unusual places".
>
> 24. The current under-representation of certain well-qualified groups within the judiciary suggests that factors other than pure talent may be influencing either people's willingness to apply or the selection process, or both."

We find that there is no violation of equal opportunity. There is a wide search for talent for inducting in the judicial service as well as

in direct recruitment from Bar, and the best candidates are identified and recruited. Persons from unusual places are also given the opportunity to stake their claim in pursuit of their choice. In *State of Bihar and Ors. v. Bal Mukund Sah and Ors.,* (2000) 4 SCC 640, this Court has observed that onerous duty is cast on the High Court under the Constitutional Scheme. It has been given a prime and paramount position in the matter with the necessity of choosing the best available talent for manning the subordinate judiciary. Thus, we find that there is no violation of any principle of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

44. Article 2 of the Universal Declaration of Human Rights has also been relied upon, which provides thus:

> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The aim of our Constitution is also the same, and there is no violation of any of human rights. The submission is far-fetched. In service jurisprudence, it is always permissible to provide different sources of recruitment and quotas along with a qualification. Equal opportunity is given, and seniority and competence are criteria for promotion, and in merit promotion, seniority is not to be considered.

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 practicing 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 practicing advocate having minimum 7 years' experience.

46. In view of the aforesaid interpretation of Article 233, we find that rules debarring judicial officers from staking their claim as against the posts reserved for direct recruitment from bar are not *ultra vires* as rules are subservient to the provisions of the Constitution.

47. We answer the reference as under :-

(i) The members in the judicial service of the State can be appointed as District Judges by way of promotion or limited competitive examination.

(ii) The Governor of a State is the authority for the purpose of appointment, promotion, posting and transfer, the eligibility is governed by the Rules framed under Articles 234 and 235.

(iii) 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.

(iv) 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. Members of judicial service having 7 years' experience of practice before they have joined the service or having combined experience of 7 years as lawyer and member of judiciary, are not eligible to apply for direct recruitment as a District Judge.

(v) The rules framed by the High Court prohibiting judicial service officers from staking claim to the post of District Judge against the posts reserved for Advocates by way of direct recruitment, cannot be said to be ultra vires and are in conformity with Articles 14, 16 and 233 of the Constitution of India.

(vi) The decision in *Vijay Kumar Mishra* (supra) providing eligibility, of judicial officer to compete as against the post of District Judge by way

of direct recruitment, cannot be said to be laying down the law correctly. The same is hereby overruled.

48. In the case of *Dheeraj Mor* and others cases, time to time interim orders have been passed by this Court, and incumbents in judicial service were permitted to appear in the examination. Though later on, this Court vacated the said interim orders, by that time certain appointments had been made in some of the States and in some of the States results have been withheld by the High Court owing to complication which has arisen due to participation of the ineligible in-service candidates as against the post reserved for the practising advocates. In the cases where such in-service incumbents have been appointed by way of direct recruitment from bar as we find no merit in the petitions and due to dismissal of the writ petitions filed by the judicial officers, as sequel no fruits can be ripened on the basis of selection without eligibility, they cannot continue as District Judges. They have to be reverted to their original post. In case their right in channel for promotion had already been ripened, and their juniors have been promoted, the High Court has to consider their promotion in accordance with prevailing rules. However, they cannot claim any right on the basis of such an appointment obtained under interim order, which was subject to the outcome of the writ petition and they have to be reverted.

49. The civil appeals, writ petitions, Transfer Petition and contempt petition are, accordingly, disposed of. No order as to costs.

.....J.
(Arun Mishra)

.....J.
(Vineet Saran)

New Delhi;
February 19, 2020.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL/INHERENT JURISDICTION

CIVIL APPEAL NO. 1698 OF 2020

(ARISING OUT OF S.L.P. (C) No. 14156 OF 2015)

DHEERAJ MOR ...APPELLANT(S)

VERSUS

THE HON'BLE HIGH COURT OF DELHI ...RESPONDENT(S)

WITH
CIVIL APPEAL NO. 1699 OF 2020
(ARISING OUT OF S.L.P (C) NO. 14676/2015)

CIVIL APPEAL NO. 1700 OF 2020
(ARISING OUT OF S.L.P (C) NO. 24219/2015)

CIVIL APPEAL NO. 1701 OF 2020
(ARISING OUT OF S.L.P (C) NO. 30556/2015)

(W.P. (C) NO. 77/2016, W.P. (C) NO. 130/2016, W.P. (C) NO. 405/2016, W.P. (C) NO. 414/2016)

CIVIL APPEAL NO. 1702 OF 2020
(ARISING OUT OF S.L.P (C) NO. 15764/2016)

W.P. (C) NO. 423/2016

CIVIL APPEAL NO. 1707 OF 2020
[@ SPECIAL LEAVE PETITION (C) NO. 4781 OF 2020]
(ARISING OUT OF S.L.P (C) NO.....CC NO. 15018/2016)

CIVIL APPEAL NO. 1703 OF 2020
(ARISING OUT OF S.L.P (C) NO. 23823/2016)

CIVIL APPEAL NO. 1704 OF 2020
(ARISING OUT OF S.L.P (C) NO. 24506/2016)

CIVIL APPEAL NO. 1706 OF 2020
[@ SPECIAL LEAVE PETITION (C) NO. 4778 OF 2020]
(ARISING OUT OF S.L.P (C) NO. ..... CC NO. 15304/2016)

(W.P. (C) NO. 600/2016, W.P. (C) NO. 598/2016, W.P. (C) NO. 601/2016, W.P. (C) NO. 602/2016, W.P. (C) NO. 733/2016, W.P. (C) NO. 189/2017, W.P (C) NO. 222/2017, W.P. (C) NO. 316/2017, W.P. (C) NO. 334/2017, W.P. (C) NO. 371/2017, W.P. (C) NO. 96/2018, W.P. (C) NO. 102/2018, W.P. (C) NO. 103/2018)

T.P. (C) NO. 272/2018

(W.P. (C) NO. 108/2018, W.P. (C) NO. 110/2018, W.P. (C) NO. 106/2018, W.P. (C) NO. 146/2018, W.P. (C) NO. 123/2018,W.P. (C) NO. 124/2018, W.P. (C) NO. 138/2018, W.P. (C) NO. 155/2018, W.P. (C) NO. 145/2018, W.P. (C) NO. 158/2018, W.P. (C) NO. 174/2018)

CIVIL APPEAL NO. 1705 OF 2020
(ARISING OUT OF S.L.P (C) NO. 8480/2018)

(W.P. (C) NO. 291/2018, W.P. (C) NO. 287/2018, W.P. (C) NO. 344/2018, W.P. (C) NO. 352/2018, W.P. (C) NO. 387/2018, W.P. (C) NO. 392/2018, W.P. (C) NO. 396/2018, W.P. (C) NO. 530/2018, W.P. (C) NO. 519/2018, W.P. (C) NO. 535/2018, W.P. (C) NO. 581/2018, W.P. (C) NO. 578/2018, W.P. (C) NO. 612/2018, W.P. (C) NO. 629/2018, W.P. (C) NO. 596/2018, W.P. (C) NO. 616/2018, W.P. (C) NO. 632/2018, W.P. (C) NO. 608/2018, W.P. (C) NO. 628/2018, W.P. (C) NO. 617/2018, W.P. (C) NO. 624/2018, W.P. (C) NO. 631/2018, W.P. (C) NO. 635/2018, W.P. (C) NO. 636/2018, W.P. (C) NO. 641/2018, W.P. (C) NO. 642/2018, W.P. (C) NO. 639/2018, W.P. (C) NO. 640/2018, W.P. (C) NO. 650/2018, W.P. (C) NO. 644/2018, W.P. (C) NO. 658/2018, W.P. (C) NO. 659/2018, W.P. (C) NO. 680/2018, W.P. (C) NO. 671/2018, W.P. (C) NO. 677/2018, W.P. (C) NO. 681/2018, W.P. (C) NO. 686/2018, W.P. (C) NO. 703/2018, W.P. (C) NO. 696/2018, W.P. (C) NO. 717/2018, W.P. (C) NO. 728/2018, W.P. (C) NO. 726/2018, W.P. (C) NO. 727/2018, W.P. (C) NO. 1272/2018, W.P. (C) NO. 1302/2018, W.P. (C) NO. 656/2018, W.P. (C) NO. 744/2019, W.P. (C) NO. 999/2019, W.P. (C) NO. 1054/2019, W.P. (C) NO. 1053/2019, W.P. (C) NO. 1080/2019, W.P. (C) NO. 1073/2019, W.P. (C) NO. 1089/2019, W.P. (C) NO. 1086/2019, W.P. (C) NO. 1150/2019)

CONMT. PET. (C) NO. 1023/2019 IN W.P. (C) NO. 414/2016

W.P. (C) NO. 1266/2019

JUDGMENT

S. RAVINDRA BHAT, J.

1. I have gone through the draft judgment proposed by the Arun Mishra, J. I agree with his analysis; however, I have given additional reasoning as well in respect of the issue involved. Therefore, I am supplementing with my separate opinion.

2. This judgment answers a reference made to the present three judge bench. The referral order[1] noticed several previous decisions of this court (in *Rameshwar Dayal* v. *The State of Punjab & Ors.* 1961 (2) SCR 874; *Chandra Mohan v. The State of Uttar Pradesh and Ors.* (1967) 1 SCR 77; *Satya Naraian Singh v High Court of Judicature* 1985 (2) SCR 112; *Deepak Aggarwal v Keshav Kaushik* 2013 (5) SCC 277 and felt that the observations in a judgment, *Vijay Kumar Mishra & Anr v. High Court of Judicature at Patna & Others* (2016) 9 SCC 313, necessitated a re-consideration on the issue as to the eligibility of judicial officers, of any State, to apply for selection and appointment to the quota earmarked to be filled by Advocates with seven years' practice.

3. The controversy in these petitions is whether officers in the judicial services of the States (holding posts below that of District Judges) can compete, with members of the Bar (with seven or more years' practice), for direct recruitment, to the post of District Judge.

4. All petitioners hold posts in the judicial services [and in one group, non-judicial service] of various States. Broadly, they fall in three categories: those selected to judicial service without any, or with less than seven years' experience at the Bar; those who had seven years' experience at the Bar, before appointment to the judicial service; and those with seven years or more experience at the Bar, but are working in non-judicial posts. Those with seven years' experience, prior to their appointment falling in the second and third categories mentioned above, argue that the Constitution does not preclude them from participating in the process of recruitment for District Judges, in the 25% Advocates' quota earmarked for that purpose. These set of petitioners strongly rely on the decision reported as *Rameshwar Dayal (supra)*, especially the ruling of this

[1] Order dated 23-01-2018 in SLP (C) 14156/2015, *Dheeraj More v High Court of Delhi*

Court (in answer to the alternative argument that two candidates were ineligible, as they were serving in the Government), and *Mahesh Chandra Gupta* v. *Union of India and Ors.* (2009) 8 SCC 273. Reliance is also placed on *Chandra Mohan (supra)*. It is submitted that in *Chandra Mohan (supra)*, this Court categorically held that the disqualification attached to persons in the service of the Union or a State [under Article 233(1)], expressly excludes those in the employment of the State, holding executive posts and discharging purely executive function, but does not prevent those in judicial service. It was pointed out that the rule considered in *Chandra Mohan (supra)* – clearly entitled judicial officers (along with advocates) with seven years' experience at the Bar, to compete in the recruitment process.

5. Counsel for the petitioners in the second category (i.e. those with less than seven years' experience at the Bar, and who have been working as judicial officers) submit that neither Article 233(1) nor Article 233(2) bar the participation of such candidates (as long as they have an overall combined experience of seven years – at the Bar and in judicial service) in the recruitment process along with members of the Bar, for appointment to the cadre of District Judges.

6. The argument of some of the petitioners is that Articles 233 (1) and 233 (2) operate in two different fields. Article 233 (1), the argument goes, confers power upon the Governor to make appointments, subject to consultation with the High Court of the State. It is urged that this is an independent source of power; in exercise of this provision, the Governor can make appointment of persons in the judicial service. Another argument, in the context of power under Article 233 (2) is that the experience of seven years' at the bar, applies only to those in practise at the bar. It cannot apply to those already in the judicial service of the State. The decision in *Rameshwar Dayal (supra)* is relied upon. The petitioners also urge that *Chandra Mohan (supra)* decided that it is only members of the judicial services of any State, who can be considered for appointment, as District Judges [in addition to Advocates with seven years' practise at the Bar, *per* Article 233 (2)] and not members of the executive branch of the States or the Union. It is emphasized that in fact, the rule which this court had to consider,

permitted judicial officers to compete along with members of the Bar, for selection and appointment to the post of District Judge.

7. It was argued, in addition, that the provision by which the quota earmarked for members of the Bar, to be exclusively competed for by them and for which members of the judicial services are prohibited from applying, is discriminatory. Learned counsel highlighted that such a bar (preventing members in the judicial services) from applying and competing, along with members of the Bar, is arbitrary, because there is no basis for such classification. It was submitted in this regard that the Constitution makers envisaged that only those with talent could be recruited and appointed as District Judges; if that were the true objective, a restriction placed on those in judicial service undermines that purpose. It was submitted that experience gained as a judge is as, if not more, relevant in discharge of duties and functions as District Judges; on the other hand, Advocates with enrolment and experience of seven years at the Bar, have no manner of experience. Counsel emphasized that the phrase used in Article 233 i.e. being an advocate of not less than seven years' standing, has to be considered along with the bar to members of the services or holders of posts under the Union or the States, from competing for the post of District Judge. The Constitution merely underlined that the lawyer, competing for that post should not have less than seven years' experience; however, for members of the judicial service, neither is a bar (or restriction) expressed, nor can an implied bar be discerned. Therefore, the absolute restriction placed on members of any judicial service, from competing along with lawyers in the quota earmarked for that purpose, is unconstitutional and void. It was submitted that the decision in *Satya Naraian Singh (supra)*, to the effect that the Constitution made a clear distinction between the two sources of recruitment and the dichotomy is maintained, and that the two streams are separate until they come together by appointment, is erroneous and needs correction. It is further submitted that the decision of this court in *Deepak Aggarwal (supra)* to the effect that Article 233 (2) mandates that an applicant has to be in practise as a member of the Bar, at the time of making the application (for appointment), was wrongly decided. *Deepak Aggarwal (supra)* held as follows:

> *"This is clear by use of 'has been'. The present perfect continuous tense is used for a position which began at some time 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."*

8. It was submitted that besides being unduly narrow, the literal interpretation of Article 233 (2) defeats the broad objective that the framers of the Constitution had in mind, and their intent to bring in the best minds and those with talent, irrespective of whether they were members of the Bar, or holders of judicial office, at the time of commencement of the recruitment process.

9. The respondents, both States and High Courts, countered the submissions of the petitioners, contending that neither *Rameshwar Dayal (supra)* nor *Chandra Mohan (supra)*, (both Constitution Bench decisions) held that members of any judicial service had a right under the Constitution to apply for selection to the post of District Judges, on the basis that they had been Advocates at some prior point of time. It was pointed out that Article 233 (1) merely indicates that the appointment to the post of District Judge is to be made by the Governor, on the recommendation of the High Court; so is also the case with promotions, postings etc. This provision merely indicates who is the appointing authority: it also lays down that such appointment cannot be made without the concurrence or recommendation of the High Court concerned. *Chandra Mohan (supra)*, it was submitted, decisively held that the recommendation of the High Court is binding; it also clearly held that those in the services of the State, i.e. selected and appointed to administrative or executive departments or services, were barred from consideration to the post of District Judge.

10. It was submitted that for the last many decades, two clear streams of appointment to the post of District Judge have been delineated in the States: one, by direct recruitment (from members of the Bar with not less than seven years' experience) and two, from among members of the judicial service, fulfilling the requisite criteria, necessary to be considered for promotion. The latter category are considered and

recommended for promotion in accordance with rules framed under Article 234 of the Constitution of India, read with proviso to Article 309.

The relevant provisions of the Constitution, for the purposes of this judgment, are extracted below:

"Article 233 Appointment of district judges

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(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 as an advocate or a pleader and is recommended by the High Court for appointment.

Article 233A Validation of appointments of, and judgments, etc. delivered by, certain district judges

Notwithstanding any judgment, decree or order of any court, -

(a) (i) no appointment of any person already in the judicial service of a State or of any person who has been for not less than seven years an advocate or a pleader, to be a district judge in that State, and
(ii) no posting, promotion or transfer of any such person as a district judge, made at any time before the commencement of the Constitution (Twentieth Amendment) Act, 1966, otherwise than in accordance with the provisions of article 233 or article 235 shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions;

(b) no jurisdiction exercised, no judgment, decree, sentence or order passed or made, and no other act or proceeding done or taken, before the commencement of the Constitution (Twentieth Amendment) Act, 1966 by, or before, any person appointed, posted, promoted or transferred as a district judge in any State otherwise than in accordance with the provisions of article 233 or article 235 shall be deemed to be illegal or invalid or ever to have become illegal or invalid by reason only of the fact

that such appointment, posting, promotion or transfer was not made in accordance with the said provisions.

Article 234 -Recruitment of persons other than district judges to the judicial service

Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

Article 235 Control over subordinate courts

The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

Article 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."

11. It would be first essential to recollect that the power of High Courts, to recommend to the Governor, suitable persons, for appointment, is now considered to be decisive; the recommendation is almost always binding, barring in exceptional circumstances. This court, in *State of West Bengal v. Nripendra Nath Bagchi* (1966 (1) SCR 771) and *High Court of Punjab and Haryana etc. v. State of Haryana* 1975 (3) SCR 365 had ruled that Article 235 vests control in the High Courts over District Courts and courts subordinate to it. The Governor (of the concerned State) appoints, dismisses

and removes Judicial Officers. The control vested in the High Court is complete control subject to the power of the Governor in the matter of appointment including dismissal, removal, reduction in rank and the initial posting and of the initial promotion to District Judges. It was also held that nothing in Article 235 restricts the control of the High Court in respect of Judges other than District Judges in any manner. This position was endorsed by a four-judge bench of this court in *State of Haryana vs. Inder Prakash Anand H.C.S. & Ors.* 1976 (2) SCR 977.

12. In the decision reported as *State of Assam and Ors. vs. S.N. Sen & Ors* 1972 (2) SCR 251, a Constitution Bench of this court underlined the unique nature of the power of the High Courts, while interpreting Articles 233-235 of the Constitution of India:

> *"13. Under the provisions of the Constitution itself the power of promotion of persons holding posts inferior to that of the district judge is in the High Court. It stands to reason that the power to confirm such promotions should also be in the High Court.*
>
> *14. This Court has on several occasions expressed its views on Article 235 of the Constitution. In The State of West Bengal v. Nripendra Nath Bagchi (1968) I LLJ 270 (SC), it was pointed out:*
>
> *"In the case of the judicial service subordinate to the district judge the appointment has to be made by the Governor in accordance with the rules to be framed after consultation with the State Public Service Commission and the High Court but the power of posting, promotion and grant of leave and the control of the courts are vested in the High Court."*
>
> *15. A year later, in State of Assam v. Ratiga Mohammed and Ors. (1968) I LLJ 282 SC this Court against observed as follows:*
>
> > *"The High Court is in the day to day control of courts and knows the capacity for work of individuals and the requirements of a particular station or Court. The High Court is better suited to make transfers than a Minister. For however well-meaning & Minister may be he can never possess the same intimate knowledge of the working of the judiciary as a whole and of individual judges, as the High Court. He must depend on his department for information. The Chief Justice and his colleagues know these matters and deal with them personally. There is less chance of being*

> *influenced by secretaries who may withhold some vital, information if they are interested themselves. It is also well-known that all stations are not similar in climate and education, medical and other facilities. Some are good stations and some are not so good. There is less chance of success for a person seeking advantage for himself if the Chief Justice and his colleagues, with personal information, deal with the matter, than when a Minister deals with it on notes and information supplied by a secretary."*
>
> *16. This observation was made in relation to a case of transfer, but it applies with greater force to the case of promotion. The result is that we hold that the power of promotion of persons holding posts inferior to that of the district judge being in the High Court, the power to confirm such promotions is also in the High Court."*

13. The decision in *Rameshwar Dayal (supra)* was in the context of a challenge to the eligibility of candidates who had been selected and appointed as District Judges. The main argument – or ground of challenge was that the incumbents/appointees did not possess seven years' practise at the Bar: which was repelled by this court. The court held that the practise of the concerned appointees, which spanned about two decades or so, in pre-partition India, had to be included for reckoning the seven-year period. The court considered the provisions of the Bar Councils Act, 1926, and the High Courts (Punjab) Order, 1947. The relevant part of the discussion in that judgment, which repelled the challenge to the appointments, is extracted below:

> "*14. Learned Counsel for the appellant has also drawn our attention to Explanation I to clause (3) of Art. 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 Art. 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 Art. 233, and we do not think that clause (2) of Art. 233 can be interpreted in the light of Explanations added to Arts. 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 Art. 233 which must lead to the exclusion of that period for determining his eligibility for appointment as district judge.

15. What will be the result if the interpretation canvassed for on behalf of the appellant is accepted ? Then, for seven year beginning from August 15, 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 that 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 Art. 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 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 Art. 233 of the Constitution.

16. 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 Art. 233 of the Constitution. Harbans Singh was in service of the State at the time of his appointment, and Mr. ViswanathaSastri appearing for him has submitted that clause (2) of Art. 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 September 28, 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 August 15, 1947, to September 28, 1948, they were recognised as Advocates entitled to practise in the Punjab High Court and after September 28, 1948, they automatically came on the roll of advocates of the Punjab High Court but had to pay fee of Rs. 10 to the Bar Council. They did not cease to be advocates at any time or stage after August 15, 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 Art. 233 of the Constitution."

14. It is thus evident, that the main part of the discussion related to the possession of qualification, i.e. seven years' experience at the Bar, of the concerned candidates. As regards some candidates, the argument that they were not members of the Bar on the date of their appointment (as District Judge) was rejected: "*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.*"

A significant aspect, is that this court had no occasion to deal with any rules framed under Articles 233 or 234, in relation to the appointment or promotion to the post of District Judge.

15. The next decision is of *Chandra Mohan (supra).* There, the issue was regarding eligibility of certain candidates, who were members of the civil services or holders of civil posts of, the State. This court first noticed the relevant provisions and observed as follows:

> *"20. The gist of the said provisions may be stated thus : 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. There are two sources of recruitment, namely, (i) service of the Union or of the State, and (ii) members of the Bar. The said judges from the first source are appointed in consultation with the High Court and those from the second sources are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district judges, they will be made by the Governor of the State in accordance with rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all district courts and courts subordinate thereto, subject to certain prescribed limitations."*

16. Thereafter, the court held that the expression "*not already in the service"* of the Union or any State meant that those holding civil posts, or members of civil services, i.e. occupying non-judicial posts, were ineligible to compete for selection and appointment as District Judge; thus, only those in service as judges, or members of judicial services could be considered for appointment.

17. *Satya Naraian Singh* (supra) is a direct authority on the issue which this court is now concerned with. There, members of the UP judicial service responded and applied to direct recruitment posts in the UP Higher Judicial Service claiming that they had acquired 7 years' practice at the bar prior to their appointment to the judicial service. The High Court ruled that they were ineligible for appointment by direct recruitment to UP Higher Judicial Service. On appeal, it was urged that any interpretation of Article 233 which would render a member of the Subordinate judicial

service ineligible for appointment to the Higher Judicial Service by direct recruitment because of the additional experience gained by him as a Judicial officer would be unjustified. This court, after noticing *Rameshwar Dayal (supra)* and *Chandra Mohan (supra)* held as follows:

> *"We may mention here that Service of the Union or of the State' has been interpreted by this Court to mean judicial service. Again while the first clause make consultation by the Governor of the State with the High Court necessary, the second clause requires that the High Court must recommend a person for appointment as a District Judge. It is only in respect of the persons covered by the second clause that there is a requirement that a person shall be eligible for appointment as District Judge if he has been an advocate or a pleader for not less than 7 years. In other words, in the case of candidates who are not members of a Judicial Service they must have been advocates or pleaders for not less than 7 years and they have to be recommended by the High Court before they may be appointed as District Judges, while in the case of candidates who are members of a Judicial Service the 7 years rule has no application but there has to be consultation with High Court. A clear distinction is made between the two sources of recruitment and the dichotomy is maintained. The two streams are separate until they come together by appointment. Obviously the same slip (sic. ship) cannot sail both the streams simultaneously.*

After quoting *Chandra Mohan (supra)* the court concluded:

> *"Subba Rao, C.J. after referring to Articles 233,234, 235, 236 and 237 stated,- E "The gist of the said provisions may be stated thus: Appointments of persons to be, and the posting and pro motion of, district judges in any State shall be made by the Governor of the State. There are two sources of recruitment, namely, (i) service or the Union or of the State and (ii) members of Bar. The said judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district judges, they will be made by the Governor of the State in accordance with rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all the district courts and courts subordinate thereto, subject to certain prescribed limitations."*

Subba Rao, CJ. then proceeded to consider whether the Government could appoint as district judges persons from services other than the judicial service. After pointing out that Art. 233 (1) was a declaration of the general power of the Governor in the matter of appointment of district judges and he did not lay down the qualifications of the candidates to be appointed or denoted the sources from which the recruitment had to be made, he proceeded to state, "But the sources of recruitment are indicated in cl. (2) thereof. Under cl. (2 of Are. 233 two sources are given namely, (i) persons in the service of the Union or of the State, and (ii) advocate or pleader." Posing the question whether the expression "the service of the Union or of the State" meant any service of the Union or of the State or whether it meant the judicial service of the Union or of the State, the learned Chief Justice emphatically held that the expression "the service" in Art. 233 (2) could only mean the judicial service. But he did not mean by the above statement that persons who are already in the service, on the recommendation by the High Court can be appointed as District Judges, overlooking the claims of all other Seniors in the Subordinate Judiciary Contrary to Art. 14 and Art. 16 of the Constitution.

Thus we see that the two decisions do not support the contention advanced on behalf of the petitioners but, to the extent that they go, they certainly advance the case of the respondents. We therefore, see no reason to depart from the view already taken by us and we accordingly dismiss the writ petitions."

18. In the decision reported as *Deepak Agarwal* (supra) this court had to deal with a conflict between certain previous judgments, on the question of whether salaried public prosecutors or government counsel, after obtaining full time employment under the State (or the Union) could be considered as members of the Bar, i.e. those practising in the courts, for the purpose of Article 233 (2). The court, after an elaborate analysis of the previous decisions, observed as follows:

"… by the above resolution of the Bar Council of India, the second and third para of Rule 49 have been deleted but we have to see the effect of such deletion. 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 practice. The 'employment' spoken of in Rule 49 does not cover the employment of an

advocate who has been solely or, in any case, 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 practice 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 second and third para 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.

85. 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 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 negative, he ceases to be an advocate.

86. An advocate has a two-fold duty: (1) to protect the interest of his client and pursue the case briefed to him with the best of his ability, and (2) as an officer of the Court. Whether full-time employment creates any conflict of duty or interest for a Public Prosecutor/Assistant Public Prosecutor? We do not think so. As noticed above, and that has been consistently stated by this Court, a Public Prosecutor is not a mouth- piece of the investigating agency. In our opinion, even though Public Prosecutor/Assistant Public Prosecutor is in full-time employ with the government and is subject to disciplinary control of the employer, but once he appears in the court for conduct of a case or prosecution, he is

> *guided by the norms consistent with the interest of justice. His acts always remain to serve and protect the public interest. He has to discharge his functions fairly, objectively and within the framework of the legal provisions. It may, therefore, not be correct to say that an Assistant Public Prosecutor is not an officer of the court. The view in Samarendra Das to the extent it holds that an Assistant Public Prosecutor is not an officer of the Court is not a correct view."*

Dealing specifically with the issue of the requirement under Article 233 (1) that the applicant "has been" in practise for 7 years, this court significantly held as follows:

> *"88. 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 some time 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.*
>
> *89. Rule 11 of the HSJS Rules provides for qualifications for direct recruits in Haryana Superior Judicial Service. Clause (b) of this rule provides that the applicant must have been duly enrolled as an advocate and has practised for a period not less than seven years. Since we have already held that these five private appellants did not cease to be advocate while working as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, the period during which they have been working as such has to be considered as the period practising law. Seen thus, all of them have been advocates for not less than seven years and were enrolled as advocates and were continuing as advocates on the date of the application."*

19. It is clear that what this court had to consider was whether public prosecutors and government advocates were barred from applying for direct recruitments (i.e. whether they could be considered to have been in practise) and whether- during their course of their employment, as public prosecutors etc, they could be said to have *"been for not less than seven years"* practising as advocates. The court quite clearly ruled that

such public prosecutors/government counsel (as long as they continued to appear as advocates before the court) answered the description and were therefore eligible.

20. In *Vijay Kumar Mishra (supra)* the challenge was to the rejection of a representation (of the petitioners) to appear in interview for the post of District Judge Entry Level (Direct from Bar) Examination, 2015. A condition, i.e. that they had to tender their resignation, first, from the Subordinate Judicial Service of the State of Bihar as a precondition that they could appear in the interview was imposed. The facts were that the petitioners, who were practising advocates with seven years' practise, on the cut-off date (5th February, 2015) and applied as such to the posts, responding to an application; they were permitted to and appeared in the Preliminary as well as in the Mains Examination pursuant to such advertisement. Before the publication of the results of the test, for the post, they qualified in and were appointed to the Bihar State Subordinate Judicial Service in the 28th Batch. They accordingly joined the subordinate judicial service in August, 2015. The result of the mains examination of the District Judge Entry Level (Direct from Bar) was published on 22nd of January, 2016. The petitioners qualified in the Mains Examination. They however were not called for interview; their request was dealt with, and they were asked to resign from the subordinate judicial service, as a precondition, which was challenged. The High Court repelled the challenge holding that to permit the appellant to participate in the interview would be breaching the mandate of Article 233 (2) holding that since before the date of interview, they joined the judicial service, they could not in terms of the Article 233 (2) of the Constitution, be permitted to continue with the selection process for District Judge Entry Level (Direct from Bar) as they were, members of the judicial Service.

21. The court in *Vijay Kumar Mishra (supra)* after noticing *Satya Naraian Singh (supra)* and *Deepak Agarwal (supra)* held that:

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

22. Justice Chelameshwar held that that neither of the two decisions [*Satya Naraian Singh (supra)* and *Deepak Agarwal (supra)]* dealt with the issue on hand. The other member of the Bench (Justice Sapre) concurred, stating as follows:

"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."*

23. It is thus evident, that *Rameshwar Dayal (supra)* was mainly concerned with the question whether practice as a pleader or advocate, in pre-partition India could be reckoned, for the purpose of calculating the seven-year period, stipulated in Article 233 (2). No doubt, there are some observations, with respect to appointments being referable to Article 233 (1). However, the important aspect which is to be kept in mind, is that no rules were discussed; the experience of the concerned Advocates, who were appointed as District Judges, were for a considerable period, in pre-partition India, in the erstwhile undivided Punjab. *Chandra Mohan (supra)*, on the other hand is a clear authority – and an important judgment, on the aspect that those in the service of or holding posts, under the Union or States, - if they are not in judicial service- are ineligible for appointment as District Judges, under Article 233 (2) of the Constitution. The corollary was that those holding judicial posts were not barred *as holders of office or posts under the Union or the State*. Significantly, this court in *Chandra Mohan (supra)*, invalidated a rule which rendered both officers holding executive positions, under the State, and those holding judicial posts, eligible to apply for appointment under Article 233 (2). In *Satya Naraian Singh (supra)* this court clearly held that the disqualification of those holding judicial posts from applying as Advocates, under Article 233 (2) did not violate Article 14: a *"clear distinction is made between the two sources of recruitment and the dichotomy is maintained. The two streams are separate until they come together by appointment. Obviously the same slip (sic ship) cannot sail both the streams simultaneously."*

24. A close reading of Article 233, other provisions of the Constitution, and the judgments discussed would show discloses the following:

(a) That the Governor of a State has the authority to make *"appointments of persons to be, and the posting and promotion of, district judges in any State* (Article 233 [1]);

(b) While so appointing the Governor is bound to consult the High Court (Article 233 [1]: *Chandra Mohan (supra)* and *Chandramouleshwar Prasad v Patna High Court* 1970 (2) SCR 666[2]);

(c) Article 233 (1) cannot be construed as a source of appointment; it merely delineates as to who is the appointing authority;

(d) In matters relating to initial posting, initial appointment, and promotion of District Judges, the Governor has the authority to issue the order; thereafter it is up to the High Court, by virtue of Article 235, to exercise control and superintendence over the conditions of service of such District Judges. (See *State of Assam v Ranga Mahammad* 1967 (1) SCR 454[3]);

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[2] The court in *Chandramouleshwar Prasad* held that

"No doubt the appointment of a person to be a District Judge rests with the Governor but he cannot make the appointment on his own initiative and must do so in consultation with the High Court. The underlying idea of the Article is that the Governor should make up his mind after there has been a deliberation with the High Court."

[3] This court held as follows:

"By the first of these articles the question of appointment is considered separately but by the second of these articles posting and promotion of persons belonging to the judicial service of the State and holding any post inferior to the post of a district Judge is also vested in the High Court. The word 'post' used twice in the article clearly means the position or job and not the station or place and 'posting' must obviously mean the assignment to a position or job and not placing in-charge of a station or Court. The association of words in Art 235 is much clearer but as the word 'posting' in the earlier article deals with the same subject matter, it was most certainly used in the same sense and . this conclusion is thus quite apparent. This is, of course, as it should be. The High Court is in the day to day control of courts and knows the capacity for work of individuals and the requirements of a particular station or Court. The High Court is better suited to make transfers than a Minister. For however well-meaning a Minister may be he can never possess the same intimate knowledge of the working of the judiciary as a whole and of individual Judges, as the High Court. He must depend on his department for information. The Chief Justice and his colleagues know these matters and deal with them personally. There is less chance of being influenced by secretaries who may withhold some vital information if they are interested themselves. It is also well-known that all stations are not similar in climate and education, medical and other facilities. Some are good stations and some are not so good. There is less chance of success for a person seeking advantage for himself if the Chief Justice and his colleagues, with personal information, deal with the matter, than when a Minister deals with it on notes and information supplied by a secretary. The reason of the rule and the sense of the matter combine to suggest the narrow meaning accepted by us. The policy displayed by the Constitution has been in this direction as has been explained in earlier cases of this Court. The High Court was thus right in its conclusion that the powers of the Governor cease after he has appointed or promoted a person to be a district Judge and assigned him to a post in cadre. Thereafter, transfer of incumbents is a matter within the control of District Courts including the control of persons presiding there as explained in the cited case.

As the High Court is the authority to make transfers, there was no question of a consultation on this account. The State Government was not the authority to order the transfers. There was, however, need for consultation before D. N. Deka was promoted and posted as a District Judge. That such a consultation is mandatory has been laid down quite definitely in the recent decision of this Court in Chandra Mohan v UP On

(e) Article 233 (2) is concerned only with eligibility of those who can be considered for appointment as District Judge. The Constitution clearly states that one who has been for not less than seven years, "an advocate or pleader" and one who is *"not already in the service of the Union or of the State"* (in the sense that such person is not a holder of a civil or executive post, under the Union or of a State) can be considered for appointment, as a District judge. Significantly, the eligibility- for both categories, is couched in negative terms. Clearly, all that the Constitution envisioned was that an advocate with not less than seven years' practise could be appointed as a District Judge, under Article 233 (2).

(f) Significantly, Article 233 (2) *ex facie* does not exclude judicial officers from consideration for appointment to the post of District Judge. It, however, equally does not spell out any criteria for such category of candidates. This does not mean however, that if they or any of them, had seven years' practise in the past, can be considered eligible, because no one amongst them can be said to answer the description of a candidate who *"has been for not less than seven years" "an advocate or a pleader"* (per *Deepak Agarwal*, i.e. that the applicant/candidate should be an advocate fulfilling the condition of practise on the date of the eligibility condition, or applying for the post). The sequitur clearly is that a judicial officer is not one who *has been for not less than seven years*, an advocate or pleader.

25. The net result of the decision in *Chandra Mohan (supra)*, and subsequent decisions which followed it, is that Article 233 (2) renders ineligible all those who hold civil posts under a State or the Union, just as it renders all advocates with less than seven years' practice ineligible, on the date fixed for reckoning eligibility. Equally, those in judicial service [i.e. holders of posts other than District Judge, per Article 236 (2)] are not entitled to consideration because the provision (Article 233 [2]) *does not*

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this part of the case it is sufficient to say that there was consultation."

prescribe any eligibility condition. Does this mean that any judicial officer, with any length of service as a member of the judicial service, is entitled to consideration under Article 233 (2)? The answer is clearly in the negative. This is because the negative phraseology through which eligibility of holders of civil posts, or those in civil service (of the State or the Union) and advocates with seven years' service is couched. However, the eligibility conditions are not spelt out in respect of those who are in the judicial service.

26. The omission, - in regard to spelling out the eligibility conditions *vis-à-vis* judicial officers, to the post of District Judge, in the opinion of this court, is clearly by design. This subject matter is covered by three provisions: Article 233 (1) – which refers to promotions to the post of District Judge; Article 234, which, like Article 233 (1) constitutes the Governor as the appointing authority in respect of judicial posts or services, (other than District Judges), and like Article 233 (1), subject to recommendation of the High Court concerned. This position is most definitely brought home by the fact that Article 235 vests in the High Courts the power of supervision and control of the judicial service, *"including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge."* The corollary to this is that the Governor is appointing authority for the post of District Judge, and other judicial posts; both are to be filled after prior consultation with the High Court, and crucially, the promotion of judicial officers, to the post of District Judge, is regulated by conditions (read rules) framed by the High Court.

27. The upshot of the above discussion is that the Constitution makers clearly wished to draw a distinction between the two sources of appointment to the post of District Judge. For one, i.e. Advocates, eligibility was spelt out in negative phraseology, i.e. not less than seven years' practice; for judicial officers, no eligibility condition was stipulated in Article 233 (2): this clearly meant that they were not eligible to be appointed (by direct recruitment) as they did not and could not be considered advocates with seven years' practise, once they entered the judicial service. The only channel for their appointment, was in accordance with rules framed by the High court, for

promotion (as District Judges) of officers in the judicial service (defined as those holding posts other than District Judges, *per* Article 236 [b]).

28. In view of the above discussion clearly, the decision in *Satya Naraian Singh (supra)* correctly appreciated the relevant provisions and held that the dichotomy between the two streams meant that those in one stream (read judicial service) could not compete for vacancies falling in the quota earmarked for advocates.

29. The petitioners had urged that the court should endeavour and interpret the provisions of the Constitution in a broad manner, rather than placing a narrow interpretation and that rendering ineligible those with seven years' practise as advocates, but who were appointed to judicial posts, would be violative of Article 14 of the Constitution of India. It was emphasized in this regard, that there is no distinction between those who continue to practice and those, who had practiced for seven years, later joined the judicial service and continued in it, as on the date of reckoning eligibility. It was urged that those in judicial service are in fact better qualified, because they would be experienced in discharging functions relating to a judicial office, whereas those who continue to practice, and remain advocates, would not have such benefit. As between the two, therefore, those holding judicial office, would be better suited. It was therefore urged, that if they are permitted to compete for the post of District Judge, without insisting that they should resign, society would have a greater pool of merit to pick up from. The last argument was since both categories fulfilled the basic condition of seven years' practise, excluding those in judicial service, does not sub-serve the object of recruitment, i.e. selecting the best candidates.

30. In the opinion of this court, there is an inherent flaw in the argument of the petitioners. The classification or distinction made- between advocates and judicial officers, *per se* is a constitutionally sanctioned one. This is clear from a plain reading of Article 233 itself. Firstly, Article 233 (1) talks of both appointments and *promotions.* Secondly, the classification is evident from the description of the two categories in Article 233 (2): one *"not already in the service of the Union or of the State"* and the other *"if he has been for not less than seven years as an advocate or a pleader"*. Both

categories are to be *"recommended by the High Court for appointment."* The intent here was that in both cases, there were clear exclusions, i.e. advocates with less than seven years' practice (which meant, conversely that those with more than seven years' practice were eligible) and those holding civil posts under the State or the Union. The omission of judicial officers only meant that such of them, who were recommended for promotion, could be so appointed by the Governor. The conditions for their promotion were left exclusively to be framed by the High Courts.

31. In view of the above analysis, since the Constitution itself makes a distinction between advocates on the one hand, and judicial officers, on the other, the argument of discrimination is insubstantial. If one examines the scheme of appointment from both channels closely- as Justice Mishra has done- it is evident that a lions' share of posts are to be filled by those in the judicial service. For the past two decades, only a fourth (25%) of the posts in the cadre of District Judges (in every State) are earmarked for advocates; the balance 75% to be filled exclusively from amongst judicial officers. 50%, (out of 75%) is to be filled on the basis of seniority cum merit, whereas 25% (of the 75%) is to be filled by departmental examination. This examination is confined to members of the judicial service of the concerned State. The decision of this court in *All India Judges' Association & Ors v Union of India & Ors* 2010 (15) SCC 170, reduced the limited departmental examination quota (out of turn promotion quota) from 25% to 10% which took effect from 01.01.2011. Thus, cumulatively, even today, judicial officers are entitled to be considered for appointment, by promotion, as District Judges, to the extent of 75% of the cadre relating to that post, in every State. It is therefore, held that the exclusion- by the rules, from consideration of judicial officers, to the post of District Judges, in the quota earmarked for Advocates with the requisite standing, or practice, conforms to the mandate of Articles 233-235, and the rules are valid.

32. This court is also of the opinion that if rules of any State permit judicial officers to compete in the quota for appointment as District Judges, they are susceptible to challenge. The reason for this conclusion is that where a dichotomy is maintained, and two distinct sources for appointment are envisaged, like the present, enabling only

judicial officers to compete in the quota earmarked for advocates would potentially result in no one from the stream of advocates with seven or more years' practice, being selected. This would be contrary to the text and mandate of Article 233 (2), which visualized that such category of candidates would always be eligible and occupy the post of District Judge. Clear quotas for both sources have been earmarked by High Courts. If one those in one stream, or source- i.e. judicial officers- are permitted to compete in the quota earmarked for the other (i.e. advocates) without the converse situation (i.e. advocates competing in the quota earmarked for judicial officers- an impossibility) the result would be rank discrimination.

33. Another strong reason drives us to this conclusion. The Constitution makers were aware that the judicial branch had to be independent, and at the same time, reflect a measure of diversity of thought, and approach. This is borne out by eligibility conditions spelt out clearly in regard to appointments at every level of both the lower and higher judiciary: the District court, the High Courts and the Supreme Court. In regard to judicial positions in each of these institutions, the Constitution enables appointments, from amongst members of the Bar, as its framers were acutely conscious that practising advocates reflect independence and are likely offer a useful attribute, i.e. ability to think differently and have novel approaches to interpretation of the laws and the Constitution, so essential for robustness of the judiciary, as well as society as a whole.

34. This view is fortified by Article 217 (2), which spells out two sources from which appointments can be resorted to for the position of judge of a High Court: firstly, member of a judicial service of a State [Article 217 (a)] and an advocate with ten years' experience [Article 217 (b)]. For the Supreme Court, Article 124 (3) (a) enables consideration of a person with five years' experience as a High Court judge; Article 124(3)(b) enables consideration of an advocate with ten years' experience at the bar in any High Court; Article 124(3)(c) enables consideration of a distinguished jurist. Significantly, advocates with stipulated experience at the bar are entitled, by express provisions of the Constitution [Articles 233 (2), Article 217 (b) and Article 124 (3) (b)]

to be considered for appointment to the District Courts, High Courts and the Supreme Court, respectively. However, members of the judicial service can be considered only for appointment (by promotion) as District Judges, and as High Court judges, respectively. Members of the judicial service cannot be considered for appointment to the Supreme Court. Likewise, academics or distinguished jurists, with neither practise at the Bar, nor any experience in the judicial service, can be considered for appointment as District Judge, or as High Court judge.

35. The Constitution makers, in the opinion of this court, consciously wished that members of the Bar, should be considered for appointment at all three levels, i.e. as District judges, High Courts and this court. This was because counsel practising in the law courts have a direct link with the people who need their services; their views about the functioning of the courts, is a constant dynamic. Similarly, their views, based on the experience gained at the Bar, injects the judicial branch with fresh perspectives; uniquely positioned as a professional, an advocate has a tripartite relationship: one with the public, the second with the court, and the third, with her or his client. A counsel, learned in the law, has an obligation, as an officer of the court, to advance the cause of his client, in a fair manner, and assist the court. Being members of the legal profession, advocates are also considered thought leaders. Therefore, the Constitution makers envisaged that at every rung of the judicial system, a component of direct appointment from members of the Bar should be resorted to. For all these reasons, it is held that members of the judicial service of any State cannot claim to be appointed for vacancies in the cadre of District Judge, in the quota earmarked for appointment from amongst eligible Advocates, under Article 233.

36. This court is of the opinion that the decision in *Vijay Kumar Mishra* (supra), 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 & Ors. vs. Chander Shekhar & Ors* 1997 (4) SCC 18, a three-judge bench of this court held as follows:

> *"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 of 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.*
>
> *7. 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.*
>
> *8. 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 (Smt.) v. University of Rajasthan and Ors. (1993) I LLJ 617 (SC). 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* 1994 (2) SCC 723 and *Bhupinderpal Singh & Ors. vs. State of Punjab & Ors* 2000 (5) SCC 262. Therefore, the observation in *Vijay Kumar Mishra (supra)* that "*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 Art. 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. 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 (supra),* 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.

37. As a result of the above discussion, it is held that *Vijay Kumar Mishra (supra),* to the extent that it is contrary to *Ashok Kumar Sharma (supra),* as regards participation in the selection process, of candidates who are members of the judicial service, for appointment to the post of District Judge, from amongst the quota earmarked for advocates with seven years' practice, was wrongly decided. To that extent, *Vijay Kumar Mishra (supra)* is hereby overruled.

38. 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 Rules framed under Article 234 and proviso to Article 309 of the Constitution of India.

.....J.
[S. RAVINDRA BHAT]

New Delhi,
February 19, 2020.