

Before A.B. Chaudhari & Inderjit Singh, JJ

ANMOL SINGH NAYAR—*Petitioner*

versus

PUNJAB AND HARYANA HIGH COURT AND OTHERS—

Respondents

CWP No. 892 of 2017

February 26, 2018

Constitution of India, 1950—Art. 226, 233(2)—Haryana Superior Judicial Service Rules, 2007—Rl. 6(1)(c)—Superior Judicial Service—Direct recruitment from Advocates—Petitioner, Judicial Officer assailed corrigendum issued of allowing Judicial Officers to participate—Held, in service candidates could participate—Eligibility to be seen at time of appointment, not the last date of application—Dismissed.

Held that attempt to distinguish the case of Vijay Kumar Mishra (supra) on the plea that they were Advocates on the last date of filing applications for the post of District Judge (Direct from the Bar), whilst respondents No.3 to 14 have been members of the judiciary is fallacious. The reason is on the date of event/ date of interview/ selection/ appointment for the said post, Vijay Kumar Mishra and another were not Advocates but were members of the Subordinate Judiciary; but still the Apex Court allowed them to participate in the interview. What is significant or paramount is the status as on the date of appointment and not the last date of application. That is why the key word “appointment” in clause (2) of Article 233 has been interpreted for the first time by the Apex Court. (Emphasis original)

(Para 23)

Manohar Lall, Advocate
for the petitioner.

Naveen Gupta, Advocate
for respondent No.1.

A.B. CHAUDHARI, J.

(1) By the present petition, the petitioner has challenged Corrigendum dated 17.08.2016 (Annexure P-3), issued by respondent No.1 and communication dated 24.12.2016 (Annexure P-

4), by which respondents No.3 to 14, in-service candidates in the judiciary, Haryana Civil Services (Judicial Branch), were allowed to appear provisionally in the written examination of Haryana Superior Judicial Service and were allowed to participate in the selection process of direct recruitment to the said service meant for practising Advocates.

Facts:

(2) The petitioner is serving as Civil Judge (Senior Division)-cum-Additional Chief Judicial Magistrate at Bhiwani. He was appointed on 25.01.2007 and was posted initially to work at Panchkula where he joined on 27.01.2007. He completed his probation period and was confirmed with effect from 08.03.2011. On 16.07.2017, respondent No.1 issued a Notification inviting applications for selection to 10 posts of Haryana Superior Judicial Service by way of direct recruitment i.e. 25%, from amongst the eligible Advocates through competitive examination under Rule 6(1)(c) of the Haryana Superior Judicial Service Rules, 2007 (for short 'the Rules'). The eligibility was provided by clause 2(b) in the Notification that the candidate should have been duly enrolled as an Advocate and must have been practising for a period not less than 7 years as on the last date of submission of applications. Respondents No.3 to 14 are in judicial service who had applied for direct recruitment pursuant to the said Notification/advertisement dated 16.07.2015. They were not members of the Bar on the last date of submission of applications. Their initial appointments in the judiciary range from the years 2006 to 2013. Thereafter, respondent No.1 issued Corrigendum dated 17.08.2016 under which respondents No.3 to 14 were considered eligible for direct recruitment to the Haryana Superior Judicial Service in the light of the judgment of the Apex Court in Civil Appeal No.7358 of 2016 titled 'Vijay Kumar Mishra and another vs. High Court of Judicature at Patna and others', decided on 09.08.2016. The facts in the said judgment were entirely different as the candidates in the said judgment were the members of the Bar at the time of submission of applications and at the time of participating in the written test and only thereafter they had joined the judicial service. Private respondents No.3 to 14 were allowed to appear in the written test that was held from 10.02.2017 to 12.02.2017. None of them were members of the Bar as on the last date of submission of applications; namely, 31.08.2015. Respondents No.3 to 14 were, therefore, ineligible to even apply for the said post and consequently could not have been considered nor could be allowed to participate in the process of selection. Respondents No.3 to 14, in the

order of seniority, are junior to the petitioner and in case they are selected and appointed in the Haryana Superior Judicial Service, they will be obviously placed above the petitioner in the seniority which would affect him adversely. The petitioner has, thus, put to challenge Corrigendum dated 17.08.2016, as aforesaid.

(3) This Court had issued notice of motion of on 06.02.2017 by making a speaking order and Registrar (Recruitment) was directed to produce entire relevant record. On 07.02.2017, this Court passed an interim order allowing respondents No.3 to 14 to appear provisionally in the written examination that was scheduled to be held from 10.02.2017 to 12.02.2017 subject to the decision of the present writ petition and that the result thereof shall be kept in a sealed cover.

(4) Respondent No.1 filed written statement which was taken on record on 09.03.2017. Thereafter, on 26.07.2017, Registrar (Recruitment) produced an envelope containing the result of respondents No.3 to 14. This Court found that none was qualified in the main examination except respondents No.8 and 13 who had cleared the same. Consequently, this Court deleted respondents No.3 to 7, 9 to 12 and 14 from the array of respondents and ordered renumbering of respondents No.8 and 13 as respondents No.3 and 4 and then made the result subject to the outcome of the present petition.

(5) Respondent No.1 filed its written statement and reliance has been placed on the decision of the Apex Court in the case of Vijay Kumar Mishra (supra) for the proposition that Article 233(2) of the Constitution of India only prohibits the appointment of a person as District Judge, if such person is already in the service of the Union or the State but it does not prohibit the consideration of the candidature of a person who is in service of the Union or the State and that such a person would still have an option, if selected, to join the service in the Superior Judicial Service or to continue in the existing employment. The objection is that the petition is premature because according to the petitioner himself, if selected and appointed, respondents No.3 to 14 would become senior to him and, therefore, he has no legal right to maintain the petition before this Court. There is, thus, prayer for dismissal of the writ petition by respondent No.1.

Arguments :

(6) In support of the writ petition, learned counsel for the petitioner made the following submissions:-

(i) the decision in the case of Vijay Kumar Mishra (supra) by the Apex Court relied upon by the Committee for issuing Corrigendum dated 17.08.2016, has no application whatsoever on facts as well as in law and, therefore, the reliance on the said decision of the Apex Court for issuing the impugned is not legally correct.

(ii) Respondents No.3 to 14 admittedly are in judicial service, they having joined the judicial service in Subordinate Judiciary ranging from the years 2006 to 2013. They were not the members of the Bar as is the requirement according to the advertisement as well as the rules even on the last date of making applications.

(iii) 10 posts advertised by the Punjab and Haryana High Court are only meant for Advocates practising in the Bar for 7 years preceding the date of application and no other person can be allowed to participate in the process of selection, including respondents No.3 to 14.

(iv) The Corrigendum in question is in violation of Rule 5, 6(1)(c) and 11 of the Rules made in exercise of power conferred by Article 233 read with proviso to Article 309 of the Constitution of India. The impugned action is also contrary to Article 233(2) of the Constitution of India and in terms of the judgment in the case of *Satya Narain Singh* versus *High Court of Judicature at Allahabad and others* (1985) 1 SCC 225 and the other judgment in the case of *Deepak Aggarwal* versus *Keshav Kaushik and others*, Civil Appeal No.561 of 2013 (arising out of SLP (C) No.17463 of 2010, decided on 21.01.2013, the petitioner has cause of action to file the petition inasmuch as his seniority will be adversely affected if any of respondents No.3 to 14 is selected as obviously after appointment, such person would be placed above the petitioner, which would cause irreparable loss to the petitioner in his service career.

(v) The decisions in the cases of Satya Narain Singh and Deepak Aggarwal (supra), in fact, have application in the present case rather than the decision in the case of Vijay Kumar Mishra (supra), as in the facts of the case in the case of Vijay Kumar Mishra (supra), the applications were already made by petitioners-Vijay Kumar Mishra and

another, before the cut off date 05.02.2015 and in the meantime those petitioners were selected and appointed in the Subordinate Judicial Service of the State of Bihar in August, 2016 and were the members of the Subordinate Judiciary. The fact remains that when they had applied they were Advocates, though eventually were selected in the Superior Judicial Service. Therefore, according to the learned counsel for the petitioner, the facts would be distinguishable.

(7) Learned counsel for the petitioner, thus, submitted that the petition is, therefore, required to be allowed by quashing the entire process of selection and the Corrigendum dated 17.08.2016.

(8) Per contra, learned counsel for respondent No.1 opposed the petition and submitted that the petitioner does not have legal right to prosecute the present petition as he did not apply for the post in question nor any of his legal right would be affected. The petition is, therefore, required to be dismissed on the said preliminary objection. On merits, learned counsel for respondent No.1 submitted that the Corrigendum in question was issued to implement the law that was declared by the Apex Court in the case of Vijay Kumar Mishra (supra) and respondent No.1 was duty bound to implement the said judgment made by the Apex Court. The judgment of the Apex Court in clear terms considers the judgments relied upon by the counsel for the petitioner and those judgments are distinguishable. He, therefore, submitted that there is no merit in the petition and the same is liable to be dismissed and may be dismissed accordingly.

Consideration

(9) We have heard learned counsel for the rival parties at length and have seen the entire record. Rules 5, 6(1)(c) and 11 of the Rules, read thus:-

“5. Recruitment to the Service shall be made by the Governor, -

(i) by promotion from amongst the Haryana Civil Service (judicial Branch) in consultation with the High Court; and

(ii) by direct recruitment from amongst eligible Advocates on the recommendations of the High Court on the basis of the written and viva voice test conducted by High Court.”

“6.(1) Recruitment to the Service shall be made:-

XX XX XX
XX XX XX

(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 the High Court.”

“11. The qualifications for direct recruits shall be as follows:

- (a) must be a citizen of India;
- (b) must have been duly enrolled as an Advocate and has practiced for a period not less than seven years;
- (c) must have attained the age of thirty five years and have not attained the age of forty five years on the 1st day of January of the year in which the applications for recruitment are invited.”

(10) The relevant portion from the advertisement/Notification dated 16.07.2015 reads thus:-

“2. Any person who fulfills the following conditions may apply to the Registrar (Recruitment), High Court of Punjab and Haryana, Chandigarh:-

- (a) he/she must be a citizen of India;
- (b) he/she must have been duly enrolled as an Advocate and must have been in practice for a period not less than seven years as on the last date of submission of applications i.e. 31.08.2015.
- (bb) must be an income tax assessee for at least three assessment years preceding the date of application, with gross professional income of not less than rupees five lacs per annum. The applicant shall also be required to attach the proof of his independent engagement and conducting of not less than fifty cases (other than bunch cases) as per year in the preceding three years;

Provided that in case of candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, differently abled persons and Ex-servicemen, the gross professional income shall not be less than rupees three lacs per annum

and the condition of independent engagement and conducting of cases shall be forty cases (other than bunch cases) per year in the preceding three years;

(c) he/she must have attained the age of 35 years and must not have attained the age of 45 years on 1st day of January of the year in which the applications for recruitment are invited.”

(11) The Corrigendum dated 17.08.2016 is reproduced below :

“HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Corrigendum - Postponement of Main Written Examination of Haryana Superior Judicial Service and of applications.

Hon'ble Supreme Court in recent Judgment dated 09.08.2016 passed in Civil Appeal No.7358 of 2016 titled as 'Viiav Kumar Mishra and another Vs. High Court of Judicature at Patna and others' held that 'in service' candidates cannot be debarred from participating in the selection process of Superior Judicial Service Examination. Further, eligibility criteria regarding income and number of cases, is under challenge before Hon'ble Supreme Court. All those who applied and were eligible *DE-HORS* income and number of cases criteria, have been provisionally allowed to appear in the Main Written Examination at their own risk and responsibility subject to production of proof of their eligibility in all respects under the rules.

Hon'ble High Court, in the interest of justice, has decided to give fresh chance to all aspirants who are eligible in all respects as on 31.08.2016 in accordance with the notification No.92 Gaz.I/V1.F.2 dated 16.07.2015 & corrigendum dated 19.02.2016. They may apply for appearing in the Recruitment Process of Haryana Superior Judicial Service at their own risk and responsibility subject to production of proof of their eligibility in all respects under the rules. The failure of the applicant to furnish proof of his/her eligibility to the satisfaction of the High Court at any stage, will lead to cancellation of candidature without any notice.

The candidates who applied in pursuance of notification No.92 Gaz.I/VI.F.2 dated 16.07.2015 & corrigendum dated 19.02.2016 and have also been issued Admit Cards, need not to apply afresh.

The application of the fresh applicants must reach in the office of Registrar (Recruitment) on or before 15.09.2016 up to 4.00 p.m. complete in *ALL* respect on the prescribed proforma as per aforesaid notification and corrigendum dated 16.07.2015 and 19.02.2016 respectively. The aforesaid notification and corrigendum are already available on the official website of this Court under the link i.e. <http://highcourtchd.gov.in>. All other terms and conditions of the notification No. 92 *GAZ.I/VI.F.2* dated 16.07.2015 and corrigendum dated 19.02.2016 shall remain unchanged.

Consequently, the Main Written Examination for Haryana Superior Judicial Service scheduled to be held from 26.08.2016 to 28.08.2016, is postponed.”

(12) The preliminary objection raised by the counsel for respondent No.1 about the locus standi or about the legal right of the petitioner to maintain the present petition will have to be rejected outright since the petitioner has clearly averred that his seniority would be affected if any of respondents No.3 to 14 who are junior to him in the present cadre are selected and appointed to the posts in question. There is no counter submission by respondent No.1 to the said averment in the petition that in that event the seniority of the petitioner would not be affected. The preliminary objection is, therefore, rejected.

(13) A reading of the impugned Corrigendum shows that respondent No.1 has relied upon the judgment of the Supreme Court dated 09.08.2016 in the case of Vijay Kumar Mishra (*supra*) by which it was held that 'in service' candidates cannot be debarred from participating in the selection process of Superior Judicial Service Examination. Insofar as eligibility criteria regarding income and number of cases is concerned, respondent No.1 found that the same was not challenged before the Apex Court. It is for that reason that respondent No.1 inserted a clause that the entire process of selection shall be treated as “provisional” and the candidates were being allowed to appear at their own risk and responsibility subject to the production of proof of their eligibility in all respects under the Rules. It is in that point of view that further process was undertaken by respondent No.1.

(14) The legal question that arises for consideration is whether the in service candidates in the judiciary not being the members of the Bar could be allowed to participate for Haryana Superior Judicial Service. In the case of Vijay Kumar Mishra (supra), the facts were that Advocates Vijay Kumar Mishra and another had applied in response to Advertisement No.1 of 2015 for direct recruitment in respect of 99 vacancies as on 31.03.2015. They had appeared in the preliminary examination as well as in the mains examination pursuant to the said advertisement. In the meantime, the petitioners became qualified for the Subordinate Judicial Service in the State of Bihar in 28th Batch. Accordingly, they joined service in August, 2015. Thereafter, on 22.01.2016, the result of the Mains Examination of the District Judge Entry Level (Direct from Bar) was published as they had qualified in the Mains Examination.

(15) From the above facts, it is clear that petitioners-Vijay Kumar Mishra and another were not the members of the Bar as they had entered the Subordinate Judicial Service in August, 2015. It is also clear that the result of the District Judge Entry Level (Direct from Bar) was published on 22.01.2016 i.e. after about 5 months, on which date they were not the members of the Bar. The question for consideration before the Apex Court was not whether on the last date of application they were the members of the Bar or not but the question before the Apex Court that was answered ultimately was whether in service candidates in the judiciary could be allowed to participate for the purpose of selection though on the date of application, they were not the members of the Bar. In the case of Vijay Kumar Mishra (supra), the Patna High Court granted them permission to appear in the interview if they resigned immediately from the Subordinate Judicial Service which they had joined in August, 2015, obviously, for the reason that they were the members of Judicial Service as on the date of interview in respect of District Judge Entry Level (Direct from Bar) Examination, 2015 in view of the purported bar under Article 233(2) of the Constitution of India. The High Court of Patna held that before the date of interview, the petitioners had joined the judicial service in terms of clause (2) of Article 233 of the Constitution, thus, they were debarred from participating in the process of selection to the post of District Judge Entry Level. Presumably the High Court found that they were no more the members of the Bar. On the basis of above facts, the Apex Court proceeded to decide the Civil Appeal.

(16) We have carefully gone through the said decision in the case of Vijay Kumar Mishra (*supra*). It would be appropriate to quote paragraphs 6, 7 and 8 from the said judgment to find out the ratio decidendi of the said judgment. The same read, thus :-

“6. Article 233(1)2 stipulates that appointment of District Judges be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. However, Article 233(2) 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 Judges. The said article is couched in negative language creating a bar for the appointment of certain class of persons described therein. It does not prescribe any qualification. It only prescribes a disqualification.

7. It is well settled in service law that there is a distinction between selection and appointment. 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 Art. 233(2) nor

contemplated under the scheme of the constitution as it would not serve any constitutionally desirable purpose.”

(17) Additional reasons were given by the Supreme Court and it would be appropriate for us to quote them hereunder:-

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

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

“9) Mr. Ranjit Kumar, Solicitor General of India appearing for the respondent (High Court), however, contended that the word "appointed" occurring in Article 233(2) of the Constitution should necessarily include the entire selection process starting from the date of submitting an application by the person concerned till the date of his appointment. It was his submission that if any such person is found to be in service of Union or State, as the case may be, on the 15 Page 16 date when he has applied then such person would suffer disqualification prescribed in clause (2) of Article 233 and would neither be eligible to apply nor be eligible for appointment to the post of district judge.”

“11) In my view, there lies a subtle distinction between the words “selection" and "appointment" in service jurisprudence. (See : Prafulla Kumar Swain vs. Prakash Chandra Misra & Ors., (1993) Supp. (3) SCC 181). When the framers of the Constitution have used the word "appointed" in clause (2) of Article 233 for determining the eligibility of a person with 16 Page 17 reference to his service then it is not possible to read the word "selection" or "recruitment" in its place. In other words, the word "appointed" cannot be read to include the word "selection", “recruitment” or “recruitment process”.” “12) In my opinion, there is no bar for a person to apply for the post of

district judge, if he otherwise, satisfies the qualifications prescribed for the post while remaining in service of Union/State. It is only at the time of his appointment (if occasion so arises) the question of his eligibility arises. Denying such person to apply for participating in selection process when he otherwise fulfills all conditions prescribed in the advertisement by taking recourse to clause (2) of Article 233 would, in my opinion, amount to violating his right guaranteed under Articles 14 and 16 of the Constitution of India.”

(18) It is clear from the reasons given by the Apex Court above that it has been held that the meaning of Clause (2) of Article 233 of the Constitution is that the eligibility of a person in judicial service is required to be seen at the time of his appointment for such post and not prior to it.

(19) The next submission made by the learned counsel for the petitioner that the decisions in the cases of Satya Narain Singh and Deepak Aggarwal (supra) would have an application rather than the judgment in the case of Vijay Kumar Mishra (supra) cannot be accepted as both the decisions were considered by the Apex Court in the case of Vijay Kumar Mishra (supra) and have been specifically distinguished. Therefore, the submission that the decisions in the cases of Satya Narain Singh and Deepak Aggarwal (supra) were rendered by 3 Judges of the Apex Court does not impress us. We cannot find out any other reason on our own in contradistinction to the clear opinion given by the Apex court in para-12 which reads thus for emphasis :

“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.”

(20) The next question raised by the learned counsel for the petitioner is that in the case of Vijay Kumar Mishra (supra), the

petitioners had applied for the post of District Judge (Direct from Bar) when they were Advocates while in the present case respondents No.3 to 14 were not Advocates as on the last date of filing of the applications. We think the submission is faint. To repeat, in the case of Vijay Kumar Mishra (supra) also, the petitioners therein had already entered the Subordinate Judicial Service in August, 2015 and, therefore, as on the date of interview they were not Advocates or members of the Bar. At any rate, the larger question decided by the Apex Court would not depend upon such type of fact as the question has been decided with reference to the interpretation of clause (2) of Article 233 of the Constitution. The attempt to distinguish the case of Vijay Kumar Mishra (supra) on the plea that they were Advocates on the last date of filing applications for the post of District Judge (Direct from the Bar), whilst respondents No. 3 to 14 have been the members of judiciary is fallacious. The reason is on the date of event/ date of interview/ selection/ appointment for the said post, Vijay Kumar Mishra and another were not Advocates but were the members of the Subordinate Judiciary; but still the Apex Court allowed them to participate in the interview. What is significant or paramount is the status as on the date of appointment and not the last date of application. That is why the key word “appointment” in clause (2) of Article 233 has been interpreted for the first time by the Apex Court.

(21) The submission that the Rules quoted above of the Haryana Superior Judicial Service were violated, also will have to be rejected in view of the ratio decidendi laid down by the Apex Court on the issue in question in the case of Vijay Kumar Mishra (supra).

(22) In the result, we do not find any merit in the present petition. Hence, we make the following order:-

ORDER :

(23) Civil Writ Petition No.892 of 2017 is dismissed.

Shubreet Kaur