**Subhash Chandra and ors. Vs. State of U.P. and ors.**

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**SooperKanoon Citation** : sooperkanoon.com/462943

**Court** : Allahabad

**Decided On :** Mar-17-2004

**Reported in** : (2004)2UPLBEC1150

**Judge** : A.K. Yog and ;V.N. Singh, JJ.

**Acts** : Uttar Pradesh Higher Judicial Service Rules, 1975 - Rule 5; Uttar Pradesh Higher Judicial Service Rules, 1953 - Rule 5; Constitution of India - Articles 14, 16 and 233(2); Uttar Pradesh Higher Judicial Service Rules, 1972 - Rule 5; Uttar Pradesh Judicial Service Rules, 2001 - Rule 34; Uttar Pradesh Government Servants Conduct Rules, 1956 - Rules 3(2) and 15; Allahabad High Court Rules, 1952 - Rule 4

**Appeal No.** : Civil Misc. Writ Petition No. 5018 of 2004

**Appellant** : Subhash Chandra and ors.

**Respondent** : State of U.P. and ors.

**Advocate for Def.** : Sri. Sudhir Agarwal

**Judgement** :

**A.K. Yog, J.**

1. Subhash Chandra, Angad Prasad, Abdul Quaiyum and Narendra Kumar Singh, four petitioners, have filed the present writ petition under Article 226, Constitution

of India praying for following reliefs :

'(i) issue a writ, order or direction of a suitable nature commanding the respondents to produce a copy of the decision of the selection committee holding the petitioners ineligible for consideration and to quash the same.

(ii) issue a writ, order or direction of a suitable nature commanding the respondents to forthwith interview the petitioners for U.P. Higher Judicial Service in pursuance to the interview letters issued to them within a period to be specified by this Hon'ble Court.

(iii) issue a writ, order or direction of a suitable nature quashing the entire proceedings of interview and to direct de novo interview proceedings to be conducted of all candidates including the petitioners and only thereafter to declare the final result.

(iv) writ, order or direction in the nature of which this Hon'ble Court may deem fit and proper under the circumstances of the case.

(v) award cost to the humble petitioner throughout of the present writ petition.'

FACTS OF THE CASE :

2. On behalf of High Court of Judicature at Allahabad, Registrar General of the Court published an advertisement in Newspaper dated 8th June, 2000 inviting applications from eligible persons for appearing in H.J.S. Examination, 2000, Annexure-1 to the writ petition.

3. Petitioners, vide Paras 5 to 20 of the writ petition, contend that according to the eligibility clause in the advertisement, 1.1.2001 is the cut-off date for computing 7 years' standing as an Advocate : the petitioners as Advocate had more than 7 years' standing on 1.1.2001, being eligible they applied in pursuance to the advertisement, their application forms were found in order; admit cards were issued for appearing in the written examination (held on 25th and 26th November, 2000); after three years written examination result was published in December, 2003; petitioners were called for interview initially scheduled on 8th, 12th and 15th

January, 2004, petitioners meanwhile selected and joined U.P. Nyayik Sewa (on 23.3.2001, 26.3.2001, 23.5.2001 and 25.5.2001 as disclosed by the respondents); petitioners applied for permission through concerned District Judges who forwarded it to High Court/respective Administrative Judges, they were initially accorded permission; petitioners appeared on the original dates fixed for interview but later intimated of change of dates; petitioners again reported on the re-scheduled dates for interview; and that the Selection Committee did not interview these candidates on the ground that they were not eligible since petitioners had joined U.P. Nyayik Sewa (i.e. they were in judicial service) and therefore, ceased to be Advocate on the date of interview. The petitioners, therefore, felt aggrieved.

4. We called for the original record of the case from the Registry. It shows that these petitioners submitted applications for permission to appear in interview through their concerned District Judges who forwarded them to the Court. The office report dated 14.1.2001, addressed to Deputy Registrar (Misc.), shows that Subhash Chandra, Abdul Quaiyum and Narendra Kumar Singh (three petitioners) were granted permission by their respective Administrative Judges. It is also admitted in Para 14 of the counter affidavit.

5. The record also shows that similar application of Angad Prasad/petitioner No. 2 was referred by the Registrar General along with his note dated 14.1.2002 to the Administrative Judge who in turn referred the matter to the Hon'ble Chief Justice for appropriate orders. The Hon'ble Chief Justice, presumably in exercise of powers under Chapter III, Rule 4, Clause (A) Sub-clause (6) of the Rules. Passed order dated 16.1.2004, which reads :

'Permission cannot be granted in view of the admitted fact that he has been working as P.C.S. (J) and he cannot be said to be a pleader or an Advocate at the time of interview.'

(Also quoted in Para 16 of the counter affidavit.)

6. It appears, in view of the aforequoted order dated 16.1.2004, other three petitioners were also consequently not allowed to participate in the interview.

7. Petitioners, who were not permitted to appear in the interview in the aforesaid circumstances, have filed this petition primarily on the following grounds quoted below :

'(a) Because Rule 5 specifies the source of recruitment to the said service and includes direct recruitment of pleaders and Advocates of not less than 7 years standing on the first day of January of next following the year in which the notice inviting the applications is published.

(b) .....

(c) Because a perusal of 1975 Rule as also the advertisement issued by the High Court initiating the selection process demonstrates that first day of the succeeding year is the date for computing eligibility of possessing 7 years length of service as also the permissible age limit.

(d) Because clearly the date for adjudging the eligibility has been specified both under rules and the advertisement initiating the recruitment process. Alternatively in the absence of any such specification the last date for submitting application form would be the relevant date for consideration.

(e) Because on either of the aforesaid two dates the petitioners were fully eligible for appointment and suffer from no ineligibility.

(f) Because the petitioners cannot be held to be ineligible for appointment on account of any subsequent facts which comes into existence subsequent to the aforesaid dates.

(g) .....

(h) Because the petitioners have been wrongly excluded from the selection process despite their success in the written examination. (i).....

(j).....

(k) Because even otherwise the decision to exclude the petitioners from consideration in interview is a decision taken by the selection committee who has

no power in this regard. There does not exist any decision of the full Court of the High Court holding the petitioners to be ineligible.

(l) .....

(m) Because even in the past selections whenever there existed doubt with regard to the candidature of any candidate called for interview the objection against his name was noted in the selection proceedings but such candidate nevertheless interviewed by the selection committee and the matter referred to the full Court of the High Court for final decision on the candidature.

(n) .....

(o) Because in a process of selection of candidates who have qualified the written examination ought to be interviewed by the same interview board in the same proceedings so that the norm for awarding marks in in no manner affected. In such view of the matter it is essential in the interest of justice that the entire proceeding of interview of all the candidates be set. aside with the direction issued of holding de novo interview proceeding with regard to all candidates including the petitioners.'

8. Counter affidavit [sworn by Sri P.K. Goel, Joint Registrar (Inspection), High Court, Allahabad], has been filed on behalf of the Respondent No. 2 only.

9. Paras 9 to 13 of the counter affidavit are relevant wherein 'Advertisement' in question is admitted and it is stated that 4103 candidates applied in pursuant thereto; on scrutiny 385 candidates were permitted to appear in the written examination held on 25th/26th November, 2000, the petitioners were issued admit cards to appear in the examination, result was published in December, 2003, and petitioners were issued interview letters: It is pleaded by the answering respondents that the petitioners had, in the meantime, applied for recruitment and got appointed to UP. Nyayik Sewa on the basis of the result declared by the U.P. Public Service Commission in the year 2001 and the petitioners being in U.P. Nyayik Scwa sought for permission for appearing in interview.

10. In the rejoinder affidavit sworn by Narendra Kumar Singh (one of the petitioners) there is nothing in particular except that in Para 5 of the rejoinder affidavit, while replying to Paras 14 to 17 of the counter affidavit, it is stated that the order of Hon'ble Chief Justice dated 16.1.2004 was on the basis of the application of one of the petitioners (Angad Prasad), that the said order of the Hon'ble Chief Justice was not an order of general nature applicable to all the petitioners and the question whether the petitioners were eligible or not ought to have been adjudged with reference to Article 233 of the Constitution and the Rules, and whether a person is 'eligible' or 'ineligible' could be decided only by 'Full Court' of the High Court and not by the Hon'ble Chief Justice or the Selection Committee.

11. From original record of the case, it transpires that two candidates (Suail Kumar Panwar/Rall No. 1225 and Sri Pradeep Kumar/Roll No. 2088), who were also eligible at the time of submitting their applications as per advertisement but subsequently joined Judicial Services and working as 'Judicial Officer' in the State of Jharkhand and Bihar and given permission by their respective High Courts for appearing in interview, were also not accorded permission to appear in the interview in question.

12. Apart from the above, in Para 29 of the petition, it is stated that two candidates were interviewed by the Selection Committee who were already in the Judicial Service and posted as Additional District Judge in other State,

13. Respondents, vide Para 29 of the counter affidavit, in reply admit that two persons, already in Judicial Service in the State of Jharkhand and holding the post of Additional district Judge were though interviewed by the Selection Committee but their candidature was later cancelled by the Selection Committee on the ground of being ineligible.

14. On behalf of the petitioners, it is argued that plain reading of Article 233(2) read with Rule 5 and Rule 18 of the Rules along with the advertisement/Annexure 1 to the writ petition, it is amply clear that in case of direct appointment under U.P. Higher Judicial Services, eligibility condition of 7 years practice as an 'Advocate or pleader' is to be seen and satisfied at the time of submitting application. In other

words, an applicant need not continue as 'Advocate' or 'pleader' throughout the process of selection which include 'recommendation by the High Court' and to be actually appointed by the Governor of the State,

15. In the backdrop of the facts of this case the question to be answered is 'Whether a person (admittedly eligible at the time of submitting application as per advertisement) who later during 'Selection'/Recruitment Process' of H.J.S, Exam joins 'Judicial Service', and ceases to be 'Advocate', will be entitled to be considered for rest of selection process and recommended by the concerned High Court for appointment under Article 233(2), Constitution of India and the relevant Rules.

16. Answer to the above question depends upon interpretation of Article 233, Constitution of India and certain provisions, of U.P. Higher Judicial Services Rules, 1975 (as amended up to date); hereinafter called 'the Constitution' and 'the Rules' respectively.

17. Before dealing with the respective contentions of the parties, it will be appropriate to reproduced relevant statutory provisions.

RELEVANT PROVISIONS :

CONSTITUTION OF INDIA-CHAPTER

VI-SUBORDINATE COURTS

'Article 233. Appointment of District Judges.--(1) Appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an Advocate or a pleader and is recommended by the High Court for appointment.

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.

UTTAR PRADESH HIGHER JUDICIAL SERVICE RULES, 1975

(framed under rules regulating recruitment and appointment to the U.P. Higher Judicial Service framed by the Governor in exercise of powers conferred by the proviso to Article 309 read with Article 233 of the constitution):

PART II-CADRE

5. Sources of recruitment.--The recruitment to the service shall be made--

(a) by direct recruitment of pleaders and Advocates of not less than seven years' standing on the first day of January next following the year in which the notice inviting applications is published :

(b) by promotion of confirmed members of the Uttar Pradesh Nyayik Sewa (hereinafter referred to as Nyayik Sewa), who have put in not less than seven years' service to be computed on the first day of January next following the year in which the notice inviting applications is published:

Provided that for so long as suitable officers are available from out of the dying cadre of the Judicial Magistrates, confirmed officers who have put in not less than seven years' service to be computed as aforesaid shall be eligible for appointment as Additional Sessions Judges in the service.

Explanation.--When a person has been both a pleader and an Advocate his total standing in both the capacities shall be taken into account in computing the period of seven years under Clause (a).

6. Quota.--Subject to the provisions of Rule 8, the quota for various sources of recruitment shall be--

(i) direct recruitment from the Bar 15%

(ii) Uttar Pradesh Nyayik Sewa of the vacancies 7.0%

(iii) Uttar Pradesh Judicial Officers Service (Judicial Magistrates) : 15%

Provided that where the number of vacancies to be filled in by any of these sources in accordance with the quota is in fraction, less man half shall be ignored and the fraction of half or more shall ordinarily be counted as one :

Provided further that when the strength in the cadre of the Judicial Magistrates gradually gets, depleted or is completely exhausted and suitable candidates are not available in requisite numbers or no candidate remains available at all, the shortfall in the number of vacancies required to be filled from amongst Judicial Magistrates and in the long run all the vacancies, shall be filled by promotion from amongst the members of the Nyayik Sewa and their quota shall, in due course, become 85 per cent

16. Selection Committee.--(1) The Chief Justice shall, for each recruitment service, appoint a Selection Committee consisting of such number of Judges of the Court, not less than three, as he may decide.

(2) No proceeding of the Selection Committee shall be invalid merely by reason of a vacancy occurring in it, or by a member or members being not present at one or more of its meetings, provided that a majority of the members of the committee have been present at each meeting.

17. Direct recruitment.--(1) Applications for direct recruitment to the service shall be invited by the Court by publishing a notice to that effect in the leading newspapers of the State and shall be made in the form prescribed from time to time to be obtained from the Registrar of the Court on payment of the prescribed fee.

(2) The application shall be submitted to the Court by the candidate through the District Judge within whose jurisdiction the candidate has been practising, and in the case of members of the Bar normally practising in High Court, through the Registrar of the High Court. The application shall be. accompanied by certificates of age, academic qualifications, character, standing as a legal practitioner and such other documents as may be required to be furnished.

(3) The District Judge shall forward to the Court all applications received by him along with his own estimate of each candidate's character and fitness of appointment to the service.

18. Procedure of selection.--(1) The Selection Committee referred to in Rule 16 shall scrutinize the applications received and may thereafter hold such examination, as it may consider necessary for judging the suitability of the candidates. The Committee may call for interview such of the applicants who in its opinion have qualified for interview after scrutiny and examination.

(2) In assessing the merits of a candidate the Selection Committee shall have due regard to his professional ability, character, personality and health.

(3) The Selection Committee shall make a preliminary selection and submit the record of all candidates to the Chief Justice and recommend the names of the candidates in order of merit who, in its opinion, are suitable for appointment to the service.

(4) The Court shall examine the recommendations of the Selection Committee and, having regard to the number of direct recruits to be taken, prepare a list of selected candidates in order of merit and forward the same to the Governor.'

18. Relevant extract of the Advertisement dated 8th June, 2000 published under Rule 17(3) of the Rules, 1975 (Annexure-1 to the writ petition) is reproduced :

'RECRUITMENT TO UTTAR PRADESH HIGHER JUDICIAL

SERVICE

Applications for direct recruitment to 38 vacancies in the Uttar Pradesh Higher Judicial Service ..... are invited by the undersigned. Out of this 19 vacancies are for general candidates, 8 vacancies are reserved for Scheduled Caste candidate, '1 vacancy for Scheduled Tribe candidate and 10 vacancies for Other Backward Classes. The recruitment will consist of a written examination followed by an interview :

Eligibility of candidate.--(1) The applicant must be a citizen of India.

(2) The applicant must be an Advocate of not less than 7 years' standing on 1.1.2001.

(3) The applicant must have attained the age of 35 years and must not have attained the age of 42 years on the 1st day of January, 2001 in other words, must have been born on or after 1.1.1959 and not later than 1.1.1966.....

Last date for submission of duly completed form before the conce(sic) District Judge or the Registrar/Registrar General, High Court, Allahabad is 16.8.2000 by 5 p.m.

The manner in which the application shall be submitted and other details are contained in 'Instruction to the Candidates' which will be sent alongwith the application form.'

19. Clause (2) of the aforequoted advertisement is relevant for the present case which clearly spells out 'cut-off date' of an applicant being 'Advocate' of not less than 7 years standing) on 1.1.2001.

BROCHURE AND APPLICATION FORM :

20. Brochure containing 'application form' required to be filled for direct recruitment to the U.P. Higher Judicial Service through H. J. S. Exam, 2000 (bearing Serial No. 6700) is also placed on record by the respondents for perusal of the Court. Relevant columns and the declaration (to be filled up and submitted by a candidate) are reproduced--

11. Whether you were a candidate for a post in the Higher Judicial Service in the past If so, state the year and the fact whether you were called for interview : 16. If you have been employed at any time Give particular below :

Name of the post ornature of employment

Name of employer

Date of joining

Date of termination

Reason for termination

Salary

Proof furnished(EnclosureNo.)

17. If you have practised as an Advocate, give particulars below :

(i) (a) Date of enrollment as an Advocate.

(b) Are you enrolled with Bar Council If so of which State. Give the Enrollment number.

(c) Name of Advocate with whom you received training.

(d) Did you work as a Junior to any Advocate If so, with whom and for what period.

(ii) Period during which you practiced regularly and continuously and the Courts and Districts in which you practised.

(iii) Did you pay any Income Tax on your professional income If so, the amount on which Income Tax was paid in each of the last 3 years.

(iv) Whether any proceeding was ever taken against you for Professional Misconduct or Contempt of Court If so, give particulars with result and also enclose certi-fied copies of the

## JUDGMENT / ORDER

passed in the proceedings by the State Bar Council/the Bar Council of India/the High Court and the Supreme Court of India, if any.

(v) Did you ever figured as an accused or a complainant in any criminal case If so, give particular with result and also enclose certified copies of the

## JUDGMENT / ORDER

of the trial Court, or of the Appellate Court, or of Revisional Court, if any.

21. In the Brochure also there is nothing to show that candidate is required to disclose/declare that he continues or that he shall continue to be Advocate throughout process of selection. From underlined expressions in column 17 quoted above it is clear that information sought in respect of the applicant is the

period during which he had already practised as 'Advocate' continuously and on regular basis in Court on or before 1.1.2001.

REASONS AND DISCUSSION :

22. Rule 5 (a) of the Rules provides that a 'pleaders' or 'Advocates' of not less than seven years standing on the first day of January next following the year in which the notice/advertisement inviting applications is published, shall be eligible for 'direct recruitment' to the service, viz. 'U.P. Higher Judicial Service'

23. Rule 17(2) of the Rules provides that the application shall be submitted to the Court by the candidate through the District Judge within whose jurisdiction the candidate has been practising, and in the case of 'Advocate' practising in High Court, through the Registrar General/Registrar of the High Court. This rule require that the application shall be accompanied by certificates of age, academic qualifications, character, standing as a legal practitioner and such other documents as may be requited to be furnished

24 This Rule shows that position, as existed on the date of submitting application is required to be disclosed.

25. Rule 18 of the Rules, lays down procedure for selection makes it clear that Selection Committee, constituted by the Chief Justice under Rule 16(i) of the Rules, shall on receiving applications, scrutinizes them and thereafter it may hold such examination, as it may consider necessary for judging the suitability of the candidates and the Committee may also call for interview such of the candidates who are, after scrutiny and examination, found suitable for interview.

26. There is no other provision of scrutiny of 'eligibility' of candidate except the scrutiny before written examination. In practice also, as informed by the learned Counsel for the respondent, there is no second scrutiny.

27. We fail to find in the Brochure containing Application Form, any column requiring a candidate to declare or disclose that he shall continue to be a practising Advocate till actual appointment, if selected. Nor do we found any such condition mentioned in the advertisement or Article 233(2) or the Rules.

28. Learned Counsel for the respondents as well as the official of the Registry present in Court disclosed that no such declaration is taken from concerned candidates at any stage nor scrutiny of any kind done to ascertain that candidate continued to be 'Advocate' after 1.1.2001 and during entire selection process including interview.

29. This naturally raises question-as to how the concerned authorities involved with 'selection process' in question otherwise identify that a candidate, who was eligible while submitting application form; has not entailed 'ineligibility' by ceasing to be an Advocate after 1.1.2001. This tends to bring in element of 'unfairness'. Respondents fairly conceded that there was no methodology or mode to identify such candidates and permit those candidates only who continue to be Advocate 'during selection process'.

30. On the other hand it is also admitted to the respondents that the fact that the petitioners (and some other candidates), joined 'judicial service' in U.P. or other States (like Uttaranchal, Jharkhand and Bihar) came to light only because they had applied for permission from concerned High Court in the context of their service condition and not as a part of 'selection process' of Direct Recruitment. It is clear that these candidates did not disclose the fact of their joining 'judicial service' under the Rules 1975 or under the Advertisement or the application form in question not it was otherwise requited under the 'selection process'. It is interesting to note that in the case of other candidates, who may have otherwise ceased to practice as Advocate after submitting application form and may be sitting idle, or opted to indulge in some other vocation, trade, etc. or failed in judicial service examination (in which the petitioners were successful and proved their merit) are not screened/eliminated and permitted to participate in the process of selection. Apparently, there is no rationale or logic in the said approach.

31. Under Rule 5(a) and the Advertisement provide 'cut-off date' which alone is relevant to ascertain eligibility of being an 'Advocate with not less than 7 years' practice' 'Origin' or the 'source' of a candidate being 'Advocate', is referable to the 'cut-off date' and this is to be seen at the time when he applies in response to the advertisement.

32. The stand taken by the petitioners is that a candidate need not continue to be 'Advocate' throughout 'process of selection'; no such statutory requirement can be culled out from the language used either in Article 233(2) of the Constitution or the Rules 1975 or the Advertisement issued under said rules or the application form supplied by the High Court. According to him subsequent change in candidates position is immaterial. In this context reference is to the case of Gopal Krushna Rath v. M. A. A. Baig (Dead) by LRs and Ors., (1999) 1 SCC (sic) (Paras 6 and 7), held that subsequent change in eligibility qualification will not adversely effect a candidate who was eligible when he had applied. For ready reference Para 6 and 7 are quoted below :

'6. When the selection process has actually commenced and the last date for inviting applications is over, any subsequent change in the requirements regarding qualifications by the University Grants Commission will not affect the process of selection on which has already commenced. Otherwise it would involve issuing a fresh advertisement with the new qualifications. In the case of P. Mahendran v. State of Karnataka, (1990) 1 SCC 411, this Court has observed : (SCC p. 416, para 5).

'5. It is well-settled rule of construction that every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect'.'

The Court further observed that:

'Since the amending Rules were not retrospective, it could not adversely affect the right of those candidates who were qualified for selection and appointment on the date they applied for the post, moreover as the process of selection had already commenced when the amending Rules came into force, the amended Rules could not affect the existing rights of those candidates who were being considered for selection as they possessed the requisite qualifications prescribed by the Rules before its amendment.'

7. In the present case, therefore, the appellant possessed the necessary qualifications as advertised on the last date of receiving applications, these

qualifications were in accordance with the Rule/guidelines then in force. There is also no doubt that the appellant obtained higher marks than the original Respondent 1 at the selection. There is no challenge to the process of selection nor is there any allegation of mala fides in the process of selection.'

33. Learned Counsel for the respondent, Sri Sudhir Agarwal, Additional Advocate General, on the other hand, argued-(i) Article 233 provides for two sources of recruitment to the post of District Judge; one by 'promotion' of those who are already in judicial service and the other by 'direct recruitment' from the Bar who have minimum of serve years practice as Advocate/pleader; and (ii) Article 233(2) of the Constitution, requires that a person, who has applied for direct recruitment in U.P. Higher Judicial Services, should continue to be, an Advocate throughout selection process of direct recrutiment.

34. In support of his contention he has referred to the words 'from the Bar' in Rule 6(i) of the Rules.

35. It is argued that the words 'from the Bar' indicate that 'status' of being a member of the Bar should continue throughout the 'process of selection' and if the candidate ceases to be 'Advocate' at any point of time during process of selection, he will become ineligible and consequently exposed to rejection of his candidature.

36. Sri Sudhir Agarwal, learned Counsel for the Respondent, submits and expression 'recruitment' and 'appointment' are synonymous and the two, in given context, may of same connotation, He argued that the word 'appointed' appearing in Article 233, Constitution of India includes both 'appointment' and process of 'recruitment'. It is also argued that expression 'has been for not less man seven years an Advocate' is to be interpreted and read as--'an Advocate', who continues to be as such throughout 'selection process' including recommendation by the High Court.

37. Respondents endeavoured to derive help from the Full Bench decision of Andhra Pradesh High Court in K. Naga Raja and Ors. v. Superintending Engineer, Irrigation Department and Anr., AIR 1987 AP 230 (FB). In the case of K. Naga Raja (supra) Supreme Court considered the meaning of the expression 'matters

relating to the appointment' which includes process of selection and of appointment. In the case in hand, no such expression is used in the relevant Rules, 1975 or Article 233(2); Constitution of India. On the Other hand, advertisement in question and the Rules 5 and 17 of the Rules, clearly indicate that there is no mention that a candidate for direct recruitment should continue to be 'practising Advocate' after submitting application.

38. Decision in the case of K. Naga Raja (supra) is, therefore, distinguishable and out of context.

39. Answer of the question in hand depends upon the interpretation of Article 233(2) of the Constitution read with Rules, 1975.

40. Learned Counsel for the respondents pointed out that words 'has been' used in Article 233(2), Constitution of India supports his contention-namely candidate should, throughout selection process, continue to be Advocate. It is argued that the eligibility feature of candidate being 'Advocate' (which admittedly existed at the time of submitting application in the present case) ought to continue throughout the process of selection. We are unable to agree with this preposition.

41. Expression 'has been' is present perfect tense. This shows that identify of 'source' is not referable to selection process. Candidates' 'eligibility' of being an 'Advocate' of not less than 7 years' practice is required and referable to 'cut-off date' mentioned in the Rules/Advertisement and it is sufficient, as the statutory provision exist on date, that such condition is 'fait accompli' on 'cut-off date' and not beyond.

42. In the case of Mubarak Mazdoor v. K.K. Banerjee, AIR 1958 All 323, Division Bench interpreted the expression 'A person who has been a Judge' and explained that the said phrase used in Section 86(3), Representation of People Act means a person who has, at some time, held office as Judge but it does not necessarily mean that the person must be holding office as a Judge at the time of his appointment.

43. In the case of Secretary, Regional Transport Authority, Bangalore and Anr. v. D. P. Sharma and Anr., AIR 1989 SC 509 (Para 15), Court observed : '.....In our opinion, whether the expression 'has been' occurring in a provision of a statute denotes transaction prior to the enactment of the statute in question or a transaction after the coming into force of the statute will depend upon the intention of the Legislature to be gathered from the provision in which the said expression occurs or from the other provisions of the statute.....'

44. Earlier Rule 5 of the Uttar Pradesh Higher Judicial Service Rules, 1953, quoted below ready reference read :

'5. Sources of recruitment.--(1) Recruitment to the service shall be made to the posts of Civil and Sessions Judges--

(i) by promotion from the members of the Uttar Pradesh Civil Service (Judicial Branch);

(ii) by direct recruitment after consultation with the Court.

(2) Persons eligible for direct recruitment under Sub-clause (ii) of Clause (i) of this rule shall be--

(a) Barristers, Advocates, Vakils or Pleaders of more than 7 years' standing;

(b) ....."

45. Ex ANIMO, i.e. intentional, change in expression of present existing Rule 5 of the Rules. 1975 is clear and apparent.

46. Rule 5(2)(a) of Rules 1953 required that Advocate, Pleader etc. should be of more than 7 years' standing. From the expression used therein, it could be probably possible to argue that for direct recruitment, Advocate must continue to be as such. Aforesaid Rules 1953 have been replaced by Rules, 1975 which brought in distinct and clear change in the expression.

47. A plain reading of the above expression in Rule 5 of the Rules, 1975. means that a candidate should be an 'Advocate' having seven years' standing to his credit

on or defer the 'cut-off date' prescribed in the said Rule 5 itself. The above expression in Rule 5 of the Rules 1975 by no stretch can be read to mean that candidate ought to continue to be Advocate throughout process of selection.

48. Change in status after 'cut-off date' is also not material under Article 233(2), as it stands today.

49. To have better appreciation of the point in hand, it will be useful to examine it with the help of illustration. For this purpose-one may pose following tow questions :

I. Whether any of the petitioners who would have resigned from the judicial service before interview (and hence needed no permission from High Court to appear in interview) could be declared ineligible and deprived from participating in interview and

II Whether there is any methodology adopted to identify and exclude candidates who rendered ineligibility after filing application/cut-off date-and as of fact not continuing to be Advocate during selection process?

50. As noted earlier, there is nothing in the Rules 1975 to warrant cancellation of a candidate if he is not in regular practice or otherwise cease to be Advocate after 'cut-off date' and during selection process.

51. Let us take the present case itself. There may be other candidates who may have applied and appeared in U.P. Nyayik Sewa Examination alongwith these petitioners, and not being successful may have taken other vacation and thus ceased to be practising 'Advocate' as such. Such candidates shall not be checked and will be able to participate in 'selection process' which includes interview. There is no rationale in it. Moreover, there is also otherwise, no 'device' to identity that a candidate is actually 'practicing' and not stopped working as 'Advocate', after submitting application.

52. This brings us back to the task of interpreting Article 233(2) of the Constitution and to find out the meaning of the expression 'if he has been for not less than seven years an Advocate.....'

53. At the outset we may note that not a single decision is cited at the Bar wherein the question of eligibility, in the facts of present case, has been considered.

PRINCIPLES OF INTERPRETATION :

54. In the case of Maharao Sahib Shri Bhim Singhji v. Union of India and Ors., (1981) 1 SCC 166, Krishna Iyer, J. In Para 12 of the Judgment observed that:

'..... there are no absolutes in law as in life and the compulsions of social realities must unquestionably enter the judicial verdict.....'

55. In Para 17 of this very judgment the Court observed :

'.....Courts can and must interpret words and read their meanings so that public good is promoted and power misuse is interdicted. As Lord Denning said : 'A Judge should not be a servant of the words used. He should not be a mere mechanic in the powerhouse of semantics'.....'

56. In the case of S. Gopal Reddy v. State of A.P., (1996) 4 SCC 596, in Para 12 of the judgment Apex Court observed :

'It is well-known rule of interpretation 6f statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a statute. The Courts must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act. A purposive approach for interpreting the Act is necessary.....'

57. In Seaford Court Estates Ltd. v. Asher, (1949) 2 All ER 155 (CA), Lord Denning advised a purposive approach to the interpretation of a word used in a statute and observed :

'.....It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must see to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief

which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature .....A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases.'

58. As seen above, it is a well settled principle of interpretation that when two interpretations are possible, the one which better serves the purpose and makes the provision workable should be adopted. On this criterion, we may test as to what purpose is sought to be achieved by requiring a candidate to continue to be a practising Advocate/member of Bar throughout the process of selection and what purpose shall be served by excluding candidates, who are eligible on the date of submitting application but subsequently joined judicial services during selection process and have not suffered any permanent disability nor rendered disqualified permanently.

59. A candidate like the petitioners, who joins 'judicial service' after submitting application form and permitted in written examination, merely carries a temporary kind of 'handicap'/hurdle and does not render ineligibility or 'disqualification' in its ordinary sense and, therefore, need not be normally excluded/debarred except for very compelling and relevant reasons. There is nothing on record to show that the petitioners as candidates of Higher Judicial Service Examination shall not be in a position to surrender their lien and/or quit the posts held by them in 'judicial service' by resigning if he is offered 'appointment' in H.J.S. under Article 233(2) of the Constitution.

60. Form the U.P. Government Notifications dated 13.3.2001, 23.6.2001 and 6.6.2001, notifying appointment of the petitioners and others on the basis of U.P. Judicial Service Examination, 1999 held by the U.P. Public Service Commission show that the petitioners' appointment was not temporary basis not he post of Civil Judge (Junior Division) and apparently there appears to be no permanent obstacle in their way to relinquish their right in the aforesaid service except offer of appointment in future, if selected.

61. It is to be noted that petitioners 'candidature' were picked up because they had applied for permission, as a part of their service obligation and not as a part of 'Selection Process' under any statutory Rule/provision dealing with the direct recrutiment of eligible 'Advocates' in U.P. Higher Judicial Service under Article 233(2) of the Constitution.

62. Rule 34 of the Uttar Pradesh Judicial Service Rules, 2001 read :

'34. Regulation of other matters.--In regard to matters not specifically covered by the rules or special orders, the members of the service shall be governed by the rules, regulations and orders applicable generally to Government servants serving in connection with the affairs of the State.'

63. The petitioners when joined U.P. Nyayik Sewa, as contemplated under U.P. Judicial Service Rules, 2001, aforequoted Rule 34 became applicable to them and consequently the Rules and Government Orders also became applicable to them in general.

64. In this context reference may be made to Rules 3(2) and 15 of U.P. Government Servant Conduct Rules, 1956 which is reproduced--

'3(2) Every Government servant shall at all times conduct himself in accordance with the specific of implied orders of Government regulating behaviour and conduct which may be in force.

If a Government servant conducts himself in a way not consistent with due faithful discharge of duty in service it is misconduct. Misconduct means misconduct arising from ill motive. Acts of negligence, errors judgment or innocent mistakes do not constitute misconduct.

15. Private trade or employment.--No Government servant shall, except with the previous sanction of Government, engage directly or indirectly in any trade or business or undertake any employment:

Provided that a Government may, without such sanction, undertake honorary work of a social or charitable nature or occasional work of a literary, artistic or scientific

character, subject to the condition that his official duties do not thereby suffer and that he informs his Head of Department, and when he is himself the Head of the Department, the Government, within one month of his undertaking such a work; but he shall not undertake, or shall discontinue, such work if so directed by the Government.'

65. Aforequoted Rule 15 merely requite sanction of the Government, in ease of Government servant intend to take any other employment.

66. The provisions dealing with an application, for outside employment within the country, received from the Government servant are being dealt under Chapter 143, titled 'DISPOSAL OF APPLICATIONS FROM GOVERNMENT, SERVANTS FOR OUTSIDE EMPLOYMENT'. Releyant extract of Paras 1090 and 1091 are being reproduced--

'1090. The disposal of applications received from Government servants for employment outside their departments will be made in accordance with the following orders :

1. G O.No. 16/2/68-Apptt.(B), dated January 23, 1970

2. G.O. No. 16/2/68-Karmik-2, dated June 19, 1979.

(a) .....

(b) Disposal of applications from permanent Government servants will be regulated in accordance with the orders given below--

(1) General--Not more than six applications of a permanent employee will be forwarded for outside posts during the entire period of his service.

(2) No applications will be forwarded for any post in a private sector.

(3) There is no bar for posts advertised by the Lok Seva Ayog, Uttar Pradesh, Union Public Service Commission and Public Service Commissions of other States. The posts advertised by other instructions e.g., Public Sector Corporations etc., will be treated as 'outside posts'.

(4) .....

(5) .....

(6) .....

(7) Any Head of Department or Head of Office can withhold, in his discretion, the application of an employee, in the public interest.

(c) Disposal of applications from temporary Government servants will be regulated as follows :

(1) The applications of temporary employees (gazetted or non-gazetted) will be forwarded in keeping with the conditions contained in Paras 17-20 of O.M. No. 4379/II-A-661-57, dated November 19, 1959. No other restriction will apply to them. Sometimes, a Head of Department, while forwarding an application of a temporary employee, imposes a condition that, in the event of his selection for the new posts, he will have to resign from his post under Government. It has also come to notice that an employee made a request for being relieved after his selection for the outside post as a result, of his application having been duly forwarded by his employer, but he was not relieved or was asked to submit his resignation. This position is not correct. The application of a temporary employee should be forwarded according to the provisions of Paras 37-18 of the aforesaid O.M. without imposing the condition of resignation. In the event of his selection for the new post he should be relieved as early as possible in accordance with Para 19 of the above O.M

(2) .....

1091. Competence of Officers to forward applications.--heads of Departments/Heads of offices are competent to forward applications of such employees only as have been appointed by them. Applications in respect of employees, whose appointing authority is the Governor, should be forwarded through Government.

G.O. No. 16/2/1968 Karmik-2, dated January 14, 1976.'

67. In the light of the above, and as per prevalent practice, petitioners applied for sanction/promotion being under obligation as part of their service condition contained in Rule 34 of the Uttar Pradesh Judicial Service Rules, 2001, dealing with U.P. Nyayik Seva.

68. It is another thin that a Government employee or Judicial Officer is required to take permission for joining selection process from its employer (High Court in the instant case) so that the 'Judicial work' pertaining to the post held by the petitioners in U.P. Nyayik Sewa did not hamper or otherwise adversely affected. The question as to whether the petitioners had rendered ineligibility or not was not at all relevant for deciding aforementioned applications seeking permission.

69. To elaborate further one may ask a question--What would be the position if High Court would have withheld permission sought by the petitioners for appearing in the interview at the relevant time?' Answer will be that petitioners could resign and then appear for interview. Then why petitioners and like candidates be forced to gamble and not to take up other Examinations/job inasmuch as no one could be sure to be appointed finally. On the other hand they are not expected to sit idle also and forego other opportunities except for specific prohibition in law. The stage to opt will arise only if the petitioners were finally selected/recommended. In the instant case that stage never arose because the petitioners have been deprived of appearing in the interview for seemingly no/good reason.

70. Reference may be made to the following decisions cited at the Bar :

(1) Rameshwar Dayal v. State of Punjab and Ors., AIR 1961 SC 816 (Para 12)

In this case, question of eligibility at the time of making 'appointment' was considered. It is not a decision on the question arising in the present case, i.e. Whether a candidate should continue to be Advocate throughout 'selection process', under Article 233(2) of the Constitution of India. The aforesaid case is distinguishable of facts. Supreme Court, in Para 12 of the above judgment observed :

'12. Learned Counsel for the appellant has also drawn our attention to Explanation I to Clause (3) of Article 124 of the Constitution relating to the qualification for appointment as a Judge of the Supreme Court and to the Explanation to Clause (2) of Article 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 formally in India. Articles 124 and 217 are differently worded and refer to an additional qualification of citizenship which is not a requirement of Article 233, and we do not think that Clause (2) of Article 233 can be interpreted in the light of Explanations added to Articles 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 show/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 Article 233 which must lead to the exclusion of that period for determining his eligibility for appointment as District Judge.'(2) Chandra Mohan v. State of Uttar Pradesh, AIR 1966 SC 1987 :

In this case the Supreme Court pointed out about two sources of appointment--first, by promotion from the 'service' of the Union or of the State; second, by direct recruitment from the Advocates. Supreme Court further observed that the expression 'the service' appearing in Article 233(2) of the Constitution is to be read as judicial service (vide Paras 16 and 18 of the said reported judgment). This judgment does not answer the question arising in present case.

In the case of Chandra Mohan v. State of U.P., AIR 1966 SC 1987 (5 JJ) (Para 17), referred to above Supreme Court Judgment in the case of Rameshwar Dayal (supra) and noted aforequoted para with the observation :

'This passage in thing mere than a summary of the relevant provisions, the question whether the service' in Article 233(2) is any service of the Union or of the State did not arise for consideration in that case nor did the Court express any opinion therein.'

A careful reading of the cases cited at the Bar, we find that no judgment lays down that under Article 233(2), candidate's character as 'Advocate' must continue throughout from the date of submitting application and always during 'process of selection'.

In the case of All India Judges' Association v. Union of India and Ors., JT 2002(3) SC 503 (Para 26) (3-JJ), Supreme Court noted '..... while we agree with the Shetty Commission the recruitment to the Higher Judicial Service, i.e. District Judge cadre from amongst the Advocates should be 25 per cent .....' Their Lordship, however, did not elaborate the point in hand.

During the course of arguments parties were unable to dispute the following preposition. It may be pointed out that by adding word 'judicial' before expression 'service' used in Article 233(2), Constitution of India, a serious anomaly arises. There is no logic to exclude a person who is selected in 'judicial service' and on the other hand a person in service other than 'judicial service' does not suffer such disqualification. There is no logic behind it. Reference be made to Article 236, which contains interpretation of expression 'judicial service'. The Constitution makers intentionally did not use the word 'judicial' before expression 'the service' in Article 233(2) of the Constitution. The 'word 'judicial' according to settled principle of interpretation should not be read in Article 233(2) of the Constitution, more so when there is no ambiguity in the said provision.

It will be useful to refer to the book titled 'Constitutional Law of India' by H.M. Seervai, IIIrd Edition, Page 2511-Paragraph 26.8; relevant extract of which is reproduced :

'.....'District Judge' and 'Judicial Service' are defined respectively by Articles 236(a) and (b). The interpretation of Article 233 was considered by the Supreme Court in Chandra Mohan v. State of U.P. The question for determination in that

case was, whether the appointment of District Judges selected by a committee, with a right to the High Court to veto such recommendation complied with the requirements of Article 233. Article 233 falls into two parts. As regards persons in the service of the Union or of the State, the appointment is to be made by the Governor in consultation with the High Court. As regards and Advocate or a pleader of serene years' standing it can only be made on the recommendation of the High Court.....As regards Advocates, the decision of the Supreme Court is clearly right, because recommendation by a committee with a veto by the High Court is not recommendation by the High Court. As regards the appointment of persons already in the service of the Union or a State, the decision of the Supreme Court is open to question. It reads into Article 233(2), which speaks of the 'service of the Union or of the State', the definition of 'Judicial service' given in Article 236(b), and this is against the canons of construction, and there are no compelling reasons why in a part which uses in two Articles the words 'service' [Article 233(2)] and 'judicial service' (Article 234), the definition of 'judicial service' should be read into Article 233. Again, the judgment of the Supreme Court is not consistent.'

It is also pointed out at the Bar that since there has been no All India Judicial Services and Article 233(2) uses the word 'Union1 it also reflects that word 'judicial' before the expression 'service' was deliberately avoided by the framers of the Constitution.

However, we are not entering into this dispute as this question does not arise in the present case. Facts of the case of Chandra Mohan (supra) and the facts of present case are distinguishable, inasmuch as in the case in hand, all the petitioners were admittedly eligible when they applied for being considered for appointment but changed their position by joining judicial service later (i.e. after submitting application for Direct Recruitment). In the case of Chandra Mohan (supra), the candidates were in already 'judicial service', when they applied for 'direct recruitment' and were not 'Advocate' as such, at the initial state of 'selection process' itself,

(3) Satya Narain Singh v. Chief Justice, 1979 Lab IC (NOC) 162 (All) :

Since the journal contained only short note, we called for complete text of it.

A Division Bench (Yashoda Nandan and Gopi Nath, JJ.) while deciding Writ Petition No. 8642 of 1978--Satya Narain Singh v. Chief Justice and Ors., connected with Civil Misc. Writ Petition No. 9146 of 1978--V.K. Jain v. Chief Justice and Ors., considered the question of eligibility, at the time of submitting application for seeking appointment under Article 233(2), Constitution of India.

Respondent seek to place reliance on the following observation in the said judgment of Satya Narain Singh (supra) which read :

'In our opinion, the Rules contemplate that pleaders and Advocates of not less than seven years' standing and continuing in the profession alone are eligible for direct recruitment to the service, and those who are either members of the U.P. Nyayik Sewa or belong to the cadre of Judicial Magistrates can be considered only for appointment by promotion .....'

Their Lordships referred to Rule 6, which provides quota and uses the expression 'direct recruitment from the bar' and also other provisions of the Rules and observed that the words 'has been practising' and 'normally practising' used in Rule 17(2) of the Rules are in 'present continuous tense' which indicate that applicant must be practising Advocate The Court observed :

'..... While forwarding applications is required to give his estimate.....If an Advocate has ceased to be in active practice either because he has taken up employment or has retired form practice after surrendering his certificate of enrollment or his right to practice has been suspended by the Bar Council, the District Judge cannot possibly make and give any estimate either of his character or fitness for recruitment to the service.'

The above passage shows that it was also a case where Court was considering 'eligibility' as Advocate at the time of submitting application and not the subsequent stages during selection process.

Division Bench referred to Article 233(2) of the Constitution, Judgment in the case of Rameshwar Dayal (supra) and in the case of Behariji Das v. Chandra Mohan,

AIR 1969 All 594 (FB), this Court held that, Prayag Narain, who was Judicial Magistrate, could not be treated in 'judicial service', and hence he was eligible for being recruited/appointed under Article 233(2) of the Constitution of India.

It may be noted that appointment of Prayag Narain was under challenge in the aforesaid Full Bench decision and whether said Prayag Narain was eligible to apply at the initial stage itself. In this case also the question of eligibility as Advocate during selection process was not under consideration.

The Division Bench approved said 'Full Bench' decision in the case of Behariji Das (supra) and held that Prayag Narayan was not in 'Judicial Service' of the State within the meaning of Article 233(2) of the Constitution and since he has been a pleader/Advocate for not less than seven years before his appointment to the Higher judicial Service, he was eligible for appointment under Article 233(2) of the Constitution. '

This shows that appointment of Prayag Narayan was held 'not' bad even though Prayag Narayan was admittedly not Advocate even at that stage--being in service and holding the post of Judicial Magistrate at relevant point of time under Article 233(2) Constitution of India.

In Para 18 of the judgment reported in Behariji Das v. Chandra Mohan, AIR 1969 All 594 (FB), the Court observed :

'Sri Prayag Narayan was not already in the service of the State within the meaning of Clause (2) of Article 233. He has been a pleader for not less than seven years before his appointment to the Higher Judicial Service. He was, therefore, eligible for the appointment under Clause (2) of Article 233. The learned Single Judge was right in upholding Sri Prayag Narain's appointment.'

One thing which clearly discerns from the aforesaid Full Bench judgment is that Prayag Narayan, who was admittedly, in service (though not in-judicial service) was not practising as Advocate at relevant point of time but still he was held to be eligible for appointment under Article 233(2).

(4) Satya Narayan Singh v. High Court of Judicature at Allahabad and Ors., etc. AIR 1985 SC 308 :

In Paras 1 and 3 of the said judgment, Supreme Court noted ;

(1) The petitioners in the several writ petitions now before us as well as the appellants in Civil Appeal No. 528 of 1982 and the petitioners in Writ Petition Nos. 6346-6351 of 1980 which we dismissed on 11th October, 1984 were members of the Uttar Pradesh Judicial Services in 1980 when all of them, in response to an advertisement by the High Court of Allahabad, applied to be appointed by direct recruitment to the Uttar Pradesh Higher Judicial Service. They claimed that each of them had completed 7 years of practice at the bar even before their appointment to the Uttar Pradesh Judicial Service and were, therefore, eligible to be appointed by direct recruitment to the Higher Judicial Service. As there was a question about the eligibility of members of the Uttar Pradesh Judicial Service to appointment by direct recruitment to the Higher Judicial Service, some of them filed writ petitions in the Allahabad High Court. The said petitions were dismissed and it was held that members of the Uttar Pradesh Judicial Service were not eligible to be appointed by direct recruitment to the Uttar Pradesh Higher Judicial Service. Civil Appeal No. 548 of 1982 was filed in this Court after obtaining special leave under Article 136 of the Constitution. By virtue of the interim order passed by this Court, members of the Uttar Pradesh Judicial Service, who desired to appear at the examination and selection were allowed to so appear, but the result of the selection was made subject to the outcome of the civil appeal and the writ petitions in this Court. The civil appeal and some of the writ petitions were dismissed by us on October 11, 1984. The remaining writ petitions are now before us. Sri Lal Narain Sinha and Sri K.K. Venugopal, learned Counsel who appeared for the petitioners, tried to persuade us to reopen the issue, which had been concluded by our decision on October 11, 1984. Having heard them, we are not satisfied that there is any reason for reopening the issue. When we dismissed the civil appeal and the writ petitions on the former occasion, we were content to merely affirm the judgment of the High Court of Allahabad without giving our own reasons. In view of the arguments advanced, we consider that it may be better for us to indicate briefly our reasons.

3..... '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. The dichotomy is clearly brought out by S.K. Das, J. in Rameshwar Dayal v. State of Punjab, AIR 1961 SC 816 (supra), where he observes (at p. 822):

'.....Article 233 is a self contained provision regarding the appointment of District Judge. 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 serve years' sanding'.'

The case of Satya Narayan Singh (supra) is clearly distinguishable inasmuch as the petitioners/candidates in that case were already in 'judicial service' even at the time of advertisement/submitting applications. The Supreme Court had no occasion to interpret the relevant provision in the context of the 'fact situation' of the case before us; i.e. Whether a candidate will render ineligibility if he joins judicial service and as a consequence of be 'Advocate', after submitting Application.

71. It shall be noticed that in the case of present petitioners who have joined judicial service is not a kind of 'disqualification' of permanent nature. It is merely a 'hurdle' which a candidate can overcome by relinquishing his lien in the 'judicial service' (by resigning) if selected/recommended for appointment and before he avails himself of the offer of 'appointment'. Unless a candidate is selected/ recommended for selection, there is no statutory requirement or otherwise that a

candidate, after 'cut-off date' given in the advertisement, should continue to be Advocate or sit idle. In absence of any good reason and to save a candidate from unnecessary hastles which may arise due to uncertainties in life, a candidate should be allowed to exercise his 'option' to sail in one stream (i.e. of continuing in 'Judicial Service') if selected during selection process or to sail in he other stream (i.e. to be appointed through 'Direct Recruitment from the 'Bar').

72. To interpret Article 233(2), otherwise and by not adopting its plain meaning better candidates, as noted earlier, shall be prevented from joining 'selection process' in absence of a statutory prohibition and that too without having a thorough and proper screening by a scientific methodology to exclude all other similarly situated persons to add in the present scenario by excluding the petitioners there may be charged of not adopting criteria equally and fairly. 'Source' is merely relevant to identity, that a candidate is 'picked up' from the 'class' earmarked for Direct Recruitment.

73. Learned Counsel for the respondents has laid emphasis upon the 'source' of 'appointment1 of District Judge relying upon Supreme Court judgment in the case of Satya Narayan Singh(supra) and submitted that candidate in question must continue to belong to the 'source' (i.e. to say 'Bay') throughout the selection process by continuing as Advocate.

74. Above interpretation is not possible unless we add a few words of our own in Article 233(2) of the Constitution and the Rules.

75. We fail to infer the meaning suggested by the respondents from the reading of statutory Rules, the advertisement or Article 233(2) of the Constitution.

76. Even assuming for the sake of argument, that there may be some scope to interpret Article 233(2) as suggested on behalf of the respondents, we shall prefer to assign the meaning which is more practical, pragmatic and serves the purpose better. There seems to be no 'good object' in excluding the candidates like the petitioners who have proved their merit on being selected in judicial service after 'cut-off date' prescribed in the advertisement. In absence of express statutory rules, a candidate for Direct Recruitment is not required to continue to be

Advocate after filing application, and hence there is possibly no justification as to why such a candidate be denied opportunity of interview, particularly when there is no provision for giving declaration in this respect by the candidate.

77. All the petitioners were admittedly eligible on that date and they had, accordingly, applied. They were also found eligible for appearing in 'interview' on the basis of the result of written-examination. They were in fact initially invited also for that purpose. The question of their 'eligibility', in absence of any statutory rule, could not be a matter of scrutiny and have to be allowed to appear for interview.

**V.N. Singh, J.**

78. I agree with the conclusion arrived at by the brother Judge (Hon'ble A.K. Yog, J.). In addition to what has been stated in the judgment, I want to add following thinges :

Respondents have challenged the petition on the following grounds--

(i) Appointment includes recruitment process, hence even during recruitment process, ineligibility can be considered.

(ii) Petitioners must be in active practice as an Advocate or the pleader at the time of their selection as District Judge, even during process of selection till the recommendation as a District Judge, (iii) Petitioners became ineligible for appointment because they joined judicial service.

79. Now the point for determination in the case is, whether appointment includes recruitment process.

80. In this connection, attention of this Court has been drawn towards the decision in K. Naga Raja and Ors. v. Superintending Engineer, Irrigation Department, Irrigation Circle, Chittoor and Anr., AIR 1987 AP 230 (FB).

81. In this case, it has been held that, matters relating to appointment, includes not only the actual appointment, but also earlier process of recruitment.

82. Article 233, Sub-clauses (1) and (2) of the Constitution is relevant in this connection, which is being reproduced :

'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 Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person riot 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 Advocate or a pleader and is recommended by the High Court by appointment.'

83. In Article 233, Sub-clauses (1) and (2) word 'Appointment' has been used and not the word 'matters relating to Appointment'.

84. Moreover, in the abovemenioned decision also, it has been held that, word 'Recruitment' and 'Appointment' are not synonymous.

85. In this connection, decision in the case of Basant Lal Malhotra v. State of Punjab and Ors., AIR 1969 P&H; 178 (DB), is relevant.

86. In his case Division Beach held that :

'After the formalities under the rules up to Part C of Vol. 1 of he Rules and Orders of the Punjab High Court are completed the appointment to the post of Subordinate Judge takes place under Part D of the same Rules. From the Home Gazette Notification No. 3010-G-51/1-6094 D/-26-10-1951 (Punjab) and Rules 6 and 7 in Part D of Chapter 22 of the Rules and Orders of the Punjab High Court, Vol. I, it is evident that a clear distinction is being drawn between the words 'recruitment' and 'appointment'. The two words are not synonymous but connote different meanings. According to the dictionary meaning of the word 'recruit', 'recruitment' is only for making up the deficiency occurring in the cadre and this term clearly signifies enlistment, acceptance, selection or approval for appointment and not actual appointment or posting in service, while 'appointment' means an actual act of posting a person to a particular office. Thus the word 'recruited' in

Rule 4.2 does not mean actual appointment.'

87. In such circumstances, it is clear that, decision of Andhra Pradesh High Court referred by the respondents is not helpful to the respondents and argument of learned Counsel for the respondents has no force that, word 'Appointment' includes recruitment process.

88. Next point for determination is, whether the petitioners should be in the active practice, even during process of selection till the recommendation.

89. In this connection attention of the Court has been drawn towards decision in the case of Satya Narayan Singh (supra) in which, it has been held by the Division Bench of this High Court that, 'contention of Sri S.P. Gupta that word 'Bar' used in Rule 6 should be interpreted in the light of Rule 5(a) which makes eligible for appointment as direct recruits, Advocates or pleaders of 7 years standing, irrespective of the question, as to whether on the relevant date they were practising or not, in our opinion, is unsound and must be rejected.'

90. In this connection, judgment of Full Bench of Allahabad High Court given in the case of Behariji Das v. Chandra Mohan, AIR 1969 All 594 (FB), is relevant.

In Para 13 of the judgment it has been held that :

'It is true that Sri Prayag Narayan was in service at the material time.....'

In Para 14 of the Judgment it has been held that:

'Some emphasis was placed upon expression 'has been' appearing in Clause (2) of Article 233.....'

91. Contention was that, expression 'has been' made it necessary that, person, concerned must have been in active practice as an Advocate or the pleader at the time of his selection as District Judge.

92. In this connection, Court considered decision in the case of State of Assam v. Horizon Union, AIR 1967 SC 442, in which, point for consideration was, whether Sri Dutta was eligible to be appointed as the Presiding Officer of an Industrial

Tribunal in Assam under the Industrial Disputes Act, 1947 ?

Sub-Section (3) of Section 7A of Industrial Disputes Act runs as follows :

'A person shall not be qualified for appointment as the Presiding Officer of a Tribunal unless--

(a) .....

(aa) he has worked as a District Judge or as an Additional District Judge or as both for a total period of not less than three years or is qualified for appointment as a Judge of a High Court.....'

93. It was held by Apex Court that, Sri Dutta was qualified for appointment as the Presiding Officer of the Industrial Tribunal under Clause (aa) of sub-section (3) of Section 7A. It is important that, Sri Dutta's appointment in the year 1965 was upheld, although he had retired from service long before 1965.

94. In this connection Clause (2) of Article 217 was also considered by the Hon'ble Full Bench. According to which, 'a person shall not be qualified for appointment as a Judge of a High Court, unless he is a citizen of India and--(a) has for at least ten years, held a judicial office in the territory of India.....'

95. In Para 17 of he decision in Behariji Das (supra) it has been held by he Full Bench that:

'It is well known that in several cases persons have been appointed as High Court Judges some time after their retirement as District Judges. Such appointments have never been challenged. The position under Article 233(2) is similar to that under Article 217(2) of the Constitution.'

96. In such circumstances, it is clear that, even though, Prayag Narayan was in service at the time of his appointment and he was not in active practice as an Advocate, Full Bench approved the appointment of Sri Prayag Narayan.

97. It has been argued by the learned Counsel for the respondents that, judgment of the Division Bench in the case of Satya Narayan Singh (supra) was confirmed

by the Supreme Court.

98. From perusal of the Judgment in the case of Satya Narayan Singh (supra) it is clear that, fact of continuance as an Advocate or pleader during process of the selection till recommendation for appointment as District Judge, was not considered by the Apex Court.

99. So far as the case of Rameshwar Dayal (supra) is concerned, in that case also the Hon'ble Supreme Court in Para 6 has held that :

'.....Harbans Singh and P.R. Sawhney did not have their names factually on the Roll when they were appointed as District Judges. P.R. Sawhney, it appears, had his name so enrolled on October 20, 1959, that is, after his appointment as District Judge .....'

100. In such circuisances, it is also clear that, so far as the decision in the case of Rameshwar Dayal (supra) is concerned, even though Sri Harbans Singh and P.R. Sawhney were not on the roll as Advocate, their appointment was upheld.

101. In this connection, Article 217(2) of the Constitution is relevant.Article 217, sub-rule (2) is being reproduced as follows :

'A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India, and

(a) has fir at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an Advocate of a High Court or of two or more such Courts in succession; '

102. It is relevant that, in sub-section (2)(b) word 'has been an Advocate' has been used.

103. In this connection, Article 217(2) Explanation (aa) is relevant, which is being reproduced :

'In computing the period during which a person has been an Advocate of a High Court, there shall be included any period during which the person (has held judicial office or the office of a member of a Tribunal or any post, under the Union or a State, requiring special knowledge of law) after he became an Advocate.'

104. It also shows that, in computing the period, during which a person has been an Advocate period, during which, he held the judicial office shall also be considered, it means that, active practice during process of selection till recommendation for appointment as District Judge is not essential. In such circumstances, argument of the learned Counsel for the respondents has no force that applicants should remain in active practice, during process of selection till recommendation for appointment.

105. The next argument of the learned Counsel for the respondents is that, petitioners became ineligible for appointment they joined judicial service.

106. In this connection, point for determination is, (1) what will be the date of deciding the eligibility (2) who will be competent to decide the question of eligibility (3) whether refusal of permission to appear in interview, amounts declaration of ineligibility.

107. In this connection Rule 18(1) of the Uttar Pradesh Higher Judicial Service Rules, 1975 referred to earlier is, relevant which reads :

'18(1) The Selection Committee referred to in Rule 16 shall scrutinize the applications received and may thereafter hold such examination, as it may consider necessary for judging the suitability of the candidates. The Committee may call for interview such of the applicants who in its opinion have qualified for interview after scrutiny and examination.'

108. There is no provisioning the Rule 18(1) that, scrutiny of the candidates at the time of interview is also essential, because according to Rule 18(1) Committee will call for interview of such a candidate, who in its opinion have qualified for interview after scrutiny and examination. Scrutiny means scrutiny at the time of receipt of the application before examination.

109. From perusal of the record, it is clear that, no scrutiny has been made regarding other candidates also by Selection Committee.

110. Besides it, from perusal of the counter affidavit filed by the respondents, it is clear that, two candidates who are working as Additional District Judge in Jharkhand State were permitted to appear in the interview and were interviewed.

111. It also shows that no scrutiny was done by the Selection Committee after examination. Had it been done, then those two candidates of Jharkhand State in the judicial service, working as Additional District Judges would not have been permitted.

112. Next question for determination is, whether any permission is required to appear in the interview.

113. No provision or relevant Circular or Government order has been shown in spite of specific direction to produce it, by respondents.

114. In this connection, attention of the Court has been drawn towards Chapter 143, Para 1090 and Para 1091 of Manual of the Orders of the Personnel Department of U.P. Published in 1989.

115. This chapter is regarding Disposal of the Application of the Government Servants for Outside Employment.

1.16. It is admitted that petitioners who are in judicial service working as Civil Judge (Jr. Div.) are under the control of the High Court and even if, they are appointed as Additional District Judge, they shall remain under the control of the High Court and the Hon'ble Chief Justice shall be the head of the department in both the cases, as such, this provision is not applicable.

117. It is admitted fact that, Petitioners appeared in the examination before they joined the judicial service and, as such, at that time, there was no question for permission to appear in the examination, because they were Advocates.

118. Besides it, from perusal of the record, it is clear that, permission was granted to petitioner Nos. 2,3 and 4 to appear in the examination. Subsequently

permission to Angad Prasad petitioner No. 2 to appear in the interview was refused.

119. From perusal of the record it is clear that, there is no order in writing that, permission to petitioner Nos. 3 and 4 Abdul Quaiyum and Narendra Kumar Singh who were already granted permission, was refused later on.

120. Contention of the petitioners is that, eligibility is to be decided by Full Court of the High Court and not by another authority.

121. It has also been argued that, refusal to permit the petitioners to appear in the interview, amounts to declare them ineligible. As decision has not been taken by the Full Court, regarding their ineligibility, there was no question for refusal for permission to appear by any other authority.

122. As per Rule 18(3) Selection Committee shall make a preliminary selection and submit the record of all the candidates to the Chief Justice.

123. As per Rule 18(4) the Court, shall examine the recommendations of the Selection Committee and, having regard to the number of direct recruits to be taken, prepare a list of selected candidates in order of merit and forward the same to the Governor.

124. As per Article 233(2) recommendation is to be made by the High Court for appointment.

125. High Court means, Full Court as held by the Apex Court in the case of Chandra Mohan (supra).

126. As such, it is clear that, only Full Court and not any other authority, is competent for recommendation for appointment and according to the Rule 18(4) Court shall examine the recommendations of the Selection Committee, it means that Full Court shall examine recommendation and forward the same to the Governor.

127. As per Article 233(1), appointment of the person as District Judge in the State shall be made by the Governor of the State. As such it is clear that, appointment is

to be made by the Governor of the State.

128. In such circumstances, it is clear that, only the Full Court is competent to decide the ineligibility of the candidates and by refusal of the permission to appear in the interview, ineligibility has been decided by the authority other than the Full Court

129. As per rule, Selection Committee has no power to decide ineligibility after examination of candidates, who qualified in examination, for interview, before interview.

130. Besides it, contention of the petitioners in Para 33 of the writ petition has not been rebutted by the respondents.

Para 33 of the writ petition is being reproduced :

'That even in the past selections, whenever there existed doubt with regard to the candidature of any candidate called for interview the objection against his name was noted in he selection proceedings, but such candidate nevertheless interviewed by the selection committee and the matter referred to the Full Court of the High Court for final decision on the candidature.'

131. In the counter affidavit filed by the respondents, this fact has not been specifically denied that, it has not been a prevalent practice. Only this much has been said that, Para 33 is argumentative in nature, hence not admitted as such.

132. Contention of the petitioners is that refusal to permit them to appear in interview is in violation of Articles 14 and 16 of the Constitution of India.

133. Articles 14 and 16 are reproduced as follows :

'14. Equality before law.--The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

16. Equality of opportunity in matters of public employment.--(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2).....

(3).....

(4).....

(5).....'

134. In this connection, it is relevant that, it is admitted in the counter affidavit of the respondents that, two reasons already in the service in the State of Jharkhand and holding the post of Additional District Judge (Judicial Service) have been interviewed by the Selection Committee, although their names have not been disclosed, nor denied in spite of contention of petitioners that, perhaps one of them is, Sri Sandeep Srivastava.

135. Contention of the petitioners is that, although two of the applicants of Jharkhand, who are in judicial service and are holding post of Additional District Judge have been allowed to appear in the interview, but petitioners who are in judicial service, have not been allowed to appear in the interview, is clear violation of Articles 14 and 16 of the Constitution of India.

136. In this connection, decision in E.P. Royappa v. State of Tamilnadu, AIR 1974 SC 555 and decision in Ajay Hasia's case referred in AIR 1981 SC 487, and decision in D.S. Nakara v. Union of India, AIR 1983 SC 130 and decision in the case of Maneka Gandhi v. Union of India, AIR 1978 SC 597, are relevant.

137. In this connection, decision of the Apex Court in the case of A.L. Kalra v. Project and Equipment, Corporation of India Ltd., AIR 1984 SC 1361, is relevant in which, the Apex Court considering the above mentioned cases held that, 'it is difficult to accept the submission that, executive action, which results in denial of equal protection of law or equality before law, cannot be judicially reviewed, nor can be struck down on the ground of arbitrariness as being violative of Article 14.'

138. In this case also, two candidates working as Additional District Judges in the Jharkhand State, were permitted to appear in the interview, while the petitioner were not allowed to appear in interview, on the ground that, they joined judicial

service. It is clear violation of Articles 14 and 16 of the Constitution.

## ORDER

139. In the result, Writ Petition stands partly allowed.

140. We direct that the petitioners be interviewed forthwith. We also direct that the candidates in U.P. Nyayik Sewa or Judicial Service of other States, who are similarly situated, shall also be interviewed, if not already interviewed and the names of all such candidates be included in the list along with other candidates for consideration of the Court.

141. No order as to costs.