Madras High Court
W.P.No.16383 Of 2 vs The Secretary To Government on 26 August, 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26..08..2010

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THE HON BLE Mr.M.Y.EQBAL, CHIEF JUSTICE
and
THE HON BLE Mr.JUSTICE T.S.SIVAGNANAM

W.P.Nos. 16383, 15566 & 18451 of 2010
&
W.P.(MD) Nos.9090 & 9119 of 2010
&
M.P.Nos.1 & 2 of 2010 in W.P.No.16383 of 2010, 1 of 2010 in W.P.No.15566 of 2010, 1+1 of 2010 i
& 1 of 2010 in W.P.18451 of 2010

W.P.No.16383 of 2010 K.Appadurai, S/o.P.Kandavel, Bathrakaliamman Koil Street, Vadugapatti (PO), Periyakulam Taluk, Theni District. ..Petitioner.

Vs.

1. The Secretary to Government, Public (Special.A) Department, Government of Tamil Nadu, Secretariat, Chennai 600 009.

2. The Principal Secretary to Government, Social Welfare & Noon Meal Project (SW4) Department, Government of Tamil Nadu, Secretariat, Chennai 600 009. ..Respondents.

PRAYER: Petition filed under Article 226 of the Constitution of India for the issuance of a writ of certiorarified mandamus calling for the records relating to the impugned notification issued by the 1st respondent in the Internet and published in the Hindu dated 1.7.2010, inviting application for Direct Recruitment and Appointment for the post of District Judges (Entry Level) and quash the same and consequently direct the 1st respondent herein to publish afresh notification in a transparent manner indicating the number of vacancies ear-marked for disabled applicants in accordance with Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and pass such further or other orders.

For Petitioner :: Mr.M.Venkadesan For Respondents :: Mr.J.Raja Kalifulla, Govt. Pleader

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W.P.No.15566 of 2010 Manikandan Vathan Chettiar, Advocate, 28, Sait Colony, 1st Street, Chennai 8. ..Petitioner.

Vs.

1. The Secretary to Government, Public (Special.A) Department, Secretariat, Chennai.

2. The Registrar General,
High Court,
Madras. ..Respondents.

PRAYER: Petition filed under Article 226 of the Constitution of India for the issuance of a writ of declaration declaring that propounding the impugned notification dated 24.06.2010 issued by the 1st respondent as ultra vires Articles 14 and 141 of the Constitution of India, and direct the respondents to issue a de novo notification in consonance with all constitutional diktats and render justice.

For Petitioner :: V.Manikandan Vathan Chettiar (Petitioner in Person) For Respondent-1 :: Mr.J.Raja Kalifulla, Govt. Pleader For Respondent-2 :: Mr.R.Muthukumaraswamy, Senior Counsel For Mr.K.Ravichandrababu W.P.No.18451 of 2010 M.Selvaraj, M.Sc., L.L.M., S/o.Sri. S.V. Munuswamy, Hindu, aged about 47 years, No.26, A, IAF Road, Srinivasan Nagar, Selaiyur, Chennai 73. ..Petitioner.

Vs.

The State of Tamil Nadu, Rep. by Secretary to Government, Public (Special.A) Department, Secretariat, Chennai 600 009. ..Respondent.

PRAYER: Petition filed under Article 226 of the Constitution of India for the issuance of a writ in the nature of declaration declaring the rule of Tamil Nadu State Judicial Service (Cadre and Recruitment) Rules, 2007 as unconstitutional and consequently, the notification dated 24.06.2010 issued by the respondent also be declared unconstitutional and thus render justice.

For Petitioner :: Mr.G.Justin For Respondent :: Mr.J.Raja Kalifulla, Govt. Pleader

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W.P.(MD)No.9090 of 2010 R.Vidhya, No.5-7/28-3, Anupallavi Nagar, Kalai Nagar Extension, Madurai 17. ..Petitioner.

Vs.

1. The Secretary to Government, Public (Special.A) Department, Secretariat, Chennai.

2. The Registrar General, Madras High Court, Chennai.

3. The Bar Council of India, New Delhi.

4. The Bar Council of Tamil Nadu, High Court Campus, Chennai 104. ..Respondents.

(R3 and R4 are impleaded as party respondents as per order of the Court dated 16.07.2010 in W.P.(MD) No.9090/10) PRAYER: Petition filed under Article 226 of the Constitution of India for the issuance of a writ of certiorari to call for the records of the 1st respondent in Ref.No.DIPR/841/display/2010 dated 24.06.2010 and to quash the notification issued by the Secretary to Government (Special.A) Department in Ref. No.DIPR/841/display/2010 dated 24.06.2010 in so far inviting application from Assistant Public Prosecutor Grade I and II and pass any appropriate orders and thus render justice.

For Petitioner :: Mr.N.Sundareshan For Respondent-1 :: Mr.P.Kumaresan, Public Prosecutor For Respondent-2 :: Mr.R.Muthukumaraswamy, Senior Counsel For Mr.K.Ravichandrababu For Respondents3&4 :: Mr.P.S.Raman, Advocate General For Petitioner in M.P.1/10 :: Mr.K.Doraiswamy, Senior Counsel (Impleading Petition) For Muthumani Doraisamy

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W.P.No.9119 of 2010 B.Ramesh Babu, S/o.Balaguru, Flat No.2956, TNHB Colony, Villapuram, Madurai 1. ..Petitioner.

Vs.

1. The Registrar General, High Court of Madras, Chennai.

2. The State of Tamil Nadu, Rep. by its Secretary, Public (Special.A) Department, Secretariat, Chennai.

3. The Chairman, Co-ordination Committee for The Persons with Disabilities (Equal Opportunity, Protection of Rights and Full Participation) Committee, Department of Social Welfare, State of Tamil Nadu, Secretariat, Chennai. ..Respondents.

PRAYER: Petition filed under Article 226 of the Constitution of India for the issuance of a writ of certiorarified mandamusto call for the records of the 2nd respondent pursuance to his proceeding Nil dated 24.06.2010 which was published on 1.7.2010 and quash the same in so far as the petitioner is concerned and direct the respondents to include the physically disabled persons to be appointed as District Judge direct selection and reserve a post by giving effect to Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and pass such other or further orders.

For Petitioner :: Mr.K.P.S.Palanivel Rajan For Respondent-1 :: Mr.R.Muthukumaraswamy, Senior Counsel For Mr.K.Ravichandrababu For Respondent-2 :: Mr.P.Kumaresan, Public Prosecutor

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C O M M O N O R D E R The Hon ble The Chief Justice Since, in all these writ petitions the petitioners have attacked and assailed the notification calling for application for appointment to the post of District Judges (Entry Level) on various grounds, they have been heard together and disposed of by this common order.

2. For better appreciation, the notification published in the daily newspaper The Hindu on 01.07.2010 issued by the Government of Tamil Nadu, Public (Special.A) Department is reproduced herein under.

GOVERNMENT OF TAMIL NADU Public (Special.A) Department, Secretariat, Chennai 600009.

NOTIFICATION CALLING FOR APPLICATIONS FOR THE POST OF DISTRICT JUDGES (ENTRY LEVEL) Applications are invited by the Government of Tamil Nadu for appointment of seventeen (17) posts of District Judges (Entry Level) in the Tamil Nadu State Judicial Service to be made by direct recruitment under the amended provisions of the Tamil Nadu State Judicial Service (Cadre and Recruitment) Rules, 2007 from Advocates or Pleaders in India who have not less than seven years practice and Practising as on the date of this notification.

The distribution of the above said 17 vacancies is as follows:

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General Turn                                        -  4 (1 Woman)
Scheduled Caste                                     - 1 (1 Woman)
(Arunthathiyars on preferential basis)
Most Backward Classes &                             - 4 (1 Woman)
Denotified Communities
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Backward Classes	- 4 (1 Woman)	
(Other than Backward Class Muslims)		
Scheduled Caste	- 3 (1 Woman)	
Backward Class Muslims	- 1	

Total		- 17

The reservation in recruitment in respect of differently abled persons is governed by the order

2. An Applicant should be of sound health and active habits and free from any bodily defect or infirmity making him/her unfit for appointment. The 17 posts of District Judges (Entry Level) shall be filled by direct recruitment from among the eligible advocates on the basis of the written and viva-voce test prescribed and to be conducted by the High Court of Madras in accordance with the rules.

3. A candidate shall along with his application:

(i) If he/she is an Advocate or Pleader, produce from the Presiding Officer of the Court in which he/she is actually Practising, a certificate indicating the length of his/her practice;

(ii) If he/she is an Assistant Public Prosecutor, Grade-I or an Assistant Public Prosecutor, Grade II, produce from the Collector of the District concerned, a certificate indicating the length of his/her service.

(iii) Produce a certificate of good character, from a Senior Advocate/Counsel and another from a responsible person, not being a relative but who is well acquainted with him/her in private life.

4. The selection shall be made based on the results of written examination and viva voce i.e., the selection will be made on the basis of the total marks obtained by the candidates in the written examination and viva voce taken together subject to the rule of reservation of appointment. The maximum marks allotted for the written examination and viva voce shall be 75% and 25% respectively.

5. The notification, enlisting the successful candidates prepared under these rules shall be published in the Tamil Nadu Government Official Gazette and it shall cease to be operative as from the date of Publication of the next list of successful candidates prepared under these rules, in the Tamil Nadu Government Official Gazette.

6. (i) The applicant must possess a Degree in Law of a University in India established or incorporated by or under a Central Act or a State Act or an institution recognized by the University Grants Commission, or any other equivalent qualification and got enrolled in the Bar Council of Tamil Nadu; and in the case of candidates enrolled in the Bar Councils of other States, they should submit proof of transfer of their enrollment to the Bar Council of Tamil Nadu.

(ii) The applicant must be Practising on the date of Notification as an advocate and must have so practiced for a period of not less than seven years as on such date.

(iii) The applicant must not have attained the age of 48 years in the case of SC/ST and 45 years in the case of others as on 1st July of the year 2010.

(iv) The scale of pay for the post of District Judges is Rs.16750-400-19150-450-20500/- (Pre-revised Scale)

7. The written examination will be of 3 hours duration involving Law Paper Part I (Civil), Law Paper Part II (Criminal) and Law Paper Part III (General) carrying 25 marks each (75 marks total) and 25 marks is ear-marked for viva-voce.

The Question Papers on Law Paper Part I, II & III will be set in English as well as in Tamil. The candidates shall answer either in English or in Tamil/ but not in both.

The written examination will precede the viva-voce examination. As to short listing the candidates, their length of practice at the bar and the marks obtained by them in the written examination will be considered and such short listed candidates alone will be called for viva-voce examination.

8. The application in the prescribed format shown below along with the attested copes of certificates as required should be sent by Registered Post with acknowledgement due to the Secretary to Government of Tamil Nadu, Public (Special.A) Department, Secretariat, Chennai 600 009 so as to reach the office on or before 5.45 pm on 16.07.2010. Candidates should check up the correctness of the particulars furnished in the application. Candidates should submit only one application for the post. The written examination will be held at Chennai on 01.08.2010 and the venue of examination will be intimated later by the High Court of Madras.

Candidates shall enclose a Demand Draft for Rs.250/- (Rs.100/- in case of SC candidates) towards examination fee payable by way of Demand Draft in favour of the Registrar General, High Court of Madras along with the application form.

Two passport size photographs of the candidate (one to be affixed in the application from) and a copy of latest community certificate shall be enclosed.

9. No traveling allowance will be paid to the applicant for attending written examination/interview and for joining the post if he/she is selected.

10. Every person appointed to the post of District Judge by direct recruitment shall,

(a) from the date on which he/she joins duty, be on probation for a total period of two years on duty within a continuous period of three years;

(b) undergo training as prescribed by the High Court of Madras.

(c) within the period of probation, pass the Account Test for Executive Officers.

Only after satisfactory completion of the training, the direct recruit will be posted as District Judge.

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3. W.P.(MD)No.9090 of 2010 was filed in Madurai Bench of the Madras High Court. The petitioner therein sought issuance of a writ of certiorari for quashing the notification as contrary to Article 14 of the Constitution of India as the service personnel and the non-service personnel form a different class. It is stated that a person not already in service of the Union or of the State shall only be eligible to be appointed, if he had been for not less than 7 years of service as Advocate or Pleader. The main contention of the petitioner therein is that the Assistant Public Prosecutors Grade I and Grade II, who were employees under the State Government, drawing salary from the exchequer, are not entitled to and eligible for appearing in the examination.

4. In W.P.No.16383 of 2010 and W.P.(MD)No.9119 of 2010 the aforesaid notification was challenged on the ground that the said notification does not indicate the number of vacancies earmarked for disabled candidates in accordance with Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. It is stated that while distributing the 17 vacancies against each category, it does not show the category of disabled persons and reservation in the distribution of vacancies to disabled persons. According to the petitioner, the rule of 3% reservation for disabled persons is applicable for mass appointment in every establishment. The said minimum of 3% has been adopted as per Section-33 read with Section 2(k) of the aforesaid Act of 1995. The petitioner s case is that the disabled persons constitute a special category, and reservation by government for them is a special drive to ensure and guarantee equal opportunities to them in the society.

5. In W.P.No.15566 of 2010 the above referred to notification was challenged on the ground that apart from 100% marks, the length of bar experience is stated as a criteria for short listing the candidates to appear in the viva-voce, without any explanation as to the manner in which it is proposed to be done. The petitioner s case is that as per the decisions of the Supreme Court the marks allotted to the viva-voce shall not exceed 12.50% of the total marks, whereas the impugned notification prescribes as much as 25% of the marks to the viva-voce, which is unconstitutional. The impugned notification also suffers from serious illegality in as much as apart from 100% marks the length of bar experience is stated as a criteria for short listing the candidates for viva-voce without giving any explanation as to the manner in which it is proposed to be done. The petitioner also challenged the notification on the ground that no syllabi has been prescribed for the examination, which is contrary to all canons of reasonableness.

6. In W.P.No.18451 of 2010 the petitioner sought for a declaration to declare that the Rules of Tamil Nadu State Judicial Service (Cadre and Recruitment) Rules, 2007 as unconstitutional, and consequently the impugned notification issued by the respondent for appointment to the post of

District Judges (Entry Level) as also ultra vires and unconstitutional. It is stated that the candidates in the subordinate judicial service as Magistrates, Sub Judges and District Munsifs, who have put in 7 years of practice before their appointment in such service, can also be made eligible to appear for the examination for the recruitment of District Judges as in the case of Assistant Public Prosecutors Grade-I and Grade-II. According to the petitioner therein, the Assistant Public Prosecutors Grade I and Grade II are employees of the State and they are not pleaders. The respondents having made eligible the Assistant Public Prosecutors Grade I and Grade II, it is wholly unjustifiable to exclude the Magistrates, District Munsifs and Sub Judges to appear for the examination, as they are also government servants, and they must also be given a chance for their career advancement based on merit.

7. In W.P.(MD)No.9090 of 2010 a counter affidavit has been filed by the second respondent therein viz., the Registrar General, High Court, Madras. It is stated that as per the order of the Supreme Court in W.P.(C) No.1022 of 1989 dated 21.03.2002, the Full Court of the Madras High Court re-drafted the Tamil Nadu State Judicial Service (Cadre & Recruitment) Rules, 2007 and the Draft Rules were approved by the Government of Tamil Nadu, which came into effect from 19.01.2007. It is stated that pursuant to the order passed by a Division Bench of this Court in W.P.Nos.14499 of 2009 & Batch on 01.12.2009 and 26.02.2010 the Government was directed to forward the Draft Notification calling for applications containing the application proforma to fill up 17 posts of District Judges (Entry Level) by direct recruitment from the Bar for approval of the High Court as per the Rules. The Draft Notification forwarded by the Government was considered and approved by the High Court, and accordingly, the Government published the notification impugned in the writ petition. It is stated that as per Serial No.3(iii) of the Schedule to Rule 5 of the Tamil Nadu State Judicial Service (Cadre & Recruitment) Rules, 2007 applications were invited for appointment of 17 posts of District Judges (Entry Level), and it was mentioned that the candidates, along with their application, shall furnish the certificates mentioned therein. The second respondent justified the notification by referring to Article 233 (2) of the Constitution, which would include Law Officers practising before a Court of Law. Hence, according to the second respondent the notification inviting applications from Advocates/Pleaders, Assistant Public Prosecutors Grade I and II for appointment to the post of District Judge (Entry Level) is perfectly justified.

8. In the separate counter affidavits filed by the first respondents in W.P.(MD)No.9119 of 2010 the common stand taken are that the Government of Tamil Nadu in G.O.Ms.No.87 dated 17.07.2008, issued orders to adhere to the system of 200 point roster, dividing into six classifications granting an equal ratio of 1:1:1 to the disabled category i.e., Blind, Deaf and Orthopaedically challenged as far as possible and to select differently abled persons among the 33 vacant posts in each division. It is stated that though the nature of duties and responsibilities attributed to the post of District Judge (Entry Level) requires persons free from certain disabilities like blindness, total deafness, etc. so as to discharge his official duties, every possible steps have been taken to give equal opportunities to the eligible disabled persons, and hence, the operation of the relevant G.O. in respect of differently abled persons in the present selection process was not notified in the notification calling for applications.

9. In W.P.No.15566 of 2010 the main defense taken by both the respondents are that as per the recruitment rules the selection shall have to be made based on the result in the written examination and the viva-voce i.e., the selection will be made on the basis of the total marks obtained by the candidates in their written examination and viva-voce taken together, subject to the rule of reservation for appointments. The maximum marks allotted to the written examination and the viva-voce shall be 75% and 25%. It is stated that the marks fixed for the viva-voce i.e., 25% is neither violative of any rules nor against the decisions of the Supreme Court.

10. First, we will take up the writ petition being W.P.No.9090 of 2010 wherein the notification inviting applications for appointment for the post of District Judge (Entry Level) was challenged on the ground that inviting the applications from the Assistant Public Prosecutors Grade - I and II for appointment to the said post is illegal and unconstitutional, and against the provisions of Article 223 of the Constitution of India.

11. Before coming to this issue, it would be useful to state here the brief history about the procedure for appointment for the post of District Judges (Entry Level). Before independence, originally, the post of District and Sessions Judges and Additional Sub Judges were filled by persons from Indian Civil Service. In 1922, the Governor General in Council issued notification empowering the local government to make appointment to the said service from the Members of Provincial Civil Service (Judicial Branch) or from the Members of the Bar. In exercise of the power conferred by Section 246 and 250 of the Government of India Act, 1935, the Secretary of State for India framed Rules called Reserved Post (Indian Civil Service) Rules, 1938. Under those Rules the Governor was given power to appoint a District Judge from among the Members of the Judicial Service of the Province or from Members of the Bar. Till India attained independence the position was that the District Judges were appointed by the Governor from these sources i.e., Indian Civil Service, Provincial Judicial Service and the Bar. But, after independence in 1947 recruitment to the Indian Civil Service was discontinued and the Government of India decided that the Members of the newly created Indian Administrative Service would not be given judicial post. Thereafter, District Judges had been recruited only either from the Judicial Service or from the Bar.

12. Article 233 deals with the appointments, postings and promotion of District Judges in any State. Article 234 deals with the recruitment of persons other than District Judges to the judicial service. Article 233, which is relevant here, is quoted herein below:

33. 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.

13. From a bare reading of Art. 233, it is manifest that it is a self-contained provision regarding the appointment of District Judges. A qualification has been laid down in clause (2) of Art. 233 as to

who will be eligible for the said post. The provision in Art. 233 (2) has been discussed in series of decisions rendered by the Supreme Court and various High Courts. The expression service used in clause (2) of Art. 233 means the judicial service.

14. In Satya Narain Singh Vs. High Court of Judicature, Allahabad reported in AIR 1985 SC 308 the facts of the case were that pursuant to the notification for appointment of District Judges by direct recruitment, members of the Uttar Pradesh Subordinate Judicial Service applied to the Uttar Pradesh Higher Judicial Service by direct recruitment. They claimed that each of them have completed 7 years of practice at the Bar even before their appointment to the judicial service and they are eligible to be appointed by direct recruitment to the higher judicial service. The said writ petition was dismissed by the High Court holding that the members of the Uttar Pradesh Judicial Service were not eligible to be appointed by direct recruitment. The matter ultimately went up to the Supreme Court. Dismissing the writ petitions their Lordship s, after quoting Art. 233 of the Constitution, observed :-

Para-3: The first clause deals with appointments of persons to be, and the posting and promotion of, District Judges in any State while the second clause is confined in its application to persons not already in the service of the Union or of the State . We may mention here that Service of the Union or of the State has been interpreted by this Court to mean judicial service. Again while the first clause makes consultation by the Governor of the State with the High Court necessary, the second clause requires that the High Court must recommend a person for appointment as a District Judge. It is only in respect of the persons covered by the second clause that there is a requirement that a person shall be eligible for appointment as District Judge if he has been an Advocate or a Pleader for not less than 7 years. In other words, in the case of candidates who are not members of a Judicial Service they must have been advocates or pleaders for not less than 7 years and they have to be recommended by the High Court before they may be appointed as District Judges, while in the case of candidates who are members of a Judicial Service the 7 years rule has no application but there has to be consultation with the High Court. A clear distinction is made between the two sources of recruitment and the dichotomy is maintained. The two streams are separate until they come together by appointment. Obviously the same ship can not sail both the streams simultaneously. The dichotomy is clearly brought out by S.K.Das, J. in Rameshwar Dayal Vs. State Punjab (AIR 1961 SC 816)(supra) where he observes (at P.822):

Article 233 is a self contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under Cl.(1) the Governor can appoint such a person as a District Judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in Cl.(2) and all that is required is that he should be an advocate or pleader of seven years standing. Again dealing with the cases of Harbans Singh and Sawhney it was observed.

We consider that even if we proceed on the footing that both those persons were recruited from the Bar and their appointment has to be tested by the requirements of Clause (2), we must hold that they fulfilled those requirements. Clearly the Court was expressing the view that it was in the case of recruitment from the Bar, as distinguished from Judicial Service that the requirements of Cl.(2)

had to be fulfilled. We may also add here earlier the Court also expressed the view, .we do not think that Cl.(2) of Art.233 can be interpreted in the light of the Explanation added to Articles 124 and 217.

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Para-5: Posing the question whether the expression the service of the Union or of the State meant any service of the Union or of the State or whether it meant the judicial service of the Union or of the State, the learned Chief Justice emphatically held that the expression the service in Art.233(2) could only mean the judicial service. But he did not mean by the above statement that persons who are already in the service, on the recommendation by the High Court can be appointed as District Judges, overlooking the claims of all other Seniors in the Subordinate Judiciary contrary to Art.14 and Art.16 of the Constitution.

15. In Chandra Mohan Vs. State of Uttar Pradesh reported in AIR 1966 SC 1987 a similar question came up for consideration before the Supreme Court. In that case the appointment of judicial officers to the post of Superior Judicial Service was challenged. The Supreme Court dismissed the appeals holding that the Uttar Pradesh Higher Judicial Service Rules providing for the recruitment of the District Judges from the persons in judicial service are constitutionally void. Their Lordship s observed in paragraph 16 as follows:-

6. So far there is no dispute. But the real conflict rests on the question whether the Governor can appoint as District Judges persons from services other than the judicial service; that is to say, can he appoint a person who is in the police, excise, revenue or such other service as a District Judge? The acceptance of this position would take us back to the pre-independece days and that too to the conditions prevailing in the Princely States. In the Princely States one used to come across appointments to the judicial service from police and other departments. This would also cut across the well-knit scheme of the Constitution and the principle underlying it, namely., the judiciary shall be an independent service. Doubtless if Art.233(1) stood alone, it may be argued that the Governor may appoint any person as a District Judge, whether legally qualified or not, if be belongs to any service under the State. But Art.233(1) is nothing more than a declaration of the general power of the governor in the matter of appointment of District Judges. It does not lay down the qualifications of the candidates to be appointed or denote the sources from which the recruitment has to be made. But the sources of recruitment are indicated in Cl.(2) thereof. Under Cl.(2) of Art.233 two sources are given, namely, (i) persons in the service of the Union or of the State and (ii) advocate or pleader. Can it be said that in the context of Ch.VI of Part VI of the Constitution the service of the Union or the State means any service of the Union or of the State or does it mean the judicial service of the Union or of the State? The setting, viz., the chapter dealing with subordinate courts, in which the expression the service appears indicates that the service mentioned therein is the service pertaining to Courts. That apart, Article 236(2) defines the expression judicial service to mean a service consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge. If this definition, instead of appearing in Art.236, there cannot be any dispute that the service in Art.233(2) can only mean the judicial service. The circumstances that the definition of judicial service finds a place in a subsequent Article does not

necessary lead to a contrary conclusion. The fact that in Article 233(2) the expression the service is used whereas in Arts.234 and 235 the expression judicial service is found is not decisive of the question whether the expression the service in Art.233(2) must be something other than the judicial service, for, the entire chapter is dealing with the judicial service. The definition is exhaustive of the service. Two expressions in the definition bring out the idea that the judicial service consists of hierarchy of judicial officers starting from the lowest and ending with District Judges. The expressions, exclusively and intended emphasise the fact that the judicial service consists only of persons intended to fill up the posts of District Judges and other civil judicial posts and that is the exclusive service of judicial officers. Having defined judicial service in exclusive terms, having provided for appointments top that service and having entrusted the control of the said service to the care of the High Court, the makers of the Constitution would not have conferred a blanket power on the Governor to appoint any person from any service as a District Judge.

16. Rule 49 of the Bar Council of India Rules as it stood prior to 2001 reads as under:-

Rule-49: An advocate shall not be a full-time salaried employee of any person, Government, firm, corporation or concern, so long as he continues to practice and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practice as an advocate so long as he continues in such employment.

Nothing in this Rule shall apply to a law officer of the Central Government or of a State or of any public corporation or body constituted by statute who is entitled to be enrolled under the rules of his State Bar Council made under Section 28(2)(d) read with Section 24(1)(e) of the Act despite his being a full-time salaried employee.

Law officer for the purpose of this Rule means a person who is so designated by the term of his appointment and who, by the said term, is required to act and/or plead in courts on behalf of his employer.

17. In the case of Sushma Suri Vs. Government of National Capital Territory of Delhi reported in (1999) 1 SCC 330, the aforesaid Rule 49, as it stood prior to its deletion in 2001, was considered by the Supreme Court. In that case, in response to an advertisement issued by the Delhi High Court for appointment in Delhi Higher Judicial Service, the appellant working as an Additional Government Advocate in Government of India and also advocate on record of the Supreme Court, applied for the said post. But, she was not called for the interview on the ground that she was not eligible. The appellant moved the Delhi High Court in a writ petition and the same was dismissed on the ground that a Law Officer of the government, though entitled to enroll as an advocate for the purpose of Advocates Act, 1961, ceased to be a member of the Bar. The matter has been finally considered by the Supreme Court. The Supreme Court, taking into consideration Rule 49 of the Bar Council of India Rules, held that an advocate employed with the Government or a Body Corporate as its Law Officer even on terms of payment of salary would not cease to be an advocate. Their Lordships observed in paragraphs 8, 9 and 10 as follows:-

8. For purposes of the Advocates Act and the Rules framed thereunder the law officer (Public Prosecutor or Government Counsel) will continue to be an advocate. The intention of the relevant Rules is that a candidate eligible for appointment to the Higher Judicial Service should be a person who regularly practises before the court or tribunal appearing for a client.

9. In Oma Shanker Sharma case, CWP No.1961 of 1987 the Delhi High Court approached the matter in too pedantic a manner losing sight of the object of recruitment under Article 233(2) of the Constitution. Whenever any recruitment is conducted to fill up any post, the area of recruitment must be as broad-based as the Rules permit. To restrict it to advocates who are not engaged in the manner stated by us earlier in this order is too narrow a view, for the object of recruitment is to get persons of necessary qualification, experience and knowledge of life. A Government Counsel may be a Public Prosecutor or Government Advocate or a Government Pleader. He too gets experience in handling various types of cases apart from dealing with the officers of the Government. Experience gained by such persons who fall in this description cannot be stated to be irrelevant nor detrimental to selection to the posts of the Higher Judicial Service. The expression members of the Bar in the relevant Rule would only mean that particular class of persons who are actually practising in courts of law as pleaders or advocates. In a very general sense an advocate is a person who acts or pleads for another in a court and if a Public Prosecutor or a Government Counsel is on the rolls of the Bar Council and is entitled to practise under the Act, he answers the description of an advocate.

10. Under Rule 49 of the Bar Council of India Rules, an advocate shall not be a full-time employee of any person, Government, firm, corporation or concern and on taking up such employment, shall intimate such fact to the Bar Council concerned and shall cease to practise as long as he is in such employment. However, an exception is made in such cases of law officers of the Government and corporate bodies despite his being a full-time salaried employee if such law officer is required to act or plead in court on behalf of others. It is only to those who fall into other categories of employment that the bar under Rule 49 would apply. An advocate employed by the Government or a body corporate as its law officer even on terms of payment of salary would not cease to be an advocate in terms of Rule 49 if the condition is that such advocate is required to act or plead in courts on behalf of the employer. The test, therefore, is not whether such person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to act or plead on its behalf in a court of law as an advocate. In that event the terms of engagement will not matter at all. What is of essence is as to what such law officer engaged by the Government does whether he acts or pleads in court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. If the terms of engagement are such that he does not have to act or plead, but does other kinds of work, then he becomes a mere employee of the Government or the body corporate. Therefore, the Bar Council of India has understood the expression advocate as one who is actually practising before courts which expression would include even those who are law officers appointed as such by the Government or body corporate.

18. In the case of State of U.P. Vs. Johri Mal, reported in (2004) 4 SCC 714, while discussing the rights and duties of the Public Prosecutors appointed in terms of Section 24 of the Code of Criminal Procedure, their Lordship s held (Paras 39 & 50 at pp.734 &737) : 9. The appointment of Public Prosecutors, on the other hand, is governed by the Code of Criminal Procedure and/or the executive

instructions framed by the State governing the terms of their appointment. Proviso appended to Article 309 of the Constitution of India is not applicable in their case. Their appointment is a tenure appointment. Public Prosecutors, furthermore, retain the character of legal practitioners for all intent and purport. They, of course, discharge public functions and certain statutory powers are also conferred upon them. Their duties and functions are onerous but the same would not mean that their conditions of appointment are governed by any statute or statutory rule.

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50. The very premise whereupon the High Court has based its decisions, therefore, was incorrect. The impugned judgment, thus, cannot be sustained as it suffers from misdirection in law.

19. Section 2(1)(a) of the Advocates Act, 1961 (in short Act) defines the word Advocate which means an advocate entered in any roll under the provisions of this Act. Section 16 of the Act lays down the provisions for admission and enrollment of advocates. According to Section 17 every State Bar Council shall prepare and maintain a roll of advocates in which shall be entered the names and addresses of all persons who were entered as advocates on the roll of any High Court under the Indian Bar Councils Act, 1926 and shall be enrolled as advocates under the said Act in any area to his intention of practice within the jurisdiction of the Bar Council. Section 24 of the Act prescribes the qualification for appointment as an advocate on the State Roll. According to this provision, a person shall be qualified to be admitted as an advocate on a State Roll if he fulfils certain conditions prescribed therein. Section 28 of the Act confers powers to the State Bar Councils to make rules to carry out the purposes of the Act. Section 29 categorically provides that the advocates are the only recognized class of persons entitled to practice law. Similarly, Section 33 provides that it is the advocates alone whose names have been enrolled as advocates are entitled to practice law. For better appreciation, Sections 30 and 33 of the Act are quoted herein below:

0.Right of advocates to practice Subject to provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practice throughout the territories to which this Act extends, -

(i)in all Courts including the Supreme Court;

(ii)before any tribunal or person legally authorized to take evidence; and

(iii)before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice.

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33.Advocates Alone entitled to practice Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practice in any Court or before any authority or person unless he is enrolled as an advocate under this Act.

20. Considering the aforesaid provisions it is manifest that all persons who have been enrolled as advocates are entitled to practice in a Court of Law except persons who ceased to be advocates and whose names have been de-listed or cancelled from the roll of the advocates maintained by the Bar Council.

21. In the case of Satish Kumar Sharma Vs. Bar Council of H.P. reported in (2001) 2 SCC 365, the aforesaid provisions of the Advocates Act were considered by the Supreme Court. In that case the appellant, having obtained LL.B degree, was appointed to the post of Assistant(Legal) by the H.P.State Electricity Board. The post was later redesignated as Law Officer Grade II . The Electricity Board thereafter issued permission to the appellant to act as an advocate on its behalf and also undertook to bear his enrollment expenses. After the filing of the enrollment application, the designation of the appellant was changed to Law Officer . The Bar Council thereafter issued a certificate of enrollment to the appellant and the appellant started functioning as an advocate. Subsequently, the Bar Council issued show cause notice to the appellant directing him to explain why his enrollment ought not to be cancelled. The Bar Council then passed a resolution withdrawing the enrollment of the appellant on the ground that under Rule 49 of the Bar Council of India Rules he was no longer entitled to enrollment after his promotion. The said resolution was challenged by the appellant in a writ petition, which was dismissed. The matter then went up to the Supreme Court where the appellant contended that paragraph 2 of Rule 49 of the Bar Council of India Rules had created an exception to the bar against full time salaried employees from being enrolled as advocates. It was contended that the exception was in respect of Law Officers of Central or State or Public Corporation or statutory bodies who are entitled to enrollment under the Rules of their respective State Bar Councils. Dismissing the appeal the Supreme Court held that -

9. It is an admitted position that no rules were framed by the respondent entitling a Law Officer appointed as a full-time salaried employee coming within the meaning of para 3 of Rule 49 to enroll as an advocate. Such an enrolment has to come from the rules made under Section 28(2)(d) read with Section 24(1)(e) of the Act. Hence it necessarily follows that if there is no rule in this regard, there is no entitlement. In the absence of express or positive rule, the appellant could not fit in the exception and the bar contained in the first paragraph of Rule 49, was clearly attracted as rightly held by the High Court. Added to this, in the light of terms of appointment/promotion orders issued by the Board to the appellant, it is clear that the first appointment of the appellant was as Assistant (Legal). Subsequent promotions as Under-Secretary (Legal)-cum-Law Officer, Deputy Secretary (Legal)-cum-Law Officer and Additional Secretary (Law) show that the appellant was not designated as Law Officer. Similarly, there is no indication in any of the appointment/promotion orders issued to the appellant that he was to act or plead in the courts of law on behalf of the Board except in the order dated 5-7-1984. At any rate from these orders it cannot be said that he was/is required to act or plead in courts on behalf of the employer mainly or exclusively so as to come within the meaning

of Law Officer for the purpose of Rule 49. It appears the modified orders dated 11-6-1984 and 5-7-1984 were issued by the Board in order to get enrolment of the appellant as an advocate on the roll of the respondent. None of the appointment/promotion orders issued to the appellant indicate that his duties were exclusively to act or plead in courts on behalf of the Board as Law Officer . These orders clearly show that the appellant was required to work in the Legal Cell of the Secretariat of the Board; was given different pay scales; rules of seniority were applicable; promotions were given to him on the basis of the recommendations of the Departmental Promotion Committee; was amenable to disciplinary proceedings, etc. Further looking to the nature of duties of Legal Cell as stated in the regulation of business of the Board extracted above, the appellant being a full-time salaried employee had/has to attend to so many duties which appear to be substantial and predominant. In short and substance we find that the appellant was/is a full-time salaried employee and his work was not mainly or exclusively to act or plead in court. Further, there may be various challenges in courts of law assailing or relating to the decisions/actions taken by the appellant himself such as challenge to issue of statutory regulation, notification or order; construction of statutory regulation, statutory orders and notifications, the institution/withdrawal of any prosecution or other legal/quasi-legal proceedings etc. In a given situation the appellant may be amenable to disciplinary jurisdiction of his employer and/or to the disciplinary jurisdiction of the Bar Council. There could be conflict of duties and interests. In such an event, the appellant would be in an embarrassing position to plead and conduct a case in a court of law. Moreover, mere occasional appearances in some courts on behalf of the Board even if they be, in our opinion, could not bring the appellant within the meaning of Law Officer in terms of para 3 of Rule 49. The decision in Sushma Suri v. Govt. of National Capital Territory of Delhi2 in our view, does not advance the case of the appellant. That was a case where meaning of expression from the Bar in relation to appointment as District Judge requiring not less than seven years standing as an advocate or a pleader came up for consideration. The word advocate in Article 233(2) was held to include a Law Officer of the Central or State Government, public corporation or a body corporate who is enrolled as an advocate under exception to Rule 49 of Bar Council of India Rules and is practising before courts for his employee. Para 10 of the said judgment reads: (SCC pp. 336-37) 0. Under Rule 49 of the Bar Council of India Rules, an advocate shall not be a full-time employee of any person, Government, firm, corporation or concern and on taking up such employment, shall intimate such fact to the Bar Council concerned and shall cease to practise as long as he is in such employment. However, an exception is made in such cases of Law Officers of the Government and corporate bodies despite his being a full-time salaried employee if such Law Officer is required to act or plead in court on behalf of others. It is only to those who fall into other categories of employment that the bar under Rule 49 would apply. An advocate employed by the Government or a body corporate as its Law Officer even on terms of payment of salary would not cease to be an advocate in terms of Rule 49 if the condition is that such advocate is required to act or plead in courts on behalf of the employer. The test, therefore, is not whether such person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to act or plead on its behalf in a court of law as an advocate. In that event the terms of engagement will not matter at all. What is of essence is as to what such Law Officer engaged by the Government does whether he acts or pleads in court on behalf of his employer or otherwise? If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. If the terms of engagement are such that he does not have to act or plead, but does other kinds of work, then he becomes a mere employee of the Government or the

body corporate. Therefore, the Bar Council of India has understood the expression advocate as one who is actually practising before courts which expression would include even those who are Law Officers appointed as such by the Government or body corporate. (emphasis supplied)

20. As stated in the above para the test indicated is whether a person is engaged to act or plead in a court of law as an advocate and not whether such person is engaged on terms of salary or payment by remuneration. The essence is as to what such Law Officer engaged by the Government does.

22. In the light of the ratio laid down by the Supreme Court in the decisions quoted herein before, it can safely be concluded that the nature of duties of the Assistant Public Prosecutors is to act and plead in Courts of Law on behalf of the State as Advocates. Even after becoming Assistant Public Prosecutors they continue to practice as advocates and plead the cases on behalf of the Government and their names remained in the roll of advocates maintained by the Bar Council. As Public Prosecutors they acquired much experience in dealing criminal cases.

23. It was argued on behalf of the petitioners that the note appended to Rule 49 of the Bar Council of India Rules having been deleted by a resolution dated 22nd June, 2001 of the Bar Council of India, the ratio decided by the Supreme Court in Sushma Suri Case (supra) will not apply, and therefore, an advocate who is employed as a full time salaried employee of the government, ceases to practice as an advocate so long as he continues in such employment. The submission made by the counsel has no substance.

24. As noticed above, Rule 49 of the Bar Council of India Rules provides an exception where in case of Law Officers of the government and corporate bodies, despite they being employed by the government as Law Officers, they cannot cease to be advocates so long as they are required to plead in the courts. For example, Assistant Public Prosecutors so appointed by the government on payment of salary their only nature of work is to act, plead and defend on behalf of the State as an advocate. Hence, an advocate employed by the government as Law Officer namely, an Assistant Public Prosecutor on terms of payment of salary would not cease to be an advocate in terms of Rule 49 of the Bar Council of India Rules for the purpose of appointment, as such advocate is required to act or plead in courts on behalf of the State. If, in terms of the appointment, an advocate is made a Law Officer on payment of salary to discharge his duties at the Secretariat and handle the legal files, he ceased to be an advocate. In our considered opinion, therefore, the deletion of the note appended to under Rule 49 of the Bar Council of India Rules will not in any way affect the legal proposition of law. We are also of the view that in the light of the relevant clauses of the Advocates Act, 1961 it will not debar the Assistant Public Prosecutors to continue and plead in courts as an advocate.

25. A similar question arose before the Madhya Pradesh High Court in the case of Smt.Jyoti Gupta Vs. Registrar General, High Court of M.P. (2008(3)MPHT 13 = MANU/MP/0151/2008) as to whether the Assistant Public Prosecutors are eligible to apply for appointment for the post of District Judges, their Lordships held -

Para-16. A careful reading of the note provided in the exception states that nothing in Rule 49 of the Bar Council of India Rules shall apply to a Law Officer of the Central Government, State

Government or a body corporate who is entitled to be enrolled under the rules of the State Bar Council under Section 28(2)(d) read with Section 24(1)(e) of the Advocates Act, 1961 despite his being a full-time salaried employee. Hence, the exception to Rule 49 has been provided because of the provisions in the Rules of State Bar Council made under Section 28(2)(d) read with Section 24(1)(e) of the Advocates Act, 1961 for a Law Officer of the Central Government or the State Government or a body corporate to be admitted into the roll of the State Bar Council if he is required by the terms of his appointment to act and/or plead in Courts on behalf of his employer. In other words, if the rules made by the State Bar Council under Section 28(2)(d) read with Section 24(1)(e) of the Advocates Act, 1961 provide for admission as an Advocate, enrolment in the State Bar Council as an Advocate or a Law Officer of the Central Government or the State Government or a body corporate, who, by the terms of his employment, is required to act and/or plead in Courts on behalf of his employer, he can be admitted as an Advocate and enrolled in the State Bar Council by virtue of the provisions of Sections 24(1)(e) and 28(2)(d) of the Advocates Act, 1961 and the rules made thereunder by the State Bar Council and he does not cease to be an Advocate on his becoming such Law Officer of the Central Government, State Government or a body corporate. As we have seen, the State Bar Council of M.P. has provided under Proviso(i) of Rule 143 that a Law Officer of the Central Government or a Government of State or a public corporation or a body constituted by a statute, who by the terms of his appointment, is required to act and/or plead in Courts on behalf of his employer, is qualified to be admitted as an Advocate even though he may be in full or part-time service or employment of such Central Government, State Government, public corporation or a body corporate. The position of law, therefore, has not materially altered after the deletion of the note contained in the exception under Rule 49 of the Bar Council of India Rules by the resolution of the Bar council of India, dated 22nd June, 2001.

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Para-21. In the result, we hold that if a person has been enrolled as an Advocate under the Advocates Act, 1961 and has thereafter been appointed as Public Prosecutor/Assistant Public Prosecutor or Assistant District Public Prosecutor and by the terms of his appointment continues to conduct cases on behalf of the State Government before the Criminal Courts, he does not cease to be an Advocate within the meaning of Article 233(2) of the Constitution and Rule7(1)(c) of M.P.Uchchatar Nyayik Sewa (Bharti Tatha Sewa Shartein) Niyam, 1994 for the purpose of recruitment to the post of District Judge (Entry Level) in the M.P.Higher Judicial Service.

26. Having gone through the relevant provisions of the Constitution, the Advocates Act and the Bar Council Rules and considering the ratio laid down by the Supreme Court as discussed hereinabove, we do not find any merit in the writ petition, W.P. No.9090 of 2010.

W.P.Nos.16383 of 2010 & W.P.(MD)No.9119 of 2010:

27. As stated above in these two writ petitions, the impugned notification has been challenged by the petitioners on the ground that the said notification does not indicate the number of vacancies earmarked for disabled candidates as per the provisions of Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Learned counsel appearing for the petitioners in these two writ petitions contended that while distributing 17 vacancies against each category, the notification does not show the category of disabled persons and reservation in the distribution of vacancies to disabled persons. Learned counsel submitted that rule of 3% reservation for disabled persons is applicable inasmuch as the disabled persons constitute a special category.

28. As against that the respondent Government, in its counter affidavit filed in W.P.No.16383 of 2010, stated that the reservation in recruitments in respect of disabled persons is governed by the G.O.Ms.No.87 dated 17.07.2008. As per the said G.O., orders were issued to adhere to the system of 200 point roster dividing into 6 classifications granting an equal ratio of 1:1:1 to the disabled category viz., blind, deaf and orthopaedically challenged. It is stated in the impugned notification that the reservation roster applicable to 17 vacancies are earmarked, and in the notification itself there is a mention that the reservation in respect of differently abled persons is governed by G.O.Ms.No.87 dated 17.7.2008. It is further stated that the 3% reservation will be ensured by each Appointing Authority by appointing one individual belonging to differently abled category in each of the 6 blocks of 200 point communal roster. It is further stated in the counter that the entire notification is given for the Vertical Reservation i.e., for communities, whereas the differently abled persons comes under Horizontal Reservation, hence, the petitioner will be accommodated if he comes on merit and will be absorbed under his respective communal quota. It is further stated that the State Government is giving utmost importance for providing employment opportunities to the differently abled persons. It is also submitted that the impugned notification is crystal clear about the reservation meant for differently abled persons and facilitates them to apply for the same as per the existing rules, and there is no arbitrariness on the part of the State Government, and hence, the impugned notification does not violate the fundamental rights guaranteed under Articles 14, 15 and 21 of the Constitution of India. The obligation of filling up of the vacancies as per 3% reservation will be carried out by the Appointing Authority at the time of appointment by appointing one individual belonging to differently abled category in each of the 6 blocks of 200 point Communal Roaster.

29. The Registrar General, High Court, Madras, in her counter affidavit filed in W.P.(MD)No.9119 of 2010 reiterated the stand taken by the State Government. It is stated that the Government of Tamil Nadu in G.O.Ms.No.87 dated 17.07.2008 issued orders to adhere to the system of 200 point roaster dividing into 6 classifications granting an equal ratio of 1:1:1 to the disabled category i.e., Blind, Deaf and Orthopaedically challenged as far as possible, and to select differently abled persons among the 33 vacant posts in each division, and follow the method of making selection against their respective community in the communal roaster. It is further stated that inner rotation for all eligible categories including the differently abled persons are provided in the 200 point roaster, which is going to be adopted for the present selection on the basis of G.O.Ms.No.87 dated 17.07.2008. It is further stated that though the nature of duties and responsibilities attributed to the post of District Judge (Entry Level) required persons free from certain disabilities like blindness, total deafness, etc., so as to discharge his official duties, every possible steps have been taken to give equal opportunities to the

eligible disabled persons, and hence, the operation of the relevant Governmental Order viz., G.O.Ms.No.87 dated 17.07.2008 in respect of differently abled persons in the present selection process was notified in the impugned notification itself. Therefore, it is submitted that the impugned notification is transparent and strictly adhering to the rules of reservation in force.

30. After hearing the learned counsel appearing for the parties, we are of the view that the stand taken by the respondents in their respective counter affidavit is fully justified inasmuch as the system of 200 point roaster dividing into 6 classifications granting an equal ratio of 1:1:1 to the disabled category has been followed. It has been categorically stated that the obligation of filling up of vacancies as per 3% reservation would be carried out by the Appointing Authority at the time of appointment as per the roaster. In that view of the matter, we find that the impugned notification is transparent and is strictly adhering to the rules of reservation in force. Hence, the contention made by the petitioners in these two writ petitions are misconceived and devoid of any substance. We, therefore, do not find any merit in this writ petition also.

W.P.No.15566 of 2010

31. In this case the impugned notification has been challenged only on the ground that the maximum marks allotted to the written examination and the viva voce shall not be 75% and 25% respectively. Learned counsel for the petitioner contended that apart from 100% marks, the length of Bar experience is fixed as a criteria for short listing candidates for viva voce without any explanation as to the manner in which it is proposed to be done, which is illegal and unconstitutional. According to the learned counsel, the marks to be allotted to the viva voce shall not in any case exceed 12.5% of the total marks. In this connection, the learned counsel for the petitioner relied upon a decision of the Supreme Court in Mohinder Sen Garg Vs. State of Punjab reported in (1991) 1 SCC 662. In this context, first we would like to refer to Annexure I under Rule 5 of the Tamil Nadu State Judicial (Cadre and Recruitment) Rules, 2007, which reads as follows:-

The selection shall be made based on the results of written examination and viva voce i.e., the selection will be made on the basis of the total marks obtained by the candidates in the written examination and viva voce taken together subject to the rule of reservation of appointment. The maximum marks allotted for the written examination and viva voce shall be 75% and 25% respectively.

32. The contention of the learned counsel for the petitioner that the marks fixed for the viva voce shall not exceed 12.5% cannot be accepted in view of the recent decision of the Supreme Court rendered in the case of Manish Kumar Shahi Vs. State of Bihar reported in 2010(6) SCALE 166. In that case, an advertisement was issued by the Bihar Public Service Commission for appointment of Civil Judges (Junior Division). As against the 850 marks prescribed for the written test 200 marks was allotted for viva voce. The said allotment of 200 marks for the viva voce was challenged by a candidate and ultimately the matter went up to the Supreme Court. The question that fell for the consideration of the Supreme Court was whether the marks prescribed for viva voce test/interview are excessive. The Supreme Court, after considering the various decisions including the decision rendered in Mohinder Sen Garg Vs. State of Punjab, (1991) 1 SCC 662 observed that . Shri.

Jayant Bhushan, learned Senior Counsel argued that the High Court committed a serious error in denying relief to the petitioner by invoking the principle of estoppel/waiver ignoring that he had challenged the constitutionality of the rule by which excessive marks have been prescribed for viva voce test and also questioned the selection made by the Commission on the ground of violation of his fundamental right to equality guaranteed under Articles 14 and 16 of the Constitution. Learned counsel emphasized that the rule of estoppel, waiver and acquiescence cannot be applied in the cases involving violation of the rights guaranteed under Part III of the Constitution. He then submitted that the marks prescribed for viva voce test are highly excessive and contrary to the law laid down by this Court in Ashok Kumar Yadav Vs. State of Haryana, (1985) 4 SCC 417.

33. Their Lordships further observed that 9. The question whether the marks prescribed for viva voce test/interview are excessive and selection made in accordance with the criteria like the one specified in Rule 14 read with Appendix C and para (vi) of the advertisement issued by the Commission has been considered by this Court in several cases including those upon which reliance has been placed by learned counsel for the petitioner. Although, no straightjacket formula has been judicially evolved for determining whether the prescription of particular percentage of marks for viva voce test/interview introduces an element of arbitrariness in the process of selection or gives unbridled power to the recruiting authority/agency to select less meritorious candidates, by and large, the courts have not found any Constitutional infirmity in prescribing of higher percentage of marks for viva voce test/interview for recruitment to judicial services, administrative services and the like.

34. The next ground of challenge to the notification is that no syllabi has been prescribed for the said examination, which is contrary to all canons of reasonableness. It appears from paragraph 7 of the impugned notification that the subjects and the marks had been categorically mentioned therein. For better appreciation paragraph 7 of the impugned notification is quoted herein below:-

. The written examination will be of 3 hours duration involving Law Paper Part I (Civil), Law Paper Part II (Criminal) and Law Paper Part III (General) carrying 25 marks each (75 marks total) and 25 marks is ear-marked for viva-voce.

The Question Papers on Law Paper Part I, II & III will be set in English as well as in Tamil. The candidates shall answer either in English or in Tamil/ but not in both.

The written examination will precede the viva-voce examination. As to short listing the candidates, their length of practice at the bar and the marks obtained by them in the written examination will be considered and such short listed candidates alone will be called for viva-voce examination.

35. Besides the above, all persons, who aspire to become a District Judge, are supposed to have knowledge of civil, criminal and other laws and must have put in 7 years standing in the Bar as an advocate. It has rightly been contended by the respondents that the post of District Judge is a coveted one having multiple responsibilities both on the judicial side and on the administrative side, and therefore, the candidates must have a good knowledge in civil, criminal and other laws and also basic knowledge in general law. In our considered opinion the impugned notification does not suffer

from any error on account of non-furnishing of the syllabi. Hence, the challenge made by the petitioner on this ground cannot be sustained.

W.P.No.18451 of 2010

36. In this writ petition, the petitioner seeks a declaration that the Rules of Tamil Nadu State Judicial Service (Cadre and Recruitment) Rules, 2007 as unconstitutional, and consequently the impugned notification issued by the respondent for appointment to the post of District Judges (Entry Level) as also ultra vires and unconstitutional. It is stated that the candidates in the subordinate judicial service as Magistrates, Sub Judges and District Munsifs, who have put in 7 years of practice before their appointment in such service, can also be made eligible to appear for the examination for the recruitment of District Judges as in the case of Assistant Public Prosecutors Grade-I and Grade-II. According to the petitioner therein, the Assistant Public Prosecutors Grade I and Grade II are employees of the State and they are not pleaders. The respondents having made eligible the Assistant Public Prosecutors Grade I and Grade II, it is wholly unjustifiable to exclude the Magistrates, District Munsifs and Sub Judges to appear for the examination, as they are also government servants, and they must also be given a chance for their career advancement based on merit.

37. While discussion the point raised by other writ petitioners with regard to eligibility of Addl. Public Prosecutors to appear in the examination, we have discussed at length the provision of Art. 233 of the Constitution of India and referring to various decisions of the Supreme Court held that the candidates holding the post in the Subordinate Judicial Service are not eligible to appear in examination and not eligible for appointment to the post of District Judge (Entry Level). In that view of the matter, the rule of the Tamil Nadu State Judicial Service (Cadre & Recruitment) Rules, 2007, cannot be held to be unconstitutional. Hence, this writ petition has also no merit and is devoid of any substance.

38. In the result, all these writ petitions are dismissed. Consequently, connected miscellaneous petitions are closed. However, there shall be no order as to costs.

39. Since the post of District Judges are lying vacant and there are urgent need of District Judges to be posted in different places, we direct the concerned respondents to notify the date and venue of the written examination within a period of six weeks from today.

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