

Allahabad High Court

Akhilesh Kumar Misra, And Others vs The High Court Of Judicature At ... on 6 January, 1995

Equivalent citations: AIR 1995 All 148, 1995 (71) FLR 92, (1995) 1 UPLBEC 374

Author: P Basu

Bench: P Basu, P Nag

ORDER Palok Basu, J.

1. Sri Akhilesh Kumar Misra, Sri Rajesh Kumar Saxena and Sri Abhimanu Kumar Misra have filed this writ petition under Article 226 of the Constitution of India with the prayer that a writ in the nature of certiorari should issue quashing the orders dated 21-12-1994 issued by the Additional Registrar of this court telling each of the petitioner that their applications for seeking permission to appear in the U.P. Higher Judicial Service Examination has been rejected. Further prayer in the writ petition is that each of the petitioner should be permitted to appear in the U.P. Higher Judicial Service Examination scheduled to be held on 7th and 8th of January, 1995.

2. Sri K. N. Tripathi, learned Senior Advocate assisted by Sri Rakesh Kumar, Advocate has been heard at sufficient length in support of this writ petition. Since notice of this writ petition was already given to the opposite parties, the Additional Advocate General Sri Rakesh Dwivedi assisted by Sri R. I. Saxena, learned Standing Counsel have put appearance on behalf of the opposite parties and have argued at length for dismissing the writ petition.

3. Since none of the facts and questions of law are in dispute, this writ petition is finally decided at the admission stage.

4. In the State of U.P. there has come to exist a service known as U.P. Higher Judicial Service. For recruitment to the said service, U.P. Higher Judicial Service Rules 1975 have been framed (for short thereafter referred to as the "Rules"). Under Rule 5 of the rules, it is provided that there would be two sources of recruitment. For a ready reference the said rule should be quoted :--

"5. Sources of recruitment. -- The recruitment 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 Nyayaik Sewa (hereinafter referred to as the 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 Judge 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).

5. The emphasis and thrust of the argument on behalf of the petitioners is upon seven years standing. It may be mentioned here that they want to get the benefit of "seven years standing" as appearing in clause (a) of the said rule.

6. The petitioner Sri Akhilesh Kumar Misra was admittedly enrolled as an advocate on 28th of April, 1982. After having successfully competed in the examination conducted by the Public Service Commission became an Assistant Prosecuting Officer in the year 1982, but he joined the said post on 12-1-1987.

7. The petitioner No. 2 Rajesh Kumar Saxena passed the law examination in the year 1980, Likewise, he was appointed Assistant Prosecuting Officer on 19-1-1985. Similarly, Sri Abhimanu Kumar Misra did his law examination and was also appointed as Assistant Prosecuting Officer on 19-1-1985.

The result of mentioning these dates is that none of the petitioner can be said to have been a member of the Bar for a continuous period of seven years if the period since they have been working as Assistant Prosecuting Officer is excluded. Therefore, Sri K. N. Tripathi vehemently argued looking at the corresponding provisions in the Advocates Act and the rules framed by the Bar Council of India read with Sections 24 and 25 of the Criminal Procedure Code that the petitioners are entitled to be treated as having seven years standing as an Advocate. This has been opposed by the learned Additional Advocate General.

8. The Advocates Act has defined the Advocate as under:--

"2(l)(a) "Advocate" means an advocate entered in any roll under the provision of this Act."

9. Section 24 of the Advocates Act, 1961 provides that subject to the provisions contained in the said Act and the rules made thereunder, a person shall be qualified to be admitted as an advocate on a State roll if he fulfils the conditions enumerated therein.

10. Section 29 of the Advocates Act says subject to the provisions of this Act and rules made thereunder, there shall be only one class of persons entitled to practise the profession of law, namely, advocates.

11. Section 30 of the Advocates Act then provides that subject to the provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends. -- in all courts including Supreme Court, before any tribunal or person legally authorised to take evidence and before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise.

12. The combined reading of the aforesaid three sections leaves no manner of doubt that enrolment in State Roll would determine the person's right to practise as an advocate. To be more specific, Section 33 of the Advocates Act makes further provision that except otherwise provided in the Advocates Act or in any law for the time being in force, no person shall be entitled to practise in any court or before any authority or person unless he is enrolled as an advocate under the provision of

the Act.

13. It may be mentioned here that the High Court as well as the State Bar Council and the Bar Council of India have been empowered to frame rules to carry out the objectives of this Act. Before coming to the rules, it may be mentioned here that Section 26A was added in the Advocates Act by an amending Act No. 60 of 1973. The said section reads as under:--

"26A. Power to remove names from roll --A State Bar Council may remove from the State roll the name of any advocate who is dead or from whom a request has been received to that effect."

14. It may be mentioned here that this provision requires voluntary action on the part of the advocate when he may not be able to practise any more in view of the provisions contained in the Act and rule's framed by the Bar Council concerned. Chapter V, which incorporates several parts, has in it Sections 49 to 54 which have been classified as "Section VII -- Restrictions on other employment". For the purposes of decision on the facts of the present case, Rule 51 may be usefully quoted here:

"51. An advocate shall not be a full-time salaried employee of any person, Government, firm, corporation of concern, so long as he continues to practise 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 practise 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 the Government 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 terms of his appointment and who, by the said terms, is required to act and/or plead in Courts on behalf of his employer."

15. The other relevant provisions which have to be noted are contained under Sections 24 and 25 of the Criminal Procedure Code. For the purposes of this case provisions contained in Section 25 alone may be relevant which are quoted below:--

"25. Assistant Public Prosecutors. -- (1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

(1A) The Central Govenment may appoint one or more Assistant Public Prosecutores for the purpose of conducting any case or class of cases in the courts of Magistrates.

(2) Save as otherwise provided in subsection (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

(3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case:

Provided that a police officer shall not be so appointed -

(a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or

(b) if he is below the rank of Inspector.

16. It may be mentioned here that Section 25 of the Criminal Procedure Code stated in unequivocal terms that the State Government shall "appoint" one or more Assistant Public Prosecutors for conducting prosecution in the Courts of Magistrates.

17. If the appointment of the advocate as Assistant Public Prosecutor is for the purposes of creating an employment for him, then it is needless to say that Rule 51 of the Bar Council of India Rules noted above would segregate him from advocates. Therefore, it would not be possible for him to contend that by adding the years of working as A.P.P. he would be having seven years standing as an advocate. It is true that for an appointment of Public Prosecutor or Assistant Public Prosecutor, a degree in law and practice as an advocate may be the basic qualifications. But if it is to be interpreted that Section 25 of the Criminal Procedure Code enjoins the appointment of an advocate as Assistant Public Prosecutor for conducting prosecution in the courts of Magistrate, then it debars the appointee to call himself an Advocate. The sections of the Advocates Act noted above and the rules of the Bar Council of India also would deny him the right to be called an advocate as having been appointed as A.P.P. Therefore, such a person cannot be permitted to add the period of serving as Assistant Public Prosecutor to the period of practising as advocate for claiming 'seven years standing' as an Advocate.

18. The aforesaid discussion leaves no room for doubt that none of the petitioners can, therefore, claim that they have "seven-years" "standing" as an advocate and therefore, there does not appear any force in the contention that they are entitled to appear in the Higher Judicial Service Examination Scheduled to be held as noted above as they do not possess the minimum qualification.

19. Sri Tripathi has placed reliance on the decision of the Patna High Court reported in 1991 BBCJ (HC) 213 Dr. Amar Nath Singh v. State of Bihar. In paragraph No. 8 of the said decision it has been held :--

"8. The next aspect of the question is whether an Advocate Assistant Public Prosecutor who has not put in seven years practice in the Bar but got appointed under Section 25, Cr.P.C. whether the period for which he has worked as Assistant Public Prosecutor can be counted towards experience of seven years as an Advocate. This question directly falls for consideration in the case of Gobind Chandrayan v. State of Bihar, 1976 BBCJ (HC):554 while considering the question of appointment of a Munsif requiring one year standing in the Bar. It was held on consideration of Rule 44 of the Bar Council of

India Rules, 1975, Chapter V of the State Bar Council Rules and Section 25 of the Code of Criminal Procedure, 1973, that an Advocate appointed as an Assistant Public prosecutor does not cease to practise as an Advocate. There is an additional reason why the Assistant Public Prosecutor appointed under Section 25, Cr.P.C. can count his period of service towards his experience as an advocate because of the provision of Section 24(9) of the Code of Criminal Procedure, which was earlier not noticed. This provision makes it abundantly clear that for the purpose of seven years practice for being appointed as Additional Public Prosecutor and 10 years practice as Special Public Prosecutor under Section 24, Cr.P.C. the period for which the Assistant Public Prosecutor has rendered service shall be deemed to be the period during which such person has been in practice as an Advocate."

20. Sri Rakesh Dwivedi learned Additional Advocate General has rightly pointed out that the observations made in the said judgment do not in any way support the case of the petitioners. It may be noted here that reliance upon sub-section (9) of Section 24 as well as Section 25 of the Code of Criminal Procedure was placed by the learned Bench only in order to show that for the purposes of considering Rule 44 of the Bar Council of India Rules, the petitioners therein did not cease to practise as a Advocate. It may be mentioned here that in the above cited case the question examined was whether the petitioners were rightly disqualified from being selected as direct recruits to the post of Additional Sessions Judge and no other provision was considered."

21. As noted above, since the rules framed by the Bar Council of India exclude advocates who have been appointed to some posts except Law Officer of the Central Government or the State Government, the argument of Sri Tripathi that since the names of the petitioners continued to exist in the State roll and they would be deemed to be Advocates, is without any force.

22. It may be suggested that the moment an Advocate joins an employment, the effect of the provisions contained in Section 26A of the Advocates Act are implicitly applicable.

23. In view of the aforesaid discussions, there is no merit in the writ petition. It is dismissed summarily.

24. Petition dismissed.