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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Pronounced on: 17.03.2023

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W.P.(C) 15705/2022 & CM APPL. 48879/2022

ASHISH RASTOGI

..... Petitioner

Through: Mr Arvind Nigam, Senior Advocate with Mr. Samrat Nigam, Mr. Tapan Masta, Mr. Abhir Datt, Mr. Rupin Bahl, Mr. Vaibhav Tomar, Mr. Rajat Sehgal, Mr. Angad Mehta, Mr. Abhimanyu Walia, Mr. Abhay Raj Verma, Mr. Paranjay Chopra, Mr. Aditya Bhardwaj, Mr. Yuvraj Singh, Mr. Bhanu Sanoriya, Ms. Vidhi Jain, Mr. Arjun Rekhi, Mr. Debayan Gangopadhyay, Mr. Anand Mehta, Mr. Karambir Singh, Mr. Samyak Jain, Ms. Pragya Puri and Ms. Vandana Anand, Advocates.

versus

HONBLE HIGH COURT OF DELHI & ANR. Respondents

Through: Mr. Rajshekhar Rao, Senior Advocate with Ms. Vibha Mahajan Seth and Ms. Divyanshi Anand, Advocates for R-1.

Mr. Salman Khurshid, Senior Advocate with Ms. Asifa Rashid Mir, Ms. Shabeena Anjum, Mr. Bhanu Pratap Singh, Mr. Sanjay Kumar Tanwar, Mr. Manoj Chauhan and Mr. A.P. Singh, Advocates for R-2.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

HON'BLE MR. JUSTICE VIKAS MAHAJAN

J U D G M E N T

NAJMI WAZIRI, J.

1. This writ petition seeks the setting aside of the Final Result Notice of the Delhi Higher Judicial Services Examination, 2022 ('Impugned Notice') dated 10.11.2022, only insofar as it rejects the candidature of the petitioner for appointment to the Delhi Higher Judicial Services ('DHJS'). The main issue to be determined is whether the petitioner is covered by the expression "*continuously practicing advocate for not less than 7 years preceding receipt of applications*" which is a mandatory qualification for selection to the DHJS.
2. There is no dispute of the fact that the petitioner has been **working as a Law Officer with the Steel Authority of India ('SAIL') since 2010**. He earned a degree in B.A.LLB. (Hons.) from National Academy of Legal Studies and Research (NALSAR) University of Law, Hyderabad in 2010. He got enrolled with the Bar Council of Uttar Pradesh on 23.05.2010. In June 2010, SAIL issued him a letter of appointment and in July 2010, he started working as Jr. Manager (Law). He says that **he started appearing, acting and/or pleading on behalf of SAIL before various courts, tribunals and quasi-judicial fora**. He cleared the All-India Bar Examination in March, 2011 and was awarded a 'Certificate of Practice' on 19.03.2011 by the Bar Council of India.
3. In response to an advertisement/notification dated 26.12.2019 issued by R-1 for direct recruitment into the Delhi Higher Judicial Services, the petitioner first cleared the eponymous Preliminary Examination, 2019, but was not successful in the Main Examination (Written), 2019.
4. After the Delhi Higher Judicial Services Rules, 1970 were amended on 08.02.2022 an advertisement was issued by R-1 on 23.02.2022 for filling up 45 vacancies by way of Direct Recruitment in the DHJS. In furtherance of

the same, R-1 also issued 'Instructions' on 24.02.2022 to the effect that if a candidate, who is employed in Government Service, Public Sector Undertaking ('PSU') or a Bank or in Government Service and intends to appear for the aforesaid examination and if selected for viva-voce, she/he must inform her/his parent office apropos the same and must get a 'No Objection Certificate' from the employer.

5. In this round of recruitment exercise, the petitioner cleared the DHJS Preliminary Examination as well as the Main Examination (Written), 2022. He was amongst the 44 candidates shortlisted for the viva-voce interview. As per the "Final Result of Candidates in order of Merit (Category Wise) on the basis of their performance in Mains Examination and Viva-Voce" declared on 10.11.2022, the petitioner scored 623.5 marks out of a total of 1000 marks. Logically, he ought to have been ranked 17th in the list of meritorious candidates but it was not so done. Instead his candidature was shown as rejected for the reason mentioned in the Final Result:

"NOTE:

**** The candidates do not have continuous practice of 7 years during the period immediately preceding the last date of applications as required under Rule 9(2) of DHJS Rules, 1970 and, therefore, their candidatures have been rejected."*

6. The petitioner says that in his on-line application he had fully disclosed his employment status with SAIL and had complied with Instruction Nos. 4 and 5 (x) issued by R-1, which require that:

"...4. A candidate in Government Service or working in a Public Sector Undertaking or in a Bank whether in a permanent or temporary capacity, must inform his/her parent office that he/she has applied for Delhi Higher Judicial Service Examination 2022.

Such candidate, if selected for Viva-Voce, shall be required to produce No Objection Certificate from his/her employer at the time of Viva-Voce.

5. A candidate, if declared successful in the Mains Examination (Written) must send one set of self attested copies of the following documents to the Joint Registrar (Exams-DHJS & DJS), High Court of Delhi, within five days of the declaration of the result accompanied by a covering letter indicating his/her Roll Number and Application Number-

xxx

(x) If the candidate is in service at the time of submission of application form, Original Certificate from the employer as to whether in the performance of his/her duties, he/she acts or pleads regularly in court(s) as an advocate on behalf of his/her employer or otherwise”.

7. It is after the aforementioned disclosures that the petitioner was issued an admit card for appearing in the Preliminary Examination, which he qualified. Thereafter, R-1 issued him another admit card to write the Main Examination. In the latter too he was successful. No other information was sought at that time.
8. As per the requirement of the aforementioned Instructions dated 24.02.2022 under Clause 5 (ix), the petitioner obtained an Original Certificate from SAIL certifying that the petitioner acts and/or pleads regularly as an advocate in courts in Delhi, on behalf of SAIL. The Certificate reads as under:

(17)



स्टील अथॉरिटी ऑफ इण्डिया लिमिटेड
STEEL AUTHORITY OF INDIA LIMITED

No.PER/ESS/28707

30th August, 2022

TO WHOMSOEVER IT MAY CONCERN

This is to certify that Shri Ashish Rastogi is a permanent employee of Steel Authority of India Limited (SAIL) since 06.07.2010 and, is at present holding the post of Sr. Manager (Law), Law Department at SAIL Corporate Office, New Delhi. In the course of performance of his duties, Shri Rastogi acts or pleads regularly in courts at Delhi as an Advocate on behalf of Steel Authority of India Limited.

Ashu Singh
30/8/2022

(Ashu Singh)
Manager (Personnel)

अशु सिंह / ASHU SINGH
उप प्रबंधक (कार्मिक) / Deputy Manager (Pers.)
स्टील अथॉरिटी ऑफ इण्डिया लिमिटेड
STEEL AUTHORITY OF INDIA LIMITED
इस्पात भवन, लोदी रोड, नई दिल्ली-110003
Ispat Bhawan, Lodi Road, New Delhi-110003

इस्पात भवन, लोदी रोड, नई दिल्ली 110 003, दूरभाष : 011-24367431-86 फैक्स : 011-2436 7015, वेबसाईट : www.sail.co.in
Ispat Bhawan, Lodi Road, New Delhi-110 003, Phone : 011-24367481-86, Fax : 011-24367015, Website : www.sail.co.in
PAN No. AAACS7062F Corporate Identity No. L27109DL1973 GOI00645

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9. A No Objection Certificate (NOC) was also issued by SAIL stating that the petitioner would be released from service if he got selected in the DHJS. The NOC is reproduced as under:



स्टील अथॉरिटी ऑफ इण्डिया लिमिटेड
STEEL AUTHORITY OF INDIA LIMITED

ANNEXURE P-13

No. PER/ESS/28707

6th October, 2022

TO WHOMSOEVER IT MAY CONCERN

This is to certify that Shri Ashish Rastogi (SAIL P.No. A000762) is a permanent employee of Steel Authority of India Limited (SAIL) since 06.07.2010 and is at present holding the post of Sr. Manager (Law), Law Department at SAIL Corporate Office, New Delhi.

2. SAIL has no objection to his appearing in Viva-Voce of Delhi Higher Judicial Services (DHJS) on 13.10.2022. In case of selection in DHJS, Shri Ashish Rastogi will be released from the services of the company as per rules.

Ashu Singh
6/10/22

(Ashu Singh)

Manager (Personnel)

आशु सिंह / ASHU SINGH
(उप प्रबन्धक (व्यक्ति) / Deputy Manager (Pers.))
स्टील अथॉरिटी ऑफ इण्डिया लिमिटेड
STEEL AUTHORITY OF INDIA LIMITED
इस्पत भवन, लोदी रोड, नई दिल्ली-110003
Ispat Bhawan, Lodi Road, New Delhi-110003

T. C.

[Signature]

TRUE COPY

इस्पत भवन, लोदी रोड, नई दिल्ली 110 003, दूरभाष : 011-2436 7481-86, फ़ैक्स : 011-2436 7015, वेबसाइट : www.sail.co.in
Ispat Bhawan, Lodi Road, New Delhi-110 003, Phone : 011-2436 7481-86, Fax : 011-2436 7015, Website : www.sail.co.in
PAN No. AAACS7062F Corporate Identity No. L27109DL 1973 GOI006454

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10. The petitioner contends that despite his proven meritorious performance in the recruitment examination, which would rank him at the 17th position in the Select List against 45 vacancies, in terms of the final result dated 10.11.2022, he was not considered for employment by R-1 for the reason as specified hereinabove. The petitioner contends that the reason or objection of R-1 is baseless, arbitrary, illegal and therefore needs to be set aside.
11. During the pendency of this petition, R-1 was permitted to publish the requisite notification for recruitment of the selected candidates while keeping one seat vacant in the category under which the petitioner claims a right to be appointed. Candidates from Sl. No.17 onwards were to be intimated of the said interim order so as to accord an opportunity of hearing to a person who may be affected by such order(s). Evidently, in response to such intimation, one Mr. Aman Pratap Singh, who finds mention at Sl. No. 32 in the Merit List, sought and was impleaded as a party. He filed a reply and has been heard.
12. The petitioner contends that he having scored 623.5 marks would rank at 17th position in the Merit List instead of the candidate who is currently shown in that position and has scored only 621.5 marks, while the last person in the impugned Final Result has scored only 530.5 marks.
13. R-1 contends that the petitioner has failed to place on record any documentary evidence to the effect that he was engaged by his employer predominately in the capacity to plead as an advocate in courts and Tribunals on behalf of his employer. It is to be noted though, that this was not a requirement or information to be furnished in terms of the Recruitment Advertisement. All that was required was compliance of Instructions No.4

and 5(x), which as noted hereinabove, has been complied with by the petitioner i.e. i) furnishing of SAIL's certificate to the effect that the petitioner acts and pleads regularly as an advocate on its behalf and he has been a permanent employee of SAIL since 2010 and was holding the post of Senior Manager (Law), Law Department, at SAIL's Corporate Office as of 30.08.2022 and ii) furnishing a subsequent certificate dated 06.10.2022 reiterating the aforesaid position and certifying that SAIL has no objection to the petitioner appearing in viva-voce for the DHJS on 13.10.2022, and that in case of selection in DHJS, the petitioner will be released from services of the company as per rules. In effect, all documents as required by the advertisement had been supplied.

14. The petitioner contends that the Impugned Final Result Notice is bad in law since it is in violation of the Instructions issued by R-1 itself. Instruction No. 4 (Annexure P-7) permits candidates working in Government Service or Public Sector Undertaking or in a bank to appear in the aforesaid examinations. The assumption being that upon succeeding in the examination they would be considered for employment. The petitioner further contends that Rule 9(2) of the DHJS Rules, 1970, has been misread and so has the dicta in *Deepak Aggarwal v. Keshav Kaushik and Ors.* (2013) 5 SCC 277 (three-Judges Bench) resulting in the erroneous rejection of the petitioner's candidature.
15. He submits that when he applied for recruitment to the DHJS via an online application form, the said form contained a specific category for 'PSU employee' candidates, he had made an honest and full disclosure apropos (i) his working status as a 'PSU Employee'; (ii) his designation of a 'Law Officer' in SAIL from 06.07.2010; (iii) his service at the time of submission

of the application and (iv) his job of regularly appearing, acting, and/or pleading on behalf of SAIL.

16. The issue of 7 years continuous practice as an advocate or a pleader immediately preceding the recruitment exercise was examined in *Deepak Aggarwal* (supra) wherein the Supreme Court has held, *inter-alia*, as under:

“ ...

71. In Jyoti Gupta v. High Court of M.P. [(2008) 2 MPLJ 486] , the Madhya Pradesh High Court was concerned with the question as to whether the Assistant Public Prosecutors were eligible to apply for appointment to the post of District Judges. The Madhya Pradesh High Court held as under: (MPLJ pp. 493 & 495, paras 13 & 18)

“13. ... 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 the 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) to 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 22-6-2001.

18. 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 Rule 7(1)(c) of the M.P. UchchatarNyayik 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.”

...

89. We do not think there is any doubt about the meaning of the expression “advocate or pleader” in Article 233(2) of the Constitution. This should bear the meaning it had in law preceding the Constitution and as the expression was generally understood. The expression “advocate or pleader” refers to legal practitioner and, thus, it means a person who has a right to act and/or plead in court on behalf of his client. There is no indication in the context to the contrary. It refers to the members of the Bar practising law. In other words, the expression “advocate or pleader” in Article 233(2) has been used for a member of the Bar who conducts cases in court or, in other words acts and/or pleads in court on behalf of his client.

In Sushma Suri [(1999) 1 SCC 330 : 1999 SCC (L&S) 208] , a three-Judge Bench of this Court construed the expression “members of the Bar” to mean class of persons who were actually practising in courts of law as pleaders or advocates. A Public Prosecutor or a Government Counsel on the rolls of the State Bar Council and entitled to practise under the 1961 Act was held to be covered by the expression “advocate” under Article 233(2). We respectfully agree.

90. *In U.P. State Law Officers' Assn. [(1994) 2 SCC 204 : 1994 SCC (L&S) 650 : (1994) 26 ATC 906] , this Court stated that though the lawyers of the Government or a public body on the full-time rolls of the Government and the public bodies are described as their law officers, but nevertheless they are professional practitioners. It is for this reason, the Court said that the Bar Council of India in Rule 49 of the BCI Rules (in its original form) in the saving clause waived the prohibition imposed by the said Rule against the acceptance by a lawyer of a full-time employment.*

91. *In Sushma Suri [(1999) 1 SCC 330 : 1999 SCC (L&S) 208] , a three-Judge Bench of this Court while considering the meaning of the expression “advocate” in Article 233(2) of the Constitution and unamended Rule 49 of the BCI Rules held that if a person was on the rolls of any Bar Council and is engaged either by employment or otherwise by the Union or State and practises before a court as an advocate for and on behalf of such Government, such person does not cease to be an advocate. This Court went on to say that a Public Prosecutor or a Government Counsel on the rolls of the Bar Council is entitled to practice. It was laid down that test was 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. The terms of engagement do not matter at all and what matters 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. The functions which the law officer discharges on his engagement by the Government were held decisive. We are in full*

agreement with the above view in Sushma Suri [(1999) 1 SCC 330 : 1999 SCC (L&S) 208] .

(Emphasis supplied)

92. *While referring to unamended Rule 49, this Court in Sushma Suri [(1999) 1 SCC 330 : 1999 SCC (L&S) 208] said that the Bar Council of India had understood the expression “advocate” as one who is actually practising before courts which expression would include even those who are law officers employed as such by the Government or a body corporate.*

...

97. *However, much emphasis was placed on behalf of the contesting respondents on Rule 49 of the BCI Rules which provides that an advocate shall not be a full-time salaried employee of any person, Government, firm, corporation or concern so long as he continues to 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. It was submitted that earlier in Rule 49 an exception was carved out that a “law officer” of the Central Government or of a State or of a body corporate who is entitled to be enrolled under the rules of the State Bar Council shall not be affected by the main provision of Rule 49 despite his being a full-time salaried employee but by the Resolution dated 22-6-2001 which was published in the Gazette on 13-10-2001, the Bar Council of India has deleted the said provision and hence on and from that date a full-time salaried employee, be he a Public Prosecutor or a Government Pleader, cannot be an advocate under the 1961 Act.*

98. *Admittedly, by the above resolution of the Bar Council of India, the second and third paragraphs of Rule 49 have been deleted but we have to see the effect of such deletion. What Rule 49 of the BCI Rules provides is that an advocate shall not be a full-time salaried employee of any person, Government, firm, corporation or concern so long as he continues to practise. The “employment” spoken of in Rule 49 does not cover the employment of an advocate who has been solely or, in any case, predominantly employed to act and/or plead on behalf of his client in courts of law. If a person has been engaged to act and/or plead in court of law as an advocate although by way of employment*

on terms of salary and other service conditions, such employment is not what is covered by Rule 49 as he continues to practise law but, on the other hand, if he is employed not mainly to act and/or plead in a court of law, but to do other kinds of legal work, the prohibition in Rule 49 immediately comes into play and then he becomes a mere employee and ceases to be an advocate. The bar contained in Rule 49 applies to an employment for work other than conduct of cases in courts as an advocate. In this view of the matter, the deletion of the second and third paragraphs by the Resolution dated 22-6-2001 has not materially altered the position insofar as advocates who have been employed by the State Government or the Central Government to conduct civil and criminal cases on their behalf in the courts are concerned.

(Emphasis supplied)

99. What we have said above gets fortified by Rule 43 of the BCI Rules. Rule 43 provides that an advocate, who has taken a full-time service or part-time service inconsistent with his practising as an advocate, shall send a declaration to that effect to the respective State Bar Council within the time specified therein and any default in that regard may entail suspension of the right to practice. In other words, if full-time service or part-time service taken by an advocate is consistent with his practising as an advocate, no such declaration is necessary. The factum of employment is not material but the key aspect is whether such employment is consistent with his practising as an advocate or, in other words, whether pursuant to such employment, he continues to act and/or plead in the courts. If the answer is yes, then despite employment he continues to be an advocate. On the other hand, if the answer is in the negative, he ceases to be an advocate....

(Emphasis supplied)

17.In *Union Territory Chandigarh and Ors v. CAT, Chandigarh Bench and Ors.*, 2016 SCC Online P&H 4499, the Punjab & Haryana High Court held as under:

“...

3. In a dispute over his eligibility, the question that arose for consideration before the Tribunal was whether the experience

gained by respondent No. 2 as Law Officer in Chandigarh Transport Undertaking while appearing before the Labour Court on regular and continuous basis, can be counted as experience at Bar? The Tribunal has answered the question in affirmative. Since respondent No. 2 was meanwhile interviewed under the interim direction issued by the Tribunal and he was declared successful in the final result, the Tribunal has issued the direction for his appointment as per merit in the final result.

...

6. Having given our thoughtful consideration to the submissions, we are satisfied that no case to interfere with the order passed by the Tribunal is made out. We say so for the reason that as per the eligibility conditions notified in the advertisement, the candidate was required to have "two years' experience at Bar as an Advocate". The phrase "experience" preceded by the word 'Advocate' connotes that the candidate should have appeared in Court besides undertaking the responsibility like drafting of pleadings etc. It has come on record and has been duly certified by the Director of Transport, U.T. Administration that "respondent No. 2 while working as Law Officer in Chandigarh Transport Undertaking has been regularly pleading the Court cases on behalf of this Department before the Labour Court Chandigarh". It obviously means that respondent No. 2 has been drafting the pleadings besides defending the department in Labour Court cases as a Management representative. The professional services rendered by respondent No. 2 before the Labour Court are in no way different than what an Advocate gains while practicing at the Bar. There is no material difference between the nature and quality of experience except that an Advocate may have the advantage of appearing in different type of cases but as a Management's representative before the Labour Court, he was dealing with only specialized cases under the Labour Laws. Nonetheless, the practice before the Labour Court, so long as it involves appearance before the Court, drafting of pleadings or examination of witnesses etc., it would amount to experience as an Advocate for all intents and purposes. We may in this regard quote the following text from the judgment of the Hon'ble Supreme

Court in Deepak Aggarwal v. Keshav Kaushik, (2013) 5 SCC 277 :-

“.....85. What we have said above gets fortified by Rule 43 of the BCI Rules. Rule 43 provides that an advocate, who has taken a full-time service or part-time service inconsistent with his practicing as an advocate, shall send a declaration to that effect to the respective State Bar Council within time specified therein and any default in that regard may entail suspension of the right to practice. In other words, if full-time service or part-time service taken by an advocate is consistent with his practicing as an advocate, no such declaration is necessary. The factum of employment is not material but the key aspect is whether such employment is consistent with his practicing as an advocate or, in other words, whether pursuant to such employment, he continues to be act and/or pled in Courts. If the answer is yes, then despite employment, he continuous to be an advocate. On the other hand, if the answer is negative, he ceases to be an advocate.....”

7. To test the petitioners' contention, the matter may be viewed from another angle also. There may be a young Advocate duly enrolled as Member of the Bar but unfortunately does not have any brief, he does not join any senior's office and does not get opportunity to appear as a legal aid counsel also. Can the petitioners be heard to say that such young Lawyer would not be eligible for the advertised post, for he does not have any 'actual experience' as an Advocate? The answer has to be in negative as the advertisement simply postulates two years' experience as an Advocate be it with or without brief.

...”

(Emphasis supplied)

18.R-1 contends that the petitioner cannot be recruited because he does not

have the continuous 7 year experience on the date of receipt of the application. Reference is made to sections 22(1), 24(1)(e), 28(1),(2)(d) and 49(1)(ah) of the Advocates Act, 1961 and to some Rules concerning the petitioner's enrolment as an advocate with the State Bar Council and his full-time employment status which are to be covered. The same are reproduced hereunder:

“S.22. Certificate of enrolment.—(1) There shall be issued a certificate of enrolment in the prescribed form by the State Bar Council to every person whose name is entered in the roll of advocates maintained by it under this Act.

...

S.24. Persons who may be admitted as advocates on a State roll.—(1) Subject to the provisions of this 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 following conditions, namely:—

(e) he fulfils such other conditions as may be specified in the rules made by the State Bar Council under this Chapter;

...

S.28. Power to make rules.—(1) A State Bar Council may make rules to carry out the purposes of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for—

(d) the conditions subject to which a person may be admitted as an advocate on any such roll;

...

S.49. General power of the Bar Council of India to make rules.— 1 [(1)] The Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe—

(ah) the conditions subject to which an advocate shall have the right to practice and the circumstances under which a person shall be deemed to practice as an advocate in a court;]”

19.R-1 says that since the petitioner has been enrolled with the Bar Council of Uttar Pradesh, the Bar Council of Uttar Pradesh (Constitution and Conduct of Business) Rules, 1963 (UP Rules) would apply and Rule 47 framed by the said Bar Council under section 28 (1) and 28 (2) (d) of the Act reads as under:

“Rules under Section 28(1) and 28(2)(d) of the Act

"Rule 47: A person who is otherwise qualified to be admitted as an Advocate but is either in full or part- time service or employment or is engaged in any trade, business or profession shall not be admitted as an advocate:

Provided, however that this rule shall not apply to-

(i) Any person who is a Law Officer of the Central Government or the Government of a State.

(ii) Any person who is an Articled Clerk of an Attorney;

(iii) Any person who is an assistant to an Advocate or to an Attorney who is (sic). Advocate;

(iv) Any persons who is in part time service as a Professor, Lecturer or Teacher in Law;

(v) Any person who by virtue of being a member of Hindu joint family has an interest in a joint Hindu family business, provided he does not take part in the management thereof; and

(vi) Any other person or class of persons as the Bar Council may from time to time exempt."

20. R-1 argues that the said bar exempts only a person who has worked as a Law Officer of the Central Government or of the State Government and not a person like the petitioner. However, it is to be noted that clause (vi) of Rule 47 provides for extending exemption from application of the Rule to “any other person or class of persons as the Bar Council may from time to time exempt”. Regarding the process of enrolment, the Bar Council of Uttar

Pradesh has framed “Rules under section 28(2)(e) and section 26 of the Act (Enrolment)”. Rule 11 of the latter Rules is identical to Rule 47 framed under s.28(1) and 28(2)(d). It reads as under:

“...11. A person who is otherwise qualified to be admitted as an Advocate but is either in full or part-time service or employment or is engaged in any trade. Provided, however, that this rule shall not apply to-

(i) Any person who is a Law Officer of the Central Government or Government of a State.

(ii) Any person who is an articled Clerk of an Attorney.

(iii) Any person who is an assistant to an Advocate or to an Attorney who is an Advocate.

(iv) Any person who is a part-time service as a Professor, Lecturer or Teacher in Law.

(v) Any person who by virtue of being a member of Hindu joint family has a interest in a joint Hindu Family business, provided he does not take part in the management thereof, and

(vi) Any other person or class of persons as the Bar Council of India may from time to time exempt.”

21. The petitioner has produced a Certificate dated 14.11.2022 issued by the Bar Council of Uttar Pradesh. It is reproduced as under:

ANNEXURE 'A'

2

I.M. Khan, Advocate
Member & Former Chairman,
Bar Council of Uttar Pradesh

**Residence:-**

2, Ponappa Road, New Cantt., Allahabad

Contact:-

9415218689, 9616345764

पत्रांक सं/Letter No.

4894

दिनांक/Date

14/11/22

TO WHOMSOEVER IT MAY CONCERN

Mr. Ashish Rastogi is enrolled as an Advocate on the rolls of Bar Council of Uttar Pradesh vide Enrolment No. 05858/2010.

Shri Ashish Rastogi has been working as a Law Officer in Steel Authority of India Ltd., a Central Government Company since July, 2010. The declarations of Mr. Ashish Rastogi were duly considered by Bar Council of Uttar Pradesh and after consideration of the same in view of Rule 11 of Uttar Pradesh Bar Council Rules framed under Section 28(2)(c) and Section 26 of the Advocates Act, 1961, Mr. Ashish Rastogi was issued a Certificate of Practice No. 112124/2018, under Certificate of Practice and Renewal Rules, 2014.

As per the rolls of Bar Council of Uttar Pradesh, Mr. Ashish Rastogi is a Practicing Advocate.

(Imran Mabood Khan)

Member-Secretary

Bar Council of Uttar Pradesh
19, Maharshi Dayanand Marg,
Prayagraj-211002

- 22.The Bar Council of Uttar Pradesh has duly considered the case of the petitioner as being a Law Officer working with SAIL since July, 2010 and has certified him as a practicing advocate especially in the light of Rule 11 of the Enrolment Rules framed under section 28(2)(d) and section 26 of the Advocates Act, 1961. The residuary exemption clause (vi) under Rules 47 and 11 are identical. The Enrolment Rule 11 and Certificate of Practice as an advocate, has been issued by the State Bar Council. Clearly the Bar Council of Uttar Pradesh has examined and taken a conscious and specific decision that the bar to Rule 11 will not apply to the petitioner. That being the position, all that is required now is to see whether the petitioner had produced documents to show that he was in continuous practice of 7 years preceding the examination as per Rule 9 (2) of the DHJS Rules, 1970.
- 23.The petitioner has supplied to R-1, the list of his appearances before the various judicial and quasi-judicial fora. In its Written Submissions R-1 has analysed his appearances as under:

नित्यमेव जयते

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ORDER SHEETS	PAGE NOS.	COURT/ TRIBUNAL	APPEARANCE OF PETITIONER	REMARKS
26.05.2022 29.08.2022 02.06.2022 09.09.2022 05.09.2022 29.08.2022 02.09.2022 23.08.2022 30.08.2022 19.07.2022 18.07.2022	2-7 9 10 11 12 13-14 15-16 17-18 19	DELHI HIGH COURT	ADVOCATE	Since these orders pertain to period after 22.02.2022 (date of advertisement), same cannot be taken into consideration.
31.01.2022	8	DELHI HIGH COURT	LAW OFFICER (SAIL)	(i) Appearance as a Law Officer. (ii) Non-effective hearing.
08.08.2021	20-22	ARBITRATION (Larsen & Toubro Ltd. vs. SAIL)	LAW OFFICER (SAIL)	(i) Appearance given as a Law Officer. (ii) Proceeding Sheet has been signed by Advocates of the parties and the name of Petitioner does not figure in the same. The Two lawyers representing Respondent/ SAIL are Mr. Sunil Kumar Jain and Mr. Aditya Swarup.
22.07.2021 23.07.2021 24.07.2021	23-27 28 - 33 34-39	ARBITRATION (SAIL vs. International Seaports (Haldia) Pvt. Ltd.	LAW OFFICER	(i) Appearance as a Law Officer. (ii) Mr. Yashraj Singh Deora, represented SAIL as Advocate.
17.02.2021	40-41	CONCILIATION (Larsen & Toubro Ltd. vs.	LAW OFFICER, SAIL	(i) Appearance as a Law Officer. (ii) Mr. Aditya Swarup, Mr. Rupin Bahl, Mr.

		SAIL)		Swaroopananda Mishre represented SAIL as Advocate
23.01.2020 21.03.2020 21.01.2020 18.09.2019 16.12.2019	42 43 44 65/67 66	CRIMINAL CASE	COUNSEL FOR COMPLAINANT IN FIR NO. 227/2019	Non-effective hearings in Criminal Cases where the Petitioner is being led by the Senior Counsel
16.05.2016	135	CC No. 178/12 & 179/12	LAW OFFICER	Appearance given as a Law Officer
16.05.2016	136	SAIL vs. SM Lata	LAW OFFICER	Appearance given as a Law Officer
16.05.2016	137	CC No. 182/2012	LAW OFFICER	Appearance given as a Law Officer
26.10.2020 30.10.2020 19/20.10.2020	45-46 47-48 62-64	ARBITRATION (Shriram EPC Ltd. vs. SAIL & Anr.)	ADVOCATE/	(i) Appearance as a Law Officer. (ii) Ms. Meenakshi Arora, Sr. Adv., Ms. Bhabna Das and her associates, represented SAIL as Advocate
10.12.2019 16.07.2019 16.07.2019	94-96 97-99 100-102		MANAGER LAW & Advocate (SAIL)/	
06.07.2018	105-106		Advocate	
07.07.2018	107-108		Advocate	
02.06.2018	109-113		DEPUTY MANAGER (LAW)	
01.09.2020 30.09.2020 31.10.2020	49-56 57-59 60-61	ARBITRATION	SENIOR MANAGER (LAW) and Advocate	In the category of Advocates for Respondent/ SAIL, only names of Ms. Meenakshi Arora, Sr. Advocate and Mr. Ashish Tiwari have been mentioned, while Petitioner has been shown as the SAIL's representative.

08.05.2019 07.05.2019 07.05.2019 06.03.2019 06.03.2019	68-69 70 71 72-74 75-77	ARBITRATION (Primetals Technologies India Pvt. Ltd. vs. SAIL)	DEPUTY MANAGER (LAW) and Advocate	(i) Appearance as a Law Officer. (ii) Ms. Renu Gupta and Ms. Akshaya Ganpath represented SAIL as Advocates
06.06.2019 10.06.2019 20.09.2019 23.08.2019	78-79 80-81 82-83 93-94	ARBITRATION (M/s. Goyal MG Gases Pvt. Ltd. vs. M/s. SAIL)	DEPUTY MANAGER (LAW) & Advocate	(i) Appearance as a Law Officer. (ii) Ms. Veronica Mohan and Mr. Aman Bhatnagar represented SAIL as Advocates
30.07.2019	84	ARBITRATION (M/s. Shapoorji Pallonji & co. Pvt. Ltd. vs. M/s. SAIL)	DEPUTY MANAGER (LAW) & Advocate	(i) Appearance as a Law Officer. (ii) Ms. Bhabna Das, represented SAIL as Advocate
20.02.2019 12.03.2019 16.04.2019 14.05.2019 12.12.2019 20.06.2017 21.12.2017 02.11.2016	85 86-87 88-89 90 91-92 132 134 138	ARBITRATION (M/s. Era Infra Engineering Ltd. vs. M/s. SAIL)	LAW OFFICER & Advocate MANAGER (LAW) & Advocate ASSISTANT MANAGER (LAW), SAIL / DEPUTY MANAGER (LAW), SAIL	(i) Appearance as a Law Officer. (ii) Mr. M.K. Pandey and his other associates, Mr. Ravi Mohala represented SAIL as Advocates (iii) In the absence of other lawyers, Petitioner's presence is marked as Deputy Manager (Law), SAIL and not as an Advocate
05.12.2019	103- 104	ARBITRATION (M/s. S.P. Singla vs. M/s. SAIL)	MANAGER (LAW) & Advocate	(i) Appearance as a Law Officer. (ii) Mr. Joy Basu, Sr. Adv. Along with his other associates, represented SAIL as Advocates
12.12.2018 13.12.2018 14.12.2018 15.12.2018	114- 121	International Arbitration (ICC) (Daniel Corus BV, Netherlands vs. SAIL)	ADVOCATE	Other Advocates, Mr. Hiroo Advani, Mr. C.M. Lall, etc. formed part of the team on behalf of SAIL. Petitioner just one of these team members.

09.03.2018	122	Execution No. 113/2017	Law Officer of Decree Holder (SAIL)	Appearance of Petitioner as Law Officer of SAIL.
15.09.2017	131	(Sail ISP Ltd. vs. Alfa Steel)		
21.02.2017	123-124	OMP(COMM.) 402/2016	Advocate/	(i) Different Senior Lawyers along with their associates, formed part of the team representing SAIL.
20.07.2017	125	(SAIL vs. Essar Shipping Ltd.)	Law Officer (SAIL)	(ii) In hearing of 20.07.2017, Petitioner gave representation as Law officer of SAIL.
25.10.2017	126	OMP(I) (COMM.) 436/2017	Advocate	Different Senior Lawyers along with their associates, formed part of the team representing SAIL.
		(Era Infra Engineering Ltd. vs. SAIL)		
09.10.2017	127-130	OMP(I) (COMM.) 408/2017	Deputy Manager (Law), SAIL	Appearance given as a Law Officer.
		(Era Infra Engineering Ltd. vs. SAIL)		
10.10.2017	133	Suit No. 17109/2016	Law officer on behalf of Plaintiff	Appearance as a Law Officer on behalf of Plaintiff/ SAIL
		(M/s. SAIL vs. Sunil Engineering etc.)		
31.08.2015	139	OMP (E) 5/2015	Assistant Manager (Legal)	Appearance as a Law Officer on behalf of SAIL
		(British Marine PLC vs. SAIL)		

24. The Remarks Column showing the petitioner only as the Law Officer of his employer cannot be a ground for rejection of his experience in litigation and proof of continuously practicing as an advocate because he could not have mentioned or described his position as anything other than a Law Officer, albeit he was acting and/or pleading on behalf of his employer as an advocate. In fact, not mentioning himself as a Law Officer of SAIL could well raise an issue of incorrect information or misrepresentation. He has appeared substantively as an advocate for his employer in cases and/or has been an assisting counsel or briefed arguing counsel. His nomenclature of Law Officer would not make any difference to his predominant work of acting/pleading as an advocate. The Bar Council of Uttar Pradesh recognises and certifies him as an advocate despite his full-time employment with SAIL. The number of appearances of the petitioner before courts and Tribunals are, *ex-facie*, significant. It is not known whether similar experience certificate or instances of appearances was seen by R-1 with respect to other successful candidates who were not full-time employed advocates.

25. R-1 further contends that the nature of work carried out by the full-time employee has to be seen, i.e. it should pertain to his acting or pleading as an advocate. In this regard, the petitioner has filed a record of the Corporate Office Manual of SAIL apropos the variety of duties performed by SAIL's Law Officer. The same reads as under:

CORPORATE LAW DEPARTMENT

The Corporate Law Department, Delhi through its Law Officers performs a variety of functions including, but not limited to, the following: -

1. Handling Litigations on behalf of SAIL at Supreme Court, Delhi High Court, Lower Courts and various Tribunals in Delhi-NCR which includes Appearing, Acting and/or Pleading in Litigations on behalf of SAIL.
2. Handling Domestic and International Arbitrations with venue situated in Delhi which includes Appearing, Acting and/or Pleading in Domestic and International Arbitrations on behalf of SAIL.
3. Briefing Counsels, Senior Counsels in Ongoing Litigations and Arbitrations and regularly attending conferences in relation to such Litigations and Arbitrations.
4. The vetting and drafting of various contracts, agreements and other documents referred to it by different departments of SAIL.
5. Providing legal opinion on a variety of issues ranging from Labour Law, Environmental Law, Mining Law, Contracts, Shipping Law, Taxation, Constitutional issues etc. to all departments and/or upper management of SAIL. Plants/Units also refer complex issues for guidance/clarification to Corporate Law. Various Departments refer files to Law Department for its opinion before being put up to the Upper Management or Board of Directors.
6. Parliament queries that relate to the legal cases/arbitrations/policy of SAIL are dealt with on a time bound basis. Ministry of Steel and other Government Bodies send queries for the opinion/views of SAIL. These topics vary from nascent legislations or obsolete Acts.
7. Overall monitoring of legal cases in all plants/units. The Corporate Law Department involves itself in high value/stake matters in other States to ensure proper handling of these matters.
8. Compilation of legal data and monitoring of compliances for e.g. Legal Information Management & Briefing System (LIMBS).

While disposing the above functions law officers are required to:

1. Independently Assess disputes in light of variables such as litigation costs and merits of the matter to decide on the best course of action for the company.
2. Assist in the drafting of pleadings to be filed in Court/Arbitration after holding conferences with the concerned departments and lawyers of SAIL.
3. Appear in court hearings on behalf of SAIL and assist the Counsels/Senior Counsels in the presentation of arguments in the matters of SAIL before various courts.
4. Decide on appeal from/implementation of Awards and Orders passed by various Courts.
5. Keep himself/herself updated with the legislations passed and judgments pronounced by the different forums so as to keep himself upto date with latest legal developments.

26. From perusal of the above-mentioned duties, it is evident that the predominant function of a Law Officer of SAIL is to act and/or plead and perform functions which any other advocate would perform in relation to court cases including drafting of contracts and pleadings, filing of cases/pleadings and monitoring their progress, attending conferences with lawyers including Senior Advocates, rendering legal opinions etc. In effect his duties and functions with SAIL, encompassed all that a lawyer would do in his normal course of practice of law. The list of his appearances before various courts, Tribunals, etc. show that he has been in continuous practice for the past 7 years. He thus meets the requirement of Rule 9(2) of the DHJS Rules, 1970. Therefore, the contention of R-1 is untenable and is accordingly rejected.

27. What emanates from the documents on record and the preceding discussions is that the Bar Council of Uttar Pradesh has taken a conscious decision with reference to its Enrolment Rule 11, after considering the full disclosure by the petitioner that he was in full-time employment of SAIL and that he was appearing before various courts, to certify the petitioner as a practicing advocate enrolled with it. In view of this certification, nothing more needs to be examined by R-1.

28. As regards the submissions made on behalf of R-2 that he be given due consideration in terms of the extant Rules, the petitioner submits that although R-2 may find his name in the Merit List, the same would not confer upon him a vested right for appointment into the DHJS. Reference is made to *Commissioner of Police and Anr v. Umesh Kumar*, (2020) 10 SCC 448, which held as under:

“...19. The real issue, however, is whether the respondents were entitled to a writ of mandamus. This would depend on whether they

have a vested right of appointment. Clearly the answer to this must be in the negative. In *Punjab SEB v. Malkiat Singh* [*Punjab SEB v. Malkiat Singh*, (2005) 9 SCC 22 : 2006 SCC (L&S) 235], this Court held that the mere inclusion of candidates in a selection list does not confer upon them a vested right to appointment. The Court held : (SCC p. 26, para 4)

“4. ... the High Court [*Malkiat Singh v. Punjab SEB*, 1999 SCC OnLine P&H 75 : ILR (1999) 2 P&H 329] committed an error in proceeding on the basis that the respondent had got a vested right for appointment and that could not have been taken away by the subsequent change in the policy. It is settled law that mere inclusion of name of a candidate in the select list does not confer on such candidate any vested right to get an order of appointment. This position is made clear in para 7 of the Constitution Bench judgment of this Court in *Shankarsan Dash v. Union of India* [*Shankarsan Dash v. Union of India*, (1991) 3 SCC 47 : 1991 SCC (L&S) 800] which reads : (SCC pp. 50-51)

‘7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subash Chander Marwaha* [*State of Haryana v. Subash Chander Marwaha*, (1974) 3 SCC

220 : 1973 SCC (L&S) 488] , *Neelima Shangla v. State of Haryana* [*Neelima Shangla v. State of Haryana*, (1986) 4 SCC 268 : 1986 SCC (L&S) 759] or *Jatinder Kumar v. State of Punjab* [*Jatinder Kumar v. State of Punjab*, (1985) 1 SCC 122 : 1985 SCC (L&S) 174] .’”

(Emphasis supplied)

29. The test as is gleaned from the precedents referred to hereinabove, is: whether the substantive and predominant duties discharged by the candidate is what an advocate would do in her/his legal profession and whether the candidate is engaged to act or plead on behalf of her/his employer in a court of law, tribunal, etc., as an advocate. In the present case, the petitioner’s duties were predominantly of an advocate.
30. Enrolment of advocates on its rolls is a function entrusted to State Bar Councils. Insofar as the Bar Council of Uttar Pradesh has specifically considered the petitioner’s case under Rule 11 of its Enrolment Rules and has issued him a certificate to the effect that he is a practising advocate, there can be no cause for doubt in this regard. The petitioner was enrolled as an advocate in 2010. He fulfils the requirement of “*continuously practicing as an advocate for not less than 7 years on the last date of receipt of applications*”. Therefore, he shall be considered as a successful candidate for appointment.
31. In view of the above, the rejection of the petitioner’s candidature as notified in the impugned Final Result Notice is set aside. R-1 is directed to modify the impugned Final Result Notice by including the petitioner at Sl. No. 17 or higher, if it is so requisite, in the list of successful candidates as he has scored 623.5 marks, which are more than the 621.50 marks scored by the candidate currently shown at Sl. No. 17. In any case, the petitioner is far more meritorious than the last person in the list who has secured only 530.5

marks. Surely, merit would always be preferred and not become a victim to nomenclatures such as Advocate and Law Officer. The amended Final Merit List/Result shall be published within four weeks of receipt of this order.

32.The petition is disposed-off in terms of the above. Pending application too is disposed-off.

NAJMI WAZIRI, J

VIKAS MAHAJAN, J

March 17, 2023
'RD'



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