

SUSHMA SURI ETC. ETC.

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v

GOVT. OF NATIONAL CAPITAL TERRITORY OF
DELHI AND ANR.

OCTOBER 8, 1998

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[M.M. PUNCHHI, C.J., K.T. THOMAS AND
S. RAJENDRA BABU, J.J.]

Constitution of India, 1950: Article 233(2)—Delhi Higher Judicial Service—Appointment of—Eligibility—Officers from Delhi Judicial Service or Advocate Pleader of not less than seven years standing—Public prosecutor/ Government Counsels/ Standing Counsels of Corporation or Authority—Acting or pleading in the Courts on behalf of employers—Held, he is an advocate for the purpose of Article 233(2)—Thus entitled to be considered for appointment to Delhi Higher Judicial Service—Advocates Act, 1961; Section 2(a)—Bar Council of India Rules: Rule 9.

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Service Law—Additional Government Advocate—More than seven years standing as an Advocate—Engaged in acting/pleading in Court—Non-consideration for appointment to Delhi Higher Judicial Service—On challenge, writ petition dismissed by High Court—On appeal, held, eligible for consideration—However, as the recruitment process is completed and selected candidates are already appointed, appellant not entitled to any relief—Direction for following the procedure laid down, in pending and future recruitments—Delhi Higher Judicial Service Rules, 1970: Rules 5 and 7.

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Words & Phrases :

'Advocate'—Meaning of in the context of Rule 49 of Bar Council of India Rules.

'From the Bar'—Meaning of in the context of Rule 7 of Delhi Higher Judicial Service Rules, 1970.

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Appellant was working as Additional Government Advocate in the Supreme Court of India. In response to an advertisement issued by Delhi High Court, she applied for appointment to the Delhi Higher Judicial Service. The candidates for appointment to Delhi Higher Judicial Service should be

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A either an officer in Delhi Judicial Service or an advocate or pleader of not less than seven years standing. When appellant was not called for interview, she filed a writ petition. The High Court relying upon the judgment in *Oma Shanker Sharma's case** held that she was not entitled to be considered for appointment as she ceased to be an Advocate for the purpose of Article 233(2) of the Constitution. Hence the present appeals.

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The contention of the appellant was that she had more than seven years experience as an Advocate and therefore was fully eligible to be appointed to the Higher Judicial Service and High Court was not justified in not considering her case for appointment.

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Disposing of the appeals, this Court

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HELD : 1.1. 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 Advocates Act, 1961, he answers the description of the Advocate. Thus High Court was not justified in holding that appellant is not entitled to be considered for appointment.

[193-D; 194-E]

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1.2. 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 concerned Bar Council and shall cease to practise as long as he is in such employment. However, an exception is made in such cases to Law Officers of the Government and Corporate bodies despite his being a full time salaried employee 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

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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

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he is engaged to act or plead on its behalf in a Court of Law as an Advocate. If he is not acting or pleading on behalf of his employer, then he ceases to be an Advocate. Therefore, 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

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Government or body corporate. [193-E-F-G-H; 194-A-B]

All India Judges Association v. Union of India, [1998] 9 SCC 245, A referred to.

1.3. The expression used 'from the Bar' would only mean from the class or group of Advocates practising in Courts of law as pleader or Advocate. It does not have any other attribute. [194-D]

2. Whenever any recruitment is conducted to fill up any post, the area of recruitment must be broad based as rules permit. To restrict it to Advocates who are not engaged as a public prosecutor/Government Counsel/Standing Counsel or any Corporation or Authority, 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 person who fall in this description, cannot be stated to be irrelevant not detrimental to selection to the posts of Higher Judicial Service. [193-B-C]

3. However, it is not possible to give any relief to the appellants because when they commenced this litigation, recruitment process was still going on and it has gone too far ahead. Now that the same is complete and the selected candidates have already been appointed and they have reported to duty at different places and they are not impleaded as parties in these proceedings, it would not be proper to upset such appointments. In the circumstances the authorities concerned including the High Court and Government are directed to process the applications for recruitment of candidates in future in the light of the position as explained above. If there are any pending recruitments. the view taken in the instant case shall be applied to them also.[194-E-F-G]

**Oma Shanker Sharma v. Delhi Administration and Anr.*, Civil Writ Petition No. 1961 of 1987 decided on 13.1.1988, overruled.

Chander Mohan v. Union of India, AIR (1966) SC 1987 and *Satya Narain Singh v. Union of India*, AIR (1985) SC 308, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3021 of 1997 etc. etc.

From the Judgment and Order dated 31.1.97 of the Delhi High Court in W.P. No. 286 of 1997.

A N.N. Goswami, Arun Jaitley, Gopal Subramaniam, T.C. Sharma, Rajiv Sharma, Ajay Sharma, Rupesh Kumar, Ms. Neelam Sharma, Ms. A. Subhashini, Shrish Kr. Misra, Rajiv Dutta, (Santosh Kumar) for R.N. Keshwani, Mahabir Singh, (Mrs. Sushma Manchanda,) for D.S. Mehra, Aruneshwar Gupta, Srilok Nath Rath and Surya Kanta for the Appearing parties.

B The Judgment of the Court was delivered by

RAJENDRA BABU, J. Civil Appeal No. 3021 of 1997.

C Appellant responded to an advertisement issued by the High Court of Delhi inviting applications from candidates who have practiced as advocate for recruitment to the Delhi Higher Judicial Service claiming that she had put in experience for not less than seven years as an advocate at the time of filing the application. In 1982 Mrs. Sushma Suri passed the examination of Advocate on Record conducted by Supreme Court of India and in 1986 she was appointed as Assistant Government Advocate. Thereafter she was promoted to the post of Additional Government Advocate in the Supreme Court of India. When she was not called for interview, she filed a petition in the High Court under Article 226 of the Constitution. The High Court relying on a Division Bench decision of the same court in Civil Writ Petition No. 1961 of 1987 in *Oma Shanker Sharma v. Delhi Administration and Another*, decided on 13.1.1988 as affirmed by this Court in S.L.P. (C) No. 3088/88 held that the petitioner is not entitled to be considered for appointment. Hence this appeal.

D The High Court in *Oma Shanker Sharma's* case held that there are two sources of recruitment to Delhi Higher Judicial Service namely, (i) officers in Delhi Judicial Service and (ii) Advocate or pleader of not less than seven years' standing. The petitioner therein being in the service of the Union Administration could not fall under first category nor could he be treated as an advocate since the Law officers of the Government such as public Prosecutors/Government counsel may not cease to be advocates for purposes of Advocates Act but yet they are not members of the Bar. On that basis the claim of the petitioner therein was denied. In the special leave petition against that order, this Court held that the appellant being a Public Prosecutor was in the service of Union Territory and as such was not eligible to be considered for appointment in the Delhi Higher Judicial Service. However whether such Public Prosecutor would be an advocate was not considered by this Court in that decision. The stand of the parties in these cases is identical as in *Oma Shanker Sharma's*, case (supra). Hence we wish to examine the correctness of the view expressed by the High Court as to whether a Public Prosecutor/

Government counsel/Standing counsel of any corporation or authority would A
cease to be an advocate for the purpose of Article 233(2) of the Constitution
so as not to belong to the Bar.

The Rules of recruitment have been framed under Proviso to Article 309
of the Constitution known as Delhi Higher Judicial Service Rules, 1970 B
(hereinafter referred to as 'the Rules'). Rule 5 thereof provides for the mode
of recruitment. The recruitment of persons to the service shall be made by the
Administrator in consultation with the High Court. In regard to the persons
not already in Delhi Judicial Service, appointment to service shall be made by
the Administrator on the recommendations to be made by the High Court. C
Rule 7 pertains to regular recruitment and provides that persons who had
been recruited and promoted on the basis of selection from members of the
Delhi Judicial Service, who have completed not less than ten years of service
in Delhi Judicial Service and by direct recruitment from the bar provided that
not more than one third of the posts in the service shall be held by direct D
recruits. Obviously this rule has been framed to be in conformity with Article
233 of the Constitution. Article 233(1) thereof provides for appointment of
persons who are already in service while Article 233(2) provides that a person
not already in service is eligible for appointment if he has been for not less
than seven years an advocate or a Pleader and is recommended for the
purpose by the High Court. Referring to the expression 'service' in Article
233(2) it has been held by this Court in *Chander Mohan v. Union of India*, E
AIR (1966) SC (1987) and *Satya Narain Singh v. Union of India*, AIR (1985)
SC 308, that it means "judicial service". However, it is not the contention
either before the High Court or before us that the appellant is in judicial
service. On the other hand the contention is that she has more than seven
years experience as advocate and, therefore, is fully eligible to be appointed
to the Higher Judicial Service and the High Court was not justified in not F
considering her case for appointment. Hence we have to examine the only
question whether the appellant is an "advocate" for the purpose of Article
233(2) of the Constitution and "from the Bar" as envisaged in Rule 7 of the
Rules.

We have to ascertain the meaning of the expression 'advocate or a G
pleader' used in Article 233(2) of the Constitution and to do so we may use
the Advocates Act and the rules framed by the Bar Council. Under Section
2(a) of the Advocates Act. 'Advocate' means advocate entered in any roll
under the provisions of the Act.

Rule 49 framed by the Bar Council reads as follows :-

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A “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 practise as an Advocate so long as he continues in such employment.

B 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.*

C 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.”

D If a person on being enrolled as an advocate ceases to practice law and takes up an employment, such a person can by no stretch of imagination be termed as an advocate. However, if a person who is on the rolls of any Bar Council is engaged either by employment or otherwise of the Union or the State or any Corporate body or person practices before Court as an advocate

E for and on behalf of such Government, Corporation or authority or person, the question is whether such a person also answers the description of an advocate under the Act. That is the precise question arising for our consideration in this case.

F This Court in I.A. No.32 of 1995 in Review Petition No. 248 of 1994 in Writ Petition (Civil) No. 1022 of 1989 *All India Judges Association v. Union of India* decided on 10.5.1985 held that :-

G “There is no doubt in our minds that what was intended by the provision was that a candidate for appointment to judicial office should be a person who had three years experience of practice as an advocate. He must be a lawyer in the sense that he regularly practices before a Court or tribunal, who appears for his clients before the Court or Tribunal. It may be that in a given case he may do so only for a client who is his employer.”

H For purposes of 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 Higher Judicial Service should be a person who regularly practices before the Court or Tribunal appearing for a client. A

In *Oma Shanker Sharma's* case, 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 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. C
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 Higher Judicial Service.) D
The expression 'members of the Bar' in the relevant rule would only mean that a 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 practice under the Act, he answers the description of an advocate. E

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 concerned Bar Council and shall cease to practise as long as he is in such employment. However, an exception is made in such cases to 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. F
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 H

- A 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, 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.

- C If that be the true position, we fail to understand how the object of recruitment could be defeated if these persons are also allowed to participate in the recruitment process. None of the decisions referred to in *Oma Shanker Sharma's* case has examined the matter in this perspective. Either those decisions were concerned with the distinction between service and judicial service or meaning of expression 'advocates' in other contexts. We think it is in this manner that the expression used in Article 233(2) of the Constitution
- D has to be understood and the rules framed by the Delhi Administration in this regard have to be read in the light of the constitutional provisions. The expression used 'from the Bar' would only mean from the class or group of advocates practising in Courts of law. It does not have any other attribute.

- E On the above analysis made by us, we think that the view taken by the High Court cannot be upheld.

- F However, we are not in a position to give any relief to the appellant before us now because when she commenced this litigation, recruitment process was still going on and it has gone too far ahead. Now that the same is complete and the selected candidates have already been appointed and they have reported to duty at different places and they are not impleaded as parties in these proceedings, it would not be proper to upset such appointments. All that we can now do is to direct the authorities concerned including the High Court and Government to process the applications for recruitment of candidates in future in the light of the position as explained
- G above. If there are any pending recruitments, the view taken by us shall be applied to them also. The appeal, therefore, stands disposed of in the manner stated above.

CIVIL APPEAL NOs. 3022 AND 3022 OF 1997

- H These two matters arise out of a common order which was the subject

matter of Civil Appeal No. 3021/97 which we have disposed of just now. A
Following the decision and for the reasons stated therein, these appeals also
stand disposed of in the same terms as set forth therein.

CIVIL APPEAL NOS. 8359 AND 8360 OF 1997

These appeals arise out of a common order made by the High Court of B
Judicature at Allahabad on 26.8.1997 in Civil Miscellaneous Writ Petition Nos.
37519 of 1996 and 37059 of 1996 on identical considerations as available in
the order made by the High Court of Delhi in Writ Petition No. 286 of 1997
which was the subject matter of Civil Appeal No. 3021 of 1997. Following the
said decision and for the reasons stated therein, these appeals also stand C
disposed of in the same terms as set forth in that case.

WRIT PETITION (CIVIL) NO. 189 OF 1997

In this Writ Petition under Article 32 of the Constitution, the petitioner D
seeks for a direction to consider his candidature for appointment to the
Higher Judicial Service in the National Capital Territory of Delhi. We have
examined the relevant rules and passed an order in Civil Appeal No. 3021 of
1997. Following the order made therein, this Writ Petition stands disposed of
in the same terms as set forth in C.A.No. 3021/97.

WRIT PETITION (CIVIL) NO. 2 OF 1998 E

In this Writ Petition under Article 32 of the Constitution, the petitioner
is seeking for a direction to consider his candidature for appointment to
Higher Judicial Service in the State of Rajasthan. We have examined the
position of similar claims and declared the law in the matter. If the petitioner F
satisfies the conditions thereto, he may place necessary material before the
concerned authority. We hope the same would be examined in the light of the
decision rendered by us in Civil Appeal No. 3021/97. Subject to what is stated
above, this Writ petition is disposed of.

S.V.K.I.

Appeals and Petition disposed of.