

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE SMT. JUSTICE P.V.ASHA

TUESDAY, THE 14TH DAY OF JULY 2020 / 23RD ASHADHA, 1942

WP(C).No.20301 OF 2019(R)

PETITIONER:

K.DEEPA, AGED 43 YEARS
(ROLL. NO.K/940/2003), ADVOCATE, RESIDING AT
THACHAMPARA HOUSE, KADARALA, MUTHUKKURISSY PO,
PALAKKAD.

BY ADVS.
SRI.S.SREEKUMAR (SR.)
SRI.P.MARTIN JOSE
SRI.P.PRIJITH
SRI.THOMAS P.KURUVILLA
SRI.MANJUNATH MENON
SRI.AJAY BEN JOSE
SRI.R.GITHESE
SHRI.HARIKRISHNAN S.

RESPONDENTS:

- 1 STATE OF KERALA REPRESENTED BY SECRETARY TO
GOVERNMENT, DEPARTMENT OF HOME AFFAIRS, GOVERNMENT
SECRETARIAT, THIRUVANANTHAPURAM-695 001.
- 2 THE HIGH COURT OF KERALA
KOCHI-682 031 REPRESENTED BY REGISTRAR GENERAL.
- 3 K.V.REJANISH, ADDITIONAL MUNSIF, RESIDING AT
KARAMPILLIL HOUSE, HOUSE NO.21/24, NETTOOR PWD
ROAD, NETTOOR PO, ERNAKULAM-682 040.

R1 BY SPECIAL GP.SRI.N.MANOJ KUMAR
R2 BY ADV. SRI.ELVIN PETER P.J.
R3 BY ADV. SRI.S.P.ARAVINDAKSHAN PILLAY
R3 BY ADV. SMT.N.SANTHA
R3 BY ADV. SRI.V.VARGHESE
R3 BY ADV. SRI.PETER JOSE CHRISTO
R3 BY ADV. SRI.S.A.ANAND
R3 BY ADV. SMT.L.ANNAPOORNA
R3 BY ADV. SHRI.VISHNU V.K.
R3 BY ADV. KUM.ABHIRAMI K. UDAY

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 09-
07-2020, THE COURT ON 14-07-2020 DELIVERED THE FOLLOWING:

P.V.ASHA, J.

W.P. (C) No.20301 of 2019-R

Dated this the 14th day of July, 2020

JUDGMENT

The petitioner, who was included in the rank list for appointment to the post of District Judge in the Kerala Higher Judicial Service, is challenging the appointment of the 3rd respondent as District and Sessions Judge.

2. The High Court of Kerala issued Ext.P1 notification dated 21.11.2017 inviting applications for appointment as District and Sessions Judges in the Kerala Higher Judicial Service by direct recruitment from the Bar. 4 regular vacancies (probable), 2 NCA vacancies of Scheduled Castes and one NCA vacancy each of Hindu Nadar, Muslims, Latin Catholics/Anglo Indians, Viswakarmas and Ezhavas, Thiyyas and Billavas communities, were notified. After the written examination and interview, the High Court published Ext.P4 list of candidates who qualified in the examination 2017, on 07.06.2019. In the list of candidates for NCA vacancy of Ezhavas, Thiyyas and Billavas, the 3rd respondent was ranked at sl.no.2 and the petitioner at rank no.4. In the list of candidates for regular vacancies the 3rd respondent was included at serial no.3 and the petitioner at serial no.13. On 08.06.2019 the High Court as per Ext.P6 notice informed that candidates who were Judicial Officers on the date of publication of recruitment notification

would not be considered for appointment as District and Sessions Judges. It was also informed that the Full Court of the High Court in its meeting held on 06.06.2019 resolved to appoint 8 candidates including the 3rd respondent at Sl. no.5 as District and Sessions Judges. Thereafter, as per Ext.P10 order dated 02.08.2019 the Honourable Governor of Kerala appointed 5 candidates as District and Sessions Judges by direct recruitment from the Bar (NCA selection 2017) against NCA vacancies of different communities. The 3rd respondent, who was at serial no.5 in that, was appointed against NCA vacancy of Ezhavas/Thiyyas/Billavas. The petitioner challenges the inclusion of the 3rd respondent in Ext.P5 list and his appointment as per Ext.P10 order and seeks a direction to include her name in the list and to grant her appointment in the place of the 3rd respondent. She alleged that the 3rd respondent was not eligible to apply for the post since he was appointed as Munsiff-Magistrate in the Kerala Judicial Service as per order dated 28.12.2017 and therefore he was not entitled to be included in Ext.P6 list or for appointment as District and Sessions Judge.

3. It is stated that as per Ext.P1 notification, applications were invited from candidates who were practising advocates having not less than 7 years' practice. Clause 6(2) of Ext.P1 notification deals with qualifications required for the candidates for selection and appointment as District Judges. Clause 6(2) provides that eligibility of a candidate would be

determined with reference to the date of closure of Step II process. It is stated that the last date fixed for closure of step II process was extended to 22.01.2018.

4. In Ext.P1 itself in clause 20 the date of closure of step II process was notified as 11.01.2018 and last date for receipt of the copies of the required documents was notified as 22.01.2018. As per Ext.P2 notification the date of closure of Step II process was extended from 11.01.2018 to 22.01.2018 and the last date of receipt of documents was 01.02.2018. In the meanwhile, as per Ext.P9 notification dated 28.12.2017 the Hon'ble Governor of Kerala appointed 21 candidates including the 3rd respondent as Munsiff-Magistrates, by direct recruitment. The petitioner was at sl.no.13 in that list. Based on Ext.P9 and other 2 orders the High Court issued Ext.P5 order dated 11.01.2018 inducting 28 candidates in the Kerala Judicial Service and posted them in various stations with effect from 12.02.2018, directing them to take charge in their respective stations on 12.02.2018. The 3rd respondent was at serial no.21 in Ext.P5 list and he was posted as Additional Munsiff, Alappuzha. The petitioner alleged that the 3rd respondent was not eligible to submit application and hence for inclusion in Ext.P6 list of selected candidates and also for appointment, as he was in Judicial Service as on the last date fixed for completing step II process of the recruitment. It is stated that as per Ext.P3 order dated 10.05.2019 in SLP No.14156/2015, WP(C) No.414/2016, etc. the Apex Court had ordered that in-service candidates shall

not be permitted to stake their claims in the examination or for being appointed as against the quota reserved for Bar. The petitioner points out that inclusion of the name of the 3rd respondent in Ext.P4 select list dated 07.06.2019 and in Ext.P6 notice dated 08.06.2019 was in violation of Ext.P3 interim order passed by the Apex Court. The petitioner also points out that the appointment of the 3rd respondent in Ext.P10 order, was made subject to the final disposal of WP(C) Nos.414/2016 and 423/2016 pending before the Hon'ble Supreme Court of India. Petitioner states that even though she had approached the Hon'ble Supreme Court filing WP(C) No.888/2019, the said Writ Petition was disposed of as per Ext.P8 order dated 19.07.2019, permitting her to approach this Court as the position is made clear in the order dated 10.05.2019 in W.P.(C) No. 14156 of 2019 and in another order passed in July, 2019. The learned Senior Counsel for the petitioner points out that the Hon'ble Supreme Court has by common judgment dated 19.02.2020 in ***Dheeraj Mor vs. High Court of Delhi : 2020 (1) KLT online 1166 (SC)*** disposed of the Writ Petitions mentioned in the order of appointment of the 3rd respondent and those referred to in Ext.P8 order and it is held that the quota set apart for direct recruitment cannot be filled up by those in service and that a candidate submitting application shall continue to be a practising advocate as on the date of his appointment. Therefore, the petitioner claims appointment in the place of the 3rd respondent.

5. The 3rd respondent has filed counter affidavits before

and after amendment of the Writ Petition. He stated that pursuant to Ext.P1 notification he had submitted his application for appointment as District and Sessions judge, on 01.12.2017, as he had put in more than 7 years of practice as on 1st day of January, 2017 and was having all the qualifications prescribed. On being successful in the examinations, he was included at serial no.3 in the list for recruitment to regular vacancies and at serial no.2 in the list for recruitment to NCA vacancies of Ezhava, Thiyya and Billava community. At the same time, the petitioner was rank no.13 in the list for regular vacancies and no.4 in the list for NCA vacancies. It is stated that by Ext.P6 notification the High Court had only informed that candidates who were judicial officers on the date of publication of the recruitment notification would not be considered for appointment as District and Sessions Judges in view of Ext.P3 order dated 10.05.2019 of the Hon'ble Supreme Court. He stated that based on the decision of the Full Court he was posted as District and Sessions Judge for trial of cases relating to atrocities towards Women & Children (POCSO), Thiruvananthapuram as per Ext.R3(a) order dated 17.8.2019 and he joined there on 24.08.2019. It is stated that as on 01.12.2017, i.e as on the date of final submission of his online application, he was a practicing advocate and he continued as practicing advocate till he joined duty as Munsiff-Magistrate, based on Ext.P5 order, on 12.02.2018 and started discharging his duties on 12.02.2018. According to the 3rd respondent, the eligibility of a candidate is determined

as on the date of final submission of his application. It was stated that since he had already completed the process of submitting application, it was not necessary for him to avail the benefit of extension of time for completion of Step II process, as he had already completed both steps I and II ahead of time schedule. According to him, the crucial date for determining eligibility was 27.12.2017 which was the last date for submitting application and that he was a practising Advocate as on that date and therefore Ext.P5 order appointing him as Munsiff-Magistrate cannot affect him adversely. According to him, he fulfilled all the qualifications prescribed in Ext.P1 notification and the Special Rules viz. The Kerala State Higher Judicial Service Rules. As prescribed therein, he was an advocate with more than 7 years' practice as on the date of his application. As per the notification Ext.P1, the requirement was that candidates should possess the qualifications with respect to age and 7 years of practice as Advocate as on 01.01.2017. He stated that the Note to clause 6 of Ext.P1 notification which provides that the provision for determining eligibility would be the last date fixed for closure of step II process did not have any application in respect of age or practice as advocate, as it is already provided that both should be as on 01.01.2017. Therefore, according to him, the contention of the petitioner that his eligibility was liable to be determined as on the extended date for completing step II process cannot be accepted. It is stated that Ext.P1 notification, which was issued in tune

with Rule 3 of the Kerala State Higher Judicial Service 1961, had only stipulated that applicant should continue to be an advocate as on the 1st day of January of the year of recruitment i.e as on 01.01.2017. In his case even the extension of time granted for completion of step II process was not availed by him as he had already completed step II process before 11.01.2018. According to him, he was not an in-service candidate and he has not incurred any disqualification.

6. In the additional counter affidavit he stated that the judgment of the Apex court in **Dheeraj Mor**'s case (*supra*) is not applicable to the circumstances of his case as the case before the Apex Court was in respect of candidates who were judicial officers at the time of submission of application. It is also pointed out that he did not appear in any of the examinations or interview on the strength of any interim order from any court and therefore his appointment as Munsiff-Magistrate would not render him disqualified for appointment as District Judge. It is stated that he had submitted application for appointment as District Judge before his appointment as Munsiff-Magistrate. It is also stated that at the relevant time there was no judgment which declared that an Advocate with 7 years of practice can submit application only if he continued as an Advocate till his appointment as District Judge. It is his further case that though his appointment was stated to be subject to the final disposal of WP(C) Nos.229/2017, 232/2017, 618/2017, SLP(C) No.14156/2015, WP(C) No.414/2016 and 423/2016 pending before the

Hon'ble Supreme Court of India, he was not a party to any of those cases. Though he was made party to WP(C) NO.15832/2019 and 16331/2019, those cases were withdrawn by the petitioners. It is stated that he was not a party to WP(C) Nos.33053/2018, 39543/2018 or Writ Appeal 406/2018 and he was not a party to any of the cases subject to which he was appointed as per Ext.P10 order. The only case in which he was a party - as 7th respondent, was W.P(C) No.999/2019, which was filed by judicial officers in Kerala Judicial Service and no relief was granted to the petitioners therein. It is stated that there is no direction in the judgment of the Apex court to revert him from the post of District Judge. Referring to para.48 of the judgment in **Dheeraj Mor's** case it is stated that the parties before the Supreme Court were persons who were appointed as District Judges on the basis of interim orders and the Apex Court had directed their reversion; whereas there was no such direction in his case.

7. The High Court filed a statement explaining the process of selection starting from the date of notification, the Writ Petitions filed by Judicial Officers, permission granted to the Judicial Officers on the basis of the judgment in civil appeal no.7358/16, their inclusion in the list and subsequent exclusion from the list based on Ext.P3 order, etc. It is stated that the date fixed for closure of step II process was originally notified as 11.01.2018; as there was a rush in the recruitment process towards the end of Step-II stage and as there were several requests from the prospective candidates, the

date fixed for closure of step-II process was extended to 22.01.2018 in order to enable the candidates who failed to complete their application in time. It is stated that the 3rd respondent had filed his application well in time without availing the benefit of extension. It is stated that the administrative committee had in the light of the judgment of the Honourable Supreme Court in Civil Appeal no.7358/16 and various orders ordered to modify the online application program enabling the judicial officers to apply for the post, in the light of the dictum laid down therein. The written examination was thereafter conducted on 22nd and 23rd December 2018; its results were published on 14.03.2019; viva-voce was conducted from 1st to 9th April 2019; after Ext.P3 order was issued by the Apex Court, the administrative committee approved the merit list and select list excluding the candidates who were judicial officers as on the date of closure of step II process of online filing of application; the merit list was published on 08.06.2019. It is stated that date of closure of step II was not relevant in determining the eligibility with respect to qualification as Note 2 under Clause 6 of the notification starts with "save as otherwise provided". It is stated that the 3rd respondent was practicing advocate till he took charge on 12.02.2018; even if the date of his joining for training on 17.01.2018, is reckoned, that was subsequent to 11.01.2018, the date for closure of step II process and that he was not a Judicial Officer at the time of application.

8. Heard Sri. S.Sreekumar, the learned Senior Counsel for the petitioner, Sri.S.P.Aravindakshan Pillai, the learned Counsel for the 3rd respondent, Sri. Elvin Peter, the learned Counsel for the High Court and Sri. N.Manoj Kumar, the learned Special Government Pleader.

9. Having heard the contentions on either side, it is seen that going by the notification as well as the Kerala State Higher Judicial Service rules, the petitioner was having all the qualifications for appointment i.e as prescribed in Clause 6 of Ext.P1 notification. Clause (b), (f) and Note (2) thereof, which are relevant in this context, are the following:

"(b) He shall have attained 35 years of age and shall not have completed 45 years of age as on first day of January 2017.

xxx

(f) He shall be a practising Advocate having a standing of not less than 7 (seven) years of practice as on the first day of January 2017.

xxxx

Note(2): Save as otherwise provided, eligibility shall be determined with reference to the last date fixed for closure of Step II Process."

Ext.P5 order would show that the petitioner was inducted in Kerala Judicial Service as Munsiff-Magistrate only with effect from 12.02.2018 and hence he was continuing as an Advocate till he took charge of the post on 12.02.2018. Therefore, even on extension of the date of closure of step II process from

11.01.2018 to 22.01.2018, the petitioner continued to be an Advocate. As pointed out by Sri. Aravindakshan Pillai, Note 2 of sub clause (f) which provides for eligibility regarding qualification as on 01.01.2017, containing the clause "save as otherwise provided" cannot apply to eligibility regarding qualification. It can only be with respect to requirements for which no date or condition is provided. Therefore, it cannot be said that eligibility with respect to qualification is to be determined as on the date of closure of step II process. At any rate, the petitioner has completed his Step II process on 11.01.2018 itself well before the date fixed, even without availing the benefit of extension.

10. However in the judgment dated 19.02.2020 in **Dheeraj More's** case(*supra*) the Apex Court after interpreting Article 233 of the Constitution of India, held as follows in para.45 of the judgment:

"In view of the aforesaid discussion, we are of the opinion that for direct recruitment as District Judge as against the quota fixed for the advocates/pleaders, incumbent has to be practicing advocate and must be in practice as on the cut-off date and at the time of appointment he must not be in judicial service or other services of the Union or State. For constituting experience of 7 years of practice as advocate, experience obtained in judicial service cannot be equated/combined and advocate/pleader should be in practice in the immediate past for 7 years and must be in practice while applying on the cut-off date fixed under the rules and should be in practice as an advocate on the date of appointment. The purpose is

recruitment from bar of a practicing advocate having minimum 7 years' experience."

11. The judgment in **Vijayakumar Mishra V High Court of Judicature at Patna and Ors.**: (2016) 9 SCC 313, in which a 2 Judge Bench of the Apex Court had held that the appellants therein who entered judicial service during the process of selection could attend the interview without tendering resignation and could opt for joining the higher post, was overruled. As vehemently argued by Sri.S.P.Aravindakshan Pillai, the law as laid down by the Apex Court on interpretation of Article 233(2) of the Constitution at the time of appointment of the 3rd respondent was that one should be a practising Advocate as on the date of application as held in **Deepak Aggarwal v. Keshav Kaushik** : (2013) 5 SCC 277 and the judgment in **Vijayakumar Mishra's** case (*supra*). It may also be true that the 3rd respondent opted for the Higher Judicial Service in view of those judgments. Pointing out that the dictum laid down in **Deepak Aggarwal's** case (*supra*) is not yet overruled, heavy reliance was placed on para.102 of the judgment where the Apex Court held as follows:

"102. As regards construction of the expression, "if he has been for not less than seven years an advocate" in Article 233(2) of the Constitution, we think Mr Prashant Bhushan was right in his submission that this expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of "has been". The present perfect continuous tense is used for a position which began at sometime in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as an advocate on the date of

application."

The learned Counsel argued that the judgment in **Deepak Agarwal's** case was also by a 3 Judge Bench and going by the dictum laid down therein, the appointment of the petitioner was perfectly legal. But I find that when there are different judgments of co-equal benches, this Court has to follow the later one in point of time, as held in the judgment of the Full Bench of this Court in **Raman Gopi and another V Kunhu Raman Unnithan** : 2011(4) KLT 458 and hence the judgment in **Dheeraj Mor's** case.

12. It was argued that the 3rd respondent was not a party in any of the cases in which any direction was issued with respect to his appointment and that he was not a party to any of the cases mentioned in Ext.P10 order, subject to which he was appointed. It was also argued that the 3rd respondent did not appear in any of the examinations on the basis of any interim order. It is also pointed out that petitioners/parties before the Apex Court were judicial officers at the time of submitting applications and there was nobody like the 3rd respondent who fulfilled all the qualifications as on the date of submission of application. It is his further contention that the 3rd respondent happened to be meritorious in getting selected as Munsiff Magistrate as well as the District Judge. Though it was also pointed out that the notification or the special rules which insists 7 years practice as on 1st day of January of the recruitment year are not under challenge, when the Apex Court has interpreted the provisions contained in Article 233, this

Court is bound to follow the same.

Therefore, in the light of the dictum laid down in **Dheeraj Mor's** case(*supra*) the appointment of the 3rd respondent as District and Sessions Judge can only be set aside, as he was not an Advocate as on the date of his appointment. As a consequence the petitioner, who is the candidate ranked below him in the list of NCA candidates for Ezhava, Thiyya and Billava and who continues to be an Advocate, would therefore be entitled to get appointment in his place. Ordered accordingly.

The Writ Petition is allowed.

Sd/-

P . V . ASHA
JUDGE

rkc

APPENDIX**PETITIONER'S EXHIBITS:**

- EXHIBIT P1 TRUE COPY OF THE NOTIFICATION VIDE NO.REC4-75832/2017 DATED 21.11.2017 PUBLISHED THIS HON'BLE COURT.
- EXHIBIT P2 TRUE COPY OF THE NOTIFICATION DATED 9.1.2018 OF DJ SELECTION 2017 PUBLISHED BY THE RECRUIT CELL OF THIS HON'BLE COURT.
- EXHIBIT P3 TRUE COPY OF THE ORDER DATED 10.5.2019 IN SLP NO.14156/2015 OF THE HON'BLE SUPREME COURT OF INDIA.
- EXHIBIT P4 TRUE COPY OF THE SELECT LIST VIDE NO.REC4-75832/17 DATED 7.6.2019 PUBLISHED BY THIS HON'BLE COURT.
- EXHIBIT P5 TRUE COPY OF THE POSTING ORDER VIDE NO.B1(A)-63/2018 (1) DATED 11.1.2018 PUBLISHED BY THIS HON'BLE COURT.
- EXHIBIT P6 TRUE COPY OF THE NOTICE OF APPOINTMENT VIDE NO.REC4-75832/2017 DATED 8.6.2019 ISSUED BY THIS HON'BLE COURT.
- EXHIBIT P7 TRUE COPY OF JUDGMENT DATED 01-07-2019 IN WWPC NO.15832 OF 2019 OF THIS HON'BLE COURT.
- EXHIBIT P8 TRUE COPY OF ORDER IN W.P.(C) NO.888 OF 2019 DATED 19-7-2019 OF THE HON'BLE SUPREME COURT OF INDIA.
- EXHIBIT P9 A TRUE COPY OF THE G.O.MS.NO.262/2017/HOME DATED 28/12/2017 ISSUED BY THE 1ST RESPONDENT.
- EXHIBIT P10 A TRUE COPY OF THE G.O.(MS) NO.111/2019/HOME DATED 2/8/2019 ISSUED BY THE 1ST RESPONDENT.

RESPONDENTS' EXHIBITS

- EXT.R3(a) TRUE COPY OF THE ORDER NO.B1(A)-58166/2018 DATED 17.08.2019 OF THE HIGH COURT OF KERALA.

EXT.R3 (b)

**TRUE COPY OF THE ONLINE APPLICATION DATED
1.12.2017 SUBMITTED BY THE 3RD RESPONDENT
BEFORE THE HIGH COURT OF KERALA.**