REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL/INHERENT JURISDICTION

CIVIL APPEAL NO. 3947 OF 2020

REJANISH K.V. …APPELLANT(S)

VERSUS

K. DEEPA AND OTHERS …RESPONDENT(S)

WITH

CONNECTED MATTERS

J U D G M E N T

M. M. Sundresh, J.

1. I have gone through the detailed analysis made by Hon'ble the Chief Justice of India in rendering the judgment. While I am in absolute agreement with the reasoning and the ultimate conclusion arrived at, along with the directions issued therein, I would only add my views on the interpretation of Article 233 of the Constitution of India, 1950 (hereinafter referred to as "**the Constitution**").

2. We are dealing with a situation where this Court, in its subsequent decisions in **Satya Narain Singh v. High Court of Judicature at Allahabad and Others, (1985) 1 SCC 225** and **Dheeraj Mor v. High Court of Delhi, (2020) 7 SCC 401** has misconstrued the law as laid down by the larger benches of this Court in **Rameshwar Dayal v. The State of Punjab and Others, 1960 SCC OnLine SC 123** and **Chandra Mohan v. State of Uttar Pradesh and Others, 1966 SCC OnLine SC 35**.

3. Chapter VI of the Constitution deals exclusively with appointment, recruitment and control *qua* the Subordinate Courts. It is rather significant to note that this Chapter starts from the top with the appointment of district judges, followed by recruitment of persons other than district judges to the judicial service, moves on to control over Subordinate Courts, defines the expression "district judge" and "judicial service" and thereafter ends with the application of provisions of this Chapter to certain classes of Magistrates.

CHAPTER VI
SUBORDINATE COURTS

Article 233 of the Constitution

> **"233. Appointment of district judges.**—(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be

made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

Article 233-A of the Constitution

"233-A. Validation of appointments of, and judgments, etc., delivered by, certain district judges.—Notwithstanding any judgment, decree or order of any court, —

(*a*)(*i*) no appointment of any person already in the judicial service of a State or of any person who has been for not less than seven years an advocate or a pleader, to be a district judge in that State, and

(*ii*) no posting, promotion or transfer of any such person as a district judge,

made at any time before the commencement of the Constitution (Twentieth Amendment) Act, 1966, otherwise than in accordance with the provisions of article 233 or article 235 shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions;

(*b*) no jurisdiction exercised, no judgment, decree, sentence or order passed or made, and no other act or proceeding done or taken, before the commencement of the Constitution (Twentieth Amendment) Act, 1966 by, or before, any person appointed, posted, promoted or transferred as a district judge in any State otherwise than in accordance with the provisions of article 233 or article 235 shall be deemed to be illegal or invalid or ever to have become illegal or invalid by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions."

Article 234 of the Constitution

"234. Recruitment of persons other than district judges to the judicial service.—Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State."

Article 235 of the Constitution

> **"235. Control over subordinate courts.**—The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.**"**

Article 236 of the Constitution

> **"236. Interpretation.—**In this Chapter—
>
> (*a*) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge;
>
> (*b*) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.**"**

Article 237 of the Constitution

> **"237. Application of the provisions of this Chapter to certain class or classes of magistrates.—**The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification.**"**

4. As per Article 233 and Article 234 of the Constitution, while an appointment to the post of a district judge, and to posts in the judicial service other than that of a district judge shall be made by the Governor

of the State, the consultation is only with the High Court for the former, while it additionally extends to the State Public Service Commission for the latter. The exclusion of the State Public Service Commission in the process of appointment to the post of a district judge shows that added importance is given to the said post.

5. Article 233 of the Constitution deals with two modes of appointment to the post of a district judge. Clause (1) of Article 233 of the Constitution speaks of appointments to be made to the post of a district judge. These appointments are to be made either by way of a promotion or through direct recruitment.

6. The procedure for appointment, posting and promotion to the post of a district judge, *qua* a person in the judicial service, is one and the same with respect to the appointing authority, namely, the Governor, and the same is to be done in consultation with the High Court. Promotion is obviously meant only for a person in the judicial service. One has to be promoted first by the Governor, in consultation with the High Court, and thereafter appointed as a district judge. Therefore, promotion is a precursor to appointment as a district judge *qua* a person in the judicial service. Such an appointment is nothing but a resultant consequence.

To make this position clear, one has to read Article 233(1) of the Constitution with respect to appointments as "appointments of persons to be district judges". Similarly, for posting, it has to be read as "posting of district judges" and promotions of persons in the judicial service as "promotion and appointment as district judges." One cannot ignore the word "persons" which would only mean persons from two modes of appointment. Therefore, Article 233(1) of the Constitution deals with both, the modes and the sources of appointment.

7. Article 233(2) of the Constitution is a continuation of Article 233(1) of the Constitution. This provision, in fact, reiterates the fact that an appointment by way of direct recruitment can be done from two sources, namely, 'judicial service' and 'an advocate or a pleader'. While doing so, it declares the eligibility criteria only for the latter. Hence, it is made abundantly clear that no such eligibility criteria are fixed for a person in the judicial service. Clause (1) along with Clause (2) of Article 233 of the Constitution, is a complete code by itself, and therefore does not leave any room for interpretation otherwise.

DOCTRINE OF SEPARATION OF POWERS VIS-À-VIS INDEPENDENCE OF THE JUDICIARY

8. Montesquieu's words of wisdom in **'The Spirit of Laws'** become relevant in this context**:**

> **"There can be no liberty... there is no liberty if the powers of judging are not separated from the legislative and executive... there would be an end to everything if the same man or the same body... were to exercise those three powers."**
>
> (emphasis supplied)

9. Article 50 of the Constitution forms the basis for the applicability of the doctrine of separation of powers. It deals with the separation of the judiciary from the executive, and imposes an obligation on the State to take steps to separate the judiciary from the executive in the public services of the State.

Article 50 of the Constitution

> "**50. Separation of judiciary from executive.—**The State shall take steps to separate the judiciary from the executive in the public services of the State."

Hence, the concept of 'independence of the judiciary' finds both, its genesis and sustenance, in the doctrine of separation of powers. Dr. Rajendra Prasad, President of the Constituent Assembly and later President of India, in his speech to the Constituent Assembly of India, preceding the motion to adopt the Constitution, in **Constituent Assembly Debates, Volume XI (debate of 26-11-1949),** stated thus:

> "We have **provided in the Constitution for a judiciary which will be independent. It is difficult to suggest anything more to make the Supreme Court and the High Courts independent of the influence of the executive. There is an attempt made in the Constitution to make even the lower judiciary independent of any outside or extraneous influence.**"
>
> (emphasis supplied)

It is such independence that allows each and every judge to make decisions, uninfluenced by any factor. Thus, the independence of the judiciary and the separation of powers between the three organs of the State, which form an integral part of the basic structure doctrine, ensure a vibrant and flourishing institution.

10. Under Article 233 of the Constitution, the primacy given to the High Courts, insofar as the mandate for its consultation in appointments to the post of a district judge, along with the control exercised by it over Subordinate Courts under Article 235 of the Constitution, is a classic exhibition of the doctrine of separation of powers.

11. Judging is an independent sovereign function. The function of the presiding officer of a Court is purely judicial, and not even quasi-judicial. For instance, in a criminal case, the prosecuting agency would invariably be either the State, the Union or their instrumentalities, who become mere litigants before the Court, though the presiding officer's post may be connected to them only for administrative purposes. No

employee can be an adjudicator of an employer. To say that such a judge is their employee, and therefore debarred from competing for the vacancies earmarked to be filled through direct recruitment, would be contrary to the principle of independence of the judiciary.

12. In the context of the aforesaid discussion, the views of M.P. Singh in his article titled, 'Securing the Independence of the Judiciary – The Indian Experience' published in the Indiana International & Comparative Law Review, IU Robert H. McKinney School of Law, gain significance**:**

> **"**…Although the nature of the Indian Constitution-whether it is federal or unitary-is doubtful, basically it provides for a federal structure of government consisting of the Union and the States. The Union and the States have their distinct powers and organs of governance given in the constitution. **While the Union and States have separate legislatures and executives, they do not have a separate judiciary. The judiciary has a single pyramidal structure with the lower or subordinate courts at the bottom, the High Courts in the middle, and the Supreme Court at the top. For funding and some administrative purposes, the subordinate courts are subject to regulation by the respective States, but they are basically under the supervision of the High Courts**….**The unitary character of the judiciary is not an accident but rather a conscious and deliberate act of the constitution makers for whom a single integrated judiciary and uniformity of law were essential for the maintenance of the unity of the country and of uniform standards of judicial behavior and independence**…."
>
> (emphasis supplied)

13. Judicial service is a distinct service by itself, owing allegiance to the judiciary alone. Therefore, it is kept away from the hands of the other two organs, except to a limited extent. Any attempt to dilute such judicial

independence, by giving a rigid interpretation, would be against the constitutional ethos. The said view gets fortified by the judgment of this Court in the case of **State of Bihar and Another v. Bal Mukund Sah and Others, (2000) 4 SCC 640**

> "**32.** It is true, as submitted by learned Senior Counsel, Shri Dwivedi for the appellant State that under Article 16(4) the State is enabled to provide for reservations in services. But **so far as "Judicial Service" is concerned, such reservation can be made by the Governor, in exercise of his rule-making power only after consultation with the High Court. The enactment of any statutory provision dehors consultation with the High Court for regulating the recruitment to the District Judiciary and to the Subordinate Judiciary will clearly fly in the face of the complete scheme of recruitment and appointment to the Subordinate Judiciary and the exclusive field earmarked in connection with such appointments by Articles 233 and 234. It is not as if that the High Courts being constitutional functionaries may be oblivious of the need for a scheme of reservation if necessary in appropriate cases by resorting to the enabling provision under Article 16(4). The High Courts can get consulted by the Governor for framing appropriate rules regarding reservation for governing recruitment under Articles 233 and 234. But so long as it is not done, the Legislature cannot, by an indirect method, completely bypassing the High Court and exercising its legislative power, circumvent and cut across the very scheme of recruitment and appointment to the District Judiciary as envisaged by the makers of the Constitution. Such an exercise, apart from being totally forbidden by the constitutional scheme, will also fall foul on the concept relating to "separation of powers between the Legislature, the Executive and the Judiciary" as well as the fundamental concept of an "independent Judiciary". Both these concepts are now elevated to the level of basic structure of the Constitution and are the very heart of the constitutional scheme.**
>
> **33. In the case of *Kesavananda Bharati* v. *State of Kerala* [(1973) 4 SCC 225] a twelve-Member Constitution Bench of this Court had occasion to consider this question regarding the basic structure of the Constitution which, according to the Court, could not be tinkered with by Parliament in exercise of its amending power under Article 368 of the Constitution. Sikri, C.J., in para 247 of the Report referred with approval the decision of the Judicial Committee in *Liyanage case***

[*Liyanage* v. *R.*, (1967) 1 AC 259 : (1966) 1 All ER 650 : (1966) 2 WLR 682 (PC)] for culling out the implied limitations on the amending power of the competent Legislature like Parliament of Ceylon with which that case was concerned. The relevant observations are found in SCC paras 253 to 255 of the Report at pp. 357 and 358, which read as under:

"*253*. The case, however, furnishes another instance where implied limitations were inferred. After referring to the provisions dealing with 'Judicature' and the Judges, the Board observed:

'These provisions manifest an intention to secure in the Judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the Judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the Executive or the Legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the Judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the Executive or the Legislature.'

***254*. The Judicial Committee was of the view that there 'exists a separate power in the Judicature which under the Constitution as it stands cannot be usurped or infringed by the Executive or the Legislature'. The Judicial Committee cut down the plain words of Section 29(1) thus:**

'*Section 29(1) of the Constitution says.*—"Subject to the provisions of this Order Parliament shall have power to make laws for the peace, order and good government of the Island." These words have habitually been construed in their fullest scope. Section 29(4) provides that Parliament may amend the Constitution on a two-thirds majority with a certificate of the Speaker. Their Lordships however cannot read the words of Section 29(1) as entitling Parliament to pass legislation which usurps the judicial power of the Judicature — e.g., by passing an Act of attainder against some person or instructing a Judge to bring in a verdict of guilty against someone who is being tried — if in law such usurpation would otherwise be contrary to the Constitution.' (p. 289)

255. In conclusion the Judicial Committee held that there was interference with the functions of the Judiciary and it was not only the likely but the intended effect of the impugned enactments, and that was fatal to their validity."

The ultimate conclusion to which Chief Justice Sikri reached are found in paras 292 to 294 at p. 366 of the Report which read as under:

"*292*. The learned Attorney General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same. The basic structure may be said to consist of the following features:

(1) Supremacy of the Constitution;

(2) Republican and democratic form of Government;

(3) Secular character of the Constitution;

***(4) Separation of powers between the Legislature, the Executive and the Judiciary*;**

(5) Federal character of the Constitution.

***293*. The above structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed.**

***294*. The above foundation and the above basic features are easily discernible not only from the Preamble but the whole scheme of the Constitution, which I have already discussed."**

The other learned Judges constituting the Constitution Bench had nothing inconsistent to say in this connection. Thus separation of powers between the Legislature, the Executive and the Judiciary is the basic feature of the Constitution.

34. It has also to be kept in view that judicial independence is the very essence and basic structure of the Constitution. We may also usefully refer to the latest decision of the Constitution Bench of this Court in *Registrar (Admn.), High Court of Orissa* v. *Sisir Kanta Satapathy* [(1999) 7 SCC 725 : 1999 SCC (L&S) 1373] wherein K. Venkataswami, J., speaking for the Constitution Bench, made the following pertinent observations in the very first two paras regarding Articles 233 to 235 of the Constitution of India: (SCC Headnote)

"An independent Judiciary is one of the basic features of the Constitution of the Republic. Indian Constitution has zealously

guarded independence of Judiciary. Independence of Judiciary is doubtless a basic structure of the Constitution but the said concept of independence has to be confined within the four corners of the Constitution and cannot go beyond the Constitution."

The Constitution Bench in the aforesaid decision also relied upon the observations of this Court in *All India Judges' Assn.* [(1993) 4 SCC 288 : 1994 SCC (L&S) 148 : (1993) 25 ATC 818 : AIR 1993 SC 2493] wherein on the topic of regulating the service conditions of the Judiciary as permitted by Article 235 read with Article 309, it had been observed as under: (SCC p. 297, para 10)

"[T]he mere fact that Article 309 gives power to the Executive and the Legislature to prescribe the service conditions of the Judiciary, does not mean that the Judiciary should have no say in the matter. It would be against the spirit of the Constitution to deny any role to the Judiciary in that behalf, for theoretically it would not be impossible for the Executive or the Legislature to turn and twist the tail of the Judiciary by using the said power. Such a consequence would be against one of the seminal mandates of the Constitution, namely, to maintain the independence of the Judiciary."

In view of this settled legal position, therefore, even while operating in the permissible field of regulating other conditions of service of already-recruited judicial officers by exercising power under Article 309, the authorities concerned have to keep in view the opinion of the High Court of the State concerned and the same cannot be whisked away.

35. In order to fructify this constitutional intention of preserving the independence of the Judiciary and for fructifying this basic requirement, the process of recruitment and appointment to the District Judiciary with which we are concerned in the present case, is insulated from outside legislative interference by the Constitution-makers by enacting a complete code for that purpose, as laid down by Articles 233 and 234. Consultation with the High Court is, therefore, an inevitable essential feature of the exercise contemplated under these two articles. If any outside independent interference was envisaged by them, nothing prevented the Founding Fathers from making Articles 233 and 234 subject to the law enacted by the Legislature of States or Parliament as was done in the case of other articles, as seen earlier…."

(emphasis supplied)

PRINCIPLE OF CONSTITUTIONAL SILENCE

14. While taking note of the doctrine of separation of powers and independence of the judiciary, coupled with the maintenance and enhancement of the quality of judging which forms part of the basic structure doctrine, a decision was consciously taken by the makers of the Constitution to fix the eligibility criteria only for the category of 'an advocate or a pleader.' At this juncture, the concept of 'constitutional silence' comes into play as the makers of the Constitution deliberately left certain areas open-ended, keeping in mind the evolving needs of the society. This concept is invoked to give effect to the essence of the Constitution. The spirit of this principle has been captured by Thomas Carlyle, a Scottish Philosopher and Historian, when he famously stated:

> "**Under all speech and writing that is good for anything, there lies a silence that is better**...."
>
> (emphasis supplied)

This Court had the occasion to deal with the aforesaid principle in the case of **Bhanumati and Others v. State of U.P. and Others, (2010) 12 SCC 1.**

> "**49.** Apart from the aforesaid reasons, **the arguments by the appellants cannot be accepted in view of a very well-known constitutional doctrine, namely, the constitutional doctrine of silence. Michael Foley**

> **in his treatise on *The Silence of Constitutions* (Routledge, London and New York) has argued that in a Constitution "abeyances are valuable, therefore, not in spite of their obscurity but because of it. They are significant for the attitudes and approaches to the Constitution that they evoke, rather than the content or substance of their strictures"**. (P. 10)
>
> **50.** The learned author elaborated this concept further by saying, "**Despite the absence of any documentary or material form, these abeyances are real and are an integral part of any Constitution. What remains unwritten and indeterminate can be just as much responsible for the operational character and restraining quality of a Constitution as its more tangible and codified components.**" (P. 82)
>
> **51. Many issues in our constitutional jurisprudence evolved out of this doctrine of silence. The basic structure doctrine vis-à-vis Article 368 of the Constitution emerged out of this concept of silence in the Constitution. A Constitution which professes to be democratic and republican in character and which brings about a revolutionary change by the Seventy-third Constitutional Amendment by making detailed provision for democratic decentralisation and self-government** on the principle of grass-root democracy cannot be interpreted to exclude the provision of no-confidence motion in respect of the office of the Chairperson of the panchayat just because of its silence on that aspect."
>
> (emphasis supplied)

15. One must appreciate the constitutional silence on the eligibility criteria *qua* a person in the judicial service, which has accordingly been left to the discretion and wisdom of the High Court and the Governor of the State, as per Articles 233 and 235 of the Constitution. Therefore, such an omission was done consciously, as a person in the judicial service has already been recruited by way of an appointment by the orders of the Governor, in consultation with the High Court and the State Public Service Commission.

16. As discussed, Article 233 of the Constitution does not place any fetters on the power of the appointing authority *qua* the fixation of eligibility criteria for persons in the judicial service, as circumstances might evolve over time, and the wisdom of the Constitutional Courts would take care of it.

ELIGIBILITY VIS-À-VIS QUALIFICATION TO THE POST OF A DISTRICT JUDGE

17. Provisions in the Constitution use the words "qualification" and "eligibility" interchangeably. Examples of such provisions are Article 58 of the Constitution, which provides for the qualifications for election as President, Article 66 of the Constitution, which provides for election of Vice-President and Article 84 of the Constitution, which provides for qualification for membership of the Parliament.

18. The word "eligible" used in Article 233(2) of the Constitution must be read as "qualified." Thus, a person who has been an advocate or a pleader for not less than seven years, along with the recommendation of the High Court is one qualification, and a person in the judicial service is the other qualification. Both of these qualifications are nothing but mere gateways for being appointed to the post of a district judge, facilitating a threshold for entry. However, there is no bar on the High

Court to fix the qualification, *qua* persons in the judicial service, with the approval of the Governor. These qualifications are meant only for consideration for appointment, subject to the successful completion of the recruitment process.

19. Accordingly, we are inclined to hold that there is no bar on persons in the judicial service from competing for the vacancies intended to be filled through direct recruitment. Any interpretation contrary to the aforesaid view, would amount to a reservation in favour of 'an advocate or a pleader,' which is not only not contemplated under the Constitution, but also violates the very spirit enshrined thereunder.

20. Another lens through which the aforesaid proposition can be viewed is Article 233-A of the Constitution, which provides for the validation of appointments made at any time before the commencement of the Constitution (Twentieth Amendment Act), 1966. Clause (a)(i) of Article 233-A of the Constitution encompasses the validation of appointments from both sources, i.e., a person already in the judicial service and a person who has been an advocate or a pleader for 7 years or more. The express reference to both the sources, within the same clause, indicates the constitutional intent to place the persons in the judicial service at par

with those from the Bar and thus, they are fully entitled to participate in the direct recruitment process. The use of the phrase "any such person" in Clause (a)(ii) of Article 233-A of the Constitution, which deals with the validation of posting, promotion, or transfer, further strengthens their entitlement to such participation.

CONCLUSION

21. While interpreting a constitutional provision, a Court of law must be conscious not to violate the basic structure of the Constitution, and is duty-bound to give it a vibrant and organic interpretation. Article 14 of the Constitution forms an integral part of the basic structure. Though it provides for equality before the law, it allows for a reasonable classification, based upon an intelligible differentia, having a rational nexus to the object sought to be achieved. Therefore, construing Article 233(2) of the Constitution to be a provision meant only for the category of 'an advocate or a pleader' would certainly be violative of Article 14 of the Constitution, for the purpose of its interpretation. In other words, a *contra* view would amount to creation of a quota for 'an advocate or a pleader.' An absolute bar on persons in the judicial service would certainly prevent meritorious candidates from competing for the

vacancies earmarked for direct recruitment, which would be an affront to the constitutional spirit.

22. A vibrant and qualitative judiciary fosters greater trust in the institution. Thus, it is vital to build a strong foundation. Maintaining and enhancing the quality at the bottom of the judicial pyramid would strengthen the faith of the public in the subordinate judiciary, which in turn would reduce the filing of appeals before the High Courts and the Supreme Court, and therefore considerably reduce the overall pendency.

23. Building a strong foundation and ensuring that the base is of pristine quality is only possible when the best talent is attracted. Letting go of emerging talent, by not identifying and nurturing them at the earliest, would lead to mediocrity as against excellence, which would weaken the foundation and undermine the entire judicial structure. It is obvious that greater competition would result in better quality. Excluding a group of persons from competing for a post, which is meant to serve the public, would certainly be unconstitutional, especially when the Constitution itself facilitates such participation. It is my fervent hope that our judgement empowers the institution to emerge stronger and maintain the

highest standards of justice, as it is the interest of the institution that must prevail above all.

....…… J.
(M. M. SUNDRESH)

NEW DELHI;
OCTOBER 09, 2025