IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

&

THE HONOURABLE MR. JUSTICE GOPINATH P.

WEDNESDAY, THE 14TH DAY OF OCTOBER 2020 / 22ND ASWINA, 1942

WA.No.1075 OF 2020

AGAINST THE JUDGMENT IN WP(C) 20301/2019(R) OF HIGH COURT OF KERALA DATED 14/7/2020

APPELLANT/THIRD RESPONDENT:

REJANISH K.V.,
AGED 39 YEARS
S/O K.B. VENUGOPALAN, KARAMPILLIL HOUSE,
NETTOOR SOUTH END, NETTOOR P.O.,
ERNAKULAM-682040.

BY ADVS.
SRI.K.M.FIROZ
SRI.GEO PAUL
SMT.M.SHAJNA
SRI.E.C.AHAMED FAZIL
SRI.P.C.MUHAMMED NOUSHIQ
SRI.GEORGE POONTHOTTAM (SR.)

RESPONDENTS/WRIT PETITIONER AND RESPONDENTS 1 AND 2:

1 K.DEEPA,
D/O. SUKUMARAN, AGED 44, RESIDING AT
THACHAMPARA HOUSE, KADARALA, MUTHUKURISSY P.O.,
PALAKKAD-679340.

**2 STATE OF KERALA,
REPRESENTED BY SECRETARY TO GOVERNMENT,
DEPARTMENT OF HOME AFFAIRS,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695001.**

**3 HIGH COURT OF KERALA,
ERNAKULAM, KOCHI-682031,
REPRESENTED BY REGISTRAR GENERAL.**

**R1 BY ADV. SRI.S.SREEKUMAR (SR.)
R1 BY ADV. SRI.P.MARTIN JOSE
R1 BY ADV. SRI.P.PRIJITH
R1 BY ADV. SRI.THOMAS P.KURUVILLA
R1 BY ADV. SRI.MANJUNATH MENON
R1 BY ADV. SRI.AJAY BEN JOSE
R3 BY ADV.SRI.ELVIN PETER
R2 BY ADV.SRI. N. MANOJKUMAR- SPL.G.P.**

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 25-09-2020, THE COURT ON 14-10-2020 DELIVERED THE FOLLOWING:

J U D G M E N T

Dated this the 14th day of October, 2020

Shaffique, J.

This appeal depicts the unfortunate fate of an Advocate, who got selected and appointed to the post of District and Sessions Judge and now being faced with removal from service on account of the fact that after applying for the said post, he got selected as a Munsiff/Magistrate and joined the judicial service.

2. Sri.K.V.Rejanish, the appellant herein, is the said person who was appointed and posted as District Judge in the Kerala Higher Judicial Service pursuant to Ext.P1 notification dated 21/11/2017.

3. A composite notification has been issued by the Registrar (Recruitment & Computerisation), High Court of Kerala, inviting applications for filling up 9 NCA vacancies of District and Sessions Judges under recruitment Nos. 20/2017, 21/2017 and 22/2017. Recruitment No.22/2017 included one NCA vacancy from among Ezhava,Thiyya/Billavas. Recruitment No.23/2017 was to fill up 4

regular vacancies (probable).

4. After the written examination and interview, Registrar (Subordinate Judiciary) of the High Court published a select list on 7/6/2019. From among the list of candidates of Ezhavas, Thiyyas and Billavas, Sri.Rejanish was ranked at Sl.No.2 and the writ petitioner Smt.K.Deepa was ranked at Sl.No.4. Rank No.1 was working as Munsiff Magistrate even at the time of submission of the application. Sri.Rejanish the second rank holder was appointed as per Ext.P10 order dated 2/8/2019 by the Government of Kerala as recommended by the High Court. He joined service on 24/8/2019.

5. Sri.Rejanish at the time when he submitted his application for the post of District Judge as per Ext.P1 notification was a practising lawyer having 7 years' experience in the Bar. He was also an applicant for selection to the post of Munsiff/Magistrate and while the selection process of District Judge was underway, he was appointed as a Munsiff-Magistrate on 28/12/2017.

6. Smt.K.Deepa filed the writ petition contending that Sri.K.V.Rejanish who was arrayed as the 3rd respondent was not

eligible to be appointed as District Judge since at the relevant time when he was appointed as a District Judge, he was not a practising Advocate and was in judicial service, functioning as a Munsiff.

7. The learned Single Judge based on the judgment of the Apex Court in ***Dheeraj Mor v. High Court of Delhi*** [(2020) 1 KLT Online 1166 (SC)] held that the appointment of Sri.Rejanish cannot be sustained. Accordingly, his appointment was set aside forming an opinion that he was not a practising Advocate as on the date of his appointment. Consequently, it was held that the petitioner would be entitled to get appointment in his place.

8. Learned senior counsel Sri.George Poonthottam appearing on behalf of the appellant would initially contend that the writ petition itself is an abuse of process of Court as material particulars had been concealed. Further it is contended that the learned Single Judge was not justified in placing reliance on the judgment in ***Dheeraj Mor*** (supra) as the issue considered in that case was totally different from the factual aspects involved in the present case. Further it was contended that as per the Kerala State Higher Judicial Services Rules, 1961 as amended, appellant

was well qualified to be considered for appointment and in ***Dheeraj Mor*** (supra), the qualification prescribed under the Special Rules had not been considered. It is further argued that the Constitution Bench of the Apex Court in ***Rameshwar Dayal v. State of Punjab*** (AIR 1961 SC 816) had considered an almost similar issue and had approved the appointment of District Judges who were working in a different capacity as on the date of appointment. The specific contention, therefore raised by the appellant are (i) ***Dheeraj Mor*** (supra) was decided on different set of facts, (ii) appellant was not in judicial service at the time of submission of the application and at the time of appointment, (iii) Ratio decidendi in ***Rameshwar Dayal*** (supra) applies to the facts of the present case, (iv) Article 233(2) does not contemplate actual practice as a lawyer, but only right to practice as held in ***Mahesh Chandra Guptha v. Union of India and others*** [2009 (8) SCC 273], (v) *"has been for not less than seven years an advocate"* must be read as seven years immediately preceding the application, as held in ***Deepak Aggarwal v. Keshav Kaushik and Others*** [2013(5) SCC 277], (vi) that if there are mutually inviolable decisions, the succeeding ones fall into the

category of *per incuriam* as held in ***Sundeep Kumar Bafna v. State of Maharashtra and another*** (AIR 2014 SC 1745), (vii) Rule 3(f) of the special rules and clause 6(f) of the notification are not under challenge, (viii) material particulars have not been pleaded and finally (ix) that ***Dheeraj Mor*** (supra) did not contemplate removal of the appellant from service.

9. On the other hand, learned senior counsel Sri.S.Sreekumar appearing on behalf of the writ petitioner submitted that in terms of Ext.P1 notification, Note 2 of Clause 6 clearly indicated that eligibility of a candidate shall be determined with reference to the last date fixed for closure of Step II process. Under Step II, the candidate will have to upload his/her scanned photograph and signature filling payment details and detailed information about him/her. Step II process was extended up to 22/2/2018 and by the time the appellant/3rd respondent was appointed as Munsiff-Magistrate as per order dated 28/12/2017 and he was posted as Additional Munsiff w.e.f. 12/2/2018. It is further contended that ***Dheeraj Mor's*** case (supra) squarely applies to the factual situation and in the said case, the Apex Court had placed reliance on the Constitution

Bench judgment in ***Rameshwar Dayal's*** case (supra) as well. It is argued that the *ratio* laid down by the Apex Court in ***Rameshwar Dayal*** (supra) and ***Dheeraj Mor*** (supra) is that when a selection is conducted from the Bar, he should be a practising Advocate having a minimum of 7 years' experience in the Bar and he should continue to be an Advocate until the date of appointment. It is pointed out that as far as Sri.Rejanish is concerned, as on the date of appointment, he was working as a Munsiff and therefore ***Dheeraj Mor's*** case (supra) squarely applies to the factual situation. With reference to the argument that there is concealment of material particulars, learned counsel submits that no deliberate attempt was made to conceal any material particulars. When it was noticed that the particulars regarding an earlier case filed by the petitioner was not incorporated in the pleadings, the writ petition was amended and all material particulars were placed on record.

10. Learned Counsel Sri.Elvin Peter, appearing on behalf of the High Court submitted that the High Court has recommended the appellant/3rd respondent for appointment as he was qualified as per the prevailing rules and as per the judgment of the Apex Court in

Deepak Aggarwal (supra), it is held that eligibility of an Advocate in terms of Article 233(2) of the Constitution of India has to be considered as on the date of application. Therefore, it is pointed out that the appointment of the appellant is well in order and has to be considered taking into account the rules and the law as laid down by the Apex Court as on the date of appointment.

11. Learned Senior Government Pleader Sri.Manoj, also supported the appellant, and contended that ***Dheeraj Mor*** (supra) can have no application to the facts of the case, insofar as the said case has been decided on a different set of facts.

12. Both sides have relied upon several other judgments, but we do not intend to place reliance on all the judgments as such unless it is found necessary while considering the contentions urged on either side.

13. The counsel for writ petitioner has a contention that even as on the date when eligibility of the candidate was being considered, the appellant was not qualified. It is argued that in terms of Note 2 of Clause 6 of Ext.P1 notification, the eligibility of a candidate shall be determined with reference to the last date fixed for closure of Step II process. Step II process was extended

up to 22/2/2018 and by the time the appellant/3rd respondent was appointed as Munsiff-Magistrate as per order dated 28/12/2017 and he was posted as Additional Munsiff w.e.f. 12/2/2018. This contention, we do not think can be sustained. Note 2, can have reference only to the conditions in which a specified time-limit had not been specified. For example, the qualification criteria mentioned under Clause 6(d) is regarding age. The candidate should have attained 35 years of age and shall not have completed 45 years of age as on the 1st day of January, 2017. The said condition cannot be considered as an eligibility criteria with reference to the last date fixed for closure of Step II. Similarly Clause 6(f) of the notification regarding the standing of not less than 7 years of practice as on 1st day of January, 2017 is still an eligibility criteria which could be decided only on the first day of January, 2017.

14. Now let us consider the factual background of the case. The notification for appointment to fill up NCA vacancies of District & Sessions Judges was published on 21/11/2017. As per qualification criteria mentioned in the notification, the candidate should be a practising Advocate having a standing of not less

than 7 years of practice as on the first day of the January of the year in which the applications for appointment are invited. The last date for receipt of application was on 22/1/2018. There is no dispute about the fact that as on 1st January 2017 the date of notification, the date of submission of application and the last date of application, Sri.Rejanish was a practising Advocate. He was appointed as a Munsiff-Magistrate on 28/12/2017 and he took charge on 12/2/2018, on which date he ceased to be a practising Advocate. With reference to the selection of District Judges, list of qualified candidates was published by the High Court on 7/6/2019. Sri.Rejanish was relieved from the Subordinate Judiciary on 21/8/2019 and he took charge as District Judge, Thiruvananthapuram on 24/8/2019.

15. On 10/6/2019, writ petitioner filed WP(C) No. 15832/2019 challenging the inclusion of Sri.Rejanish in the select list prepared by the High Court. However, on 1/7/2019, the said writ petition was withdrawn for the purpose of moving the Supreme Court which was allowed by the learned Single Judge. Petitioner filed WP(C) No. 888/2019 before the Supreme Court on 4/7/2019. By order dated 19/7/2019, Apex Court directed the

petitioner to move the High Court for interim reliefs. Petitioner filed a fresh writ petition before this Court on 24/7/2019. Subsequently, she filed IA No.1/2019 seeking amendment of the writ petition which was allowed and the amended writ petition was filed on 2/8/2019.

16. As already stated, one of the contentions urged by the appellant is that there is concealment of material particulars insofar as the writ petitioner did not disclose the filing of WP(C) No. 15832/2019 and the order in the writ petition. The argument is that when the petitioner seeks for selection to a post in Judiciary, all the factual aspects which are required to be considered are to be placed before Court. If there is any factual error, it will amount to non disclosure, in which event, the writ petition ought to be dismissed on that ground itself. It is pointed out that, an amended writ petition was filed only when the learned Government Pleader had pointed out that an earlier writ petition filed by the petitioner was withdrawn with leave to approach the Apex Court and that even before the Apex Court, the writ petitioner did not disclose that she had withdrawn WP(C) No. 15832/2019 filed before the High Court. Therefore, it is

contended that all through the proceedings, the petitioner was trying to conceal the material particulars which are relevant for a proper adjudication of the case. Learned counsel placed reliance on Rules 146 and 147(1)(a) of the Kerala High Court Rules, 1971 which reads as under:-

> *"**146.Contents of the applications**:- Every application shall set out the provision of law under which it is made, the name and description of the petitioner and the respondent, a clear and concise statement of facts, the grounds on which the relief is sought and shall be signed by petitioner and by his Advocate, if he has appointed one, as in Form No.10*
> *(Provided that no petition shall be entertained by the Registry unless it contains a statement as to whether the petitioner had filed any petition seeking similar reliefs in respect of the same subject matter earlier and if so, the result thereof.*
> ***147. Documents to accompany petitions:-** (1) The application shall be accompanied by:*
> *(a) an affidavit verifying the facts relied on."*

To substantiate the above contention, the learned counsel placed reliance on some judgments which we intend to mention. In ***Marakkar v. Government of Kerala*** (1998 (2) KLT 920), after referring to Rules 146 and 150 of the High Court Rules, a learned Single Judge held that it is mandatory on the part of the petitioner to make a statement in the writ petition as to whether

the petitioner had filed any petition seeking similar reliefs in respect of the same subject matter earlier and if so, the result thereof. It was further held that if there is failure to do so, it amounts to an abuse of process of Court and the writ petition cannot be entertained. That was a case in which the petitioner failed to bring to the notice of the Court an earlier original petition filed seeking the very same reliefs in which the Court had refused to grant the said relief. In ***District Collector, Palakkad v. Devayani*** (2001 (3) KLT 697), a Division Bench of this Court observed that when there was non disclosure to state that an earlier petition is dismissed as not pressed, a fresh writ petition is not maintainable taking into consideration the principle laid down under Order XXIII Rule 1 of Code of Civil Procedure. In ***Baduvan Kunhi v. K.M.Abdulla and Another*** [2016 (4) KLJ 73], which related to a public interest litigation, this Court held that if there is failure to comply with the procedure under Rule 146 of the Kerala High Court Rules by giving a declaration about the filing or pendency of any previous case, it amounts to deliberate suppression of facts. In ***Babu C.G. v. South Indian Bank Ltd. and Others*** (ILR 2019 (4) Ker.150), yet another Division Bench of

this Court held that if a person files a writ petition without mentioning about an earlier writ petition filed for similar reliefs, it amounts to abuse of process and such a person is not entitled for invoking the extraordinary jurisdiction of this Court under Art.226 of the Constitution of India. In ***Ramjas Foundation and Another v. Union of India and Others*** [(2010) 14 SCC 38], the Apex Court also took the view that when there is no whisper about a large number of cases filed earlier challenging the acquisition of land, it amounts to suppression of fact in which event, such a person is not entitled to any relief in petitions filed under Articles 32, 226 and 136 of the Constitution of India. In ***Union of India and Others v. Muneesh Suneja*** [(2001) 3 SCC 92], the Apex Court had took serious note of the fact of non mentioning of an earlier writ petition filed by the detenu which was subsequently withdrawn amounts to non disclosure and is fatal to the petition. In ***Bhaskar Laxman Jadhav and Others v. Karamveer Kakasaheb Wagh Education Society*** (AIR 2013 SC 523), the Apex Court observed that it is not for the litigant to decide what fact is material for adjudicating a case and what is not material. It is the obligation of a litigant to disclose all the

facts involved in the case and leave the decision making to the Court. It is therefore pointed out that in the above writ petition, the very fact of filing WP(C) No. 15832/2019 and that the same had been withdrawn has not been specifically pleaded. That apart, it was pointed out that in WP(C) No. 15832/2019, the petitioner had sought to withdraw the writ petition with liberty to approach the Apex Court, and no liberty was sought for filing a fresh writ petition. When the petitioner approached the Apex Court, since it was not disclosed before the Apex Court that the petitioner had withdrawn WP(C) No. 15832/2019, petitioner was asked to move the High Court seeking interim reliefs. No permission was granted by the Apex Court to file a fresh writ petition and therefore the contention urged was that filing of the fresh writ petition without disclosing the true and correct facts, especially the filing of an earlier writ petition and withdrawal of the same, is a clear abuse of process and such a litigant is not entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution of India.

17. On the other hand, learned counsel appearing for the writ petitioner would submit that factually the said contention

does not stand scrutiny. It is pointed out that the first writ petition was withdrawn with liberty to approach the Apex Court. But in the above writ petition, there was no deliberate attempt to mislead the Court in any manner. Specific reference was made to paragraph 10 of the writ petition, wherein it was specifically stated that the petitioner had filed WP(C) No. 888/2019 before the Apex Court and that it came up for hearing on 19/7/2019 and that WP(C) No. 888/2019 was disposed of on 19/7/2019 in the light of Ext.P3 order of the Apex Court. It is therefore contended that there was no concealment of material particulars as far as the case on hand is concerned. But it is submitted that when the writ petition was filed, it was noticed that there was no mention about the earlier writ petition i.e., WP(C) No. 15832/2019. Therefore, an application was filed as IA No.1/2019 to amend the writ petition by incorporating paragraphs 13A and 13B. In paragraph 13A, it was stated that petitioner had approached this Court by filing WP(C) No. 15832/2019 for identical reliefs and the same was permitted to be withdrawn with liberty to move the Apex Court and a copy of the said order is also produced as Ext.P7. Since the petitioner had amended the writ petition, even

at the stage of admission, the same cannot be thrown out on the ground that there is concealment of material particulars.

18. There cannot be any dispute regarding the legal proposition as argued by the learned counsel for petitioner. But each case will have to be decided on its own facts. It is true that in terms of proviso to Rule 146 of the Kerala High Court Rules, the Registry shall not entertain a petition unless the petition contains a statement as to whether the petitioner had filed any petition seeking similar reliefs in respect of the same subject matter earlier and its result. In terms of Rule 147(1)(a), an affidavit is also to be filed verifying the facts relied on. It is also true that at the time of filing the writ petition, there was failure to disclose about the filing of WP(C) No. 15832/2019 and the order passed thereon, though there was specific reference to the writ petition filed before the Apex Court and the consequential order. What is to be considered is whether there was an attempt on the part of the petitioner, not disclosing such a fact to derive any particular advantage in the case or just a bonafide error. The Apex Court in its order in WP(C) No. 888/2019 had permitted the petitioner to approach the High Court for interim reliefs. When the Apex Court

had specifically permitted the petitioner to move the High Court for necessary interim orders, nothing prevented the petitioner from approaching this Court. Though initially there was failure to disclose the disposal of W.P.(C)No.15832/2019, the said irregularity had been rectified by amending the writ petition and it is thereafter that notice had been ordered to the 3rd respondent. In the light of the aforesaid factual circumstances, we do not think that any attempt had been made by the writ petitioner to conceal any material fact with the intention to mislead the Court and to obtain orders. Therefore, the said contention of the appellant cannot be sustained.

19. Now coming to the merit of the contentions urged in the case, Registrar (Subordinate Judiciary) of the High Court had issued a notice dated 7/6/2019 (Ext.P4) publishing the list of candidates who got qualified in the Kerala State Higher Judicial Service Examination, 2017. Ext.P6 is the notice dated 8/6/2019 issued by the Registrar General of High Court, which evidences the resolution of the High Court to appoint 8 candidates as District and Sessions Judges in the Kerala State Higher Judicial Service, subject to approval of the Governor of Kerala. From

among the said list, 5th person was Sri.Rejanish K.V. Ext.P10 is the Government notification dated 2/8/2019 by which the Governor of Kerala on the recommendation of the High Court has appointed 5 persons as District and Sessions Judges in the Kerala State Higher Judicial Service under Rule 2(c) of the Kerala State Higher Judicial Service Rules, 1961. The person at Sl.No.5 is Sri.Rejanish K.V. In the order of appointment, it was further stated as under:-

> *"The above appointments will be subject to the final disposal of Writ Petition Numbers 229/2017, 232/2017, 618/2017 and S.L.P.(C) No.14156/2015, pending before the Supreme Court of India and Writ Petition Numbers 33053/2018, 39543/2018, 15832/2019, 16331/2019 and Writ Appeal No.406/2018 pending before the High Court of Kerala.*
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> *In addition, the appointment of candidate at Sl.No.5 will be subject to the final disposal of WP(C) 414/2016 and WP(C) 423/2016 pending before the Hon'ble Supreme Court of India."*

20. Ext.P9 is the notification issued on 28/12/2017 by the Government of Kerala as per GO(Ms.) No.262/2017/Home appointing 21 Munsiff-Magistrates in the Kerala Judicial Service by way of direct recruitment, of which Sl.No.13 was Sri.Rejanish K.V.

Ext.P5 is the proceedings dated 11/1/2018 issued by the Registrar (Subordinate Judiciary) by which Sri.Rejanish K.V was posted as Additional Munsiff, Alappuzha pursuant to Government Order No.262/2017 dated 28/12/2017.

21. Therefore, as far as Sri.Rejanish K.V was concerned, his appointment was subject to the final disposal of WP(C) Nos. 414/2016 and 423/2016 pending before the Apex Court which is decided in ***Dheeraj Mor*** (supra). Ext.R3(a) dated 17/8/2019 is the proceedings of Registrar (Subordinate Judiciary) by which Sri.Rejanish K.V who was working as Judicial Magistrate of First Class (Temporary), Thiruvananthapuram was directed to hand over charge to the Judicial Magistrate of First Class-V, Thiruvananthapuram and to proceed to take up his new appointment. The officers were directed to join duty in their respective stations on 24/8/2019.

22. The appellant has a case that though he was appointed as per Government Order dated 2/8/2019, his appointment does not take effect until he takes charge as a District Judge. Reference is made to Rule 2(1) of the Kerala State and Subordinate Services Rules, 1958, which reads as under:-

> *"(1) A person is said to be "appointed to a service" when in accordance with these rules or in accordance with the rules applicable at the time as the case may be, he discharges for the first time the duties of a post borne on the cadre of such service or commences the probation, instruction or training prescribed as members thereof."*

It is therefore the argument of the appellant that even applying the principle laid down in ***Dheeraj Mor*** (supra), as on the date when the appellant took charge as District Judge, he was an Advocate, as by the time he was already relieved from the post of Munsiff-Magistrate as early as on 17/8/2019. In ***Dheeraj Mor*** (supra), the Apex Court had after interpretation of Art.233(2) of the Constitution of India had declared the law that an Advocate who is appointed from the bar to the post of District Judge by way of direct recruitment should be a person who should be an Advocate as on the date of application and even on the date of appointment. A person is appointed to a service when an order of appointment is issued and he enters service only when he assumes charge of that office. As per the provisions of KS & SSR, a person is said to be "appointed to a service" when he discharges for the first time the duties of a post borne on the cadre of such service or commences the probation, instruction or

training prescribed as members of the said service. In the case on hand, appointment referred to in ***Dheeraj Mor*** (supra) can only refer to the order of appointment issued by the Governor of Kerala, who is the appointing authority and none else. Therefore, to that extent, we cannot subscribe to the argument expressed by the learned counsel for appellant .

23. The main argument raised by the counsel for appellant is that the law laid down in ***Dheeraj Mor*** (supra), cannot have application to the facts of the present case. To understand the argument, it will be useful to refer to the rules relating to appointment of a District Judge and the qualification prescribed therein. As per the Kerala State Higher Judicial Service Special Rules of 1961 amended as per Special Rules, 2017 which had come into effect on 20/9/2017, one of the conditions prescribed for direct recruitment of a candidate is specified in Rule 3(f) that "*he shall be a practising Advocate having a standing of not less than 7 years of practice on the first day of January of the year in which applications for appointment are invited*".

24. Apparently, the appellant had the qualification to apply for the said post as he was a practising Advocate having a

standing of not less than 7 years of practice on 1st January, 2017. He was also a practising Advocate until he was appointed as Munsiff as per Government Order dated 28/12/2017. He was posted as a Munsiff on 12/2/2018. Therefore, going by the Rules, he satisfied all the qualification criteria as specified under Rule 3.

25. Article 233 of the Constitution of India reads a under:-

> *"**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.*

The meaning of the words "*has been for not less than seven years an advocate or a pleader*" occurring under Article 233(2) have already been addressed by the Apex Court, especially by the Constitution Bench in ***Rameshwar Dayal's case*** (supra). That was a case in which a writ petition was filed challenging the appointment of Judges who were working as Additional Judges of Punjab High Court, Officiating Judge of the same Court, District

and Sessions Judge of Delhi and another person who was a District Judge and working as Registrar of the Punjab and Haryana High Court. The contention urged was that none of them were qualified to be appointed as District Judges under Article 233(2) of the Constitution at the time when they were appointed by the State Government. Therefore, a writ of *quo warranto* was filed to oust them from their office and restraining them from exercising their powers in the said post. One of the issue was that some of them were enrolled as Advocate of the Lahore High Court and later they shifted their practice to Punjab High Court where they were appointed as District Judges. Two among them Harbans Singh and P.R.Sawhney did not have their names factually on the roll when they were appointed as District Judges. The question considered was whether all the five candidates fulfilled the requirement of Clause (2) of Art.233 of the Constitution when they were appointed as District Judges. One of the contentions urged was that the requirement of having 7 years as an Advocate or Pleader must be after adoption of the Constitution. Yet another argument was that by reason of the use of the present perfect tense “has been” in Clause (2) of Art.233, the rules of grammar

require that the person eligible for appointment must not only have been an advocate or pleader before, but must be an advocate or pleader at the time he is appointed to the office of District Judge. Yet another contention urged was that the period of 7 years' practice should be in a Court in the territory of India as defined under Art.1 of the Constitution. The Constitution Bench after elaborately considering the aforesaid matter held as under:-

> ***"11.*** *This is the background against which we have to consider the argument of learned counsel for the appellant., Even if we assume without finally pronouncing on their correctness that learned counsel is right in his first two submissions viz. that the word "advocate" in clause (2) of Article 233 means an advocate of a court in India and the appointee must be such an advocate at the time of his appointment,....."*
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> *"12. ..... Article 233 is a self contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under clause (1) the Governor can appoint such a person as a district judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in clause (2) and all that is required is that he should be an advocate or pleader of seven years' standing."*
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> ***13.*** *.....It is perhaps necessary to add that we must not be understood to have decided that the expression 'has been'*

must always mean what learned counsel for the appellant says it means according to the strict rules of grammar. .....We consider it unnecessary to pursue this matter further because the respondents we are now considering continued to be advocates of the Punjab High Court when they were appointed as district judges and they had a standing of more than seven years when so appointed. They were clearly eligible for appointment under clause 2 of Article 233 of the Constitution.

14. We now turn to the other two respondents (Harbans Singh and P.R. Sawhney) whose names were not factually on the roll of Advocates at the time they were appointed as district judges. What is their position? We consider that they also fulfiled the requirements of Article 233 of the Constitution. Harbans Singh was in service of the State at the time of his appointment, and Mr Viswanantha Sastri appearing for him has submitted that clause (2) of Article 233 did not apply. We consider that even if we proceed on the footing that both these persons were recruited from the Bar and their appointment has to be tested by the requirements of clause (2), we must hold that they fulfilled those requirements. They were Advocates enrolled in the Lahore High Court; this is not disputed. Under clause 6 of the High Courts (Punjab) Order, 1947, they were recognised as Advocates entitled to practise in the Punjab High Court till the Bar Councils Act, 1926, came into force. Under Section 8(2)(a) of that Act it was the duty of the High Court to prepare and maintain a roll of advocates in which their names should have been entered on the day on which Section 8 came into force, that is, on September 28, 1948. The proviso to sub-section (2) of Section 8 required them to deposit a fee of Rs 10 payable to the Bar Council. Obviously such payment could hardly be made before the Bar Council was constituted. We do not agree with

learned counsel for the appellant and the interveners (B.D. Pathak and Om Dutt Sharma) that the proviso had the effect of taking away the right which these respondents had to come automatically on the roll of advocates under Section 8(2)(a) of the Act. We consider that the combined effect of clause 6 of the High Courts (Punjab) Order, 1947, and Section 8(2)(a) of the Bar Councils Act 5 of 1926, was this: from August 15, 1947, to September 28, 1948, they were recognised as Advocates entitled to practise in the Punjab High Court and after September 28, 1948, they automatically came on the roll of advocates of the Punjab High Court but had to pay a fee of Rs 10 to the Bar Council. They did not cease to be advocates at any time or stage after August 15, 1947, and they continued to be advocates of the Punjab High Court till they were appointed as District Judges. They also had the necessary standing of seven years to be eligible under clause (2) of Article 233 of the Constitution."

In fact, in paragraph 14, the question relating to Harbans Singh and P.R.Sawhney were specifically considered by the Constitution Bench. Paragraphs 5(2) and (5) of the said judgment would indicate the factual position as regards those two persons, which reads as under:

"5. (2) Respondent 3 (Harbans Singh, J.) was also called to the Bar and then enrolled as an Advocate of the Lahore High Court on March 5, 1937. He worked as an Additional District and Sessions Judge, Ferozepore, from July 2, 1947, to February 22, 1948. He then returned to practice at Simla for a short while. On March 15, 1948, he worked

> *as Deputy Custodian, Evacuee Property, till April 17, 1950. On April 18, 1950, he was appointed as District and Sessions Judge and on August 11, 1958, he was appointed as an Additional Judge of the Punjab High Court."*
>
> *"(5) Respondent 6 (P.R. Sawhney) was called to the Bar on November 17, 1930, and was enrolled as an Advocate of the Lahore High Court on March 10, 1931. After partition he shifted to Delhi and worked for sometime as Legal Adviser to the Custodian, Evacuee Property, Delhi. Then practised for sometime at Delhi; he then accepted service under the Ministry of Rehabilitation as an Officer on Special Duty and Administrator, Rajpura Township. On March 30, 1949, he became the chairman, Jullundur Improvement Trust. On May 6, 1949, he got his licence to practise as an Advocate suspended. On April 6, 1957, he was appointed as District and Sessions Judge"*.

Apparently they were persons who were not Advocates as on the date of appointment. Their matter was considered by the Constitution Bench separately at paragraph 14. It was specifically held "*We consider that even if we proceed on the footing that both these persons were recruited from the Bar and their appointment has to be tested by the requirements of Clause (2), we must hold that they fulfilled those requirements*".

26. In ***Deepak Aggarwal*** (supra), a three Judge bench of

the Apex Court had occasion to consider the constitutional provision under Art.233(2). In the aforesaid case, the question considered by the Apex Court is regarding as to what is meant by Advocate or Pleader under Art.233(2). The question was whether District Attorney, Additional District Attorney, Public Prosecutor, Assistant Public Prosecutor and Assistant Advocate General were full time employees of the Government and whether they were eligible for appointment to the post of District Judge under Article 233 of the Constitution. At paragraph 51, it was held as under:

> ***"51.*** *From the above, we have no doubt that the expression, "the service" in Article 233(2) means the "judicial service". Other members of the service of the Union or State are as it is excluded because Article 233 contemplates only two sources from which the District Judges can be appointed. These sources are: (i) judicial service; and (ii) the advocate/pleader or in other words from the Bar. The District Judges can, thus, be appointed from no source other than judicial service or from amongst advocates. Article 233(2) excludes appointment of District Judges from the judicial service and restricts eligibility of appointment as District Judges from amongst the advocates or pleaders having practice of not less than seven years and who have been recommended by the High Court as such."*

Further, after referring to ***Sushma Suri v. Government of National Capital Territory of Delhi and Another*** [(1999) 1

SCC 330], yet another three-Judge Bench judgment, held at paragraph 89 as under:-

> ***"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."*

Still further, after referring to the expression relating to the words "*has been for not less than seven years an Advocate*", it was held at paragraph 102 as under:

> *"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."*

In the above case, therefore, the Apex Court took a view that the essential requirement articulated by the expression "has been" for not less than seven years as an Advocate in Art.233(2) is that such person must with requisite period be continuing as an Advocate on the date of application. Again, after referring to Rule 11 of the State Rules, it was held at paragraph 103 as under:-

> *"103. Rule 11 of the HSJS Rules provides for qualifications for direct recruits in Haryana Superior Judicial Service. Clause (b) of this Rule provides that the applicant must have been duly enrolled as an advocate and has practised for a period not less than seven years. Since we have already held that these five private appellants did not cease to be advocate while working as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, the period during which they have been working as such has to be considered as the period practising law. Seen thus, all of them have been advocates for not less than seven years*

and were enrolled as advocates and were continuing as advocates on the date of the application".

27. In ***Dheeraj Mor*** (supra), Apex Court referred to the judgments in ***Rameshwar Dayal*** (supra) as well as ***Deepak Aggarwal*** (supra) and finally held at paragraph 14, the latter part of paragraph 24 , paragraphs 45 and 47 (iv) as under:-

> ***"14.*** *Article 233(2) provides that if an advocate or a pleader has to be appointed, he must have completed 7 years of practice. It is coupled with the condition in the opening part that the person should not be in service of the Union or State, which is the judicial service of the State. The person in judicial service is not eligible for being appointed as against the quota reserved for advocates. Once he has joined the stream of service, he ceases to be an advocate. The requirement of 7 years of minimum experience has to be considered as the practising advocate as on the cut-off date, the phrase used is a continuous state of affair from the past. The context 'has been in practice' in which it has been used, it is apparent that the provisions refers to a person who has been an advocate or pleader not only on the cut-off date but continues to be so at the time of appointment."*
>
> *"24. xxxx*
> *We find ourselves unable to agree with the proposition laid down in Vijay Kumar Mishra (supra). In our opinion, in-service candidates cannot apply as against the post reserved for the advocates/pleaders as he has to be in*

continuous practice in the past and at the time when he has applied and appointed. Thus, the decision in Vijay Kumar Mishra (supra) cannot be said to be laying down the law correctly".

"45. 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."

"47.(iv) For the purpose of Article 233(2), an Advocate has to be continuing in practice for not less than 7 years as on the cut-off date and at the time of appointment as District Judge. Members of judicial service having 7 years' experience of practice before they have joined the service or having combined experience of 7 years as lawyer and member of judiciary, are not eligible to apply for direct recruitment as a District Judge".

In fact, as rightly pointed out by the learned counsel for appellant, in ***Dheeraj Mor*** (supra), the Apex Court was considering the claim of in-service candidates. Persons who were already in service as Munsiff-Magistrate applied for the post of District Judges. First category of persons included those who already had 7 years' practice as an Advocate prior to being appointed as Munsiff-Magistrates. Second category consisted of persons who had completed 7 years' judicial service and the third category consisted of persons who wanted to add on their years of practice and judicial service as Munsiff-Magistrate to attain the qualifying practice of 7 years as an Advocate. We are dealing with a case which was, in fact not the subject matter in ***Dheeraj Mor*** (supra). However, in order to answer the claim raised by judicial officers, the Apex Court considered the specific question relating to the requirement of an Advocate who is directly selected from the bar to the post of District Judge in terms of Article 233(2), since those candidates claimed that the judicial service is equivalent to practice as an Advocate, which could be considered as a qualification criteria.

28. Though it is true that the appellant was not in judicial

service at the time of submission of the application, as already stated, at the time of issuing the order of appointment by the Governor, he was functioning as the Judicial Officer. Based on the judgment in ***Rameshwar Dayal's case*** (supra) especially the factual situation that has arisen and referred to in paragraph 14 of the said judgment, we will not be justified in placing reliance on the said view of the Constitution Bench, especially on account of the fact that in ***Dheeraj Mor*** (supra), the Apex Court had considered paragraph 14 of ***Rameshwar Dayal's*** case (supra) as well, while arriving at the said conclusion. The judgment in ***Mahesh Chandra Gupta's case*** (supra) cannot be applied to the facts of the present case in view of the specific law laid down in ***Deepak Aggarwal*** (supra) which is a later judgment. Of course, in ***Deepak Aggarwal*** (supra), the Apex Court has held that the candidate who was a practising Advocate for 7 years immediately preceding the application is eligible for being considered as a District Judge. But as already stated, ***Deepak Aggarwal*** (supra) has also been considered in ***Dheeraj Mor's*** case (supra) while arriving at the conclusions aforesaid.

29. It is also contended that the findings in ***Dheeraj Mor's***

case (supra) falls into the category of per incuriam and therefore, the earlier judgment requires to be considered in the light of the judgment in ***Sundeep Kumar Bafna's*** case (supra). We do not think that such a view can be taken in the case on hand as ***Dheeraj Mor*** (supra) has been decided after referring to earlier judgments on the point and cannot be described as per incuriam. The principle of per incuriam has been well settled. The law has been laid down in a long line of judgments including ***Vinod Kumar v. Ashok Kumar Gandhi*** [2019 10 SCALE 357], following the Constitution Bench judgment in ***Punjab Land Development and Reclamation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court, Chandigarh and another*** [(1990) 3 SCC 682]. Apparently, when the previous judgments on the point have been referred and considered by the Apex Court in ***Dheeraj Mor*** (supra), the High Court is bound to follow the said judgment as a precedent.

30. It is true that there is no challenge to Rule 3 of the Special Rules or clause 6(f) of the notification. But the question of eligibility for being appointed as a District Judge primarily arises from the interpretation of Art.233(2) of the Constitution of India

and if the Special Rules depart from the constitutional mandate, it will have to be read in the light of the constitutional provision. In other words, the special rules will have no precedence over the interpretation given to Art.233(2) of the Constitution of India.

31. It is also argued that in ***Dheeraj Mor's case*** (supra), the Apex Court never intended to remove the appellant from service. But when a law has been laid down by the Apex Court during the pendency of a writ petition, challenging the qualification of a candidate, necessarily, the law laid down by the Apex Court has to be followed.

In the light of the aforesaid factual circumstances, we do not think that the appellant has made out a case for interference. Writ appeal is hence dismissed. No costs.

Sd/-

A.M.SHAFFIQUE

JUDGE

Sd/-

GOPINATH P.

JUDGE

Rp

At the time of delivering judgment, the learned counsel appearing for the appellant made a request seeking certificate for filing appeal before the Supreme Court. It is brought to our notice that, though Article 233(2) had been interpreted by the Apex Court in ***Dheeraj Mor*** (supra), certain factual issues that had arisen in the case on hand had not been directly considered in ***Dheeraj Mor*** (supra) especially with reference to Rule 3(f) of the Kerala State Higher Judicial Services Rules, 1961 (for short, '1961 Rules') and therefore a substantial question of law of general importance has arisen in the case which requires consideration by the Apex Court.

2. The above request is objected by the learned counsel appearing for the first respondent. It is submitted that ***Dheeraj Mor*** (supra) covers the entire issue on hand and therefore there is no reason to grant certificate for appeal to the Supreme Court.

3. We have in our judgment considered the aforesaid issues and we have found that as per the Rules of the High Court, the appellant was eligible to be considered for appointment as on the date of calling for applications and on the date of appointment, the law laid down in ***Deepak Aggarwal*** (supra) was applicable. But it is after appointment of the appellant as District Judge that the judgment in ***Dheeraj Mor*** (supra) came to be rendered. In the said case, while

interpreting Article 233(2) of the Constitution of India, it was observed that an advocate who applies for the post of District Judge by way of direct recruitment should continue to be a practising Advocate until the date of appointment. The 1961 Rules however did not contemplate such a situation. Further, several appointments of District Judges may have been made across the country based on the Rules applicable in the respective States which may, as in the case of the Kerala Rules be contrary to the declaration of law in ***Dheeraj Mor*** (supra).

4. Under such circumstances, we are of the view that this is a matter which involves substantial question of law of general importance and, therefore, an authoritative pronouncement by the Apex Court is required taking into consideration the factual aspects involved in the case.

Under such circumstances, in terms of Article 134A of the Constitution of India, we hereby grant certificate to the appellant to file appeal before the Supreme Court.

Sd/-

A.M.SHAFFIQUE

JUDGE

Sd/-

GOPINATH P.

JUDGE

Rp

APPENDIX

APPELLANT'S EXHIBITS:

ANNEXURE A1	**TRUE COPY OF THE WRIT PETITION AND AFFIDAVIT FILED AS WPC NO.15832/2019 BEFORE THE HON'BLE HIGH COURT OF KERALA EXCLUDING EXHIBITS.**
ANNEXURE A2	**TRUE COPY OF THE WRIT PETITION, INDEX AND AFFIDAVIT, APPLICAITON FOR EXPARTE STAY (WITHOUT ANNEXURES) IN WP(c) 888/2019 ON THE FILES OF THE HON'BLE SUPREME COURT OF INDIA.**