SUPREME COURT OF INDIA

Deepak Aggarwal

Vs.

Keshav Kaushik

C.A.No.561 of 2013

(R.M.Lodha, Anil R. Dave and Ranjan Gogoi JJ.)

21.01.2013

JUDGMENT

R.M. LODHA, J.

1. Leave granted. What is the meaning of the expression 'the service' in Article 233(2) of the Constitution of India? What is meant by 'advocate' or 'pleader' under Article 233(2)? Whether a District Attorney/Additional District Attorney/Public Prosecutor/Assistant Public Prosecutor/Assistant Advocate General, who is full time employee of the Government and governed and regulated by the statutory rules of the State and is appointed by direct recruitment through the Public Service Commission, is eligible for appointment to the post of District Judge under Article 233(2) of the Constitution? These are the questions which have been raised for consideration in this group of appeals.

2. The above questions and some other incidental questions in these appeals have arisen from the judgment of the Punjab and Haryana High Court delivered on 18.05.2010. The Division Bench of the High Court by the above judgment disposed of 12 writ petitions wherein challenge was laid to the selection and appointment of certain candidates to the post of Additional District and Sessions Judge in the Haryana Superior Judicial Service (HSJS) on diverse grounds. The High Court by its judgment disposed of the writ petitions in the following manner :

> "(A) Selections/appointments of respondents no. 9 – (Dinesh Kumar Mittal), 12 (Rajesh Malhotra), 13 (Deepak Aggarwal), 15 (Chandra Shekhar) and 18 (Desh Raj Chalia) in CWP No. 9157 of 2008 (wherever they may be in other writ petitions) as Additional District and Sessions Judges, are hereby

quashed. This direction shall, however, remain in abeyance for a period of two months to enable the High Court to make alternative arrangements;

(B) As a consequence of the quashment of the selections/appointments of above named respondents, the resultant five vacancies shall be filled up from the candidates next in the order of merit, out of the panel prepared by the Selection Committee;

(C) The appointment of Fast Track Court Judges by a process of absorption after further examination and selection contained in the recommendation of the Selection Committee dated 18.03.2008 is affirmed.

(D) Order dated 22.09.2008 (Annexure P-8 in CWP No. 17708 of 2008 rejecting the request of the High Court for de- reservation of six vacancies (four Scheduled Caste, 2 Backward Classes) is hereby quashed. Resultantly, the matter is remitted back to the Government to re-consider the request of the High Court for de-reservation in relaxation of rules by the competent authority empowered under the Government instructions dated 7.9.2008 and Rule 31 of the Haryana Superior Judicial Service Rules, 2007. The process of re-consideration shall be completed within six weeks and the decision be communicated to the High Court.

(E) If on such re-consideration, the State decides to de- reserve the vacancies, candidates recommended by the High Court vide its recommendation letter dated 25.4.2008, shall be appointed."

3. The appellants in this group of seven appeals are, Deepak Aggarwal, Dinesh Kumar Mittal, Rajesh Malhotra, Chandra Shekhar and Desh Raj Chalia, whose selections/appointments as Additional District and Sessions Judges have been quashed by the High Court, and the Punjab and Haryana High Court, Chandigarh on its administrative side.

4. On 18.05.2007, the Punjab and Haryana High Court, Chandigarh through its Registrar General issued a notification inviting applications for recruitment to certain posts of Additional District and Sessions Judge. The written examinations were conducted pursuant to the said notification wherein 64 candidates were recommended for the interview. After conducting the interview, the High Court recommended the names of 16 candidates in order of merit to the post of Additional District and Sessions Judge in the State of Haryana by direct recruitment. Of the 16 candidates recommended by the High Court, 5 were the

appellants. At the time of appointment, Deepak Aggarwal was working as Assistant District Attorney in Himachal Pradesh; Chandra Shekhar and Desh Raj Chalia were working as Assistant District Attorney in the State of Haryana, Rajesh Malhotra was working as Public Prosecutor in the office of Central Bureau of Investigation and Dinesh Kumar Mittal was working as Deputy Advocate General in the office of the Advocate General, Punjab.

5. Based on the recommendation of the High Court, the State of Haryana issued appointment orders. Some of the unsuccessful candidates filed writ petitions before the High Court raising diverse grounds of challenge. However, as indicated above, the appointments of five appellants who were working as Assistant District Attorney/Public Prosecutor/Deputy Advocate General have been quashed holding that they did not have the requisite criteria to qualify for the recruitment as contemplated in Article 233 of the Constitution and that some of the candidates did not have requisite experience.

6. Article 233 of the Constitution of India provides for appointment of District Judges. It reads as follows:

> "233. Appointment of district judges.—
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> (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.
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> (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."

7. Haryana Superior Judicial Service Rules, 2007 (for short, 'HSJS Rules') regulate the appointment of subordinate judges in the State of Haryana. Part III of these Rules deals with method of recruitment. Rules 5, 6 and 11 of the HSJS Rules are relevant for the purposes of consideration of these appeals and they read as under:

> "R.5. Recruitment to the Service shall be made by the Governor,—

(i) by promotion from amongst the Haryana Civil Service (Judicial Branch) in consultation with the High Court; and

(ii) by direct recruitment from amongst eligible Advocates on the recommendations of the High Court on the basis of the written and viva voce test conducted by the High Court.

R.6. (1) Recruitment to the Service shall be made,—

a) 50 per cent by promotion from amongst the Civil Judges (Senior Division)/Chief Judicial Magistrates/Additional Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test;

b) 25 per cent by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service as Civil Judges (Senior Division)/Chief Judicial Magistrates/Additional Civil Judges (Senior Division); and who are not less than thirty five years of age on the last date fixed for submission of applications for taking up the limited competitive examinations; and

c) 25 per cent of the posts shall be filled by direct recruitment from amongst the eligible Advocates on the basis of the written and viva voce test, conducted by the High Court.

(2) The first and second post would go to category (a) (by promotion on the basis of merit-cum-seniority), third post would go to category (c) (direct recruitment from the bar) and fourth post would go to category (b) (by limited competitive examination) of rule 6, and so on.

R. 11. The qualifications for direct recruits shall be as follows :

(a) must be a citizen of India;

(b) must have been duly enrolled as an Advocate and has practiced for a period not less than seven years;

(c) must have attained the age of thirty five years and have not attained the age of forty five years on the 1st day of January of the year in which the applications for recruitment are invited."

8. It will be convenient at this stage to refer to some other provisions which have bearing in the matter and are relevant for the purpose of these appeals. Section 2(u) of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') defines 'Public Prosecutor' to mean any person appointed under Section 24 and includes any person acting under the directions of a Public Prosecutor. Section 24 deals with 'Public Prosecutors'. It reads as under:

> "24. Public Prosecutors,—
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> (1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for conducting in such court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.
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> (2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district, or local area.
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> (3) For every district the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:
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> Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.
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> (4) The District Magistrate shall, in consultation with the Sessions Judge, prepare, a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district. (5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4). (6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).

Explanation - For the purposes of this sub-section,-- (a) "regular Cadre of Prosecuting Officers" means a Cadre of Prosecuting Officers which includes therein the post of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors, by whatever name called, to that post;

(b) "Prosecuting Officer" means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public Prosecutor under this Code.

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor:

Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.

(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person has been in practice, as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate."

9. Some of the States have amended Section 24 Cr.P.C. Insofar as Haryana is concerned, an explanation has been added to sub-section (6) of Section 24 with effect from 29.11.1985 which provides that for the purpose of sub-section (6), the persons constituting the Haryana State Prosecution Legal Service (Group A) or

Haryana State Prosecution Legal Service (Group B) shall be deemed to be a regular Cadre of Prosecuting Officers.

10. Section 25 Cr.P.C deals with Assistant Public Prosecutors for conducting prosecutions in the court of Magistrates. Section 25A was brought in the Cr.P.C. by Act 25 of 2005. It, inter alia, provides that the State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as it thinks fit. Sub-section (5) of Section 25A makes a provision that every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (1) or under sub-section (8) of Section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution. In terms of sub-section (6) of Section 25A, every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub- section (3) or under sub-section (8) of Section 24 to conduct cases in district courts and every Assistant Public Prosecutor appointed under sub- section (1) of Section 25 shall be subordinate to the Deputy Director of Prosecution. Sub-section (8), however, clarifies that the Advocate General for the State while performing the functions of public prosecutor shall not be covered by Section 25A.

11. Section 2(7) of the Code of Civil Procedure, 1908 (for short, 'CPC') defines 'government pleader'. According to this provision, 'government pleader' includes any officer appointed by the State Government to perform all or any of the functions expressly imposed by the CPC on the government pleader and also any pleader acting under the directions of the government pleader.

12. Section 2(15) CPC defines 'pleader' which means any person entitled to appear and plead for another in court, and includes an advocate, a vakil and an attorney of a High Court.

13. Prior to Indian Advocates Act, 1961, [The Indian] Bar Councils Act, 1926 (for short, '1926 Act') dealt with the functions of the Bar Council and the admission and enrolment of advocates. Section 2(1)(a) of the 1926 Act had defined 'advocate' as meaning an advocate entered in the roll of advocates of a High Court under the provisions of that Act.

14. Section 8(1) of the 1926 Act provided as under: "8.Enrolment of advocates. – (1) No person shall be entitled as of right to practice in any High Court, unless his name is entered in the roll of the advocates of the High Court maintained under this Act:

Provided that nothing in this sub-section shall apply to any attorney of the High Court."

15. Section 9 of the 1926 Act dealt with qualifications and admission of advocates while Section 14 provided for right of advocates to practice.

16. On constitution of the State Bar Council under the Advocates Act, 1961 (for short, '1961 Act'), the relevant provisions of the 1926 Act stood repealed. Section 17 of the 1961 Act provides that every State Bar Council shall prepare and maintain a roll of advocates. It further provides that no person shall be enrolled as an advocate on the roll of more than one State Bar Council. Section 24 provides for the eligibility of the persons who may be admitted as advocates on State roll. Inter alia, it states that a person shall be qualified to be admitted as an advocate on a State roll if he fulfills such other conditions as may be specified in the rules made by the State Bar Council under Chapter III. Section 28 empowers a State Bar Council to make rules to carry out the purposes of Chapter III. Clause (d), sub-section (2) of Section 28 states that such rules may provide for the conditions subject to which a person may be admitted as an advocate on the State roll. Chapter IV of the 1961 Act deals with the right to practice. This Chapter comprises of five sections. Section 29 provides that from the appointed day, there shall be only one class of persons entitled to practice profession of law, namely, advocates. Section 30 provides for right of advocates to practice. Section 33 makes a provision that except as otherwise provided in the Act or in any other law for the time being in force, no person shall on or after the appointed day, be entitled to practice in any event or before any authority or person unless he is enrolled as advocate under the Act.

17. Section 49 gives power to the Bar Council of India to make rules for discharging its functions and also to frame rules in respect of the subjects enumerated in clauses (a) to (j). Clause (ah) deals with the conditions subject to which an advocate shall have the right to practice and the circumstances under which a person shall be deemed to practice as an advocate in a court. The first proviso following the main Section provides that no rules made with reference to clause (c) or (gg) shall have effect unless they have been approved by the Chief Justice of India. The second proviso provides that no rules made with reference to clause (e) shall have effect unless they have been approved by the Central Government. Pursuant to the power given under Section 49, the Bar Council of India has framed the Bar Council of India Rules (for short, 'BCI Rules'). Rule 43 provides that an advocate, who has taken a full-time service or part-time service or

engaged in business or any avocation inconsistent with his practising as an advocate, shall send a declaration to that effect to the respective State Bar Council within 90 days. On his failure to do so or in the absence of sufficient cause for not doing so, he may face suspension of licence to practice. Prior to 2001, Rule 49 of the BCI Rules read as under :

> "49. An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practice, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practice as an advocate so long as he continues in such employment.
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> Nothing in this rule shall apply to a Law Officer of the Central Government or a State or of any Public Corporation or body constituted by statute who is entitled to be enrolled under the rules of his State Bar Council made under Section 28(2)(d) read with Section 24(1)(e) of the Act despite his being a full time salaried employee.
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> Law Officer for the purpose of this Rule means a person who is so designated by the terms of his appointment and who, by the said terms, is required to act and/or plead in courts on behalf of his employer.

18. By resolution dated 22.06.2001, the Bar Council of India deleted the second and third para of the above rule. The said resolution was published in the Government Gazette on 13.10.2001. The Chief Justice of India gave his consent to the said deletion on 23.04.2008. Rule 49 in its present form, consequent on amendment, reads as under: "An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practice, and shall, on taking up any employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practise as an advocate so long as he continues in such employment".

19. The High Court has held, and in our view rightly, that the consent of Chief Justice of India was not needed because rule in respect of eligibility is traceable to clause (ah). The amendment thus became effective in any case on its publication in the Government Gazette on 13.10.2001.

20. The High Court while considering the issue relating to eligibility of the appellants for selection and appointment under Article 233(2), dealt with Sections 17, 22, 24, 29 and 33 of the 1961 Act and Rule 49 of the BCI Rules and observed

that an advocate could not be a full-time salaried employee of any person, government, firm, corporation or concern so long as he continues to practice.

21. The High Court referred to various decisions including decisions of this Court in Mundrika Prasad Sinha v. State of Bihar[1], Mukul Dalal and others v. Union of India and Others[2], Kumari Shrilekha Vidyarthi and Others v. State of U.P. and Others[3], Chandra Mohan v. State of U.P. and Others[4], Satya Narain Singh v. High Court of Judicature at Allahabad and Others[5], Sushma Suri v. Government of National Capital Territory of Delhi and Another[6], Satish Kumar Sharma v. Bar Council of H.P.[7], Sunil Kumar Goyal v. Rajasthan Public Service Commission[8] and finally held that Dinesh Kumar Mittal, Rajesh Malhotra, Deepak Aggarwal, Chandra Shekhar and Desh Raj Chalia were ineligible at the time of their appointment as Additional District and Sessions Judge. The Bench formulated its opinion on account of the following :

> "They were in regular government service with the Union or the State. Their recruitment to the posts of Deputy Advocate General, Assistant District Attorney's/Prosecutors was pursuant to their selection by the respective Public Service Commission/Government. All of them were in the graded pay scale and subjected to all rigors of service conditions of a government servant known to service jurisprudence. We may not be misunderstood to mean that the Law Officers as a genre are ineligible for judicial appointment. Disqualification/ineligibility is attracted only to such category of Law Officers who opt for regular Government employment. However, no such ineligibility is attached to the other category of Law Officers who are practicing lawyers and are engaged on behalf of the Government or any other organization/authority, even on salary to appear on their behalf either under any contractual arrangement or on case to case basis, without subjecting themselves to the conditions of regular government employment such as the Advocate General, Additional Advocate General in the State, Assistant Solicitor General or Central Government Standing counsel or any other Law Officer engaged by various Government Corporations or otherwise who are engaged to represent them in courts of law."

22. The High Court also held that except Rajesh Malhotra, the other four, namely, Dinesh Kumar Mittal, Deepak Aggarwal, Chandra Shekhar and Desh Raj Chalia were having less than seven years of practice at the Bar before their engagement as Assistant District Attorneys/Public Prosecutors.

23. Mr. P.P. Rao, learned senior counsel who led the arguments on behalf of the appellants, argued that Article 233(2) of the Constitution is a self-contained Code. Service of a Public Prosecutor or an Assistant Public Prosecutor or a Government Pleader does not render a person ineligible for appointment as a District Judge if he has been for not less than seven years an advocate or a pleader. According to him, it is open to the State to appoint a Government Pleader in terms of Section 2(7) of C.P.C. for conducting civil cases and Public Prosecutors under Section 24 of Cr.P.C. for criminal cases on mutually agreed terms, either on a case to case basis or piece-rate basis for each item of work done or on a tenure basis or on a permanent basis. Though called 'appointment', it is in reality and in substance an engagement of an advocate for conducting cases in courts. Advocates with experience are only eligible for these posts and even after appointment as Government Pleader or Public Prosecutor or Assistant Public Prosecutor or Assistant District Attorney, their job is exclusively or mainly to conduct cases as advocates in courts. The nature of their functions remains the same. They are always Officers of the Court.

24. It was submitted by Mr. P.P. Rao that the 1961 Act and the BCI Rules, including Rule 49 , must be read harmoniously with the relevant provisions of C.P.C. and Cr.P.C. having regard to the object and scheme of appointment of the Government Pleaders, Public Prosecutors, Assistant Public Prosecutors or Assistant District Attorneys etc. He contended that rule making power by Bar Council of India cannot be exercised inconsistent with the provisions contained in CPC and Cr.P.C; it is not an overriding power and the persons who are eligible in terms of Article 233(2) of the Constitution cannot be made ineligible by a rule made by the Bar Council of India. According to him, the meaning of the word, 'advocate' occurring in Article 233(2) must be fixed and identified which the Constitution makers had in mind. Neither the 1961 Act nor the BCI Rules framed thereunder can curtail the meaning of the word 'advocate' that is understood under Article 233(2) of the Constitution.

25. Mr. P.P. Rao, learned senior counsel submitted that it could never be the intention of the Bar Council of India when it made Rule 49 that appointment of advocate by the Government for conducting its cases in courts as an advocate on a full time salary basis would attract the bar in Rule 49. The bar applies to employees engaged for work other than conducting cases in courts as advocates. He suggested that in order to save the operation of Rule 49, it needs to be read down and the test laid down by this Court in Satish Kumar Sharma7 and Sushma Suri6 must be applied, i.e. whether a person is engaged to act and/or plead in a court of law as an advocate and not whether such person is engaged on terms of

salary or payment of remuneration. In his view, what is important is not the employment but the functions that a Public Prosecutor or a Government Pleader discharges.

26. The contention of Mr. P.P. Rao is that the BCI Rules cannot override the operation of any law made by the Parliament, including the CPC or the Cr.P.C., much less Article 233(2) of the Constitution which contains the word 'advocate' having a definite meaning i.e., person enrolled as a member of the Bar to conduct cases in courts. He highlighted the consistent practice before the Constitution and after the Constitution of the Government Pleaders and Public Prosecutors on regular or permanent basis with fixed emoluments being appointed as District Judges by way of direct recruitment in view of their experience in conducting government cases. He submitted that to declare them ineligible would defeat the object of recruitment underlying Article 233(2) of the Constitution.

27. Mr. A.K. Ganguli, learned senior counsel appearing in the appeals preferred by Dinesh Kumar Mittal adopted the arguments of Mr. P.P. Rao and further submitted that it is right to practice that determines whether one is advocate or not and that is what must be understood by the term 'advocate' occurring in Article 233(2) of the Constitution.

28. Mr. B.H. Marlapalle, learned senior counsel for the appellant Desh Raj Chalia, submitted that Article 233(2) provided two different sources of appointment to the post of District Judge, namely, by promotion from service and by nomination from the law practitioners with practice of not less than seven-years. The requirement of practice for not less than seven-years is only for the appointment by nomination. He relied upon decisions of this Court in Rameshwar Dayal v. State of Punjab and others[9], Chandra Mohan4 and Satya Narain Singh5. Learned senior counsel argued that Section 24, Cr.P.C. is the source of power for appointment of the Public Prosecutor/Additional Public Prosecutor either as part of the regular service cadre or from the panel prepared by the District Magistrate. The scheme of Section 24 Cr.P.C. cannot be allowed to be defeated by Rule 49 of the BCI Rules as amended by the resolution dated 22.06.2001. Learned senior counsel submitted that a Public Prosecutor appointed by State Government as a part of regular service cadre cannot be excluded from the scheme of Section 30 of the 1961 Act just because he has chosen to appear for the State Government. Any law practitioner/advocate has the choice to restrict his practice. He heavily relied upon the observations made by this Court in paragraphs 6, 10 and 11 of the decision in Sushma Suri6 and submitted that principles laid down therein were fully applicable

to the appellant's submission that he is eligible for being selected by nomination to the post of District Judge from amongst the law practitioners.

29. Mr. B.H. Marlapalle referred to various provisions of the 1961 Act and Rule 49 of the BCI Rules and submitted that any person who is a law officer of the State/Central Government and who by the said term is required to act and plead in a court on behalf of his employer is entitled to be admitted as an advocate to the State roll. Rule 49, as amended by the Bar Council of India, cannot be interpreted to mean that every Public Prosecutor/Additional Public Prosecutor, who is appointed by the State Government as a part of regular service cadre, ceases to be an advocate. If a Public Prosecutor forming part of service cadre, ceases to be an advocate then his tenure as a Public Prosecutor under Section 24, Cr.P.C. would automatically come to an end. Such an interpretation of Rule 49 of the BCI Rules would not be proper.

30. Learned senior counsel also challenged the finding recorded by the High Court with regard to appellant Desh Raj Chalia that he did not complete seven years of law practice. According to him, his tenure as Assistant District Attorney was required to be counted for the purpose of computing period of practice and the appellant had completed more than 11 years of law practice.

31. Mr. S.S. Ray, learned counsel appearing for one of the appellants, argued that the amendment to Rule 49 in 2001 has not affected the position of the appellant as an advocate in any manner and the judgment of this Court in Sushma Suri6 is squarely applicable. Learned counsel would submit that 'advocate' means any person who pleads for his client. The word, 'advocate' is genus whereas expressions, Law Officer/Assistant District Attorney/Public Prosecutor are species. They are covered within the meaning of term 'advocate'. Suspension of the licence or deleting the name from the roll of advocates cannot exclude a Public Prosecutor or Assistant District Attorney from the definition of word 'advocate'. He further argued that if Public Prosecutor and Assistant District Attorney are taken out from the definition of 'advocate' then they cannot plead the case before the court even on behalf of the Government. He submitted that the provisions contained in CPC and Cr.P.C. should prevail over the BCI Rules. With regard to interpretation of Article 233(2), he adopted the arguments of Mr. P.P. Rao.

32. Mr. Raju Ramchandran, learned senior counsel appeared for the High Court of Punjab and Haryana on administrative side. He submitted that District Attorney, Public Prosecutor and Assistant Advocate General are in essence lawyers. Even though Rule 49 was amended by the Bar Council of India, yet under the amended

rule District Attorneys, Public Prosecutors/Assistant Advocate General continue to appear as advocates as they continue to have their licence. Rule 49 per se does not bar them from appearing before a court. Reference was made to the provisions of Haryana State Prosecution Legal Service (Group 'C') Rules, 1979 to show that the Government Pleader and Public Prosecutor may be fully engaged by the Government but in essence they are lawyers representing the Government. He submitted that High Court failed to notice the explanation to Section 24(6) and its interplay with Section 24(9) Cr.P.C. Learned senior counsel suggested that the test enunciated in Sushma Suri6 , namely, whether he is engaged to act or plead on behalf of the employer in a court of law as an advocate should be applied to find out whether the private appellants whose appointments have been cancelled met the prescribed eligibility or not.

33. Learned senior counsel sought to distinguish the decision of this Court in Mallaraddi H. Itagi Ors. v. High Court of Karnataka by highlighting that Karnataka Department of Prosecution and Government Litigation Recruitment Rules, 1962 did not allow the Public Prosecutors to appear as advocates before the Court; the candidates therein admitted that they were government servants; and the candidates therein had surrendered their licence.

34. A plea of estoppel was also raised on behalf of the High Court and it was submitted that the writ petitioners were estopped from challenging the selection process as they had taken a chance to get selected and after having remained unsuccessful, they have now challenged the appointment of successful candidates.

35. On the other hand, Mr. Prashant Bhushan, learned counsel for the respondent – Keshav Kaushik (writ petitioner before the High Court) in the appeal preferred by Deepak Aggarwal, referred to Article 233(2) of the Constitution and submitted that in order to be eligible, the candidate must not be in the service of Union or the State and must have been an advocate for at least seven years. It was submitted that the expression, "if he has been for not less than seven years an advocate" must be read to mean seven years immediately preceding his appointment/ application. It cannot mean any seven years any time in the past. If that interpretation were to be accepted, it would mean that a person who is enrolled as an advocate for seven years and thereafter took up a job for the last twenty years would also become eligible for being appointed as District Judge. This would defeat the object of the qualification prescribed in Article 233(2).

36. Mr. Prashant Bhushan contended that a Public Prosecutor being a full time employee of the Government, ceases to be an advocate by virtue of Rule 49 of the

BCI Rules. The candidates whose appointment was challenged were in full time employment of the Government; were liable to be transferred and posted with the Government Companies as law officers and they have several functions other than appearances in courts as Public Prosecutors. Merely because one of the functions of these Public Prosecutors is to appear in courts would not make them advocates and eligible for appointment under Article 233 (2) of the Constitution. He justified the view of the High Court.

37. Mr. P.S. Patwalia, learned senior counsel also arguing for respondent no. 1 in the appeal by Chandra Shekhar, submitted that Rule 49 expressly debars a person from practising as an advocate on taking up employment. Rule 43 of BCI Rules makes it imperative on any such person to file a declaration within 90 days on taking up employment failing which the State Bar Council can suspend the licence of such a person to practice. It was submitted that full time employees have a limited right of appearance before the courts by virtue of Section 24 Cr.P.C. and Section 2(7) C.P.C. Such employees can only appear in briefs marked to them by State Government for specified courts.

38. Chapter IV of the 1961, Act which deals with right to practice, was referred to by the learned senior counsel, particularly, Sections 29 to 33, and it was submitted that on a conjoint reading of these provisions with Rules 43 to 49 of the BCI Rules and Section 24 Cr.P.C. and Section 2(7) C.P.C., Additional District Attorney/Public Prosecutor/Assistant Advocate General cannot be said to practice law. Reference was made to the Resolution passed by Bar Council of India in this regard which provides that if a Public Prosecutor/Additional District Attorney is a whole time employee drawing regular salary, he will not be entitled to be enrolled as an advocate.

39. In support of the above submissions, Mr. P.S. Patwalia relied upon decision of this Court in Satish Kumar Sharma7 and a decision of this Court in Mallaraddi H. Itagi. Reference was also made to the decision of the Karnataka High Court in Mallaraddi H. Itagi from which the appeals were preferred before this Court. Learned senior counsel submitted that the view taken by Karnataka High Court and upheld by this Court is the view which has been taken by various other high courts, namely, Kerala High Court in K.R. Biju Babu v. High Court of Kerala Another[10], Jammu and Kashmir High Court in Gurjot Kaur and Others v. High Court of Jammu and Kashmir and Another decided on 14.09.2010, Bombay High Court in Sudhakar Govindrao Deshpande v. State of Maharashtra and Others[11], Allahabad High Court in Akhilesh Kumar Misra and Others v. The High Court of Judicature at Allahabad and Others[12] Rajasthan High Court in Pawan Kumar

Vashistha v. High Court of Judicature for Rajasthan, Jodhpur and Another decided on 21.02.2012.

40. Mr. P.S. Patwalia referred to Article 233(2) of the Constitution and the decision of this Court in Chandra Mohan4 and submitted that a person already employed in the executive service of a State is ineligible to be appointed. He heavily relied upon paragraphs 49 and 50 of the impugned judgment and submitted that the findings returned by the High Court were in accord with law.

41. On behalf of the respondents in the appeal by Dinesh Kumar Mittal, it was submitted that Article 233(2) of the Constitution lays down three essentials for appointment of a person to the post of District Judge and all of them are mandatorily required to be fulfilled and are to be read simultaneously. It was submitted that independence of judiciary is the basic structure of the Constitution. The Public Prosecutors holding a regular post in regular pay scale are government servants and they can not be treated as 'advocate' within the meaning of Sections 24, 29 and 30 of the 1961 Act read with Rule 49 of the BCI Rules. It was suggested that the words "has been" in Article 233(2) must be read to mean the advocate or pleader who continues to be so at the time of his appointment.

42. Article 233 of the Constitution makes provision for appointment and qualification for District Judges. Under clause (1) of Article 233 no special qualifications are laid down. The Governor can appoint a person who is already in service of the Union or of the State as a District Judge in consultation with the relevant High Court. Clause (2) of Article 233 lays down three essentials for appointment of a person to the post of District Judge; (i) a person shall not be in service of the Union or of the State; (ii) he has been for not less than seven years an advocate or a pleader; and (iii) his name is recommended by the relevant High Court for appointment. In other words, as regards a person not already in service what is required is that he should be an advocate or pleader of seven years' standing and that his name is recommended by the High Court for appointment as District Judge. We have to find out what is the meaning of the expression "the service" under Article 233 (2) of the Constitution. The expression "the service" occurring in clause (2) of Article 233 came up for consideration before a Constitution Bench of this Court in Chandra Mohan4.

43. In the case of Chandra Mohan4 the facts were these: during 1961 and 1962, the Registrar of the Allahabad High Court called for applications for recruitment with regard to ten vacancies in the Uttar Pradesh Higher Judicial Service from Barristers, Advocates, Vakils and Pleaders of more than seven years' standing and

from judicial officers. The Selection Committee, constituted under the Rules, selected six candidates for appointment to the said service. The three of the selected candidates were advocates and three were judicial officers. The Selection Committee sent two lists, one comprising the names of three advocates and the other comprising the names of three judicial officers to the High Court. Chandra Mohan, who was Member of U.P. Civil Services (Judicial Branch) and who was at that time acting as a District Judge, and some other officers who were similarly situated, filed writ petitions in the High Court of Allahabad under Article 226 challenging the selection of the six candidates for appointment to the U.P. Higher Judicial Service. The matter was heard by the Division Bench. The members of the Bench agreed that selection from the Bar was good but as regards selection from the cadre of judicial officers, there was difference of opinion on the aspect of non-issuance of notification under Article 237 of the Constitution. The matter was referred to a third Judge who agreed with one of the Judges who held that selection from the judicial officers was also good. Thus, the writ petitions were dismissed. The High Court on the application for certificate to appeal to this Court certified the case a fit one for appeal, consequently, the appeal was filed. As there was some debate on the scope of the certificate granted by the High Court, this Court also granted Special Leave to Appeal against the order of the High Court. Diverse arguments were advanced on behalf of the appellants before this Court. While dealing with the question whether the Governor can directly appoint persons from services other than the judicial service as District Judges in consultation with the High Court and on a further question whether the Governor can appoint judicial officers as District Judges, this Court dealt with Articles 233, 234, 236 and 237 of the Constitution and observed in paragraph 15 of the Report (pgs. 1993-94) as follows:

> "The gist of the said provisions may be stated thus. 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. There are two sources of recruitment namely (i) service of the Union or of the State, and (ii) members of the Bar. The said Judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district Judges they will be made by the Governor of the State in accordance with rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all the district Courts and Courts subordinate thereto, subject to certain prescribed limitations."

This Court then in paragraphs 16 and 17 (pg. 1994) of the Report observed as follows:

"16. So far there is no dispute. But the real conflict rests on the question whether the Governor can appoint as district Judges persons from services other than the judicial service; that is to say, can he appoint a person who is in the police, excise, revenue or such other service as a district Judge? The acceptance of this position would take us back to the pre- independence days and that too to the conditions prevailing in the Princely States. In the Princely States one used to come across appointments to the judicial service from police and other departments. This would also cut across the well-knit scheme of the Constitution and the principle underlying it, namely, the judiciary shall be an independent service. Doubtless if Art. 233(1) stood alone, it may be argued that the Governor may appoint any person as a district Judge, whether legally qualified or not, if he belongs to any service under the State. But Art. 233(1) is nothing more than a declaration of the general power of the Governor in the matter of appointment of district Judges. It does not lay down the qualifications of the candidates to be appointed or denote the sources from which the recruitment has to be made. But the sources of recruitment are indicated in Cl (2) thereof. Under Cl. (2) of Art. 233 two sources are given, namely, (i) persons in the service of the Union or of the State, and (ii) advocate or pleader. Can it be said that in the context of Ch. VI of Part VI of the Constitution "the service of the Union or of the State" means any service of the Union or of the State or does it mean the judicial service of the Union or of the State? The setting, viz., the chapter dealing with subordinate Courts, in which the expression "the service" appears indicates that the service mentioned therein is the service pertaining to Courts. That apart, Art. 236(2) defines the expression "judicial service" to mean 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. If this definition, instead of appearing in Art. 236, is placed as a clause before Art. 233(2), there cannot be any dispute that "the service" in Art. 233(2) can only mean the judicial service. The circumstance that the definition of "judicial service" finds a place in a subsequent Article does not necessarily lead to a contrary conclusion. The fact that in Article 233(2) the expression "the service" is used whereas in Arts. 234 and 235 the expression "judicial service" is found is not decisive of the question whether the expression "the service" in Art. 233(2) must be something other than the judicial service, for, the entire chapter is dealing with the judicial service. The definition is exhaustive of the service. Two expressions in the definition

bring out the idea that the judicial service consists of hierarchy of judicial officers starting from the lowest and ending with district Judges. The expressions "exclusively" and "intended" emphasise the fact that the judicial service consists only of persons intended to fill up the post of district Judges and other civil judicial posts and that is the exclusive service of judicial officers. Having defined "judicial service" in exclusive terms, having provided for appointments to that service and having entrusted the control of the said service to the care of the High Court, the makers of the Constitution would not have conferred a blanket power on the Governor to appoint any person from any service as a district Judge.

17. Reliance is placed upon the decision of this Court in Rameshwar Dayal v. State of Punjab, (AIR1961 SC 816), in support of the contention that "the service" in Art. 233(2) means any service under the State. The question in that case was, whether a person whose name was on the roll of advocates of the East Punjab High Court could be appointed as a district Judge. In the course of the judgment S.K. Das, J., speaking for the Court, observed :

"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 Cl. (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 Cl. (2) and all that is required is that he should be an advocate or pleader of seven years' standing."

This passage is nothing more than a summary of the relevant provisions. The question whether "the service" in Art. 233 (2) is any service of the Union or of the State did not arise for consideration in that case nor did the Court express any opinion thereon."

Explaining the meaning of the expression, 'the service', this is what this Court said in paragraph 20 of the Report (Pg. 1995) in Chandra Mohan4. "…….Though S. 254(1) of the said Act was couched in general terms similar to those contained in Art. 233 (1) of the Constitution, the said rules did not empower him to appoint to the reserved post of district Judge a person belonging to a service other than the judicial service. Till India attained independence, the position was that district Judges were appointed by the Governor from three sources, namely, (i) the Indian Civil Service, (ii) the Provincial Judicial Service, and (iii) the Bar. But after India attained

> independence in 1947, recruitment to the Indian Civil Service was discontinued and the Government of India decided that the members of the newly created Indian Administrative Service would not be given judicial posts. Thereafter district Judges have been recruited only from either the judicial service or from the Bar. There was no case of a member of the executive having been promoted as a district Judge. If that was the factual position at the time the Constitution came into force, it is unreasonable to attribute to the makers of the Constitution, who had so carefully provided for the independence of the judiciary, an intention to destroy the same by an indirect method. What can be more deleterious to the good name of the judiciary than to permit at the level of district Judges, recruitment from the executive departments? Therefore, the history of the services also supports our construction that the expression "the service" in Art. 233(2) can only mean the judicial service."

44. The Constitution Bench in Chandra Mohan4 has thus clearly held that the expression 'the service' in Article 233(2) means the judicial service.

45. In Satya Narain Singh5, this Court again had an occasion to consider Article 233 of the Constitution. This Court referred to an earlier decision of this Court in Rameshwar Dayal9 and construed Article 233 as follows:

> ".....The first clause deals with "appointments of persons to be, and the posting and promotion of, District Judges in any State" while the second clause is confined in its application to persons "not already in the service of the Union or of the State". We may mention here that "service of the Union or of the State" has been interpreted by this Court to mean Judicial Service. Again while the first clause makes consultation by the Governor of the State with the High Court necessary, the second clause requires that the High Court must recommend a person for appointment as a District Judge. It is only in respect of the persons covered by the second clause that there is a requirement that a person shall be eligible for appointment as District Judge if he has been an advocate or a pleader for not less than 7 years. In other words, in the case of candidates who are not members of a Judicial Service they must have been advocates or pleaders for not less than 7 years and they have to be recommended by the High Court before they may be appointed as District Judges, while in the case of candidates who are members of a Judicial Service the 7 years' rule has no application but there has to be consultation with the High Court. A clear distinction is made between the two sources of recruitment and the dichotomy is maintained. The two

streams are separate until they come together by appointment. Obviously the same ship cannot sail both the streams simultaneously…….".

After referring to Chandra Mohan4 , this Court in paragraph 5 (pg. 230) stated as under :

"5. Posing the question whether the expression "the service of the Union or of the State" meant any service of the Union or of the State or whether it meant the Judicial Service of the Union or of the State, the learned Chief Justice emphatically held that the expression "the service" in Article 233(2) could only mean the Judicial Service. But he did not mean by the above statement that persons who are already in the service, on the recommendation by the High Court can be appointed as District Judges, overlooking the claims of all other seniors in the Subordinate Judiciary contrary to Article 14 and Article 16 of the Constitution."

46. 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 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. 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.

47. The question that has been raised before us is whether a Public Prosecutor/Assistant Public Prosecutor/District Attorney/Assistant District Attorney/Deputy Advocate General, who is in full time employ of the Government, ceases to be an advocate or pleader within the meaning of Article 233(2) of the Constitution.

48. In Kumari Shrilekha Vidyarthi3 , this Court dealt with scheme of the Cr.P.C. relating to Public Prosecutors and it was held that the Code invests the Public Prosecutors with the attribute of the holder of public office. In paragraph 14 of the Report (Pgs. 232-233) this Court stated as under :

"……..This power of the Public Prosecutor in charge of the case is derived from statute and the guiding consideration for it, must be the interest

of administration of justice. There can be no doubt that this function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of so acting only in the interest of administration of justice. In the case of Public Prosecutors, this additional public element flowing from statutory provisions in the Code of Criminal Procedure, undoubtedly, invest the Public Prosecutors with the attribute of holder of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it."

49. In State of U.P. and Others v. U.P. State Law Officers Association and Others[13], this Court, while distinguishing the judgment of this Court in Kumari Shrilekha Vidyarthi3 , observed that appointment of lawyers by the Government and the public bodies to conduct work on their behalf and their subsequent removal from such appointment have to be examined from three different angles, namely, the nature of the legal profession, the interest of the public and the modes of the appointment and removal. With regard to the legal profession, this Court said in paras 14 and 15 (pg. 216) as under:

> "14. Legal profession is essentially a service-oriented profession. The ancestor of today's lawyer was no more than a spokesman who rendered his services to the needy members of the society by articulating their case before the authorities that be. The services were rendered without regard to the remuneration received or to be received. With the growth of litigation, lawyering became a full-time occupation and most of the lawyers came to depend upon it as the sole source of livelihood. The nature of the service rendered by the lawyers was private till the Government and the public bodies started engaging them to conduct cases on their behalf. The Government and the public bodies engaged the services of the lawyers purely on a contractual basis either for a specified case or for a specified or an unspecified period. Although the contract in some cases prohibited the lawyers from accepting private briefs, the nature of the contract did not alter from one of professional engagement to that of employment. The lawyer of the Government or a public body was not its employee but was a professional practitioner engaged to do the specified work. This is so even today, though the lawyers on the full-time rolls of the Government and the public bodies are described as their law officers. It is precisely for this reason that in the case of such law officers, the saving clause of Rule 49 of the Bar Council of India Rules waives the prohibition imposed by the said rule against the acceptance by a lawyer of a full-time employment.

15. The relationship between the lawyer and his client is one of trust and confidence. The client engages a lawyer for personal reasons and is at liberty to leave him also, for the same reasons. He is under no obligation to give reasons for withdrawing his brief from his lawyer. The lawyer in turn is not an agent of his client but his dignified, responsible spokesman. He is not bound to tell the court every fact or urge every proposition of law which his client wants him to do, however irrelevant it may be. He is essentially an adviser to his client and is rightly called a counsel in some jurisdictions. Once acquainted with the facts of the case, it is the lawyer's discretion to choose the facts and the points of law which he would advance. Being a responsible officer of the court and an important adjunct of the administration of justice, the lawyer also owes a duty to the court as well as to the opposite side. He has to be fair to ensure that justice is done. He demeans himself if he acts merely as a mouthpiece of his client. This relationship between the lawyer and the private client is equally valid between him and the public bodies."

50. In S.B. Shahane and Others v. State of Maharashtra and another[14], this Court held in para 12 (Pg. 43) as under:

"12. When Assistant Public Prosecutors are appointed under Section 25 of the Code for conducting prosecutions in courts of Magistrates in a district fairly and impartially, separating them from the police officers of the Police Department and freeing them from the administrative or disciplinary control of officers of the Police Department, are the inevitable consequential actions required to be taken by the State Government which appoints such Assistant Public Prosecutors, inasmuch as, taking of such actions are statutory obligations impliedly imposed upon it under sub-section (3) thereof. When such consequential actions are taken by the State Government in respect of large number of persons appointed as Assistant Public Prosecutors, it becomes necessary for putting them on a separate cadre of Assistant Public Prosecutors and creating a separate Prosecution Department as suggested by the Law Commission in its Report making those Assistant Public Prosecutors subject to control of their superiors in the hierarchy in matters of administration and discipline, with the head of such Prosecution Department being made directly responsible to the State Government in respect of conduct of prosecutions by the Assistant Public Prosecutors of his department. Since the aforesaid notification dated 1-4-1974 issued by the Government of Maharashtra under Section 25 of the Code merely appoints

the appellants and others, as mentioned in Schedule to the notification, the police prosecutors of the Police Department as Assistant Public Prosecutors without freeing such Assistant Public Prosecutors from the administrative and disciplinary control of the Police Department to which they belonged earlier, and without creating a separate department of prosecution for them with the head of that department or departments being made directly responsible to the Government, the Government of Maharashtra has failed to discharge its statutory obligation impliedly imposed upon it in that regard under sub-section (3) of Section 25 of the Code."

51. In Sushma Suri6, a three-Judge Bench of this Court considered the meaning of the expression "advocate" occurring in Article 233 (2) of the Constitution and unamended Rule 49 of the BCI Rules. In paragraph 6 of the Report (Pg. 335) this Court held as under :

"6. If a person on being enrolled as an advocate ceases to practise law and takes up an employment, such a person can by no stretch of imagination be termed as an advocate. However, if a person who is on the rolls of any Bar Council is engaged either by employment or otherwise of the Union or the State or any corporate body or person practises before a court as an advocate for and on behalf of such Government, corporation or authority or person, the question is whether such a person also answers the description of an advocate under the Act. That is the precise question arising for our consideration in this case."

Then in paragraph 8 of the Report, this Court observed that for the purposes of the 1961 Act and the BCI Rules, a law officer (Public Prosecutor or Government Pleader) would continue to be an advocate. Not accepting the view of Delhi High Court in Oma Shanker Sharma v. Delhi Administration case (C.W.P. No. 1961 of 1987), this Court having regard to the object of recruitment under Article 233(2) held in paragraph 9 (Pg. 336):

"……To restrict it to advocates who are not engaged in the manner stated by us earlier in this order is too narrow a view, for the object of recruitment is to get persons of necessary qualification, experience and knowledge of life. A Government Counsel may be a Public Prosecutor or Government Advocate or a Government Pleader. He too gets experience in handling various types of cases apart from dealing with the officers of the Government. Experience gained by such persons who fall in this description cannot be stated to be irrelevant nor detrimental to selection to the posts of

the Higher Judicial Service. The expression "members of the Bar" in the relevant Rule would only mean that particular class of persons who are actually practising in courts of law as pleaders or advocates. In a very general sense an advocate is a person who acts or pleads for another in a court and if a Public Prosecutor or a Government Counsel is on the rolls of the Bar Council and is entitled to practise under the Act, he answers the description of an advocate."

With regard to unamended Rule 49 of the BCI Rules, this Court held as under :

"10. Under Rule 49 of the Bar Council of India Rules, an advocate shall not be a full-time employee of any person, Government, firm, corporation or concern and on taking up such employment, shall intimate such fact to the Bar Council concerned and shall cease to practise as long as he is in such employment. However, an exception is made in such cases of law officers of the Government and corporate bodies despite his being a full-time salaried employee if such law officer is required to act or plead in court on behalf of others. It is only to those who fall into other categories of employment that the bar under Rule 49 would apply. An advocate employed by the Government or a body corporate as its law officer even on terms of payment of salary would not cease to be an advocate in terms of Rule 49 if the condition is that such advocate is required to act or plead in courts on behalf of the employer. The test, therefore, is not whether such person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to act or plead on its behalf in a court of law as an advocate. In that event the terms of engagement will not matter at all. What is of essence is as to what such law officer engaged by the Government does — whether he acts or pleads in court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. If the terms of engagement are such that he does not have to act or plead, but does other kinds of work, then he becomes a mere employee of the Government or the body corporate. Therefore, the Bar Council of India has understood the expression "advocate" as one who is actually practising before courts which expression would include even those who are law officers appointed as such by the Government or body corporate."

52. The authority most strongly relied on for the appellants is the decision of this Court in Sushma Suri6. Their contention is that the decision in Sushma Suri6 is on all fours irrespective of amendment in Rule 49 of the BCI Rules. On the other

hand, the High Court has held – and the respondent (successful writ petitioner) supports the view of the High Court – that Rule 49 in the present form has altered the legal position and Sushma Suri6 has no application. We shall deal with this aspect a little later.

53. In Satish Kumar Sharma7, the facts were these : the appellant was initially appointed as Assistant (Legal) by the Himachal Pradesh State Electricity Board (for short, 'Board'); the said post was re-designated as Law Officer Grade-II. Later on, the appellant was allowed to act as an advocate of the Board and, accordingly, his application seeking enrollment was sent by the Board to the Bar Council of Himachal Pradesh. The Bar Council of Himachal Pradesh communicated to the Board that the appellant did not meet the requirements of the Rules; he should be first designated as Law Officer and the order of appointment and the terms of such appointment be communicated. Consequent on the communication received from the Bar Council of Himachal Pradesh, the Board designated the appellant as Law Officer. The Bar Council of Himachal Pradesh issued a certificate of enrolment dated 9.7.1984 to the appellant. Subsequently, the appellant was given ad hoc promotion to the post of Under Secretary, (Legal)-cum-Law Officer and then promoted as Under Secretary, (Legal)-cum-Law Officer on officiating basis. Bar Council of Himachal Pradesh issued a notice to the appellant to show cause why his enrolment be not withdrawn. The appellant responded to the said notice. In the meanwhile, appellant was also promoted as Deputy Secretary (Legal)-cum-Law Officer on ad hoc basis. On 12.5.1996, the Bar Council of Himachal Pradesh passed an order withdrawing the enrolment of the appellant with immediate effect and directed him to surrender the enrolment certificate within 15 days therefrom. It was this resolution which was challenged by the appellant before the Himachal Pradesh High Court. However, he was unsuccessful before the High Court and he approached this Court. This Court referred to Sections 24, 28 and 49 of the 1961 Act and Rule 49 of the BCI Rules. This Court also considered the terms of appointment, nature of duties and service conditions relating to the appellant and in paragraph 17 (Pg. 377) of the Report noted as follows :

> "17. Looking to the various appointment/promotion orders issued by the Board to the appellant and regulation of business relating to Legal Cell of the Board aforementioned, we can gather that:
>
> (1) the appellant was a full-time salaried employee at the time of his enrolment as an advocate and continues to be so, getting fixed scales of pay;

(2) he is governed by the conditions of service applicable to the employees of the Board including disciplinary proceedings. When asked by us, the learned counsel for the appellant also confirmed the same;

(3) he joined the services of the Board as a temporary Assistant (Legal) and continues to head the Legal Cell after promotions, a wing in the Secretariat of the Board;

(4) his duties were/are not exclusively or mostly to act or plead in courts; and

(5) promotions were given from time to time in higher pay scales as is done in case of other employees of the Board on the basis of recommendation of Departmental Promotion Committee."

53.1. Then with regard to Rule 49 of the BCI Rules, this Court in paragraph 18 (pgs. 377-378) observed as under:

"18. On a proper and careful analysis, having regard to the plain language and clear terms of Rule 49 extracted above, it is clear that:

(i) the main and opening paragraph of the rule prohibits or bars an advocate from being a full-time salaried employee of any person, Government, firm, corporation or concern so long as he continues to practice and an obligation is cast on an advocate who takes up any such employment to intimate the fact to the Bar Council concerned and he shall cease to practice so long as he continues in such employment;

(ii) para 2 of the rule is in the nature of an exception to the general rule contained in main and opening paragraph of it. The bar created in para 1 will not be applicable to Law Officers of the Central Government or a State or any public corporation or body constituted by a statute, if they are given entitlement under the rules of their State Bar Council. To put it in other way, this provision is an enabling provision. If in the rules of any State Bar Council, a provision is made entitling Law Officers of the Government or authorities mentioned above, the bar contained in Rule 49 shall not apply to such Law Officers despite they being full-time salaried employees;

(iii) not every Law Officer but only a person who is designated as Law Officer by the terms of his appointment and who by the said terms is

required to act and/or plead in courts on behalf of his employer can avail the benefit of the exception contained in para 2 of Rule 49."

53.2. In paragraph 19, this Court noted that no rules have been framed by the Bar Council of Himachal Pradesh in respect of Law Officer appointed as a full time salaried employee and if there are no rules in this regard then there is no entitlement for enrolment and the appellant's case could not fit in the exception of Rule 49 and the bar contained in the first paragraph of Rule 49 was attracted. It also noted that the appellant was/is a full time salaried employee and his work was not mainly or exclusively to act or plead in the Court. The decision in Sushma Suri6 was held to be of no help to the case of the appellant. In paragraph 23 (Pgs. 380-381), the Court observed that the work being done by the appellant was different from Prosecutors and Government Pleaders in relation to acting and pleading in court. This is what the Court said : "23. We find no merit in the ground urged that the appellant was discriminated against the prosecutors and the government pleaders. The duties, nature of work and service conditions of the appellant, details of which are already given above, are substantially different from the duties and nature of work of prosecutors and government pleaders particularly in relation to acting and pleading in court. Thus the appellant stood on a different footing. The High Court in paras 24-26 has dealt with this aspect of the case and rightly rejected the argument based on the ground of discrimination."

54. In State of U.P. Another v. Johri Mal[15] , a three-Judge Bench of this Court while dealing with the nature of the office of the District Government Counsel, held in paras 71, 72, 73 and 74 (pgs.744-745) as under:

"71. The District Government Counsel appointed for conducting civil as also criminal cases hold offices of great importance. They are not only officers of the court but also the representatives of the State. The court reposes a great deal of confidence in them. Their opinion in a matter carries great weight. They are supposed to render independent, fearless and non-partisan views before the court irrespective of the result of litigation which may ensue.

72. The Public Prosecutors have greater responsibility. They are required to perform statutory duties independently having regard to various provisions contained in the Code of Criminal Procedure and in particular Section 320 thereof.

73. The Public Prosecutors and the Government Counsel play an important role in administration of justice. Efforts are required to be made to improve the management of prosecution in order to increase the certainty of conviction and punishment for most serious offenders and repeaters. The prosecutors should not be overburdened with too many cases of widely varying degrees of seriousness with too few assistants and inadequate financial resources. The prosecutors are required to play a significant role in the administration of justice by prosecuting only those who should be prosecuted and releasing or directing the use of non-punitive methods of treatment of those whose cases would best be processed.

74. The District Government Counsel represent the State. They, thus, represent the interest of the general public before a court of law. The Public Prosecutors while presenting the prosecution case have a duty to see that innocent persons may not be convicted as well as an accused guilty of commission of crime does not go unpunished. Maintenance of law and order in the society and, thus, to some extent maintenance of rule of law which is the basic fibre for upholding the rule of democracy lies in their hands. The Government Counsel, thus, must have character, competence, sufficient experience as also standing at the Bar. The need for employing meritorious and competent persons to keep the standard of the high offices cannot be minimised. The holders of the post have a public duty to perform. Public element is, thus, involved therein."

55. In Mahesh Chandra Gupta v. Union of India and Others[16], with reference to the provisions contained in the Legal Practitioners Act, 1879, the 1926 Act and the 1961 Act, this Court observed as follows: "66. Thus, it becomes clear from the legal history of the 1879 Act, the 1926 Act and the 1961 Act that they all deal with a person's right to practise or entitlement to practise. The 1961 Act only seeks to create a common Bar consisting of one class of members, namely, advocates. Therefore, in our view, the said expression "an advocate of a High Court" as understood, both, pre and post 1961, referred to person(s) right to practise. Therefore, actual practise cannot be read into the qualification provision, namely, Article 217(2)(b). The legal implication of the 1961 Act is that any person whose name is enrolled on the State Bar Council would be regarded as "an advocate of the High Court". The substance of Article 217(2)(b) is that it prescribes an eligibility criteria based on "right to practise" and not actual practice."

56. The Karnataka High Court in Mallaraddi H. Itagi and Others v. The High Court of Karnataka, Bangalore and Another[17] was, inter alia, concerned with the

question whether the petitioners, who were working as either Assistant Public Prosecutors or Senior Assistant Public Prosecutors or Public Prosecutors, were eligible to be considered for appointment as District Judges under Article 233(2) of the Constitution and Rule 2 of Karnataka Judicial Services (Recruitment) Rules, 1983 (for short, 'Karnataka Recruitment Rules'). The Division Bench of the High Court considered the relevant provisions and the decisions of this Court in Sushma Suri6 and Satya Narain Singh5. The High Court held that having regard to the provisions in the Karnataka Recruitment Rules, the petitioners were civil servants in the employment of the State Government and could not be treated as practicing advocates from the date they were appointed to the post of Assistant Public Prosecutors. The High Court took into consideration Rule 49 of the BCI Rules and held as under (Pg. 86-88): "The petitioners 1 to 9 came to be appointed as Assistant Public Prosecutors/Senior Assistant Public Prosecutors/Public Prosecutors in terms of the Recruitment Rules framed by the State Government. Therefore, in terms of the main provision contained in Rule 49 of the Bar Council of India Rules, the petitioners on their appointment as Assistant Public Prosecutors ceased to be practising Advocates. Further, as noticed by us earlier, when once the petitioners had surrendered their Certificate of Practice and suspended their practice in terms of Rule 5 of the Bar Council of India Rules, it is not possible to take the view that they still continue to be practising Advocates. The rules which prescribe the qualification for appointment to the post of District Judges by direct recruitment provides that an applicant must be practising on the last date fixed for submission of application, as an Advocate and must have so practised for not less than 7 years as on such date. The case of Sushma Suri, supra, does not deal with the situation where the Law Officers had surrendered the Certificate of Practice and suspended their practice. The facts of that case indicates that the Hon'ble Supreme Court proceeded on the basis that the exception provided to Rule 49 of the Rules applies to the Law Officers in that case inasmuch as the Law Officers in those cases were designated by terms of their appointment as Law Officers for the purpose of appearing before the Courts on behalf of their employers. Therefore, facts of those cases are different from the facts of the case of petitioners 1 to 9. The rule similar to the one before us which provides that an Advocate must be a practising Advocate on the date of the submission of the application did not fall for consideration before the Hon'ble Supreme Court. The Delhi Higher Judicial Services Rules, 1970 did not provide that an Advocate should be a practising Advocate on the date of submission of his application. Under these circumstances, in our considered view, the observation made by the Hon'ble Supreme Court in the case of Sushma Suri, supra, at paragraph 8 of the judgment which is strongly relied upon by the learned Counsel for the petitioners wherein it is stated that for purposes of the Advocates Act and the Rules framed thereunder the Law Officer

(Public Prosecutor or Government Counsel) will continue to be an Advocate. The intention of the relevant rules is that a candidate eligible for appointment to the higher judicial service should be a person who regularly, practices before the Court or Tribunal appearing for a client has no application to the facts of the present case. As noticed by us, the qualification prescribed for Assistant Public Prosecutor is three years of practice as an Advocate on the date of submission of application. The qualification prescribed for recruitment to the post of Munsiff, i.e., Civil Judge (Junior Division) is that an applicant, on the last date fixed for submission of application, must be a practising Advocate and must have practiced for not less than four years on the date of application; or who is working as an Assistant Public Prosecutor/Senior Assistant Public Prosecutor or as a Public Prosecutor in the Department of Prosecutions and must have so worked for not less than 4 years as on the date of application. Therefore, the Assistant Public Prosecutors/Senior Assistant Public Prosecutor/Assistant Public Prosecutor are made eligible for appointment only to the post of Munsiffs Civil Judge (Junior Division) under the Recruitment Rules. But, they are not made eligible under the Rules for appointment as District Judges. Therefore, when the Rule making Authority itself has not made the Assistant Public Prosecutor/Senior Assistant Public Prosecutor/Public Prosecutor as eligible for appointment to the post of District Judges, it is not permissible to treat the Assistant Public Prosecutor/Senior Assistant Public Prosecutor/Public Prosecutor as practising Advocates by judicial interpretation and by giving extended meaning to make them eligible for appointment to the post of District Judges."

With reference to the decision of this Court in Satya Narain Singh5 , the Karnataka High Court held as under (Pg. 88-89) :

"The Hon'ble Supreme Court in the case of Satya Narain Singh v. High Court of Judicature at Allahabad and Ors., 1985 (1) SCC 225, while interpreting Sub-clause (2) of Article 233 of the Constitution of India has taken the view that a person not already in service of Union or of the State shall mean only officers in judicial service and the Judicial Officers who are already in service are not eligible for appointment in respect of the post reserved for direct recruitment under Sub-clause (2) of Article 233 of the Constitution of India. Therefore, the Judicial Officers who are in the State services are ineligible for appointment in respect of direct recruitment vacancies. However, if the argument of the learned Counsel for petitioners is accepted as correct, the Assistant Public Prosecutor and Senior Assistant Public Prosecutor who are only made eligible under the Recruitment Rules to the post of Munsiffs which is the lowest cadre in the District Judiciary

would be eligible for appointment to the post of District Judges in respect of the posts reserved for direct recruitment vacancies. In our view, the acceptance of such a position would lead to discrimination between the officers of the State who are in judicial services on the one hand and Assistant Public Prosecutors, Senior Assistant Public Prosecutors and Public Prosecutors on the other. While considering the contention of the learned Counsel for the petitioners that the Assistant Public Prosecutor/Senior Assistant Public Prosecutor/Public Prosecutors should be treated as practising Advocates, this Court cannot ignore the consequence of resultant incongruous situation, if such an argument is accepted. We are also unable to accede to the submission of the learned Counsel for the petitioners that so long as the names of the petitioners 1 to 9 are not removed from the Rolls of State Bar Council, the said petitioners would be practising Advocates. In our view, there is no merit in this submission. No doubt, Section 2(a) of the Advocates Act (hereinafter referred to as the Act) provides that an 'Advocate' means an Advocate entered in any roll under the provisions of Advocates Act. That does not mean the Advocate who has surrendered the Certificate of Practice to the State Bar Council and who has suspended his practice also can be treated either as an Advocate or as a practising Advocate. May be that once a Law graduate enrolls himself as an Advocate, his name finds a place in the Rolls of the State Bar Council till it is removed from the Rolls of the State Bar Council in terms of Clause (d) of Sub-section (3) of Section 35 of the Act. But, that does not mean a person who has suspended his practice on securing a full time appointment can still be considered as a practising Advocate. This conclusion of ours gets support from the Sub-section (4) of Section 35 of the Act wherein it is provided that where an Advocate is suspended from practice, during the period of suspension he is debarred from practising in any Court or before any authority or person in India. Therefore, if the object of surrendering Certificate of Practice and suspending the practice is to give up the right to practice before the Court; the petitioners 1 to 9 who were required to surrender the Certificate of Practice and who have so suspended their practice, cannot in our view, be held either as Advocates or as practising Advocates. In our view, during the period of suspension of practice, such a person ceases to be an Advocate; and continuance of his name on the Rolls of Bar Council is of no consequence so far as his right to practice is concerned and such a person cannot designate himself as an Advocate. Therefore, we are of the view that the petitioners 1 to 9 not being practising Advocates on the date of submission of their applications, they are not eligible for appointment as District Judges in terms of the qualification

prescribed. Therefore, the Selection Committee has, in our view, rightly rejected the claim of the petitioners 1 to 9 for appointment as District Judges and they were rightly not called for interview. The petitioners cannot have any grievance on that account."

57. The judgment of the Karnataka High Court in Mallaraddi H. Itagi17 was challenged before this Court. This Court dismissed the appeals on 18.05.2009[18] and, upholding the judgment of the High Court, observed as follows:

"7. On that basis the Court came to the conclusion that the appellant therein was not liable to be considered as he was holding a regular post. In paragraph 19 it was observed:

"These orders clearly show that the appellant was required to work in the Legal Cell of the Secretariat of the Board; was given different pay scales; rules of seniority were applicable; promotions were given to him on the basis of the recommendations of the Departmental Promotion Committee; was amenable to disciplinary proceedings, etc.

Further looking to the nature of duties of Legal Cell as stated in the regulation of business of the Board extracted above, the appellant being a full-time salaried employee had/has to attend to so many duties which appear to be substantial and predominant. In short and substance we find that the appellant was/is a full-time salaried employee and his work was not mainly or exclusively to act or plead in court.

Further, there may be various challenges in courts of law assailing or relating to the decisions/actions taken by the appellant himself such as challenge to issue of statutory regulation, notification, the institution/ withdrawal of any prosecution or other legal/quasi-legal proceedings etc. In a given situation the appellant may be amenable to disciplinary jurisdiction of his employer and/or to the disciplinary jurisdiction of the Bar Council. There could be conflict of duties and interest. In such an event, the appellant would be in an embarrassing position to plead and conduct a case in a court of law.

Moreover, mere occasional appearances in some courts on behalf of the Board even if they be, in our opinion, could not bring the appellant with the meaning of "Law Officer" in terms of para 3 of Rule 49."

> and has also taken a view that in a situation like this the decision in Sushma Suri case is not applicable. We have no reason to take any different view, as had already been taken by this court, as the situation is not different. It is already considered before the High Court that the appellants were holding a regular post they were having the regular pay scale, they were considered for promotion, they were employed by the State Government Rules and therefore they were actually the Government servants when they made applications for the posts of District Judges."

58. The decision of the Karnataka High Court in Mallaraddi H. Itagi17 and the judgment of this Court18 in the appeals from that decision have been heavily relied on by the respondent – successful writ petitioner.

59. Few decisions rendered by some of the High Courts on the point may also be noticed here. In Sudhakar Govindrao Deshpande11, the issue that fell for consideration before the Bombay High Court was whether the petitioner therein who was serving as Deputy Registrar at the Nagpur Bench of the Bombay High Court, was eligible for appointment to the post of the District Judge. The advertisement that was issued by the High Court inviting applications for five posts of District Judges, inter alia, stated, 'candidate must ordinarily be an advocate or pleader who has practised in the High Court, Bombay or Court subordinate thereto for not less than seven years on the 1st October, 1980'. The Single Judge of the Bombay High Court considered Articles 233, 234 and 309 of the Constitution, relevant Recruitment Rules and noted the judgments of this Court in Chandra Mohan4, Satya Narain Singh5 and Rameshwar Dayal9. It was observed as follows:

> " . . . . . the phrase has been an Advocate or a pleader must be interpreted as a person who has been immediately prior to his appointment a member of the Bar, that is to say either an Advocate or a pleader. In fact, in the above judgment, the Supreme Court has repeatedly referred to the second group of persons eligible for appointment under Article 233 (2) as members of the Bar. Article 233(2) therefore, when it refers to a person who has been for not less than seven years an Advocate or pleader refers to a member of the Bar who is of not less than seven years' standing."

60. In Smt. Jyoti Gupta v. Registrar General, High Court of M.P., Jabalpur and Another[19], Madhya Pradesh High Court was concerned with the question as to whether the Assistant Public Prosecutors were eligible to apply for appointment to the post of District Judges. The Madhya Pradesh High Court held as under :

". . . . . A careful reading of the note provided in the exception states that nothing in Rule 49 of the Bar Council of India Rules shall apply to a Law Officer of the Central Government, State Government or a body corporate who is entitled to be enrolled under the rules of the State Bar Council under Section 28(2)(d) read with Section 24(1)(e) of the Advocates Act, 1961 despite his being a full-time salaried employee. Hence, the exception to Rule 49 has been provided because of the provisions in the Rules of State Bar Council made under Section 28(2)(d) read with Section 24(1)(e) of the Advocates Act, 1961 for a Law Officer of the Central Government or the State Government or a body corporate to be admitted into the roll of the State Bar Council if he is required by the terms of his appointment to act and/or plead in Courts on behalf of his employer. In other words, if the rules made by the State Bar Council under Section 28(2)(d) read with Section 24(1)(e) of the Advocates Act, 1961 provide for admission as an Advocate, enrolment in the State Bar Council as an Advocate or a Law Officer of the Central Government or the State Government or a body corporate, who, by the terms of his employment, is required to act and/or plead in Courts on behalf of his employer, he can be admitted as an Advocate and enrolled in the State Bar Council by virtue of the provisions of Sections 24(1)(e) and 28(2)(d) of the Advocates Act, 1961 and the rules made thereunder by the State Bar Council and he does not cease to be an Advocate on his becoming such Law Officer of the Central Government, State Government or a body corporate. As we have seen, the State Bar Council of M.P. has provided under Proviso(i) of Rule 143 that a Law Officer of the Central Government or a Government of State or a public corporation or a body constituted by a statute, who by the terms of his appointment, is required to act and/or plead in Courts on behalf of his employer, is qualified to be admitted as an Advocate even though he may be in full or part-time service or employment of such Central Government, State Government, public corporation or a body corporate. The position of law, therefore, has not materially altered after the deletion of the note contained in the exception under Rule 49 of the Bar Council of India Rules by the resolution of the Bar council of India, dated 22nd June, 2001.

In the result, we hold that if a person has been enrolled as an Advocate under the Advocates Act, 1961 and has thereafter been appointed as Public Prosecutor/Assistant Public Prosecutor or Assistant District Public Prosecutor and by the terms of his appointment continues to conduct cases on behalf of the State Government before the Criminal Courts, he does not cease to be an Advocate within the meaning of Article 233(2) of the

Constitution and Rule 7(1)(c) of M.P. Uchchatar Nyayik Sewa (Bharti Tatha Sewa Shartein) Niyam, 1994 for the purpose of recruitment to the post of District Judge (Entry Level) in the M.P. Higher Judicial Service."

61. In K. Appadurai v. The Secretary to Government of Tamil Nadu and Another[20], one of the questions under consideration before the Madras High Court was whether for appointment to the post of District Judge (Entry Level), the applications could have been invited from the Assistant Public Prosecutor (Grade I II). The Division Bench of that Court referred to Article 233 of the Constitution, Rule 49 of the BCI Rules and the decisions of this Court in Satya Narain Singh5, Chandra Mohan4, Sushma Suri6, Johri Mal15 and Satish Kumar Sharma7. The Division Bench held as under:

"22. In the light of the ratio laid down by the Supreme Court in the decisions quoted hereinbefore, it can safely be concluded that the nature of duties of the Assistant Public Prosecutors is to act and plead in Courts of Law on behalf of the State as Advocates. Even after becoming Assistant Public Prosecutors they continue to practice as advocates and plead the cases on behalf of the Government and their names remained in the roll of advocates maintained by the Bar Council. As Public Prosecutors they acquired much experience in dealing criminal cases.

23. It was argued on behalf of the petitioners that the note appended to Rule 49 of the Bar Council of India Rules having been deleted by a resolution dated 22nd June, 2001 of the Bar Council of India, the ratio decided by the Supreme Court in Sushma Suri Case (supra) will not apply, and therefore, an advocate who is employed as a full time salaried employee of the government, ceases to practice as an advocate so long as he continues in such employment. The submission made by the counsel has no substance.

24. As noticed above, Rule 49 of the Bar Council of India Rules provides an exception where in case of Law Officers of the government and corporate bodies, despite they being employed by the government as Law Officers, they cannot cease to be advocates so long as they are required to plead in the courts. For example, Assistant Public Prosecutors so appointed by the government on payment of salary their only nature of work is to act, plead and defend on behalf of the State as an advocate. Hence, an advocate employed by the government as Law Officer namely, an Assistant Public Prosecutor on terms of payment of salary would not cease to be an advocate in terms of Rule 49 of the Bar Council of India Rules for the purpose of

appointment, as such advocate is required to act or plead in courts on behalf of the State. If, in terms of the appointment, an advocate is made a Law Officer on payment of salary to discharge his duties at the Secretariat and handle the legal files, he ceased to be an advocate. In our considered opinion, therefore, the deletion of the note appended to under Rule 49 of the Bar Council of India Rules will not in any way affect the legal proposition of law. We are also of the view that in the light of the relevant clauses of the Advocates Act, 1961 it will not debar the Assistant Public Prosecutors to continue and plead in courts as an advocate."

62. In Biju Babu10 , the question before the Kerala High Court was whether the appellant, who was a Public Prosecutor appointed by the Central Government to conduct cases for the C.B.I., was eligible for appointment to the post of District Judge in the Kerala State Higher Judicial Service by direct recruitment. The High Court answered the question in the negative mainly relying on amended Rule 49 of the BCI Rules and the legal position stated by this Court in Satish Kumar Sharma7.

63. Two more judgments of this Court may be quickly noticed here. In State of U.P. v. Ramesh Chandra Sharma and others[21], this Court stated that the appointment of any legal practitioner as a District Government Counsel is only professional engagement. A two-Judge Bench of this Court inSamarendra Das, Advocate v. State of West Bengal and others[22] was concerned with the question whether the post of Assistant Public Prosecutor was a civil post under the State of West Bengal in terms of Section 15 of the Administrative Tribunals Act 1985. While answering the above question in the affirmative, this Court held that the post of Assistant Public Prosecutor was a civil post. The Court negated the argument that the Assistant Public Prosecutor was an officer of the Court of Judicial Magistrate.

64. After the arguments were concluded in these matters and the judgment was reserved, Respondent No. 1 (original writ petitioner) has circulated a judgment of the Bombay High Court in Sunanda Bhimrao Chaware Ors. v. The High Court of Judicature at Bombay, delivered on 17.10.2012 by the Full Bench of that Court. We are not inclined to consider this judgment for two reasons. One, the appellants had no occasion to respond to or explain that judgment. Secondly, and equally important, the aggrieved parties by that judgment, who are not before us, may be advised to challenge the judgment. We do not intend to foreclose the rights of the parties one way or the other.

65. Section 24 Cr.P.C. provides that for every High Court the Central Government or the State Government shall appoint a Public Prosecutor. The Central Government or the State Government may also appoint one or more Additional Public Prosecutor for conducting in such court, any prosecution, appeal or other proceedings on their behalf. The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district or local area. Insofar as State Government is concerned it provides that for every district it shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district. There are two modes of appointment of the Public Prosecutors, one, preparation of a panel of names of persons, who in the opinion of the District Magistrate after consultation with the Sessions Judge, are fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district. The other, appointment of Public Prosecutor or an Additional Public Prosecutor from amongst the persons in a State where exists regular cadre of prosecuting officers. A person is eligible to be appointed as Public Prosecutor only if he has been in practise as an advocate for not less than seven years. Special Public Prosecutor may also be appointed by the Central or the State Government for the purpose of any case or class of cases but he has to be a person who has been in practise as an advocate for not less than 10 years.

66. Public Prosecutor has a very important role to play in the administration of justice and, particularly, in criminal justice system. Way back on April 15, 1935 in Harry Berger v. United States of America[23] , Mr. Justice Sutherland, who delivered the opinion of the Supreme Court of United States, said about the United States Attorney that he is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. The twofold aim of United States Attorney is that guilt shall not escape or innocence suffer. It is as much his duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one.

67. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, adopted guidelines on the role of Prosecutors in 1990. Inter-alia, it states that Prosecutors shall perform their duties fairly, consistently and expeditiously and respect and protect human dignity and uphold human rights. He shall take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.

68. As a follow up action to the above guidelines on the role of Prosecutors, the International Association of Prosecutors adopted Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors which, inter-alia, provides that Prosecutors shall strive to be, and to be seen to be, consistent, independent and impartial; Prosecutors shall preserve the requirements of a fair trial and safeguard the rights of the accused in co-operation with the Court.

69. European Guidelines on Ethics and Conduct for Public Prosecutors [The Budapest Guidelines] adopted in the Conference of Prosecutors General of Europe on 31st May, 2005 are on the same lines as above. Under the head "professional conduct in the framework of criminal proceedings". These guidelines state that when acting within the framework of criminal proceedings, Public Prosecutor should at all times carry out their functions fairly, impartially, objectively and, within the framework of the provisions laid down by law, independently; seek to ensure that the criminal justice system operates as expeditiously as possible, being consistent with the interests of justice; respect the principle of the presumption of innocence and have regard to all relevant circumstances of a case including those affecting the suspect irrespective of whether they are to the latter's advantage or disadvantage.

70. In India, role of Public Prosecutor is no different. He has at all times to ensure that an accused is tried fairly. He should consider the views, legitimate interests and possible concern of witnesses and victims. He is supposed to refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods. His acts should always serve and protect the public interest. The State being a Prosecutor, the Public Prosecutor carries a primary position. He is not a mouthpiece of the investigating agency. In Chapter II of the BCI Rules, it is stated that an advocate appearing for the prosecution of a criminal trial shall so conduct the prosecution that it does not lead to conviction of the innocent; he should scrupulously avoid suppression of material capable of establishing the innocence of the accused.

71. A two Judge Bench of this Court in Mukul Dalal2, while dealing with a question about the justifiability of the appointment by the State of Special Public Prosecutors and Assistant Public Prosecutors under Sections 24 and 25 Cr.P.C. respectively, observed that in criminal jurisprudence the State was a prosecutor and that is why primary position is assigned to the Public Prosecutor.

72. In Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)[24], the Court considered role of Public Prosecutor vis-à-vis his duty of disclosure. The Court noted earlier decisions of this Court in Shiv Kumar v. Hukam Chand and Another[25] and Hitendra Vishnu Thakur and Others v. State of Maharashtra and others[26] and in paragraphs 185 and 186 (Pgs. 73-74) of the Report stated as under :

> "185. A Public Prosecutor is appointed under Section 24 of the Code of Criminal Procedure. Thus, Public Prosecutor is a statutory office of high regard. This Court has observed the role of a Prosecutor in Shiv Kumar v. Hukam Chand [(1999) 7 SCC 467] as follows: (SCC p. 472, para 13)
>
> "13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the force and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.
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> 186. This Court has also held that the Prosecutor does not represent the investigating agencies, but the State. This Court in Hitendra Vishnu Thakur v. State of Maharashtra [(1994) 4 SCC 602] held: (SCC pp. 630-31, para 23)
>
> "23. … A Public Prosecutor is an important officer of the State Government and is appointed by the State under the Criminal Procedure Code. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the

request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A Public Prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation."

Then in paragraph 187 (Pg. 74) the Court stated as follows : "187. Therefore, a Public Prosecutor has wider set of duties than to merely ensure that the accused is punished, the duties of ensuring fair play in the proceedings, all relevant facts are brought before the court in order for the determination of truth and justice for all the parties including the victims. It must be noted that these duties do not allow the Prosecutor to be lax in any of his duties as against the accused."

73. In a recent decision in Centre for Public Interest Litigation and others v. Union of India and others[27], the question before this Court was in respect of the appointment of a Special Public Prosecutor to conduct the prosecution on behalf of CBI and ED in 2G Spectrum case. While dealing with the above question, the Court considered Section 2(u) and Section 24 Cr.P.C. and Section 46 of the Prevention of Money-Laundering Act, 2002 and few earlier decisions of this Court in Manu Sharma24, Sheonandan Paswan v. State of Bihar and Others[28] and Johri Mal15 and it was observed that in an appointment of Public Prosecutor, the principle of master-servant does not apply; such an appointment is not an appointment to a civil post.

74. The mode of appointment of Public Prosecutor (including Additional Public Prosecutor and Special Public Prosecutor) under Section 24 Cr.P.C. and the mode of appointment of Assistant Public Prosecutor under Section 25 Cr.P.C. significantly differ. There is qualitative difference in the role and position of Public Prosecutor and Assistant Public Prosecutor. As a matter of law, Assistant Public Prosecutor is not included in the definition of 'Public Prosecutor' under Section 2(u) Cr.P.C. In Samarendra Das22, this Court held that the post of Assistant Public Prosecutor was a civil post. This position was accepted by a three-Judge Bench of this Court in Johri Mal15. It was stated in Johri Mal15, "….a distinction is to be borne in mind between appointment of a Public Prosecutor or Additional Public Prosecutor on the one hand and Assistant Public Prosecutor on the other. So far as Assistant Public Prosecutors are concerned, they are employees of the State……" As regards 'Public Prosecutor', this Court has consistently held that though Public

Prosecutor is a holder of 'public office' and he holds a 'post' yet he is not in government service as the term is usually understood. Despite these differences, for the purposes of Article 233(2) there is not much difference in a Public Prosecutor and an Assistant Public Prosecutor and both of them are covered by the expression 'advocate'. It is so for more than one reason. In the first place, a Public Prosecutor under Section 24 is appointed by the State Government or the Central Government for conduct of prosecution, appeal or other proceeding on its behalf in the High Court or for a district and Assistant Public Prosecutor is appointed under Section 25 by the State Government or the Central Government to conduct prosecution on its behalf in the courts of Magistrates. So the main function of the Public Prosecutor as well as Assistant Public Prosecutor is to act and/or plead on behalf of the Government in a court; both of them conduct cases on behalf of the government. Secondly and remarkably, for the purposes of counting experience as an advocate as prescribed in sub-sections 24(7) and 24(8), the period, during which a person has rendered service as a Public Prosecutor or as Assistant Public Prosecutor, is treated as being in practice as an advocate under Section 24(9) Cr.P.C. In other words, the rendering of service as a Public Prosecutor or as Assistant Public Prosecutor is deemed to be practice as an advocate.

75. The three appellants namely, Deepak Aggarwal, Chandra Shekhar and Desh Raj Chalia, at the time of their application, were admittedly working as Assistant District Attorney. They were appointed under the Haryana State Prosecution Legal Service (Group C) Rules, 1979 (for short, '1979 Rules'). The relevant Rules read as under :

> "2. Definitions.—In these rules, unless the context otherwise requires:-
>
> 2(a) xxx xxx xxx
>
> 2(b) "direct recruitment" means an appointment made otherwise than by promotion or by transfer of an official already in the service of the Government of India or any State Government; xxx xxx xxx
>
> 6. Appointing Authority.—Appointment to the posts in the service shall be made by the Director.
>
> xxx xxx xxx
>
> 9. Method of Recruitment.-(1) Recruitment to the Service shall be made:-

(i) by direct recruitment; or

(ii) by promotion; or

xxx xxx xxx

11. Seniority of Members of the service.-The seniority inter se of members of the Service shall be determined by the length of their continuous service on any post in the Service. Provided that in the case of members appointed by direct recruitment, the order of merit determined by the Commission or any other recruiting authority shall not be disturbed in fixing the seniority:

Provided further that in the case of two or more members appointed on the same date, their seniority shall be determined as follows:

(a) a member appointed by direct recruitment shall be senior to a member appointed by promotion or by transfer; xxx xxx xxx

12. Liability to serve.-(1) A member of the Service shall be liable to serve at any place whether within or outside the State of Haryana, on being ordered so to do by the appointing authority;

(2) A member of the Service may also be deputed to serve under,-

(i) a company, an association or a body of individuals whether incorporated or not, which is wholly or substantially owned or controlled by the Government, a Municipal Committee or a local authority, within the State of Haryana;

(ii) the Central Government or a company an association or a body of individuals whether incorporated or not, which is wholly or substantially owned or controlled by the Central Government; or

(iii) any other State Government, an international organisation, an autonomous body not controlled by the Government or a private body;

Provided that no member of the service shall be deputed to the Central or any other State Government or any organisation or body referred to in clause (ii) and clause (iii) except with his consent.

13. Leave, pension or other matters.-xxx xxx

(2) No member of the Service shall have the right of private practice.

14. Discipline, penalties and appeals.—(1) in matters relating to discipline, penalties and appeals, members of the Service shall be governed by the Punjab Civil Services (Punishment and Appeal) Rules, 1952, as amended from time to time:

Provided that the nature of penalties which may be imposed, the authority empowered to impose such penalties and appellate authority shall, subject to the provisions of any law or rules made under Article 309 of the Constitution of India, be such as are specified in Appendix C to these rules.

(2) The authority competent to pass an order under clause (c) or clause (d) of sub-rule (1) of rule 10 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952, as amended from time to time, shall be as specified in Appendix 'D' to these rules."

75.1. Appendix 'B' appended to the 1979 Rules provided for qualification and experience for Assistant District Attorney. It reads as follows :

"APPENDIX B"

(See Rule 7)

Qualifications and Experience

Designation of post ……
……

For Promotion/transfer For direct recruitment

Assistant District Attorney (i) Degree of Bachelor of Law of (i) Degree of Bachelor of Law a recognised university; and of recognised university;

and

(ii)who has practiced at the bar

ii) who has worked - for a period of not less than

(a) for a period of not less than two years five years, as Assistant in any post in the equivalent or higher scale in any Government office;
or

(b) for a period of not less than three years on an assignment (not less than that of an Assistant;

involving legal work to any Government office."

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76. Of the other appellants, Rajesh Malhotra at the time of making application was Public Prosecutor in the office of CBI. His services were governed by the General Rules and CBI (Legal Advisers and Prosecutors) Recruitment Rules, 2002. It is not necessary to refer to these Rules in detail. Suffice it to say that a Public Prosecutor in CBI is appointed by Union Public Service Commission by direct recruitment or by promotion from in-service Assistant Public Prosecutors or by deputation from in-service government servants. Service conditions which are applicable to any government servant or a member of civil service are applicable to such Public Prosecutor. Insofar as Dinesh Kumar Mittal is concerned, admittedly he was working as Deputy Advocate General in the State of Punjab at the time of his application. In the impugned judgment, he has been held to be full-time employee of the Punjab Government.

77. 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 Suri6, 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 practice under the

1961 Act was held to be covered by the expression 'advocate' under Article 233(2). We respectfully agree.

78. In U.P. State Law Officers Association13, this Court stated that though the lawyers of the Government or a public body on the full-time rolls of the government and the public bodies are described as their law officers, but nevertheless they are professional practitioners. It is for this reason, the Court said that the Bar Council of India in Rule 49 of the BCI

> Rules (in its original form) in the saving clause waived the prohibition imposed by the said rule against the acceptance by a lawyer of a full-time employment. In Sushma Suri6, a three-Judge Bench of this Court while considering the meaning of the expression "advocate" in Article 233(2) of the Constitution and unamended Rule 49 of the BCI Rules held that if a person was on the rolls of any Bar Council and is engaged either by employment or otherwise by the Union or State and practises before a court as an advocate for and on behalf of such Government, such person does not cease to be an advocate. This Court went on to say that a Public Prosecutor or a Government Counsel on the rolls of the Bar Council is entitled to practice. It was laid down that test was not whether such person is engaged on terms of salary or by payment of remuneration but whether he is engaged to act or plead on its behalf in a court of law as an advocate. The terms of engagement do not matter at all and what matters is as to what such law officer engaged by the Government does – whether he acts or pleads in court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer then he ceases to be an advocate; if the terms of engagement are such that he does not have to act or plead but does other kinds of work then he becomes a mere employee of the Government or the body corporate. The functions which the law officer discharges on his engagement by the Government were held decisive. We are in full agreement with the above view in Sushma Suri6.

79. While referring to unamended Rule 49, this Court in Sushma Suri6 said that Bar Council of India had understood the expression "advocate" as one who is actually practising before courts which expression would include even those who are law officers employed as such by the Government or a body corporate.

80. Have the two subsequent decisions in Satish Kumar Sharma7 and Mallaraddi H. Itagi18 differed from Sushma Suri6? Is there any conflict or inconsistency in the three decisions? Satish Kumar Sharma7 and Mallaraddi H. Itagi18 are the two

decisions on which very heavy reliance has been placed on behalf of the successful writ-petitioners (respondents). In Satish Kumar Sharma7, which has been elaborately noted in the earlier part of the judgment, this Court found from the appointment/promotion orders in respect of the appellant therein that he was required to work in the legal cell of the Secretariat of the Board. Central to the entire reasoning in Satish Kumar Sharma7 is that being a full-time salaried employee he had/has to attend many duties and his work was not mainly and exclusively to act or plead in court. Mere occasional appearances on behalf of the Board in some courts were not held to be sufficient to bring him within the meaning of expression 'Law Officer'. In the backdrop of nature of the office that the appellant therein held and the duties he was required to perform and in the absence of any rules framed by the State Bar Council with regard to enrolment of a full time salaried Law Officer, he was held to be not entitled for enrolment and the exception set out in paragraphs 2 and 3 of unamended Rule 49 of the BCI Rules was not found to be attracted. In Satish Kumar Sharma7, this Court did apply the test that was enunciated in Sushma Suri6 viz., whether a person is engaged to act and/or plead in a court of law to find out whether he is an advocate. In Satish Kumar Sharma7 when this Court observed with reference to Chapter II of the BCI Rules that an advocate has a duty to the court, duty to the client, duty to the opponent and duty to the colleagues unlike a full time salaried employee whose duties are specific and confined to his employment, the Court had in mind such full-time employment which was inconsistent with practice in law. In para 23 of the judgment in Satish Kumar Sharma7, pertinently this Court observed that the employment of appellant therein as a head of legal cell in the Secretariat of the Board was different from the work of the Prosecutors and Government Pleaders in relation to acting and pleading in Court. On principle of law, thus, it cannot be said that there is any departure in Satish Kumar Sharma7 from Sushma Suri6.

81. In Mallaraddi H. Itagi18, the appellants were actually found to be government servants when they made applications for the post of District Judges. The High Court in its judgment in Mallaraddi H. Itagi17 had noticed that the appellants had surrendered their certificate of practice and suspended their practice on their appointment as Assistant Public Prosecutors/Senior Assistant Public Prosecutors/Public Prosecutors in terms of Karnakata Recruitment Rules. It was on this basis that Karnataka High Court held that Sushma Suri6 was not applicable to the case of the appellants. There is consonancy and congruity with the decisions of this Court in Sushma Suri6, Satish Kumar Sharma7 and Mallaraddi H. Itagi18 and, in our opinion, there is no conflict or inconsistency on the principle of law.

82. In none of the other decisions viz., Mundrika Prasad Sinha1, Mukul Dalal2 and Kumari Shrilekha Vidyarthi3, it has been held that a Government Pleader or a Public Prosecutor or a District Government Counsel, on his appointment as a full-time salaried employee subject to the disciplinary control of the Government, ceases to be a legal practitioner. In Kumari Shrilekha Vidyarthi3 while dealing with the office of District Government Counsel/ Additional District Government Counsel, it was held that the Government Counsel in the district were law officers of the State which were holders of an 'office' or 'post' but it was clarified that a District Government Counsel was not to be equated with post under the government in strict sense. In Ramesh Chandra Sharma21, this Court reiterated that the appointment of any legal practitioner as a District Government Counsel is only a professional engagement.

83. However, much emphasis was placed on behalf of the contesting respondents on Rule 49 of the BCI Rules which provides that an advocate shall not be a full time salaried employee of any person, government, firm, corporation or concern so long as he continues to practice, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practice as an advocate so long as he continues in such employment. It was submitted that earlier in Rule 49 an exception was carved out that a 'Law Officer' of the Central Government or of a State or of a body corporate who is entitled to be enrolled under the rules of State Bar Council shall not be affected by the main provision of Rule 49 despite his being a full time salaried employee but by Resolution dated 22.6.2001 which was published in the Gazette on 13.10.2001, the Bar Council of India has deleted the said provision and hence on and from that date a full time salaried employee, be he Public Prosecutor or Government Pleader, cannot be an advocate under the 1961 Act.

84. Admittedly, by the above resolution of the Bar Council of India, the second and third para of Rule 49 have been deleted but we have to see the effect of such deletion. What Rule 49 of the BCI Rules provides is that an advocate shall not be a full time salaried employee of any person, government, firm, corporation or concern so long as he continues to practice. The 'employment' spoken of in Rule 49 does not cover the employment of an advocate who has been solely or, in any case, predominantly employed to act and/or plead on behalf of his client in courts of law. If a person has been engaged to act and/or plead in court of law as an advocate although by way of employment on terms of salary and other service conditions, such employment is not what is covered by Rule 49 as he continues to practice law but, on the other hand, if he is employed not mainly to act and/or plead in a court of law, but to do other kinds of legal work, the prohibition in Rule

49 immediately comes into play and then he becomes a mere employee and ceases to be an advocate. The bar contained in Rule 49 applies to an employment for work other than conduct of cases in courts as an advocate. In this view of the matter, the deletion of second and third para by the Resolution dated 22.6.2001 has not materially altered the position insofar as advocates who have been employed by the State Government or the Central Government to conduct civil and criminal cases on their behalf in the courts are concerned.

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

86. An advocate has a two-fold duty: (1) to protect the interest of his client and pursue the case briefed to him with the best of his ability, and (2) as an officer of the Court. Whether full-time employment creates any conflict of duty or interest for a Public Prosecutor/Assistant Public Prosecutor? We do not think so. As noticed above, and that has been consistently stated by this Court, a Public Prosecutor is not a mouth- piece of the investigating agency. In our opinion, even though Public Prosecutor/Assistant Public Prosecutor is in full-time employ with the government and is subject to disciplinary control of the employer, but once he appears in the court for conduct of a case or prosecution, he is guided by the norms consistent with the interest of justice. His acts always remain to serve and protect the public interest. He has to discharge his functions fairly, objectively and within the framework of the legal provisions. It may, therefore, not be correct to say that an Assistant Public Prosecutor is not an officer of the court. The view in Samarendra Das22 to the extent it holds that an Assistant Public Prosecutor is not an officer of the Court is not a correct view.

87. The Division Bench has in respect of all the five private appellants – Assistant District Attorney, Public Prosecutor and Deputy Advocate General – recorded undisputed factual position that they were appearing on behalf of their respective

States primarily in criminal/civil cases and their appointments were basically under the C.P.C. or Cr.P.C. That means their job has been to conduct cases on behalf of the State Government/C.B.I. in courts. Each one of them continued to be enrolled with the respective State Bar Council. In view of this factual position and the legal position that we have discussed above, can it be said that these appellants were ineligible for appointment to the office of Additional District and Sessions Judge? Our answer is in the negative. The Division Bench committed two fundamental errors, first, the Division Bench erred in holding that since these appellants were in full-time employment of the State Government/Central Government, they ceased to be 'advocate' under the 1961 Act and the BCI Rules, and second, that being a member of service, the first essential requirement under Article 233(2) of the Constitution that such person should not be in any service under the Union or the State was attracted. In our view, none of the five private appellants, on their appointment as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, ceased to be 'advocate' and since each one of them continued to be 'advocate', they cannot be considered to be in the service of the Union or the State within the meaning of Article 233(2). The view of the Division Bench is clearly erroneous and cannot be sustained.

88. 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 some time 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.

89. 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.

90. We, accordingly, hold that the five private appellants (Respondent Nos. 9,12,13,15 and 18 in CWP No. 9157/2008 before the High Court) fulfilled the eligibility under Article 233(2) of the Constitution and Rule 11(b) of the HSJS Rules on the date of application. The impugned judgment as regards them is liable to be set aside and is set aside.

91. Appeals are allowed as above with no order as to costs.

[1] AIR 1979 SC 1871
[2] (1988) 3 SCC 144
[3] (1991) 1 SCC 212
[4] AIR 1966 SC 1987
[5] (1985) 1 SCC 225
[6] (1999) 1 SCC 330
[7] (2001) 2 SCC 365
[8] (2003) 6 SCC 171
[9] AIR 1961 SC 816
[10] (2008) Labour Industrial Cases 1784
[11] (1986) Labour Industrial Cases 710
[12] AIR (1995) Allahabad 148
[13] (1994) 2 SCC 204
[14] 1995 Supp (3) SCC 37
[15] (2004) 4 SCC 714
[16] (2009) 8 SCC 273
[17] 2002 (4) Karnataka Law Journal 76
[18] Civil Appeal Nos. 947-956 of 2003, Mallaraddi H. Itagi and Ors. v. High Court of Karnataka and Ors.
[19] 2008 (2) MPLJ 486
[20] 2010-4-L.W.454
[21] (1995) 6 SCC 527
[22] (2004) 2 SCC 274
[23] 295 U.S. 78
[24] (2010) 6 SCC 1
[25] (1999) 7 SCC 467
[26] (1994) 4 SCC 602
[27] (2012) 3 SCC 117
[28] (1987) 1 SCC 288