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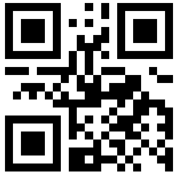

THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/53/2022

POOJA AGARWAL

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY THE L.R CUM COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM, JUDICIAL DEPARTMENT.

2:GAUHATI HIGH COURT
REPRESENTED BY ITS REGISTRAR GENERA L

For the Petitioner : Ms. Pooja Agarwal, petitioner in person

For the Respondents : Mr. U.K. Nair, Sr. Standing Counsel, Gauhati High Court.

Date of Hearing & Judgment & Order **: 4th April, 2022**.

– B E F O R E –
HON’BLE THE CHIEF JUSTICE MR. SUDHANSHU DHULIA
HON’BLE MR. JUSTICE SOUMITRA SAIKIA

JUDGMENT & ORDER (ORAL)

(Sudhanshu Dhulia, CJ)

Heard Ms. Pooja Agarwal, petitioner-in-person. Also heard Mr. U.K. Nair, learned senior standing counsel, Gauhati High Court, who appears for the respondents.

2. By means of the present petition, the petitioner has challenged the constitutional validity of the Assam Judicial Service Rules, 2003 (hereinafter referred to as ‘Assam Rules’), more particularly Rule 7, by which a minimum age of 35 years and a maximum age of 45 years has been prescribed as an essential qualification for appointment to Higher Judicial Service in Assam.

3. The main argument of the petitioner before this Court is that Article 233 of the Constitution of India prescribes the qualification for appointment of District Judges, where there is no mention of minimum age of 35 years as a qualification for appointment as a District Judge. Consequently, the State cannot bring the age as a qualification in its Rules, as that would be against the constitutional provision. It has also been argued before us that in any case, prescribing a minimum age for Higher Judicial Service is violative of Article 14 of the Constitution of India. The judgment of the Hon’ble Supreme Court in ***Madras Bar Association -Vs- Union of India & Anr.,*** reported in ***2021 SCC OnLine SC 463*** is relied by the petitioner for this purpose.

4. Mr. U.K. Nair, learned senior counsel representing the Gauhati High Court though submits that the question before this Court is no longer *res integra* as a decision on the said subject has recently been given by the Supreme Court in the case of ***High Court of Delhi -Vs- Devina Sharma,*** reported in ***2022 SCC OnLine SC 316*** and he would thus urge that this petition be decided in the light of the decision of the Apex Court in ***Devina Sharma***.

5. In ***Devina Sharma***, *inter alia,* the validity of a similar provision in Delhi Judicial Service Rules, 1970 were under challenge before the Supreme Court in which the Apex Court had upheld the validity of the Rules (Delhi Rules), which prescribed a minimum age of 35 years for direct recruitment to Delhi Higher Judicial Service. It is an admitted position that the present Rules under challenge are exactly the same as were under challenge before the Apex Court.

6. The Apex Court while upholding the validity of the minimum age in the Delhi Rules in ***Devina Sharma***, discussed the provisions of Article 233 as well as Article 235 of the Constitution of India. Whereas Article 233(2) of the Constitution stipulates that a person will be eligible to be appointed as a District Judge if he has been, for not less than 7 years an advocate or a pleader and is recommended by the High Court for appointment, Article 233(1) prescribes that appointment of persons, posting and promotion of District Judges shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to that State. This provision has to be read with Article 235, which also mandates that the control over District Courts and Courts subordinate thereto including the posting, promotion, grant of leave of person belonging to Judicial Service of the State shall vests in the High Court. Merely

because the Constitution is silent on the minimum age would not mean that those entrusted with the Rule making power cannot make such provision. Thus, the Apex Court held as under:-

> "*26. .....The Constitution has prescribed the requirement to the effect that a person shall be eligible for appointment as a District Judge only if he has been an advocate or a pleader for at least seven years. What this means is that a person who has not fulfilled the seven year norm is not eligible. The Constitution does not preclude the exercise of the rule making power by the High Courts to regulate the conditions of service or appointment. The silences of the Constitution have to be and are supplemented by those entrusted with the duty to apply its provisions. The Constitution being silent in regard to the prescription of a minimum age, the High Courts in the exercise of their rule making authority are entitled to prescribe such a requirement. Direct recruitment to the Higher Judicial Service is intended to be from members of the Bar who have sufficient experience.*"

7. In the same paragraph, after having read the two provisions together, i.e. Article 233 and Article 235 of the Constitution, the Apex Court then gave the reasons as to why a minimum age of 35 years has been prescribed. The underlying reason is to ensure that the senior most level of post in the cadre is occupied by a person of sufficient maturity and experience. This is what has been said:

> "*......The post of a District Judge is at a senior level in the cadre. Age is not extraneous to the acquisition of maturity and experience, especially in judicial institutions which handle real problems and confront challenges to liberty and justice. The High Courts are well within their domain in prescribing a requirement which ensures that candidates with sufficient maturity enter the fold of the higher judiciary. The requirement that a candidate should be at least 35 years of age is intended to sub-serve this.*"

8. The petitioner would, however, submit that in the present case she had not merely relied upon Article 233 of the Constitution of India but the petitioner had also challenged the present Rules on grounds of its violation of Article 14 of the Constitution of India and since Article 14 has not been discussed in ***Devina Sharma***, the petition be heard on its merit. The petitioner

has relied upon another judgment of the Supreme Court, i.e. ***Madras Bar Association***, already referred above.

9. Let us examine the implication of ***Madras Bar Association*** case, to the facts of the present case first. In ***Madras Bar Association***, certain provisions of the Tribunal Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 and Section 184 and Section 186(2) of the Finance Act, 2017 were challenged and a declaration was sought from the Apex Court that these provisions be declared as *ultra vires* to Articles 14, 21 and 50 of the Constitution of India. For our purpose, what is relevant is that indeed what was, *inter alia,* under challenge before the Apex Court was the prescription of minimum age of 50 years for appointment of Presiding Officer/Member of the Tribunal. It is true that the Supreme Court by a majority decision held that the prescription of a minimum age of 50 years was bad, but it was held to be bad as it was in violation of the earlier direction of the Supreme Court in case of ***Union of India -Vs- R. Gandhi, President of Madras Bar Association (MBA-I)*** reported in ***(2010) 11 SCC 1*** as well as in ***Madras Bar Association -Vs- Union of India***, reported in ***(2020) SCC OnLine SC 962***, referred to ***MBA-III***. This was so as in these two cases, the Apex Court had held that the only requirement for the Presiding Officer/Member of the Tribunal is 10 years of experience as an advocate and, therefore, adding 50 years of minimum age to the said qualification in the statute was done in order to circumvent the judgment of the Apex Court. It was for that reason that the minimum age of 50 years in the case of ***Madras Bar Association*** was held to be bad.

10. Moreover, provisions of the Assam Judicial Service Rules, 2003, which relate to Higher Judicial Service in Assam cannot in any case be compared to

another set of Rules governing a different service condition on the basis of arbitrariness and discrimination. In ***Hirandra Kumar -Vs- High Court of Judicature at Allahabad & Anr.***, reported in ***(2020) 17 SCC 401***, a judgment which has also been relied upon by the Apex Court while deciding the case of ***Devina Sharma***, it was held as under:-

> *"29. For the same reason, no case of discrimination or arbitrariness can be made out on the basis of a facial comparison of the Higher Judicial Service Rules, with the Rules governing Nyayik Sewa. Both sets of rules cater to different cadres. A case of discrimination cannot be made out on the basis of a comparison of two sets of rules which govern different cadres."*

11. In ***Hirandra Kumar***, *inter alia*, the prescription of age, i.e. minimum age of 35 years and maximum age of 45 years for Higher Judicial Service, was under challenge. It was held that the prescription of a minimum age or maximum age for entry into service is essentially a matter of policy and it is not arbitrary or discriminatory. Therefore, in any case the challenge to the Assam Judicial Service Rules, 2003 on grounds of violation of Article 14 is in any case not sustainable.

12. The ratio of the decision in ***Devina Sharma*** is that the requirement of minimum age of 35 years for a candidate for Higher Judicial Service is a valid requirement and it is in conformity with the recommendations of the "Shetty Commission". This is the law declared by the Supreme Court under Article 141 of the Constitution of India, which is binding on all Courts. This would be irrespective of the fact whether certain provisions of the Constitution of India were not considered by the Apex Court. Although we must say that this is also factually not correct inasmuch as while deciding the case of ***Devina Sharma***, the Apex Court also relied upon its earlier judgment given in ***Hirandra Kumar*** case where it was held that prescription of a minimum age of 35 years is not

arbitrary or discriminatory and hence by implication it is not violative of Article 14 of the Constitution of India.

13. Be that as it may, Article 141 of the Constitution of India states that a law declared by the Supreme Court shall be binding on all Courts within the territory of India. Undoubtedly what is binding is the ratio laid down in the said case. This is irrespective of the fact whether while doing so the Apex Court may or may not have considered all aspects of the matter.

14. In ***Director of Settlements, A.P. & Ors. -Vs- M.R. Apparao & Anr.***, reported in ***2002 0 Supreme (SC) 381***, it was held as under:-

> *"……The decision in a judgment of the supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court (see AIR 1970 SC 1002 and AIR 1973 SC 794). When supreme Court decides a principle it would be the duty of the High Court or a subordinate Court to follow the decision of the supreme Court."*

15. More specifically in ***Suganthi Suresh Kumar -Vs- Jagdeeshan***, reported in ***(2002) 2 SCC 420***, it was held in Paragraph 9 as under:-

> *"9. It is impermissible for the High Court to overrule the decision of the Apex Court on the ground that the Supreme Court laid down the legal position without considering any other point. It is not only a matter of discipline for the High Courts in India, it is the mandate of the Constitution as provided in Article 141 that the law declared by the Supreme Court shall be binding on all courts within the territory of India. It was pointed out by this Court in Anil Kumar Neotia v. Union of India [(1988) 2 SCC 587] that the High Court cannot question the correctness of the decision of the Supreme Court even though the point sought before the High Court was not considered by the Supreme Court."*

16. The challenge to the Assam Rules hence fails. The validity of the Assam Rules is upheld, in the light of the law laid down by the Apex court in ***Devina Sharma.***

17. The writ petition therefore has no force, and is hereby dismissed.

JUDGE **CHIEF JUSTICE**

Comparing Assistant