ELIGIBILITY OF NON-JUDICIAL OFFICERS FOR APPOINTMENT AS DISTRICT JUDGES: NEED TO RECONSIDER *CHANDRA MOHAN* v. *STATE OF U.P (AIR 1966 SC 1987)*

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I. Introduction

THE SUPREME court on February 19, 2020 delivered a judgment regarding eligibility of judicial officers in direct recruitment under article 233 of the Constitution of India in Civil Appeal No. 1698 of 2020, *Dheeraj Mor* v. *Hon'ble High Court of Delhi*[1] and other connected matters. In this case the petitioners, serving judicial officers across the country, challenged the constitutionality of the rules regarding direct recruitment to district judge which provided that only advocates having at least seven year experience of advocacy are eligible for direct recruitment and claimed that judicial officers having seven year experience of advocacy or of judicial service or of cumulative experience of both advocacy and judicial service should be allowed to participate in such direct recruitment. In this judgment it has been held that even judicial officers are not eligible to be appointed as direct recruit under article 233 of the Constitution of India because they are already in service and once again it has been reiterated that members of non-judicial services are ineligible for appointment as district judge under article 233. In this judgment the Supreme Court has failed to correctly appreciate the law and the history. At the same time this judgment would, unfortunately, adversely affect the quality of judges at district judge level and also deprive the country of the services of better suitable candidates available in services of the Union or of the State. Several review petitions are pending before the Supreme Court against this judgment.

This judgment extensively refers to the above judgment of *Chandra Mohan's case* wherein the Constitution bench of the Supreme Court had held that a member of non-judicial service is not eligible to be appointed as district judge under article 233 of the Constitution of India. This judgment debarred the members of non-judicial service from recruitment as district judges in any manner and the direct recruitment, thereafter, has actually been confined to advocates only. This judgment has not as yet been reconsidered by any larger bench and it is still holding the field. It has led to a situation where a large number of candidates having adequate special knowledge of law or even advocates who have joined any service, have been debarred from recruitment process on the only ground of being in non-judicial service. This article makes an attempt to

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[1] 2020 SCC Online SC 213.

analyze and evaluate the very judgment of *Chandra Mohan's case* and the legal permissibility of appointment of members of non-judicial service as district judges.

II. Facts in *Chandra Mohan's Case*

In this case, the petitioner Chandra Mohan, a civil and sessions judge, *inter alia*, challenged the constitutionality of the provision of the Uttar Pradesh Higher Judicial Service Rules, 1953 which provided that the officers of Judicial Officers cadre (at that time they were actually magistrates working under the control of the District Magistrate and were part of executive; they were not members of judicial service but they were having legal knowledge and experience) were eligible for appointment by way of direct recruitment as district judge under article 233 of the Constitution. The Constitution bench of the Supreme Court struck down the provision to be unconstitutional and it was held that the word 'service' under article 233(2) refers to only judicial service and the members of non-judicial service are not eligible under article 233 for appointment as district judge.

III. Evaluating the Reasoning in *Chandra Mohan's Case*

In *Chandra Mohan's case* it was held that members of non-judicial service are not eligible under article 233 for appointment as district judge in any manner as it is against the intent of constitutional scheme. This view was severely criticized by H. M. Seervai in his book *'Constitutional Law of India*'.[2]

Article 233 of the Constitution of India reads as:[3]

> **233. Appointment of District Judges:**
>
> (1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State
> (2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

A bare perusal is sufficient to infer that article 233(2) lays down qualification for those who are not already members of Government service. It does not lay down any qualification for those who are already in Government service. If we go through the judgment in *Chandra Mohan's* case, we find that the so called reasoning has been given in paras 14, 16, 19 and 20 of this judgment.

The Historical Perspective

First of all, if we go through the judgment in *Chandra Mohan's* case, we can find that it was not a case of promotion rather it was a case of direct recruitment. But the Supreme Court proceeded

[2] H.M. Seervai, '*Constitutional Law of India*', 2975-2976 (Universal Law Publishing Co., Delhi, 4th Edn., 2012).
[3] The Constitution of India, art. 233.

as if it was considering a matter of promotion rather than a matter of direct recruitment. It is true that a member of any other service cannot be promoted in any particular service but definitely he can be appointed by way of direct recruitment if he fulfills the eligibility criteria. The Supreme Court also failed to correctly appreciate the historical perspective of this issue. Para 20 of the judgment makes these mistakes clear:

> 20. The history of the said provisions also supports the said conclusion. Originally the posts of district and Sessions Judges and additional Sessions Judges were filled by persons from the Indian Civil Service. In 1922 the Governor-General-in-Council issued a notification empowering the local Government to make appointments to the said service from the members of the Provincial Civil Service (Judicial Branch) or from the members of the Bar. In exercise of the powers conferred under section 246 (1) and 251 of the Government of India Act, 1935, the Secretary of State for India framed rules styled Reserved Posts (Indian Civil Service) Rules, 1938. Under those Rules, the Governor was given the power to appoint to a district post a member of the judicial service of the Province or a member of the Bar. Though section 254(1) of the said Act was couched in general terms similar to those contained in article 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 article 233 (2) can only mean the judicial service.

Now, the history of the services falsifies the finding of the Supreme Court that the expression “the service” in article 233 can only mean the judicial service. Article 233 has to be interpreted in the light of its historical background and the usual meaning and construction of almost same provision of section 254 of the Government of India Act, 1935. When the Indian Civil Services Act came into force in 1861 the posts of district judge and additional district judge were reserved for the covenanted Indian Civil Service. This situation continued for a long time and only an ICS officer was eligible to be

appointed as district judge or additional district judge. With the increasing demand of indianization and of greater participation of Indians in the public services, a Royal Commission on Public Services was constituted under the chairmanship of Lord Islington in 1913 and its report was published in 1917 and it recommended for some representation of Indians on those posts which were hitherto reserved exclusively for Indian Civil Services by filling some of the posts from members of Provincial Civil Services and from members of Bar. But these recommendations could not be implemented at once.[4] Meanwhile section 99 of the Government of India Act, 1915 gave power to the local governments to make appointments on some posts which were exclusively reserved for ICS. It provided:

> Section 99 - Power to appoint certain persons to reserved offices[5]:
> (1) The authorities in India, by whom appointments are made to offices in the Indian Civil Service, *may appoint to any such office any person of proved merit and ability* domiciled in British India and born of parents habitually resident in India and not established there for temporary purposes only, although the person so appointed has not been admitted to that service in accordance with the fore-going provisions of this Act.
> (2) Every such appointment shall be made subject to such rules as may be prescribed by the Governor-General in Council and sanctioned by the Secretary of State in Council with the concurrence of a majority of votes at a meeting of the Council of India.
> (3) The Governor-General in Council may, by resolution, define and limit the qualification of persons who may be appointed under this section, but every resolution made for that purpose shall be subject to the sanction of the Secretary of State in Council, and shall not have force until it has been laid for thirty days before both Houses of Parliament.

Thus, section 99 of the Government of India Act, 1915 provided that any person of proved merit and ability could have been appointed to any post which was reserved for ICS. After the constitutional and legal reforms in 1919, in exercise of the powers conferred by section 99(2) of the Government of India Act, 1915 the Government of India issued Notification No. F. - 438 - Ests. dated the March 30, 1922, that was amended by Notification No. F - 563/22 - Ests., dated the May 17, 1923 which provided that with the previous sanction of the Governor General in Council and of the Secretary of State in council the local Government might declare the number of superior executive and judicial offices being offices ordinarily filled from amongst the members of the Indian Civil Service to which persons not being members of Indian Civil Service might be appointed. Under rule 2 it was provided that to a superior judicial office, a member of the Provincial Civil Service subordinate to the local government or persons having at least five

[4] Lee Commission, "Report of the Royal Commission on the Superior Civil Services in India" 4-5 (March 27, 1924), *available at:* https://upsc.gov.in/sites/default/files/Sl-019-RprtRoyalCmsnSuperiorCivilSerIndiaLeeComsnRprt-1924_0.pdf (last visited on Apr. 4, 2020).
[5] Government of India Act, 1915, s. 99.

year experience at the bar could be appointed. Under rule 3 any other person could have been appointed to the reserved posts. Thus, so far as the appointment to the post of district judge and additional district judge *i.e.,* superior judicial office is concerned, 15% of the posts could have been filled either from the members of subordinate judicial service or from the members of the Bar or even from amongst other persons. It is also pertinent to point out that no quota was prescribed in this notification and the local government could have appointed from any of the sources.

The notification dated May 17, 1923 read as:[6]

> 1. With the previous sanction of the Governor General in Council and of the Secretary of State in Council the local Government may, by notification in the official Gazette, declare the number of superior executive and judicial offices, being offices ordinarily filled from amongst the members of the Indian Civil Service, to which, subject to the provisions of sub section (1) of section 99 of the Government of India Act, persons not being members of the Indian Civil Service may be appointed.
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> 2. Within the limit of number declared under Rule 1 the Local Government may appoint:-
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> (i) To a superior executive office a member of the provincial civil service subordinate to the local Government;
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> (ii) To a superior judicial office a member of the provincial civil service subordinate to the local Government, or a person who at the time of the appointment is-
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> (a) A barrister of England or Ireland or a member of the Faculty of Advocates in Scotland; or
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> (b) A vakil, pleader, advocate or attorney of a high court in India; or
>
> (c) A pleader or advocate of a chief court or of a judicial commissioner's court; or
>
> (d) A pleader of a district court; and in respect of such qualification is of not less than five years' standing.
>
> 3. Notwithstanding anything contained in rule 2, the local Government may, within the limit of number declared under rule 1, appoint to a superior executive or judicial office any person not having the qualifications prescribed for such office by rule l.
>
> Provided that the number of persons so appointed shall not amount to more than 15 per cent of the total number of superior offices declared under rule 1.
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> 4. The local Government, may, by notification in the local official gazette, declare the number of inferior offices, being offices required under the provisions of section

[6] Notification No. F- 563/22 - Ests., dated the May 17, 1923, *available at:* https://www.upsc.gov.in/sites/default/files/Sl-032-PROCEDUREMAKINGAPPtmntLISTEDPOSTIN-ICS-1927_0.pdf (last visited on Apr. 4, 2020).

> 98 of the Government of India Act to be filled from amongst the members of the Indian Civil Service, to which, subject to the provisions of sub-section (1) of section 99 of the said Act, persons not being members of the Indian Civil Service may be appointed.
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> 5. In addition to appointments made under the foregoing rules whenever the exigencies of the public service so require, the local Government may, subject to the provisions of sub–section (1) of section 99 of the Government of India Act, appoint for a period not exceeding twelve months, any person not being member of the Indian Civil Service to any office ordinarily filled from amongst the members of the Indian Civil Service. The Secretary of State for India in Council may, however, sanction the continuance of any such appointment for the period as he may fix, having regard to the exigencies of the public service.

Thus, it is crystal clear that apart from ICS officers, both members of Provincial Civil Service as well as advocates were eligible for appointment to superior judicial office *i.e.,* to the post of district judge. Practically, when such appointment was from Provincial Civil Service, it was mostly from amongst the officers of judicial branch of Provincial Civil Service by way of promotion. But ICS officers who were non-judicial officers, were very well eligible for appointment as district judge. It can be seen from the perusal of these rules that even a person not qualified for the post could have been appointed under rule (3). Under rule (6) even any person could have been appointed to a post ordinarily reserved for ICS on temporary basis for a period of 12 months. The practice and procedure for the appointment of superior judicial service continued to be the same even after the advent of the Government of India Act, 1935. However the Government of India Act, 1935 made the earlier provisions compact with the same meaning *vide* section 254. There was no change in the procedure and eligibility for appointment to the post of district judge and appointment to the listed posts was made from ICS as well as officers of provincial judicial service and from the Bar. Sections 253, 254 and 255 of the Government of India Act read as under:[7]

> **Special Provisions as to Judicial Officers.**
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> 253.-(1) The provisions of this chapter shall not apply to the judges of the Federal Court or of any High Court:
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> 254. District judges, etc. - (1) Appointments of persons to be, and the posting and promotion of, district judges in any Province shall be made by the Governor of the Province, exercising his individual judgment, and the High Court shall be consulted before a recommendation as to the making of any such appointment is submitted to the Governor.

[7] Government of India Act, 1935, *available at:* http://www.legislation.gov.uk/ukpga/1935/2/pdfs/ukpga_19350002_en.pdf (last visited on Apr. 4, 2020).

(2) A person not already in the service of His Majesty shall only be eligible to be appointed a district judge if he has been for not less than five years a barrister, a member of the Faculty of Advocates in Scotland, or a pleader and is recommended by the High Court for appointment.

(3) In this and the next succeeding section the expression "district judge" includes additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, sessions judge, additional sessions judge, and assistant sessions judge.

255. (1) The Governor of each Province shall, after consultation with the Provincial Public Service Commission and with the High Court, make rules defining the standard of qualifications to be attained by persons desirous of entering the subordinate civil judicial service of a Province.

In this section, the expression "subordinate civil judicial service" means a service consisting exclusively of persons intended to fill civil judicial posts inferior to the post of district judge.

(2) The Provincial Public Service Commission for each Province, after holding such examinations, if any, as the Governor may think necessary, shall from time to time out of the candidates for appointment to the subordinate civil judicial service of the Province make a list or lists of the persons whom they consider fit for appointment to that service, and appointments to that service shall be made by the Governor from the persons included in the list or lists in accordance with such regulations as may from time to time be made by him as to the number of persons in the said service who are to belong to the different communities in the Province.

(3) The posting and promotion of, and the grant of leave to, persons belonging to the subordinate civil judicial service of a Province and holding any post inferior to the post of district judge, shall be in the hands of the High Court, but nothing in this section shall be construed as taking away from any such person the right of appeal required to be given to him by the foregoing provisions of this chapter, or as authorising the High Court to deal with any such person otherwise than in accordance with the conditions of his service prescribed thereunder.

Thus, most of the superior judicial offices were held by the members of Indian Civil Service and it was the direct recruitment in true sense which was open for all eligible candidates even if they belonged to provincial civil service or to the bar. Any eligible graduate could have been appointed to ICS if he passed the ICS examination even if he belonged to any service. But after independence the posting of ICS officers on the posts of district judges and additional district judges was discontinued. However, it was never considered that members of Provincial Civil Services or other Government services were, despite having ample and better legal knowledge, not eligible to be appointed as district judges. It is also to be kept in mind that by discontinuing

appointment of ICS/IAS officers as district judge the Government of India did not make them ineligible because eligibility for district judge could have been changed only by the Constituent Assembly or the Parliament. It was just a policy decision keeping in mind the prevailing public sentiment against the ICS district judges.

It is very pertinent to mention here that the provision under article 233 of the Constitution of India, 1950 is almost identical to section 254 of the Government of India Act 1935. Therefore the provision of article 233 of the Constitution has to be seen in the background of section 254 of Government of India Act, 1935 and earlier legislations. Thus, the Supreme Court failed to correctly appreciate the historical past and real intendment of article 233 which resulted in depriving the society of the services of more competent and meritorious candidates at district judge level.

Reasoning in Chandra Mohan's case *vis-a-vis* the Concept of Independence of Judiciary and Separation of Powers

Most importantly, a close scrutiny of this judgment of Chandra Mohan's case shows that it was allegedly based upon the principle of independence of judiciary and separation of powers. In this regard para 14 of this judgment says:

> 14…The Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States: it constitutes a High Court for each State, prescribes the institutional conditions of service of the Judges thereof, confers extensive jurisdiction on it to issue writs to keep all tribunals, including in appropriate cases the Governments, within bounds and gives to it the power of superintendence over all courts and tribunals in the territory over which it has jurisdiction. But the makers of the Constitution also realised that "it is the Subordinate Judiciary in India who are brought most closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question in the case of the superior Judges." *Presumably to secure the independence of the judiciary from the executive, the Constitution introduced a group of articles in Ch. VI of Part VI under the heading "Sub-ordinate Courts". But at the time the Constitution was made, in most of the States the magistracy was under the direct control of the executive. Indeed it is common knowledge that in pre-independence India there was a strong agitation that the judiciary should be separated from the executive and that the agitation was based upon the assumption that unless they were separated, the independence of the judiciary at the lower levels would be a mockery. So article 50 of the Directive Principles of Policy states that the State shall take steps to separate the judiciary from the executive in the public services of the States. Simply stated, it means that there shall be a separate judicial service free from the executive control*.

But if we examine the judgment of *Chandra Mohan's case* on the touchstones of independence of judiciary and separation of powers, it is found that this judgment is based upon wrong notions of separation of powers and independence of judiciary.

Simply speaking, independence of judiciary means that the judiciary should be independent from other branches of government. It connotes that the courts in their functioning should be free from improper influence or pressure from the other branches of the government or from private or partisan interests. Independence of judiciary is a key component of the idea of separation of powers.

The concept of separation of powers simply means that one branch of government should not exercise the functions of any other branch. This concept is related with the functioning and responsibilities of different branches of government. It has nothing to do with how someone is inducted into any particular branch of government. There are three main aspects of the concept of separation of powers:

1. The same person should not form part of more than one organ of the government.

2. One organ of the government should not exercise the functions of any other branch of government.

3. Any one organ of the government should not control or interfere with the exercise of its function by any other organ.

In this regard, Montesquieu, the main propounder of this doctrine of separation of power was of the view that each power (branch of government) should exercise its own functions only. He says as under:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[8]

Thus, the crux of the doctrine of separation of powers is that the person in one branch should not discharge the functions assigned to other branches. There is nothing like that a person in one

[8] Montesquieu, *The Spirit of Laws*, 173–174, *available at:* https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/montesquieu/spiritoflaws.pdf (last visited on Apr. 17, 2020).

branch of Government cannot be appointed to some other branch if he is ready to leave his previous branch.

Now, in direct recruitment for any service a person who is already in some other service, resigns his earlier service before joining the new service. For instance, when a Provincial Civil Service officer clears the UPSC civil services examination, he resigns his service in the State and joins as a direct recruit in IAS, IPS, *etc.* Thus a person who may be in some other service can take the examination of direct recruitment for any other service provided that he fulfills the eligibility criteria. Even members of judicial service do appear in civil services examination and after selection they are appointed on executive posts. It doesn't mean that the separation of powers is blurred in such cases. This is so because the person appointed in administrative service is no longer in judicial service after his resignation from judicial service. On the same criterion, if a member of non-judicial service appears in direct recruitment examination under article 233 and if he is selected then he can resign his earlier service and he can join the judicial service at district judge level. He would be under the control of the High Court after his appointment and he would no longer be a member of his erstwhile service. Therefore, there is nothing against the doctrine of independence of judiciary or the doctrine of separation of power. Moreover there are numerous instances where a member of judiciary has, after his resignation or retirement, held the political or executive posts. For instance Justice Hidayatullah held the post of vice president of India after his retirement. Mr. H. R. Gokhale, the law minister in 1976 in Indira Gandhi Government was also a judge of Bombay High court during 1962-66. Justice K. S. Hegde of the Supreme court was a politician before and also after his stint as a Supreme Court judge. Justice Vijay Bahuguna, a judge of Allahabad and Bombay High Courts became Chief Minister of Uttarakhand. Justice M. Rama Jois became Governor after his retirement as Chief Justice of Karnataka High Court. Justice P. Sathasivam held the post of governor after his retirement. Some Judges contested the election after their retirement or resignation and held even political posts. Recently Justice Ranjan Gogoi has been nominated to Rajya Sabha after his retirement as Chief Justice of India. If the notion of independence of judiciary or the doctrine of separation of power as applied in *Chandra Mohan's case* is applied which suggests that a member of one branch of Government cannot be appointed to another branch even if he leaves his earlier branch, then no judge after his retirement or resignation can be appointed to executive or political post. Similarly no person who held a political or executive post can be appointed as a judge in any court. But history bears testimony to the fact that politicians like Justice V.R. Krishna Iyer had been an outstanding judge and a milestone in the judicial system. In this regard, H. M. Seervai has also commented as follows: [9]

> The argument derived from the directive principle which provides for the separation of the judiciary from the executive, is incorrect, because the separation there provided for means that a person while exercising executive power should not also exercise judicial power, as for example, a collector should not also be a sessions judge. It has no reference to a qualified lawyer who has been a sub-judge and is later

[9] *Supra* note 3 at 2976.

> an executive magistrate or collector being appointed a judge when he ceases to discharge any executive function.

Moreover, this concept of independence of judiciary that non-judicial member cannot be appointed under article 233 is not followed even at the entry level in district judiciary *i.e.,* at Civil Judge (junior division) level. Any person of any other service who fulfills the eligibility criteria of having an LLB degree can be appointed at junior division level if he passes the examination. Is the concept of independence of judiciary not applicable to the basic level (junior/senior division level) where most of the cases are pending? This shows the apparent flaw of this reasoning.

Service under article 233 does not mean only judicial service

Now, the Supreme Court in para 16 of this judgment has given its reasoning why the word "service" under article 233(2) means only judicial service: [10]

> 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 article 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 article 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 article 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, article 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 article

[10] AIR 1966 SC 1987 at 1994.

> 236, is placed as a clause before article 233(2), there cannot be any dispute that "the service" in article 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 articles 234 and 235 the expression "judicial service" is found is not decisive of the question whether the expression "the service" in article 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" emphasize the fact that the judicial service consists only of persons intended to fill up the posts 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.

In this regard, H. M. Seervai has also criticized this view of the Supreme Court:[11]

> As regards the appointment of persons already in the service of the Union or of a State, the decision of the Supreme Court is open to question. It reads into article 233(2), which speaks of the “service of the Union or of the State,” the definition of “judicial service” given in article 236(2), and this is against the canons of construction, and there are no compelling reasons why in a part which uses in two articles the word “service” [article 233(2)] and “judicial service” (article 234), the definition of “judicial service” should be read into article 233.

The reasoning in the above para 16 is full of blunders and unreasonableness. Firstly, it has been said that the chapter dealing with the subordinate courts in which the expression the service appears indicates that the service mentioned therein is the service pertaining to courts. But the Supreme Court has failed to see that in the Government of India Act, 1935, a separate chapter II (Civil Services) under Part X (The Services of the Crown in India) was there wherein provisions relating to district judiciary was given under a separate heading “Special Provisions as to Judicial Officers (sections 253-256)” and the provisions of chapter VI of part VI of the Constitution are almost identical to these “Special provisions as to Judicial Officers” of Government of India Act, 1935. We all know that our constitution is mainly based upon the Government of India Act, 1935. The word service was also used in section 254 of the Government of India Act 1935 and the phraseology of section 254 of the 1935 Act is almost identical to article 233 of the Constitution of India. In Government of India Act, 1935 the word “service” in section 254 had its

[11] *Id.*, at 2975.

natural meaning and, therefore, the word "service" in article 233 has also to be given the same meaning. Thus this reasoning of Supreme Court is not tenable at all.

Secondly, there was a sub-section defining "subordinate civil judicial service" under section 255(1) of the Government of India Act, 1935 which is now "judicial service" in article 236(2). As has been explained earlier a person who was not in judicial service was also eligible to be appointed as district judge under article 254 and this was the prevalent position even in 1943 when the appointment for ICS was discontinued. The constitution makers deliberately used the word "service" in article 233 whereas they used the words "judicial service" in articles 234, 235, 236 and 237. Thus the Constitution makers never intended that the appointment to the post of district judge should be confined only to members of judicial service.

Thirdly, so far as the use of word "exclusively" and "intended" in article 236(2) is concerned, it should be borne in mind that they qualify the expression judicial service *i.e.*, the judiciary below the district judge level. Moreover, these words were used also in section 255(1) of the Government of India Act, 1935 in defining subordinate civil judicial service. Thus an irrelevant thing was used to defeat the claims of the non-judicial officers.

Moreover, in para 19 of the judgment the Supreme Court discarded the argument that if the word service in article 233(2) is construed as judicial service, it would ignore article 237 of the Constitution. It was held:[12]

> 19. But, it is said that this construction ignores article 237 of the Constitution. We do not see how article 237 helps the construction of article 233 (2). Article 237 enables the Governor to implement the separation of the judiciary from the executive. Under this Article, the Governor may notify that articles 233, 234, 235 and 236 of the Constitution will apply to magistrates subject to certain modifications or exceptions; for instance, if the Governor so notifies, the said Magistrates will become members of the judicial service, they will have to be appointed in the manner prescribed in article 234, they will be under the control of the High Court under article 235 and they can be appointed as District Judges by the Governor under article 233(1). To state it differently, they will then be integrated in the judicial service which is one of the sources of recruitment to the post of district Judges. Indeed, article 237 emphasises the fact that till such an integration is brought about, the Magistrates are outside the scope of the said provisions. The said view accords with the constitutional theme of independent judiciary and the contrary view accepts a retrograde step.

But the reasoning given in this para 19 of *Chandra Mohan's case* is also not worth acceptance. The Supreme Court also failed to consider the true import of the provisions of article 237 of the Constitution. By virtue of this article the Constitution makers made a provision whereby even a member of non-judicial service could have been integrated into judicial service. Had the

[12] *Supra* note 1 at 1995.

Constitution makers intended that members of non-judicial service can never be appointed into judicial service, article 237 could not have found place in the Constitution.

Overlooking the Constitution Bench Judgment in *Rameshwar Dayal* v. *State of Punjab*

In *Rameshwar Dayal* v. *State of Punjab*,[13] the appointment of P. R. Sawny and Harbans Singh as district judges was challenged on the ground that they were already in Government service and, therefore, they were not eligible under article 233(2) of the Constitution. It is very important to note that they were not in judicial service at the time of their appointment as District judge under article 233. The constitution bench of the Supreme Court turned down the challenge on this ground and appointment of these two candidates was upheld who were not members of judicial service. This was the correct interpretation of article 233 which was in accordance with the prevalent legal system and historical past. In this case, two candidates Harbans Singh (respondent No. 3) and P. R. Sawhny (respondent No. 6) were not advocates when they were appointed as district judge. Harbans Singh was working as Deputy Custodian, Evacuee Property for more than two years when he was appointed as district judge on April 18, 1950. P. R. Sawhny was working as Chairman Jullundur Improvement Trust for more than eight years when he was appointed as district judge on April 6, 1957. It is very important to note that P. R. Sawhny had got his licence to practice as an advocate suspended on March 6, 1949 and he got his name again so enrolled on October 20, 1959, that is, after his appointment as district judge. Thus these two candidates were factually not even on the roll of advocates when they were appointed as district judge. Upholding the appointment of these candidates, the Supreme Court observed in para 14 of this judgment:

> .....We now turn to the other two respondents (Harbans Singh and P. R. Sawhney) whose names were not factually on the roll of Advocates at the time they were appointed as district judge. What is their position? We consider that they also fulfilled' the requirements of article 233 of the Constitution. Harbans Singh was in service of the State at the time of his appointment, and Mr. Viswanatha Sastri appearing for him has submitted that Cl. (2) of article 233 did not apply.

The Supreme Court further clarified it in para 12 of this judgment and held that for a person already in the service of the Union or of the State, no special qualifications are laid down under article 233. It held:

> 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.

[13] AIR 1961 SC 816.

It appears that while deciding the *Chandra Mohan's case*, the Supreme Court overlooked the ratio in *Rameshwar Dayal's case* which was a binding precedent in *Chandra Mohan's case*. Thus it is crystal clear that there was no bar on appointment of a person who was even in some other service. Had it been so, the persons working in the Indian civil services could not have been appointed as district judges after some required years of service in executive branch nor could the members of other services have been appointed to such posts under the notification of 1922/1923[14]. The provision under article 233 of the Constitution of India remained the same as it was in section 254 of Government of India Act, 1935, and as such no different interpretation can be given to article 233 of the Constitution so as to debar the members of non-judicial service.

IV. Retaining the earlier provisions in the Constitution

It is also pertinent to mention here that when the provisions relating to district judiciary were considered in Constituent Assembly in 1949, the Constitution makers did not alter the major part of the existing provisions of Government of India Act, 1935.[15] They were fully aware of the provisions of the Government of India Act, 1935 and if they wanted to disqualify the members of other services from direct recruitment they would have discussed on it in the Constituent Assembly as well as they would have changed the word "service" in article 233 with the word "judicial service". But the Constitution makers never wanted to make the eligibility zone too narrow rather they negated such an attempt. It is also very important to mention that in the Constituent Assembly an attempt was made to restrict the appointment of advocates under article 233 to the post of district judge only to the advocates/pleaders of the concerned High Court/province on the ground that unless a lawyer has practiced in the same province in which he is going to be appointed as a judge, it will be very difficult for him to appreciate the customs, manners and the practices of the province. For this purpose, an amendment was moved by Mr. Kuldhar Chaliha. But this amendment was rejected by the Constituent Assembly. Replying on this amendment, Dr. Ambedker said:[16]

> With regard to the amendment moved by Mr. Chaliha, I am sorry to say I cannot accept it, for two reasons: one is that we do not want to introduce any kind of provincialism by law as he wishes to do by his amendment. Secondly, the adoption of this amendment might create difficulties for the province itself because it may not be possible to find a pleader who might technically have the qualifications but in substance may not be fitted to be appointed to the High Court, and I think it is much better to leave the ground perfectly open to the authority to make such appointment provided the incumbent has the qualification. I therefore cannot accept that amendment.

Thus, the Constituent Assembly also was of the opinion that mere technical qualification is not all that is required rather the best suitable candidates should be appointed to these posts.

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[14] *Supra* note 6.
[15] Constituent Assembly Debates on September 16, 1949, *available at*: https://indiankanoon.org/doc/1496755/ (last visited on Apr. 12, 2020).
[16] *Ibid.*

Importantly, the Constituent Assembly also did not make elaborate discussions while enacting the provisions of Chapter VI of the Constitution as most of the provisions of Government of India Act, 1935 relating to district judiciary were retained as there was no intention to alter the existing provisions.

The view in *Chandra Mohan's case* that members of non-judicial service are not eligible for appointment as district judge under article 233 of the Constitution was reiterated in *Satya Narain Singh* v. *High Court of Judicature at Allahabad*,[17] *Deepak Aggarwal* v. *Keshav Kaushik*[18] and now in *Dheeraj Mor's*[19] *cases*. The analysis of the various judgments of the Supreme Court after Chandra Mohan's case on eligibility of non-advocates under Article 233 of the Constitution reveals that these judgments are based on the findings of the *Chandra Mohan's case* and the basic problem is that these judgments are based on the presupposition that article 233 excludes members of non-judicial service from the eligibility zone of district judges. Moreover these judgments are based on the premise that direct recruitment and advocates' quota is one and the same thing. It is true that a quota may be prescribed for any particular source of recruitment and advocates may be one of the sources of recruitment under article 233. A separate quota of 10-15% may be earmarked for the advocates. But it does not mean that advocates' quota and direct recruitment quota are one and the same thing. In service jurisprudence, direct recruitment quota is open for all the eligible candidates and the qualification is fixed in view of the requirements of the service. Direct recruitment is defined as the recruitment which is *open to all candidates,* eligible as per the provisions regarding age, educational qualification/ experience etc. as prescribed in recruitment rules.[20] The object of direct recruitment is to infuse young blood in the service so that young and energetic persons are there in the service. In direct recruitment seniority never counts and it is made only on the basis of merit so as to find out the best suitable persons for the service. Direct recruitment is never confined to only a selected class of willing candidates keeping out better class of other willing candidates. The present problem of docket explosion in India, to a large extent, is due to the non-selection of best available persons and overemphasis on selection from the advocates only. Exposing this problem the Law Commission of India in its 14th report said:[21]

> As has been said repeatedly elsewhere, the problem of efficient judicial administration, whether at the level of the superior courts or the subordinate courts is largely the problem of finding capable and competent judges and judicial officers. Delays in the disposal of cases and the accumulation of arrears are in a great measure due to the inability of the judicial officers to arrange their work methodically and to appreciate and apply the provisions of the Procedural Codes.

[17] (1985) 1 SCC 225.
[18] (2013) 5 SCC 277.
[19] *Supra* note 1.
[20] FAQs on recruitment rules, Government of India, *available at:* https://dopt.gov.in/sites/default/files/AB.14017_13_2013-Estt-RR.pdf (last visited on Apr. 12, 2020).
[21] Law Commission of India, "14th Report on Reform of Judicial Administration, Vol. I" 161 (September, 1958).

In *All India Judges' Association* v. *Union of India*,[22] the Supreme Court also quoted the 14th report of Law Commission with approval and said:

> The Law Commission of India in its 14th Report in the year 1953 said:
>
> *If we are to improve the personnel of the subordinate judiciary, we must first take measures to extend or widen our field of selection so that we can draw from it really capable person.* A radical measure suggested to us was to recruit the judicial service entirely by a competitive test or examination. It was suggested that the higher judiciary could be drawn from such competitive tests at the all- India level and the lower judiciary can be recruited by similar tests held at State level. *Those eligible for these tests would be graduates who have taken a law degree and the requirement of practice at the Bar should be done away with.*
>
> Such a scheme, it was urged, would result in bringing into the subordinate judiciary capable young men who now prefer to obtain immediate remunerative employment in the executive branch of Government and in private commercial firms. The scheme, it was pointed out, would bring to the higher subordinate judiciary the best talent available in the country as a whole, whereas the lower subordinate judiciary would be drawn from the best talent available in the State.

A law officer of any government department, a teacher of law in any university or college, a law officer in any public sector undertaking, *etc.*, who might have also been an advocate before joining the service are not less suited than a large number of advocates.

Even otherwise explanation (a) and (aa) of article 217(2) of the Constitution makes it clear that the experience of any post, under the Union or of the State, requiring special knowledge of law is at par the experience of judicial service as well as advocacy. Thus a person working on a post requiring special knowledge of law is eligible to be appointed as High Court judge if he has a total experience of 10 years in terms of article 217. If the interpretation of article 233 as given in *Chandra Mohan's* case is accepted, a very anomalous situation would arise where a person eligible to be appointed as High Court judge would be ineligible for appointment as district judge which is very paradoxical. It is a matter of common prudence that a person who is competent enough to hold the post of a High Court judge shall naturally be eligible for appointment as district judge. Moreover higher qualification presupposes lower qualification.[23] It is natural that a person eligible for appointment as a High Court judge is eligible for appointment as a district judge. In this regard it is mention worthy that in *Prof. C. P. Agrawal* v. *C. D. Parekh,*[24] the Supreme Court refused to adopt an anomalous interpretation which suggested that a person eligible for appointment as a Supreme Court judge was not eligible for appointment as a High Court judge.

[22] (1992) 1 SCC 119.
[23] *Jyoti K.K.* v. Kerala *Public Service Commission*, (2010) 15 SCC 596.
[24] AIR 1970 SC 1061.

Thus, the members of non-judicial service are undoubtedly eligible for appointment under article 233 and there is no justification to keep them out of the appointment process of district judges. It is another thing that requirement of some special knowledge of law and experience is prescribed for them also.

V. Conclusion

Direct recruitment is made to infuse more meritorious candidates in the service who are comparatively young and energetic. If the object of direct recruitment to district judge is to recruit young and meritorious persons who have adequate knowledge of legal and judicial system and who are well acquainted with law, then there is no justification to exclude the members of non-judicial services having special knowledge of law from direct recruitment of district judges.

Thus, the judgment in *Chandra Mohan's case* is full of blunders and unreasonableness. It is against the constitutional scheme and the constitutional intendment. Competent, efficient and meritorious persons at every level of judicial system is sine qua non for the betterment of the judicial system. Therefore it is high time that the judgment in *Chandra Mohan's case* is reconsidered by a larger bench and the mistakes committed in it are corrected at the earliest.