
(2003) 05 AHC CK 0091
In the Allahabad High Court
Case No : C.M.W.P. No. 23719 of 2003

Bhola Nath Singh Kushwaha	Vs	APPELLANT
State of Uttar Pradesh and Others		RESPONDENT

Date of Decision : 26-05-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 226

Citation : (2003) 5 AWC 4054

Hon'ble Judges : A.K. Yog, J

Bench : Single Bench

Advocate : R.C. Maurya, for the Appellant;

Final Decision : Dismissed

Judgement

A.K. Yog, J.—Heard learned Counsel for the Petitioner and learned standing counsel for the Respondent Nos. 1 and 2 only.

2. No notice required to be given to Respondent No. 3 and no useful purpose will be served by granting time for filing counter-affidavit considering the documents annexed with the petition and the nature of the impugned order dated 24.1.2003/ Annexure-8 to the writ petition.

3. Writ petition is liable to be dismissed on the ground of laches dealt later in this judgment but the Court deem it necessary to consider whether Legal Remembrancer is right-when he mentions in the impugned order that opinion of District Judge is not required in a case where District Magistrate sends recommendation under proviso to para 7.03 (3), L.R. Manual.

4. Question - "whether Government is duty bound in law to have the opinion of concerned District Judge having consulted and obtained recommendation regarding "merit" and "suitability" of respective "advocates" in a district for being considered for appointment as Government counsel" -is of significant importance because it concerns "judicial administration" in the State and thus, a

matter of "general public interest" and since in the very nature of the appointment it has far-reaching consequences.

5. A Division Bench of this Court in its judgment and order dated 6.5.2003 in the case of Virendra Pal Singh Rana v. State of U.P. and ors, C.M.W.P. No.13550 of 2003, while considering para 7.06, 7.08, L.R. Manual observed:

We may also mention before parting with this case that over the past two or three decades a practice has arisen that whenever a new Government comes it terminates the appointments of almost all the Government counsels appointed earlier and in their places persons belonging to or affiliated to the new ruling party or their kith or kin are appointed. This is an unhealthy practice. The Court requires competent and honest Government counsels for proper assistance. The problem however, is that many of the persons whose engagements as Government counsel is terminated by the new Government were themselves earlier appointed on extraneous considerations because they belonged to or were affiliated to the previous Government, or were kith and kin of the members of the previous Government and not on merit. Thus, it often happens that the persons appointed by the previous Government were themselves incompetent or lacking in integrity or sound knowledge of law, and this Court will not like to interfere in terminating their engagements. However, there are many Government counsels who were appointed on genuine considerations on their own merit, knowledge or law and integrity and competence. Termination of engagement of such persons is against the interest of society and the State. Competent, honest Government counsels with sound knowledge of law should be allowed to continue (unless they cross 62 years) whichever Government comes to power so that there is some stability in such engagements, and they are not treated as loaves of office distributed by the ruling party. In fact if such engagements are changed frequently the best talent and competence in the bar will not be attracted to it because good lawyers would then prefer to remain in private practice rather than risk losing their private clientele in a job which is of a precarious nature.

(Italicised by me to lay emphasis)

6. At the outset, salient facts of the case, which are interesting, may be noted.

7. On the death of one Ram Autar Mittal, advocate, erstwhile District Government Counsel (Civil), District Court, Deoria, necessity arose for making fresh appointment of D.G.C. (Civil), District Magistrate, Deoria, issued notice dated May 30, 2002, Annexure-1 to the writ petition inviting applications from the eligible advocates for being considered for appointment as D.G.C. (Civil), Deoria. Following the requirement of para 7.03 (3), L.R. Manual, the District Magistrate in consultation with the District Judge who had given his opinion about conduct, integrity, suitability and merit of each candidates (who had applied) forwarded his recommendation to the Legal Remembrancer vide letter dated August 20, 2002, Annexure-2 to the writ petition. Name of the Petitioner

was recommended at serial No. 1 by both the District Judge and the District Magistrate. The opinion of the learned District Judge dated August 20, 2002 and the letter of the District Judge, Deoria, addressed to the Legal Remembrancer, U.P. Government, are enclosed as Annexures-2 and 3 of the writ petition.

8. Petitioner before us, contends that political pressure was exerted to get the recommendation changed from the District Magistrate who vide letter dated September 6, 2002, Annexure-4 to the writ petition, addressed to the Legal Remembrancer sent names of three advocates (other than the advocates in whose favour he had sent recommendation along with the endorsement of the District Judge earlier). Perusal of Annexure-4 to the writ petition shows that there is no mention as to whether the advocates in whose favour subsequent recommendation was made had applied or not.

9. The Joint Secretary/Joint Legal Remembrancer, U.P. Government vide letter dated 17/18 October, 2002 addressed to the District Magistrate, Deoria (Annexure-5 to the writ petition) recommended the name of Respondent No. 3, Umapati Tripathi, advocate to be appointed as District Government Counsel (Civil).

10. Feeling aggrieved, Petitioner filed Writ Petition No. 51958 of 2002, Bhola Nath Singh Kushwaha v. State of U.P. through Joint Secretary and Joint Legal Remembrancer U.P. Lucknow and others and this Court finally disposed of the writ petition with the observation "...The Respondent No. 1 is directed to consider the recommendations of the District Judge and the District Magistrate and pass a reasoned order within a period of one month from the date of the receipt of the certified copy of this order..."; see Annexure-7 to the writ petition.

11. Petitioner approached State Government by filing representation which has been decided by means of the impugned order dated 24.1.2003 Annexure-8 to the writ petition wherein Legal Remembrancer has interpreted para 7.03 (3), L. R. Manual in a manner that "Main provision" for appointment of a Government counsel in "District Court" in the State of U.P. in para 7.03 (3), L. R. Manual is being eclipsed and rendered completely nugatory.

12. For convenience para 7.03, L. R. Manual is reproduced:

7.03. Applications and qualifications.

(1) Whenever the post of any of the Government counsel in the district is likely to fall vacant within the next three months, or when a new post has been created, the District Officer concerned shall notify the vacancy to the members of the bar. Members eligible for consideration would be those having at their credit a practice of 10 years in case of District Government Counsel, 7 years in case of Assistant District Government Counsel and 5 years in case of Sub-District Government Counsel. The District Officer shall ask those, who want to be considered for appointment to a particular office to give their names to him with particulars such as age, length of practice at the bar, proficiency in Hindi, Income

Tax paid by them on professional income during last 3 years and if not assessed the return submitted by them, if any, details of the work handled by them during the course of the preceding two years duly verified by Court and whether they have practised on criminal, civil and revenue side.

(2) The District Government Counsel and legal practitioners of the neighbouring districts may also send the above particulars for the post of District Government Counsel through their District Officers, who shall forward the same to the District Officer of the district in which the appointment is to be made, with such remarks as they deem fit.

(3) The names so received shall be considered by the District Officer in consultation with the District Judge. The District Officer shall give due weight to the claim of the existing incumbents (Additional/ Assistant District Government Counsel), if any, and shall submit confidentially in order of preference the names of the legal practitioners for each post to the Legal Remembrancer giving his own opinion particularly about his character, professional conduct and integrity and the opinion of the District Judge on the suitability and merits, of each candidate. While forwarding his recommendations to the Legal Remembrancer the District Officer shall also send to him the bio-data submitted by other incumbents with such comments as he and the District Judge may like to make. In making the recommendations, the proficiency of the candidate in civil or criminal or revenue law, as the case may be, as well as in Hindi shall particularly be taken into consideration:

Provided that it will also be open to the District Officer to recommend the name of any person, who may be considered fit, even though he may not have formally supplied his bio-data for being considered for appointment. The willingness of such a person to accept the appointment if made shall, however, be obtained before his name is recommended.

13. Aforequoted proviso, it is to be noted, provides for limited exception, by authorising District Officer/ Magistrate to recommend name of such an advocate, (along with bio-data and consent of such advocate), even if he had not formally applied, for being considered for appointment as Government counsel.

14. The said proviso, nowhere, by direct or indirect inference, dispenses with the requirement of consultation and obtaining of opinion of concerned District Judge regarding "merit" and "suitability" of concerned advocate.

15. Requirement of submitting recommendation to Legal Remembrancer in consultation with the District Judge and "the opinion of the District Judge on the "suitability" and "merits" of a candidate, in para 7.03, L. R. Manual is a "substantive requirement" which is not dispensed with in the proviso. The proviso, in clear terms, incorporates relaxation only in procedural part of the main clause which contemplated "formal application" to be submitted by an advocate, for being considered and recommended for appointment as Government counsel by the District Officer/Magistrate.

16. Object of the proviso is that even an "advocate", who has not applied or failed to observe formality of submitting an application, may not be ignored and a District Magistrate may be left free to recommend name of an advocate who has not applied, provided he furnishes his bio-data and consent. In other words, procedural requirement of submitting application has been done away with, so that it does not come in the way of District Magistrate, while recommending name(s) to the Government for making appointment of Government counsel, and thus ensure that Government is in a position to avail services of best possible-available "advocate".

17. The proviso nowhere says that District Officer can recommend name of an advocate who had not applied and also without the consultation and opinion of such District Judge regarding merit and suitability of such candidate.

18. Therefore, where an advocate has not formally applied, his name can be recommended subject to all other requirements contained in main clause in para 7.03 (3), L. R. Manual.

19. In other words, appointment of an advocate as Government counsel, whether applied or not is subject to mandatory requirement of consultation with the District Judge-whose opinion regarding suitability and merit of such candidate is must for making appointment of Government counsel.

20. Main clause, contained in para 7.03 (3), L. R. Manual read along with the proviso require it to read *mutatis mutandis* as if it is modified to the extent mentioned in the proviso, namely doing away with the requirement of submitting application against the notice by the District Magistrate.

21. There is no ambiguity in the proviso which is intended to further the object of "main clause" of para 7.03 (3), L. R. Manual. It is to obviate handicap on procedural score because of which the Government may be deprived of opportunity to appoint best available advocate as Government counsel.

22. Division Bench in the case of Virendra Pal Singh Rana (*supra*) observed:

It may be mentioned that to be independent and to dispense high quality justice the Judges required highly competent Government counsels of integrity and good knowledge of law. These factors can best be known to the District Judge and it is not so well known to the District Magistrate. Of course if some information/material comes before the District Magistrate he can forward it to the District Judge, but after considering it if the District Judge still is of the opinion that the person should be appointed as Government counsel or his term renewed then the opinion of the District Judge must ordinarily prevail.

23. The approach of the Respondent No. 1, while deciding the representation of the Petitioner to the effect that no recommendation of District Judge is required under the proviso attached to para 7.03 (3), L. R. Manual, appears to be casual and shows that he failed to appreciate the provision in question in its proper perspective. The interpretation of the "proviso" in the impugned order is in

complete ignorance of the solemn "purpose" as well as underlying "intent" contained in para 7.03 (3), L. R. Manual.

24. The Legal Remembrancer/ Secretary, Government of U. P., while passing the impugned order appears to have been obsessed with the view that main clause of para 7.03 (3), L. R. Manual is not relevant when District Magistrate recommends name of an advocate (who had not applied) as contemplated under the proviso and that the two (i.e., the main clause and the proviso) are to be read in exclusion of the other. Apparently, this approach is not warranted in view of unambiguous language of para 7.03 (3) and its proviso. The object and purpose of the main clause and the proviso in question are not in conflict, rather they can be reconciled harmoniously being complimentary to the other. One cannot ignore either of the two. Attempt, to be made, is to ascertain the true extent of the proviso and the field in which it can legitimately have its play. The proviso in hand, by no stretch of imagination, attempts to dilute substantive ingredients of main clause in para 7.03, L. R. Manual which embraces in itself a mechanism to ensure that State Government must have opinion of District Judge (the most suitable person) to assess "merit" and "suitability" of an advocate and an advocate, otherwise deserving appointment as Government counsel, is not eliminated from the field and thus, precluded from consideration by State Government, merely for the reason, that he had failed to apply. If the proviso is read, as has been done by the L. R. in the impugned order, underlying purpose and object of main para 7.03 (3) will be rendered otiose and meaningless.

25. This clearly is not permissible particularly considering the criterion laid down by the Apex Court for interpretation of a proviso in a statutory provision as seen hereunder.

26. In the case of Sri Nasiruddin Vs. State Transport Appellate Tribunal, , Supreme Court observed that in selecting out of different interpretations "Court will adopt that which is just, reasonable and sensible rather than that which is none of those things".

27. In view of consistent approach of the Court, it is an accepted rule of interpretation, that a statute must be read as a whole and one provision of the Act should be construed with reference to the other provision in the same Act so as to make a consistent enactment of the whole Statute.

28. In this context reference is made to the decision in the case of Shiv Shakti Co-operative Housing Society, Nagpur v. Swaraj Developers and ors 2003 (3) AWC 2198 (SC): JT 2003 (4) SC 255, wherein the Apex Court, while interpreting amended Section 115, Code of Civil Procedure, observed that the principle of interpreting statutory provision is to read a Statute as a whole.

29. The reason is simple. Such a construction has the merit and advantage of avoiding any inconsistency or repugnancy either within a section, between a section and other part of the Statute. It is said that Courts must avoid, while construing statutory provision, "a head on clash" as observed by the Apex Court

in the case of Raj Krushna Bose Vs. Binod Kanungo and Others, .

30. It cannot be assumed lightly that "law maker while giving with one hand will take away with other" as held by Supreme Court in the case of Tahsildar Singh and Another Vs. The State of Uttar Pradesh, and K.M. Nanavati Vs. The State of Bombay, .

31. It is, therefore, clear that one section of a statute cannot be used to defeat those of another "unless it is impossible to effect reconciliation between them." The same rule applies with regard to Sub-section of a section.

32. In the words of Gajendragadkar, J., "the Sub-sections must be read as parts of an integral whole and as being interdependent; an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and to avoid repugnancy" Madanlal Fakirchand Dudhediya Vs. Shree Changdeo Sugar Mills Ltd., .

33. Venkatrama Aiyer, J., in the case of Sri Venkataramana Devaru and Others Vs. The State of Mysore and Others, , noted that

the rule of construction is well-settled when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is what is known as the rule of harmonious construction.

34. Effect should be given to both, main clause and proviso, unless impossible to harmonise. It is the very essence of the rule of interpretation. A construction, that reduces one of the provisions to a "useless lumber" or "dead letter" is not harmonious construction The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others, .

35. The Legal Remembrancer went wrong when he says in the impugned order that opinion of the concerned District Judge is not required when District Magistrate recommended case under the proviso of para 7.03 (3), L. R. Manual. The District Judge has failed to make any attempt to harmonise the main clause with the proviso in para 7.03 (3), L. R. Manual. Instead of harmonizing two parts of para 7.03, L. R. Manual authority chose to interpret "proviso" as if it was in conflict or an exception to the main clause in toto. It is not in accordance with the Rule of Interpretation.

36. It is not difficult to find the basis for the said Rule. In T. Devadasan Vs. The Union of India (UOI) and Another, , Court held that "a proviso should receive a strict construction and it cannot be interpreted in a manner so as to nullify or destroy the main provision. It is not open to add words to the proviso with a view to enlarge the scope of the proviso and it must be restricted to scope reasonably conveyed by the words used therein".

37. Whether the proviso in hand is, in its entirety, an exception to the main clause? Or whether this proviso is merely a provision-providing limited relaxation

of the condition in the main clause, requiring candidate a condition to the substantive proviso, or whether it is in itself to apply? These aspects have not been considered by the authority while passing the impugned order.

38. In the instant case, language of the proviso is quite clear and no other view is possible except that it relaxed the condition in the main clause with regard to the requirement of submission of application by a candidate before one could be considered for appointment as Government counsel. The said "proviso", in express words or impliedly, dispenses with the requirement of "consultation" and "opinion" of the District Judge on "merit" and "suitability" before names are recommended by the District Magistrate to the State Government for appointment of Government counsel in a district.

39. The proviso, by no means, can be construed to enlarge authority of a District Magistrate to send the names of advocates, apart from without applying, also without obtaining "opinion" of concerned District Judge on "suitability" and "merit" of such an advocate.

40. Crystal clear language of the proviso does not permit anything to be imputed to the main clause of para 7.03 (3) L. R. Manual, particularly when such an interpretation, leads to frustrate the intent and body of the said main clause itself.

41. The Legal Remembrancer has gone wrong in adopting an interpretation which has precipitated a wholly unwanted and/or unreasonable result and thereby defeat the obvious intention of the main rule.

42. Para 7.03 (3), interestingly admits of no ambiguity. This proviso specially exclude formality of applying with "bio-data" but by no means it has not excluded requirement of consultation with "District Judge" to have his "opinion" on "merit" and "suitability" required in the main clause of para 7.03 (3) Legal Remembrancer's Manual.

43. In the instant case, the District Magistrate endorsed the "Panel" prepared by the District Judge and forwarded it to the State Government for consideration. No good reason is to be found on record as to why the District Magistrate had undertaken exercise to recommend the names of other three persons under the proviso of para 7.03, L. R. Manual without seeking "opinion" of the District Judge regarding "suitability" and "merit" of the candidates mentioned in his report dated 6.9.2002, Annexure-4 to the writ petition. It is not a case where the three persons on the panel recommended by the District Judge (and endorsed by the District Magistrate himself) were not available for any reason.

44. The appointment of Respondent No. 3, D.G.C. (Civil), is without lawful excuse on record and reflects upon to be appropriately termed as "free style" manner, in which the State Government proceeded to make appointment of Government counsel in district Deoria.

45. It is true that engagement of an advocate as Government counsel is the right of the Government. But, in view of para 7.03 (3) read with its Proviso, Court fails

to appreciate the deviation from "normal procedure" to "exceptional procedure" and that too without cogent grounds-on record-which are conspicuously absent in the instant case.

46. A State counsel is required to perform duties of an expert and to protect the interest of "State", which in turn means the "interest of the society and public at large". If advocates are appointed (by manipulations, pressures, recommendations, etc.) ignoring merit and suitability, then it is bound to affect quality of administration of justice including undermine and in turn seriously the faith of the public in the administration of justice which will undoubtedly lead to serious repercussions.

47. In the last, coming to the case in hand, we find that Petitioner is guilty of laches, which is evident from the perusal of the Stamp Reporter's report. Impugned order, dated January 24, 2003, was passed by Secretary/ Legal Remembrancer, Government of U. P., it is addressed to District Magistrate and copy marked to the Petitioner. By means of it, representation of the Petitioner against appointment of Respondent No. 3 as Government counsel was rejected.

48. Petitioner has not disclosed the date when he received or came to know of the said order nor given explanation for the delay in approaching this Court.

49. In these circumstances, this Court, I refuse to invoke its jurisdiction under Article 226 of the Constitution of India at this stage at the instance of the Petitioner who is guilty of laches and also for the reason that the term of Respondent No. 3 is to come to an end in October, 2003 (as envisaged under Para 7.06, L. R. Manual).

50. A direction is, however, desired to be issued to the Respondents that fresh selection process be initiated w.e.f. July, 2003, strictly in accordance with the provisions of para 7.03, Legal Remembrancer's Manual, subject to the observations made in this judgment so that fresh appointment of a suitable advocate on merit is made without delay immediately after expiry of one year term, as Government counsel, of Respondent No. 3, Umapati Tripathi, under order dated 17/18 October, 2002 (Annexure-5 to the writ petition).

51. Writ petition dismissed subject to the above directions.

52. No order as to costs.