

(1988) 01 MAD CK 0063
In the Madras High Court

D. Gopalan

APPELLANT

Vs

The Govt. of Tamil Nadu and Another

RESPONDENT

Date of Decision : 28-01-1988

Acts Referred:

Citation : (1988) 1 LW 154 : (1988) 1 MLJ 308

Hon'ble Judges : Venkataswami, J

Bench : Division Bench

Judgement

Venkataswami, J.—The petitioner claims that he has moved this Court under Art. 226 of the Constitution to advance the cause of general public and by way of public interest litigation by filing this writ petition. Though in form the petitioner has prayed for the issue of a writ of mandamus, in substance the relief prayed for is to quash the order of appointment appointing the third respondent as Public Prosecutor.

2. Even at the outset, it may be made clear that the petitioner has in unequivocal terms stated in para 2 of the affidavit as follows:

I humbly submit the third respondent is an advocate, it appears nearly 25 years standing in the Bar and no doubt command more respect, reputation for his professional integrity among the Members of the Bar and the general public.

Notwithstanding the above encomium paid, to the third respondent, the petitioner challenges the appointment of the third respondent as Public Prosecutor on the ground that he being a Senior Advocate, has to submit himself to certain statutory restrictions imposed on Senior Advocates by the Advocate's Act and the Rules framed thereunder and such restrictions will not allow the third respondent to discharge his duties as Public Prosecutor to the best of his abilities. In other words, he cannot file any vakalatnama or appearance and cannot have direct contact with the parties-clients. If that be so, according to the learned Counsel appearing for the petitioner, he cannot do justice in important criminal appeals, referred trials and Habeas Corpus matter. Learned Counsel

explained that unless the Public Prosecutor discusses the matters with the concerned Police Official or other Officials, it is not possible for him to represent the State case or cause with full force. He also submitted that he cannot discharge the duties imposed on the Public Prosecutor under Sections 199, 321, 377 and 378 of Code of Criminal Procedure. Learned Counsel also brought to my notice Rules 46 and 209 of Criminal Rules of Practice and contended that the authorities concerned cannot directly correspond with the Public Prosecutor. In support of his arguments he cited the following decisions: Rajender Kumar Jain and Others Vs. State Through Special Police Establishment and Others, , Marappa Gounder v. Venkatachalam, 1983 L.W. (Cri) 1, Veeraswami, N. v. State, 1984 M.L.J. (Cri.) 609 : 1984 L.W. (Cri.) 268 : 1985 Cri. L.J. 572, Sheonandan Paswan Vs. State of Bihar and Others, and Badrudeen, P.S.N. v. Mrs. Selvan Raj Kennel, 1987 L.W. (Cri.) 365. He also cited another judgment of the Supreme Court reported in Rajasthan v. Sheenkaran, 1981 L.W. (Cri.) 32 (S.N.).

3. At my request, learned Advocate General assisted the Court. He produced the order of appointment which read as follows:

GOVERNMENT OF TAMIL NADU ABSTRACT

Law Officers-High Court-Madras Appointment of Public Prosecutor-Order-Issued.

Public (Establishment) Department G.O. Ms. No. 43 Dated 8th January, 1988
Read:

Government D.O. Lr. No. 78908/86-2, Public (Establishment-I) Department, dated 25.8.86.

Order:

1. The Government appoint Thiru K. Doraisami, M.A., B.L., Senior Advocate as Public Prosecutor High Court, Madras in the existing vacancy.
2. The Government also direct that as Thiru K. Doraisami, M.A., B.L. is a Senior Advocate, the instructions from the Government under Sections 337 and 378 of the Criminal Procedure Code and other instructions will be sent to him only through the Additional Public Prosecutor, High Court, Madras. The Additional Public Prosecutor, High Court, Madras is requested to take further action, after taking the orders of Thiru K. Doraisami, M.A., B.L.
3. The following Notification will be published in the Tamil Nadu Government Gazette:

NOTIFICATION

Under Section 24(I) of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), the Government of Tamil Nadu after consultation with the High Court, hereby appoint Thiru K. Doraisami, M.A., B.L., Senior Advocate as Public Prosecutor, High Court, Madras with immediate effect.

(By Order of the Government)

Sd/-A. Padmanaban, Chief Secretary to Government.

Learned Advocate General submitted that in the light of the order now produced appointing the third respondent as Public Prosecutor and also in the light of the judgment of the Supreme Court reported in *Rajasthan v. Sheekaran*, 1981 L.W. (Cri.) 32 (S.N.), there is no force in the contention of the learned Counsel for the petitioner. Learned Advocate General also pointed out that all the decisions cited by the learned Counsel for the petitioner relates to the duties and responsibilities of the Public Prosecutors and these decisions have nothing to do with the points raised challenging the appointment of the third respondent. In terms of the appointment and in the light of the judgment of the Supreme Court referred to above, learned Advocate General submitted that there is no infirmity or any irregularity in the order of appointment of the third respondent. He also contended that it is entirely for the Government to select and appoint their own law officers and the petitioner having conceded about the competency and integrity of the third respondent, has filed the writ petition presumably without noticing the terms of appointment.

4. I have considered the submissions made by the learned Counsel for the petitioner and the learned Advocate General and I am inclined to agree with the submissions of the learned Advocate General. It is clear from the order of appointment appointing the 3rd respondent as Public Prosecutor, that while appointing him as such, the Government was quite alive to the fact that the 3rd respondent being a Senior Advocate, has to subject himself to certain restrictions imposed on all Senior Advocates by the provisions of the Advocates Act and the Rules framed thereunder. Therefore, the Government, while appointing the 3rd respondent as Public Prosecutor, have taken care to see that the order is in conformity with the provisions of the Advocates Act and the Rules framed thereunder and also the provisions of the Code of Criminal Procedure. Presumably, the petitioner was not aware of the full text of the Order which led the petitioner to assume many wrong things. The Additional Public Prosecutor was also appointed in terms of Section 24 of the Code of Criminal Procedure after consultation with the High Court and as such he will be the counsel on record for all purposes, enabling the 3rd respondent to function as Public Prosecutor without violating any of the provisions of the Advocates Act and the Rules framed thereunder. The apprehension that the 3rd respondent will not be in a position to discharge the duties imposed on him as a Public Prosecutor under Sections 199, 321, 377 and 378 of the Code of Criminal Procedure as well as under Rules 46 and 209 of the Criminal Rules of Practice, is not well-founded. In this connection, the judgment of the Supreme Court relied on by the learned Advocate-General, namely, *State of Rajasthan v. Sheekaran, etc*, 1981 L.W.(Cri.) 32 (S.N.) can be referred to with advantage. The said judgment reads as follows:

The High Court of Rajasthan has held in these orders dated 29th July, 1974, that the Deputy Government Advocate of Rajasthan had no locus standi under the Code of Criminal Procedure to prefer an application u/s 378 thereof for leave to

appeal on behalf of the State against an order of acquittal recorded by a lower Court in a murder case.

Held: u/s 378, only a Public Prosecutor can present an appeal to the High Court from an original or appellate order of acquittal passed by any Court subordinate to the High Court, if so directed by the State Government. Again, for a person to be a Public Prosecutor, it is necessary that he is either appointed as such u/s 24 or acts under the directions of a Public Prosecutor so appointed.

... By a notification issued the State Government of Rajasthan has appointed the Advocate General of the State to be Public Prosecutor u/s 24 of the Code. Another notification issued by the then Advocate General of Rajasthan u/s 24 read with Clause (u) of Section 2 of the Code directs that three categories of various Law Officers of the Government including the Deputy Government Advocate shall have the authority to act, plead and argue in all matters covered by the Code. These two notifications read together, in our opinion, clinch the issue in favour of the State....

...The High Court was not justified in throwing out the application presented to it as one having been filed by a person incompetent to do so.

Mr. Balakrishnan, learned Counsel for the respondent in Criminal Appeal No. 10 of 1976, has contended that as the Deputy Government Advocate did not specify his status as Public Prosecutor in the application rejected by the High Court, that application could not be regarded as having been filed by a competent person. According to learned Counsel an application u/s 378 would be incompetent unless, its contents disclosed that it was being presented by a Public Prosecutor. We do not agree with this contention and that for two reasons. Firstly, no principle of law has been brought to our notice that if the proper designation of a person does not appear on a document authenticated by him, that document would lose its authenticity, even though that person factually holds such designation. For the application to be treated as incompetent, the High Court was bound to enquire into the status of the person presenting it and to throw it out only if it was found as a fact that he did not enjoy the status of a Public Prosecutor. Secondly, such status is for all particular purposes settled by the notification dated 25th September, 1974 of which, after its publication in the Government Gazette, the High Court could take judicial notice. Had that been done, the problem would not have arisen as the Deputy Government Advocate would have been found to be holding the status of a Public Prosecutor.

For the reasons stated, we accept all the three appeals and set aside the impugned orders with a direction that the application made u/s 373 of the Code shall be heard and decided by the High Court on merits.

The above judgment of the Supreme Court answers the points raised by the learned Counsel for the petitioner. All the decisions cited by the learned Counsel for the petitioner are not quite relevant to consider the legality of the appointment of the 3rd respondent and particularly in the light of the terms of

the order of appointment.

5. For the foregoing reasons. I do not find any case for issuing rule nisi as prayed for. The writ petition is, therefore, dismissed.