

(2016) 11 PAT CK 0040

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 16775 of 2015

Dinesh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 17-11-2016

Acts Referred:

Citation : (2016) 4 PLJR 1131

Hon'ble Judges : Hemant Gupta, ACJ. and Mr. Vikash Jain, J.

Bench : Division Bench

Advocate : Mr. Lalit Kishore, P.A.A.G.-I, Mr. Bishwa Bibhuti Kumar Singh and A.C. to P.A.A.G.-I, for the State of Bihar; None, for the Petitioner

Final Decision : Disposed Off

Judgement

Hemant Gupta, A.C.J.(Oral) - Heard learned counsel for the parties.

2. The petitioner has invoked the Public Interest Litigation jurisdiction of this Court for issuance of writ of mandamus commanding the respondents to put in place an institutional mechanism to select Law Officers and Panel Advocates of the State and Public Prosecutors, Additional/Assistant Public Prosecutors strictly on merit through an impartial/transparent process.

3. The petitioner asserts that Law Officers including Panel Advocates and Public Prosecutors constitute an essential cog in the wheel of the justice delivery system of India and such Advocates provide assistance to the Courts and Tribunals on behalf of the State. The State being a litigant in large number of cases of various and varied nature, its lawyers or Law Officers also have to be men of competence with sound knowledge of certain branches of law. It is pointed out that though Bihar Litigation Policy, 2011 has been published on 31st of March, 2011 but large numbers of Law Officers have been appointed without following a transparent merit based impartial procedure.

4. One may make reference to a recent Supreme Court judgment State of Punjab v. Brijeshwar Singh Chahal, (2016) 6 SCC 1 wherein, certain directions have

been issued in respect of appointment of Government Advocates and Public Prosecutors to represent the State at the High Court and District Court level. Though the said judgment pertains to the appointment of Law Officers in the State of Punjab and Haryana but it was observed that other States will do well to reform their system of selection and appointment to make the same more transparent, fair and objective.

5. The litigation policy (Annexure-2) did contemplate constitution of a Screening Committee for constitution of Panels for appointment of Law Officers in the Supreme Court and High Court which reads as under:-

"3.2 Screening Committees for constitution of Panels for appointment of the Law Officers in the Supreme Court and High Court will be introduced to assess the skills and capabilities of people who are desirous of being on Government Panels before their inclusion on the panel. The Screening Committee will include the Law Minister as Chairman of the Screening Committee, with the Advocate General and Law Secretary as members. Similarly a Screening Committee will be constituted for appointment of Government Pleaders and Public Prosecutors including Additional Government Pleader and Additional Public Prosecutor in the District as per the procedure laid down in the relevant law, i.e. Practise and Procedure (P.P.) Manual and Cr.P.C. The Screening Committees will make their recommendations to the Law Department."

But the said clause in the litigation policy does not satisfy the criteria of transparent, fair and objective appointment process as laid down by the Supreme Court in Brijeshwar Singh Chahal's case (supra). In Brijeshwar Singh Chahal's case, the Supreme Court framed four questions for determination but two of them are relevant for the present petition as well, such as Question Nos. (ii), (iii) and (iv) which is reproduced hereunder:-

"(ii) Whether the States of Punjab and Haryana have formulated any scheme, policy, norms or standards for appointing Law Officers.

(iii) Whether appointment of Law Officers by the State Governments need to be made on a fair, reasonable, nondiscriminatory and objective basis.

(iv) If answer to Questions (i), (ii) and (iii) are found in the negative, what is the way forward?"

6. While examining Question No. (ii), the Hon"ble Supreme Court found that the process of appointment is without any scheme, policy and norms. The Court observed as under:-

"17. We have not been able to persuade ourselves to accept the view that even when the appointments are made to offices heavily remunerated from the public exchequer the same can or ought to remain unregulated. That is particularly so when those appointed are expected by the very nature of their appointment to discharge important public function affecting not only State interest but the quality of justice which the courts administer. There is in the case of Punjab and

Haryana not even a semblance of any selection process in the matter of appointment of those chosen for the job leave alone a process that is credible in terms of its fairness and objectivity. The practise of making appointments in disregard of what is expected of a functionary sensitive to the demands of fairness and equality of opportunity even when in vogue for long, runs contrary to the true legal position settled by a long line of decisions to which we shall presently refer. The dominant purpose which ought to permeate any process of selection and appointment, namely, "protection of public interest" in courts by availing services of the most meritorious is clearly defeated by the method that the States have been following and continue to follow. What is regrettable is that even after the pronouncements of this Court have settled, the principles on which public authorities are required to act while discharging their functions, the States continue to harp on the theory that in the matter of engagement of State Counsel they are not accountable and that the engagement is only professional and/or contractual, hence, unquestionable. It is, in our view, too late in the day for any public functionary or Government to advance such a contention leave alone expect this Court to accept the same. If a Government Counsel discharges an important public function and if it is the primary duty of those running the affairs of the Government to act fairly, objectively and on a non-discriminatory basis, there is no option for them except to choose the best at the Bar out of those who are willing and at times keen to work as State Counsel. It is also their duty to ensure that the process by which the best are selected is transparent and credible. Abdicating that important function in favour of the Advocate General of the State who, in turn, has neither the assistance of norms or procedure to follow nor a mechanism for assessment of merit will be self-defeating. We regret to say that in the matter of appointment of State Counsel, the States of Punjab and Haryana have much to do to reform the prevalent system which reform is in our opinion long overdue."

It is thereafter, the Court summed up the propositions which are as under:-

"41.1. The Government and so also all public bodies are trustees of the power vested in them.

41.2. Discharge of the trust reposed in them in the best possible manner is their primary duty.

41.3. The power to engage, employ or recruit servants, agents, advisors and representatives must like any other power be exercised in a fair, reasonable, non-discriminatory and objective manner.

41.4. The duty to act in a fair, reasonable, nondiscriminatory and objective manner is a facet of the Rule of Law in a constitutional democracy like ours.

41.5. An action that is arbitrary has no place in a polity governed by Rule of Law apart from being offensive to the equality clause guaranteed by Article 14 of the Constitution of India.

41.6. Appointment of Government Counsel at the district level and equally so at the High Court level, is not just a professional engagement, but such appointments have a "public element" attached to them.

41.7. Appointment of Government Counsel must like the discharge of any other function by the Government and public bodies, be only in public interest unaffected by any political or other extraneous considerations.

41.8. The Government and public bodies are under an obligation to engage the most competent of the lawyers to represent them in the courts for it is only when those appointed are professionally competent that public interest can be protected in the courts.

41.9. The Government and public bodies are free to choose the method for selecting the best lawyers but any such selection and appointment process must demonstrate that a search for the meritorious was undertaken and that the process was unaffected by any extraneous considerations.

41.10. No lawyer has a right to be appointed as a State/Government Counsel or as Public Prosecutor at any level, nor is there any vested right to claim an extension in the term for which he/she is initially appointed. But all such candidates can offer themselves for appointment, re-appointment or extension in which event their claims can and ought to be considered on their merit, uninfluenced by any political or other extraneous considerations.

41.11. Appointments made in an arbitrary fashion, without any transparent method of selection or for political considerations will be amenable to judicial review and liable to be quashed.

41.12. Judicial review of any such appointments will, however, be limited to examining whether the process is affected by any illegality, irregularity or perversity/irrationality. The Court exercising the power of judicial review will not sit in appeal to reassess the merit of the candidates, so long as the method of appointment adopted by the competent authority does not suffer from any infirmity."

7. Later, while examining Question No. (iv), the Supreme Court noticed that consultation with the Sessions Judge for a Public Prosecutor in the district judiciary and with the High Court for one in the High Court is statutorily prescribed in terms of Section 24 of the Code of Criminal Procedure because of the importance of the appointment and the significance of the opinion of the courts where the appointee has to work, as to his or her capacity and professional ability. Therefore, the Court said that a State Counsel by whatever designation called, appears in important civil and constitutional matters, service and tax matters and every other matter where substantial stakes are involved or matters of grave and substantial importance at times touching public policy and security of State are involved. To treat such matters to be inconsequential or insignificant is to trivialize the role and position of a State Counsel at times

described as Additional and even Senior Additional Advocate General. What holds good for appointment of a Public Prosecutor as a check on arbitrary exercise of power must, therefore, act as a check on the State's power to appoint a State Counsel as well especially in situations where the appointment is unregulated by any constitutional or statutory provision. The Court also held that no lawyer has a right to be appointed as State Government Counsel or as Public Prosecutor at any level nor does he has a vested right to claim extension in the term for which he/she is initially appointed. Such candidates can at best claim consideration for any such appointment or extension upon expiry of the respective terms but such considerations shall, however, have to be in accordance with the norms settled for such appointments and on the basis of their inter se merit, suitability and performance. In respect of process of selection and assessment of merit, the Court held that the process can be primarily left to the State Government who can appoint a Committee of officers. This aspect has been taken care of in the Litigation Policy of 2011 but it is the third stage of process of selection and appointment as contained in Paragraph 50 which has not been followed. Paragraph 50 reads as under:-

"50. The third stage of the process of selection and appointment shall in the absence of any statutory provisions regulating such appointments involve consultation with the District and Sessions Judge if the appointment is at the district level and the High Court if the appointment is for cases conducted before the High Court. It would, in our opinion, be appropriate and in keeping with the demands of transparency, objectivity and fairness if after assessment and finalisation of the selection process a panel is sent to the Chief Justice of the High Court concerned for his views on the subject. The Chief Justice could constitute a Committee of Judges to review the names recommended for appointment and offer his views in regard to professional competence and suitability of candidates for such appointments. Appointments made after such a consultative process would inspire confidence and prevent any arbitrariness. The same procedure could be followed where candidates are granted extension in their terms of appointment in which case the Committee appointed by the Government and that constituted by the Chief Justice could also look into the performance of the candidates during the period they have worked as State Counsel."

8. The principles of law laid down in the above judgment are applicable in respect of appointment to the posts of Law Officers with whatever designation called at the High Court and the Courts subordinate to it in the State.

9. Therefore, the present writ application is disposed of with direction to the State to comply with the mandate as contained in the above said order. We direct that the State shall comply with the said mandate expeditiously, preferably within a period of six months.