

(2004) 12 AHC CK 0208
In the Allahabad High Court
Case No : C.M.W.P. No. 35490 of 2004

Ghanshyam Kishor Bajpayee and Others	APPELLANT
Vs	
State of U.P. and Others	RESPONDENT

Date of Decision : 02-12-2004

Acts Referred:

Constitution of India, 1950 — Article 13, 14

Citation : (2005) 1 AWC 379 : (2005) CriLJ 1985 : (2005) 1 ESC 115

Hon'ble Judges : V.M. Sahai, J; Tarun Agarwala, J

Bench : Division Bench

Advocate : Rajiv Gupta and Dileep Kumar, for the Appellant; Sudhir Agarwal, Addl. A.G. and C.S. Singh, S.C., for the Respondent

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—The controversy regarding the appointments, renewal and removal of the District Government Counsel (hereinafter referred to as D.G.C. in short) has been the subject matter of several writ petitions over the last two decades and the reason is not far to see. In the last 20 years or so, the Government has changed hands half a dozen times. Whenever a Government changes or a new Government takes over, an effort is made to appoint Government counsel of their own choice. The appointments are not made on merit, but on the basis of political affiliations. While appointing their own, the new Government generally cancels the appointment or refuses to renew the appointment of the existing D.G.C. This has developed into an unhealthy practice and, time and again, this Court had been directing that meritorious appointments should be made and that the appointments should not be made on the basis of political affiliation or on the basis of caste or creed. The stand now taken by the Government is that the engagement of the Government counsel by previous Government was made on political and extraneous considerations and therefore, the engagement of these persons is no longer desirable. This may be true, but can this be used as a lever to remove all the DGCs en masse on the sole ground

of political affiliations? In our view, every new Government has to tread cautiously. The Government has to examine each and every case individually and if after an enquiry, it is found that the person so engaged was politically affiliated, it may, in that case, cancel or refuse to renew his appointment. But, in no case, the renewal, cancellation or refusal to renew an appointment can be made on extraneous considerations. Each and every case has to be dealt with on merit.

2. In *State of U.P. and Another Vs. Johri Mal*, the Supreme Court held :

"The State, therefore, is not expected to rescind the appointments with the change in the Government. The existing panel of the District Government counsel may not be disturbed and a fresh panel come into being, only because a new party has taken over charge of the Government."

3. It has been observed that the appointments of DGCs are not being renewed by not following the procedure laid down In the L.R. Manual and in most cases a perfunctory exercise is made in order to give legitimacy to the action taken. The Supreme Court in *Johri Mal's* case (supra) held :

"The State is required to act fairly and reasonably. The State normally would be bound to follow the principles laid down In the L.R. Manual."

4. Whenever the State fails to discharge its public duty or acts arbitrarily in defiance of the provisions of law, the Courts can always intervene exercising their powers of judicial review. The Supreme Court in *Johri Mal's* case (supra) held :

"The action of the State in not renewing the tenure can be subjected to Judicial scrutiny inter alia on the ground that the same is arbitrary."

The Supreme Court further held that:

"Malice in law can also be a ground for judicial review."

5. In *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, the Supreme Court held that the appointment on the post of DGC is not contractual in nature and, the State could not act arbitrarily and that such arbitrary action was liable to be set aside on the ground of being violative of Article 14 of the Constitution of India.

6. It is therefore, clear that the State Government has to act fairly and reasonably with regard to the appointment, termination and renewal of the tenure of DGC and as held by the Supreme Court in *John Mal's* case (supra) :

"The State normally would be bound to follow the principles laid down in the L.R. Manual."

7. What exactly is the L.R. Manual ? The Supreme Court in *Johri Mal's* case (supra) held ;

"The LR's Manual is merely a compilation of executive orders and is not a "law"

within the meaning of Article 13 of the Constitution of India."

8. Para 1.01 of the L.R. Manual states that it is the authoritative compilation of the Government orders and instructions for the conduct of the legal affairs of the State Government. Chapter VII contains the provisions relating to the appointment and condition of engagement of the DGC. Para 7.02 deals with the power of the Government to appoint DGC in the districts in the interest of efficient and expeditious disposal of business. Para 7.03 provides for applications and qualifications for the appointments on the post of DGC. The District Officer is required to consider all the applications in consultation with the District Judge. Para 7.04 requires the Legal Remembrancer to submit the recommendations along with his own opinion to the State Government. Para 7.06 provides for the appointment and for the renewal and Para 7.08 for renewal of the term. Para 7.07 forbids the DGC, from participating in political activity so long as he holds the post of DGC. These provisions read as under :

"7.02. Power of Government to appoint Government counsel in the districts.-(1) The Government shall ordinarily appoint a District Government Counsel (Criminal), a District Government Counsel (Civil) and a District Government Counsel (Revenue) for each district in the State.

(2) The Government may also, wherever, necessary in the interest of efficient and expeditious disposal of business, appoint :

(a) Additional or/and Assistant District Government Counsel to assist the District Government Counsel (Criminal) or (Civil) in the discharge of his duties.

(b) Subordinate District Government Counsel for the conduct of civil cases in outlying towns of a district where civil court exists or may be created in future.

(c) Assistant District Government Counsel in the outlying towns of the district for the conduct of criminal or civil cases or both.

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 practiced 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 biodata 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 biodata 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.

7.04. Legal remembrancer to obtain orders of Government on receipt of recommendations from the district.-On receipt of the recommendation of the District Officer, the Legal Remembrancer may, if necessary, make such further enquiry about the candidates as he may deem necessary and then submit the recommendations of the District Officer along with his own opinion for the orders of the Government, whose decision shall be final.

7.05. Prohibition of canvassing.-Any canvassing or interview with the members of the Government, Legal Remembrancer or any officer working under him, on the part of a candidate in support of his candidature may disqualify him for such appointment.

7.06. Appointment and renewal.-{I) The legal practitioner finally selected by Government may be appointed District Government Counsel for one year from the date of his taking over charge.

(2) At the end of the aforesaid period, the District Officer after consulting the District Judge shall submit a report on his work and conduct to the Legal Remembrancer together with the statement of work done in Form No. 9. Should his work or conduct be found to be unsatisfactory the matter shall be reported to the Government for orders. If the report in respect of his work and conduct is satisfactory, he may be furnished with a deed of engagement in Form No. 1 for a term not exceeding three years. On his first engagement a copy of Form No. 2

shall be supplied to him and he shall complete and return it to the Legal Remembrancer for record.

(3) The appointment of any legal practitioner as a District Government Counsel is only professional engagement terminable at will on either side and is not appointment to a post under the Government. Accordingly the Government reserves the power to terminate the appointment of any District Government Counsel at any time without assisting any cause.

7.07. Political Activity.-The District Government Counsel shall not participate in political activities so long they work as such, otherwise they shall incur a disqualification to hold the post.

7.08. Renewal of term.-[1] At least three months before the expiry of the term of a District Government Counsel, the District Officer shall after consulting the District Judge and considering his past record of work, conduct and age, report to the Legal Remembrancer, together with the statement of work done by him in Form No. 9 whether in his opinion the term of appointment of such counsel should be renewed or not. A copy of the opinion of the District Judge should also be sent along with the recommendations of the District Officer.

(2) Where recommendation for the extension of the term of a District Government Counsel is made for a specified period only the reasons therefore shall also be stated by the District Officer.

(3) While forwarding his recommendation for renewal of the term of a District Government Counsel :

(i) the District Judge shall give an estimate of the quality of the counsel's work from the Judicial stand point, keeping in view the different aspects of a lawyer's capacity as it is manifested before him in conducting State cases, and specially his professional conduct;

(ii) the District Officer shall give his report about the suitability of the District Government Counsel from the administrative point of view, his public reputation in general, his character, integrity and professional conduct.

(4) If the Government agrees with the recommendations of the District Officer for the renewal of the term of the Government counsel. it may pass orders for reappointing him for a period not exceeding three years.

(5) If the Government decides not to reappoint a Government counsel, the Legal Remembrancer may call upon the District Officer to forward fresh recommendations in the manner laid down in para 7.03.

(6) The procedure prescribed in this para shall be followed on the expiry of every successive period of renewed appointment of a District Government Counsel.

9. The Supreme Court in *Shrilekha Vidyarthi* (supra) summarised the aforesaid provisions as under :

"These provisions show that the initial appointment is for a period of one year during which the work and conduct of the appointee is watched to adjudge his suitability and a report is required to be submitted at the end thereof by the District Officer after consulting the District Judge and on the same being found satisfactory, his engagement is made for a term not exceeding three years. Before expiry of the term of three years, the case of incumbent is to be considered on the basis of his work, conduct and age for renewal and the Government is required to decide the question of his reappointment for a period not exceeding three years on the basis of the report of the District Officer and the opinion of the District Judge. If the Government agrees with their recommendations, the term of the existing incumbent is renewed for a period not exceeding three years. It is only if the Government decides not to reappoint a Government counsel that the Legal Remembrancer may call upon the District Officer to forward fresh recommendations in the manner laid down in para 7.03."

10. It is also clear that the process of selection and renewal expressly involves the District Judge and gives due weight to his opinion. The extent of consultation and the opinion of the District Judge has been explained in various cases.

11. In *Ram Nihor Singh Vs. State of U.P. and others*, a Division Bench of this Court held that the consultation with the District Judge is necessary.

12. In *Virendra Pal Singh Rana Vs. State of U.P. and Others*, a Division Bench of this Court held that in the event there is a conflict between the opinion of the District Judge and the opinion of the District Magistrate, in that event, the opinion of the District Judge would prevail over the opinion of the District Magistrate. The reasoning given by the Division Bench is fortified by the Supreme Court in *Johri Mal's case* (supra) in which it was held :

"The age-old tradition on the part of the State in appointing the District Government Counsel on the basis of the recommendations of the District Collector in consultation with the District Judge is based on certain principles. Whereas the District Judge is supposed to know the merit, competence and capability of the lawyers concerned for discharging their duties, the District Magistrate is supposed to know their conduct outside the Court vis-a-vis the victims of offences, public officers, witnesses, etc. The District Magistrate is also supposed to know about the conduct of the Government counsel as also their integrity."

13. In *Mundrika Prasad Singh Vs. State of Bihar*, the Supreme Court held :

"It is heartening to notice that the Bihar Government appoints these lawyers after consultation with the District Judge. It is in the best interest of the State that it should engage competent lawyers without hunting for political partisans regardless of capability. Public officers-and Government Pleadership is one-shall not succumb to Tammany Hall or subtler spoils systems, if purity in public office is a desideratum. After all, the State is expected to fight and win its cases and sheer patronage is misuse of power. One effective method of achieving this

object is to act on the advice of the District Judge regarding the choice of Government Pleaders."

14. The Supreme Court in Johri Mal's case (supra) after considering the case of Mundrika Prasad Singh's case (supra) further held :

"The State should bear in mind the dicta of this Court in Mundrika Prasad Singh as regards the necessity to consult the District Judge. While making appointments of District Government Counsel, therefore, the State should give primacy to the opinion of the District Judge. Such a course of action would demonstrate fairness and reasonableness of action and, furthermore, to a large extent the action of the State would not be dubbed as politically motivated or otherwise arbitrary."

15. From the aforesaid, it is clear that the consultation with the District Judge is necessary and that the State has to give primacy to the opinion of the District Judge. In case of a conflict of opinion between the District Judge and the District Magistrate, the opinion of the District Judge would ordinarily prevail over the opinion of the District Magistrate.

16. In the light of the observation made above, as culled out from the decisions of the Supreme Court and of this Court, we have to see whether in the present case, the State Government had acted fairly and reasonably while passing the impugned order refusing to renew the term of the petitioners as DGC. The Court is also required to consider whether the action taken by the State Government was valid and not, arbitrary and that the decision of the State Government was arrived at after complying with the procedure as laid down in the L.R. Manual.

17. Coming to the facts of the present case. It transpires that the petitioners were appointed on various dates in the year 1998 as DGC initially for a period of one year. Subsequently, their term was renewed for a further period of three years upto 13.12.2002, except petitioner No. 6 whose renewal was extended till 16.3.2003. The District Magistrate vide his letter dated 28.12.2002, asked the petitioners to furnish Information with regard to the work performed by them in the prescribed Form No. 9 of the L.R. Manual for the purpose of considering the renewal of the term of the petitioners as DGC. It transpires that the petitioners submitted the requisite information. It further transpires that the District Magistrate wrote a letter dated 17.12.2002 and 23.1.2003 to the District Judge asking for his opinion on the performance, character and behaviour of the petitioners. The District Judge submitted his opinion dated 29.1.2003 indicating therein that the performance, character and behaviour of the petitioners was satisfactory. Based on the opinion of the District Judge, the District Magistrate vide its letter dated 26.6.2003, made a recommendation to the State Government to renew the term of the petitioners as DGC.

18. While the matter was pending consideration, the petitioners were permitted to discharge their duties as DGC. It transpires, that before the matter could be finalised, the Government changed and, the new Government initiated a fresh

exercise in the matter of the renewal of the appointments of the petitioners as DGC. The District Magistrate vide letter dated 21.4.2004 again asked the petitioners to furnish the requisite Information in Form 9 which was duly made available. The District Magistrate vide his letter dated 21.4.2004 also requested the District Judge to give his opinion. The District Judge vide his letter dated 3.6.2004 again submitted his opinion indicating therein that the performance, character and behaviour as well as the legal knowledge of the petitioners was satisfactory.

19. It transpires that the District Magistrate submitted his report dated 2.7.2004 to the State Government recommending that the term of the petitioners on the post of DGC should not be renewed. The letter of the District Magistrate indicates that the recommendation was made on the basis of a complaint given by one Arun Kumar, Advocate complaining that the DGCs are extracting money from the Advocates and that on the basis of a newspaper report dated 4.5.2004, the DGCs are indulging in political activities. Based on the report of the District Magistrate, the State Government issued an order dated 12.8.2004 relieving the petitioners as DGC with immediate effect. On the basis of the aforesaid order, the District Magistrate communicated the decision of the State Government to the petitioners by his letter dated 13.8.2004. The petitioners have now collectively challenged the validity and legality of the order dated 12.8.2004 and 13.8.2004 in this writ petition.

20. We have heard Sri Dileep Kumar, advocate assisted by Sri Rajeev Gupta for the petitioners and Sri Sudhir Agarwal, Additional Advocate General for the respondents at length and have also perused the record that was produced before us.

21. A perusal of the impugned order of the State Government indicates that the order does not disclose any reason for not renewing the term of the petitioners. The reason is, however, disclosed in the counter-affidavit and the supplementary counter-affidavit. The basis of issuing the impugned order is solely based on the recommendation of the District Magistrate dated 2.7.2004. The District Magistrate's recommendation dated 2.7.2004 is purely based on a complaint of Sri Arun Kumar and the report of the Senior Prosecuting Officer. The complaint of Sri Arun Kumar stated that the DGCs are extracting money from the advocates and on the basis of the newspaper report, the DGCs are engaged in political activities. The Senior Prosecuting Officer had submitted a chart showing the number of cases handled by the petitioners and the percentage of cases where the accused had been acquitted or sentenced. On the basis of this chart, the District Magistrate had concluded that the work performed by the petitioners was not satisfactory on account of the fact that the percentage of acquittal was more than the percentage of the sentencing.

22. In our view, the recommendations of the District Magistrate is based on surmises and conjectures. The entire report of the District Magistrate is based on the complaint of Arun Kumar. The District Magistrate did not make any effort to

find out the veracity of the complaint. The complaint merely makes a bald allegation that all the DGCs are extracting money from the Advocates. There is no specific allegation against any of the petitioners. It is only a general allegation. In such circumstances, the District Magistrate committed a manifest error in presuming that the contents of the complaint was correct and further committed an error in forwarding the same to the State Government without verifying its genuineness. The District Magistrate also based his recommendation on the basis of a newspaper report concluding that the petitioners are indulging in political activities. In our view, a newspaper report cannot be made the basis for arriving at a conclusion that the petitioners are indulging in political activities. A newspaper report cannot be treated as conclusive and the District Magistrate should have investigated the matter which he has not done in the present case. The chart submitted by the Senior Prosecuting Officer only shows the figures of the disposal of the cases by the petitioners. From this chart, the District Magistrate concluded that the petitioners are not doing proper "pairvi" and that the percentage of success is very little. We are constrained to observe that it is inconceivable for a person to come to this conclusion on the basis of this chart and we can only say that the finding of the District Magistrate was purely based on surmises and conjectures and was solely made to please political bosses.

23. Taking another aspect of the matter, the percentage of acquittal against the percentage of sentencing of the accused could not, by itself indicate the integrity or the work performance or the legal acumen of the petitioners. A DGC has to perform and give his best in the given circumstances. Unless the file is studied, it cannot be concluded, that the DGC was not doing proper "pairvi" or that his performance was not satisfactory. Therefore, we are of the view that the recommendation given by the District Magistrate was based on non-existent facts and non-application of mind.

24. The counter-affidavit and the supplementary counter-affidavit of the State lays stress on only one fact, namely, that the petitioners were indulging in political activities. This is based on a newspaper report. In our view, no conclusion can be drawn on the basis of a news item. It is common knowledge that a newspaper report has no evidentiary value and a news report is inadmissible in evidence and therefore, such a report could not be relied upon. In the absence of any other material, the conclusion drawn by the State Government that the petitioners were indulging in political activities was wholly erroneous.

25. The conclusion drawn is that the recommendation of the District Magistrate was wholly erroneous and based on non-application of mind. In our view, the report/recommendation of the District Magistrate must be based on the parameters laid down in para 7.08 of the L.R. Manual. The District Magistrate is required to give his report about the suitability of the DGC from the administrative point of view, his public reputation in general, his character, integrity and professional conduct. The District Magistrate has not considered

these aspects in his report.

26. At this Juncture we would like to observe that if in the course of investigation, some adverse material comes to light, the District Magistrate should place this information before the District Judge and invite his opinion. This would; in our view, lead to an effective consultation. In our view, the material brought before the District Magistrate should have been brought to the knowledge of the District Judge which was not done in the present case.

27. There is another aspect of the matter. The petitioners were appointed by separate orders. Instead of dealing with each case individually the State Government chose to pass an omnibus order, relieving the petitioners as DGCs, by a common reason. The sole reason justifying the common reason as shown in the counter-affidavit and the supplementary counter-affidavit is that the petitioners were indulging in political activities. In our opinion, it is a clear case of non-application of mind. Arbitrariness is writ large in the impugned order which is not governed by any Rule but is based on the whim and fancy of someone who is totally unaware of the requirement of the rule of law.

28. The impugned order has been passed without following the procedure laid down in the L.R. Manual. A detailed procedure has been prescribed in the L.R. Manual for the renewal of the tenure which has not been followed. In our view, the material produced before us does not impose confidence nor does it show that the petitioners were not suitable for the office of DGC. In our view, no objective assessment was taken.

29. It may also be stated here that the State Government has not stated anything in their affidavit as to why the opinion of the District Judge was not considered or on what grounds the opinion of the District Judge was rejected. The State Government is totally silent on this issue. In our view, the opinion of the District Judge could not be brushed aside or treated in a casual manner. The Supreme Court in John Mal held that the State Government should give primacy to the opinion of the District Judge. In the present case, the State Government has not given any reason as to why they have not given primacy to the opinion of the District Judge. Not only this, this Court In Virendra Pal Singh Rana's case (supra) held that in case of a conflict of opinion of the District Magistrate and that of the District Judge, in that event, the opinion of the District Judge would prevail over the opinion of the District Magistrate. The SLP of the State against this judgment before the Supreme Court was dismissed. Therefore, the Division Bench judgment of this Court was binding upon the State Government.

30. Thus, to conclude, in our opinion, the order of the State Government cannot be sustained and is liable to be quashed. The order of the State Government is based on non-existent facts which were not verified by the District Magistrate. In our view, the action of the State Government in not renewing the term of the petitioners was wholly arbitrary and violative of Article 14 of the Constitution of India. The cavalier fashion in which the impugned order was passed was wholly

illegal and arbitrary if tested on the anvil of Article 14 of the Constitution of India. We have no hesitation in quashing the order of the State Government.

31. Accordingly, the impugned order of the State Government dated 12.8.2004 and the consequential order of the District Magistrate dated 13.8.2004. are quashed.

32. Before parting, we would like to add that the performance of the District Judge in giving his opinion is also far from satisfactory. The District Judge in his opinion has only stated that the performance, character and behaviour was satisfactory. Merely by saying that the performance, etc. was satisfactory is not sufficient. The District Judge should also make an objective assessment as per the parameters laid down in para 7.08 of the L.R. Manual. In our view, the District Judge has not adhered to the parameters given in para 7.08 of the L.R. Manual.

33. Since the order has been quashed and in view of the fact that the term of the petitioners had already come to an end, we direct the State Government to reconsider the matter afresh. We, accordingly, issue a mandamus, commanding the District Magistrate to initiate a fresh exercise for the renewal of the appointments of the petitioners on the post of DGC as per para 7.08 of the L.R. Manual and submit a report to the State Government in consultation with the District Judge within one month from the date of the receipt of this judgment. The District Judge will also submit his opinion as per the parameters laid down under para 7.08 of the L.R. Manual. Upon the submission of the recommendations of the District Magistrate, the District Judge and the Legal Remembrancer, the State Government shall take a decision within one month thereafter. It is made clear that the entire exercise shall be completed without fail within two months.

34. With the aforesaid observation, the writ petition is allowed. However, in the circumstances of the case, there shall be no order as to cost.