
(2010) 10 SHI CK 0246
In the High Court Of Himachal Pradesh
Case No : CWP No. 6239 of 2010

Jawahar Lal

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 22-10-2010

Acts Referred:

Constitution of India, 1950 — Article 124(2), 217(1)
Criminal Procedure Code, 1973 (CrPC) — Section 25A, 25A(2)

Citation : (2011) 1 ShimLC 297

Hon'ble Judges : Sanjay Karol, J;Deepak Gupta, J

Bench : Division Bench

Judgement

Deepak Gupta, J.—By means of this petition the Petitioner has laid challenge to the notification dated 29th September, 2010, Annexure P-7, whereby Respondent No. 2, Shri H.S. Rana, who at the relevant time was working as Director of Prosecution, Himachal Pradesh, was granted extension in service from the date of his superannuation, i.e. 30.09.2010, till further orders.

2. The brief facts of the case are that the Petitioner is presently working as Joint Director (Prosecution) with the State of Himachal Pradesh. Respondent No. 2, as mentioned above, was working as Director (Prosecution) and was due to retire on 30th September, 2010. The main challenge in the petition was that the impugned notification had been issued without obtaining the concurrence of the Chief Justice of the High Court of Himachal Pradesh in terms of Section 25A of the Code of Criminal Procedure, 1973. The relevant portion of the Section 25A of the Code of Criminal Procedure reads as follows:

25A. Directorate of Prosecution. - (1) The State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as it thinks fit.

(2) A person shall be eligible to be appointed as a Director of Prosecution or a Deputy Director of Prosecution, only if he has been in practice as an advocate for not less than ten years and such appointment shall be made within the

concurrence of the Chief Justice of the High Court.

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3. A bare perusal of the provisions of Section 25A(2) clearly shows that the Director of Prosecution can be appointed by the State only with the concurrence of the Chief Justice of the High Court. There is no doubt in our mind that this concurrence has to be obtained prior to the issuance of the order of appointment and the concurrence of the Chief Justice cannot be obtained after issuing the orders. The word "concurrence" itself envisages that there is prior agreement of the authority who is to give his concurrence. The Legislature in its wisdom decided that the Chief Justice would be most suited to decide who should head the prosecution wing in the State. Due to this reason, amendment was carried out in the Code of Criminal Procedure vide Act 25 of 2005, which came into force on 23rd June, 2006 and after this amendment, the Director of Prosecution in any State can not be appointed without the concurrence of the Chief Justice of the High Court.

4. In *S.P. Gupta Vs. President of India and Others*, the meaning of the word "consultation" as occurring in Articles 124(2) and 217(1) of the Constitution of India came up for consideration before the Apex Court, which held as follows:

The word "consult" implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution.

Further, the Apex Court held as follows:

In order that the two minds may be able to confer and produce a mutual impact, it is essential that each must have for its consideration full and identical facts, which can at once constitute both the source and foundation of the final decision.

It would also be relevant to refer to what Justice Krishna Iyer speaking on behalf of himself and Fazal Ali, J, pointed out in this regard:

...all the materials in possession of one who consults must be unreservedly placed before the consultee.

5. In *Indian Administrative Service (S.C.S.) Association, U.P. and Others Vs. Union of India (UOI) and Others*, the meaning of the word "consultation" occurring in All India Services Act, 1951, was considered by the Apex Court. After referring to the entire law on the subject, the Apex Court held as follows:

26. The result of the above discussion leads to the following conclusions:

(1) Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute the

foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory.

(2) When the offending action affects fundamental rights or to effectuate built-in insulation, as fair procedure, consultation is mandatory and non-consultation renders the action ultra vires or invalid or void.

(3) When the opinion or advice binds the proposer, consultation is mandatory and its infraction renders the action or order illegal.

6. The meaning of the word "consultation" also came up for consideration before the Apex Court in *N. Kannadasan v. Ajoy Khose and Ors.* 2009 (7) SCC 1, wherein after discussing the judgment delivered in *S.P. Gupta's case supra* and the other law on the point, the Apex Court held as follows:

Appointment to the post of President of a State Commission must satisfy not only the eligibility criteria of the candidate but also undertaking of the process of consultation. Keeping in mind the aforementioned legal scenario the question as to whether the consultative process had been gone into, must be considered.

Indisputably, the decision by the Chief Justice must be an informed one with respect to the post of a Chairman of a State Commission, keeping in view the importance thereof having regard to the fact that the Commission is required to perform judicial functions, both the Chief Justice as also the State Government were required to be duly informed about the person who is going to be appointed. With a view to fulfill the constitutional obligations as to whether he is a fit person, it is absolutely essential that all relevant information should be placed before the consultor as also the consultee.

(emphasis supplied)

We are of the considered opinion that the ratio laid down by the Apex Court relating to the appointment to the post of the Chairperson of the Consumer Commission applies with equal, if not greater force, to the post of the Director of Public Prosecution.

7. In Section 25A, the word used is "concurrence" and not "consultation". "Concurrence" means "prior agreement". It is, therefore, obvious that without the express prior agreement of the Chief Justice, no person can be appointed as Director of Prosecution. When concurrence of any authority is required, it means that without the agreement of such authority, whose concurrence is required, no order, appointing the Director of Public Prosecution, can be passed.

8. In this regard, we may also refer to the past practice being followed in the State. A similar question had arisen earlier when this Court in Contempt Petition (Civil) No. 8 of 2006 had noticed the amendment brought about in the Code of Criminal Procedure, whereby Section 25A had been inserted and issued the following directions:

With a view to thus ensuring total and absolute compliance of the mandate contained in Section 25A, we order and direct that, with immediate effect and forthwith the State Government shall discontinue with any arrangement under which any person other than one eligible under Sub-section (2) of Section 25A is holding the post of Director prosecution. The State Government shall also, accordingly and consequently take immediate steps to evolve a follow up, consequential action in the light of the aforesaid observations and directions, as it considers appropriate in public interest but keeping in mind the aforesaid binding provision of law.

Thereafter, the State Government granted extension in service to one Shri Satish Chander Thakur, who was working as Joint Director (Prosecution) and also directed that he shall hold the office of Director (Prosecution) till further order. The second notification was issued on 1st May, 2007 and was challenged by none other than Shri H.S. Rana, Respondent No. 2 herein. In this writ petition No. 871 of 2007, on the interim application, a detailed order was passed by a Bench of this Court, of which one of us (Deepak Gupta, J) was a member. The court noticed that the then Chief Justice had disapproved the action on the part of the State Government in granting one year's extension to Shri Satish Chander Thakur. The observations of the then Chief Justice are as follows:

I am not concerned whether a similar order was earlier issued or not because the fact remains that the Government ought not to have granted extension in favour of Shri Satish Chander Thakur without first obtaining my concurrence. This matter may however now rest here.

9. It is interesting to note that thereafter a Search Committee was constituted by the then State Government and the name of the present Petitioner, Shri Jawahar Lal Sharma, was recommended for the post of Director of Prosecution. Admittedly, Shri Jawahar Lal Sharma was junior to Shri H.S. Rana. The then Chief Justice, after comparing the service records of the present Petitioner and Shri H.S. Rana, made the following observations:

I do not at all agree with the recommendation of the Search Committee for the appointment of Shri Jawahar Lal Sharma. I also do not at all agree with the view as well as the opinion of the Search Committee for not appointing Shri H.S. Rana.

I am in total and absolute disagreement with the opinion and views of the Search Committee that Shri H.S. Rana is not suitable for being appointed as Director of Prosecution.

The Chief Justice supported his order with detailed reasons which we need not to go into in detail, but we may make reference to two of the reasons, which read as follows:

(iv) The supersession of Shri H.S. Rana cannot be justified by any touchstone. My enquiries have revealed that Shri Jawahar Lal Sharma does not possess any exceptional qualities and in any case he is not more or better suited than Shri

H.S. Rana.

(v) When merit is equal, seniority has to be taken into account and given preference. There is no doubt that between Shri H.S. Rana and Shri Jawahar Lal Sharma, Shri H.S. Rana has to be preferred, he being senior to Shri Jawahar Lal Sharma and he also possessing equal, if not better, merit as compared to Shri Jawahar Lal Sharma. Just one entry in an A.C.R. of one year between "Very Good" and "Outstanding" cannot be a ground for superseding a senior officer.

10. Respondent No. 2 herein challenged the action of the State Government and this Court held as follows:

When the Chief Justice does not agree with the name of particular person then it would be totally inappropriate and inexpedient to permit him to continue on ad hoc basis.

Accordingly, we are of the considered view that till a person be appointed as Director of Prosecution in consonance with Section 25A of the Cr.P.C, only the senior most person in the department should be permitted to discharge the functions of the said post on ad hoc basis. We accordingly order that Respondent No. 2 shall cease to hold the charge of the post of Director Prosecution forthwith and we further direct that the Petitioner who is the senior most officer in the department presently working as Joint Director Prosecution, shall discharge the duties and functions of Director Prosecution till regular appointment is made in terms of Section 25A of the Cr.P.C.

It was only thereafter that Shri H.S. Rana was appointed as Director of Public Prosecution. The past practice and the earlier orders of this Court, both in the Contempt Petition (Civil) No. 8 of 2006 and CWP No. 871 of 2007, clearly show that this Court has always taken the view that the Director of Prosecution can only be appointed after obtaining the concurrence of the Chief Justice.

11. Having held so, it is obvious that before obtaining the concurrence of the Chief Justice in terms of Section 25A of the Code of Criminal Procedure, it is incumbent upon the State to place before the Chief Justice all relevant material and facts to enable the Chief Justice to form a proper and informed opinion. In this case, we are constrained to observe that no such material was placed on record. We have gone through the entire record of the case and we find that on 30th September, 2010, i.e., the date on which Respondent No. 2 was to retire, the Chief Secretary to the Government of Himachal Pradesh sent a letter addressed to the Registrar General of this Court enclosing therewith the notification dated 29th September, 2010, which had already been issued. The letter reads as follows:

No. Per(AP)AA(2)-5/96-I

Government of Himachal Pradesh Department of Personnel

Appointment-I

Dated Shimla-2, the 30th September, 2010 From
The Chief Secretary to the Government of Himachal Pradesh.

To

The Registrar General,
High Court of Himachal Pradesh,
Shimla-171 001.

Subject: Appointment of Director of Prosecution. Sir,

I am directed to refer to the subject cited above and to say that in terms of provisions of Section 25A of Cr.P.C. the State Government appointed Sh. H.S. Rana as Director of Prosecution, Himachal Pradesh after taking the approval of Hon'ble the Chief Justice of High Court of Himachal Pradesh as conveyed by your letter No. HHC/R. Gen./ PS/9-155/06-273 dated 26th October, 2007. Sh. H.S. Rana, Director of Prosecution, HP shall retire from the services on attaining the age of superannuation on 30.09.2010.

During his tenure as Director of Prosecution, HP, the working of the Department has improved substantially. He is well respected and has been able to carry his subordinates along. He has shown the maturity, sincerity and hard work that is expected of a Head of Department. He has led the Department very ably and efficiently for nearly 3 years. During his tenure as Director, the conviction rate in criminal cases has gone up from 24 % in 2007-08 to 34 % in 2009-10. In NDPS cases, the same has been reported to have risen from some 8-9% to 34% in 2009-10. The officer has conducted as many as 47 inspections of District Attorney/ Deputy District Attorney/Assistant District Attorney offices during his tenure as Director. He has been attending various training programmes/seminars, as participant or faculty, and has sent a large number of Public Prosecutors for training programmes within and outside the State. He has thus taken useful initiatives for Human Resource Development of the staff of the Directorate of Prosecution.

Having regard to his administrative, management and prosecutorial experience, the State Government is of the considered opinion that continuation of Sh. H.S. Rana in this post will be beneficial to the working of the Department and in the interest of the State and public at large. The State Government, keeping in view the larger public interest, has granted extension in service to Sh. H.S. Rana as Director of Prosecution vide Notification dated 29th September, 2010 (copy enclosed), subject to the concurrence of Hon'ble Chief Justice of High Court of Himachal Pradesh.

In view of the above, the matter may kindly be placed before the Hon'ble Chief Justice for his consideration as required under Sub-section 2 of Section 25A of

Cr.P.C.

Yours faithfully,

Sd/ - Chief Secretary to the Government of Himachal Pradesh.

Encl. As above

12. A bare perusal of this letter shows that though the Chief Secretary did project the case of Respondent No. 2 for grant of extension, there was no mention in this letter as to whether the other persons including the Petitioner, who were in the field of choice for being considered for appointment to the post of Director of Prosecution, were suitable or not for this post. We also find from the record that other than the notification, no other record was sent to the Chief Justice. Neither the service record of Shri H.S. Rana nor the service records of any of the other officials eligible for being appointed as Director (Prosecution) were sent to the Chief Justice. We fail to understand how the Chief Justice could have taken an informed decision without the relevant record being placed before him. In fact, the State had, in total disregard of Section 25A of the Cr.P.C. and the earlier directions of this Court, appointed Respondent No. 2 without the concurrence of the Chief Justice. The Chief Justice was presented with a fait accompli. Probably, it was due to this reason that the approval was given by the Chief Justice in very guarded language, which reads as follows:

In view of the special factors stated in the letter dt. 30th September, as a special case, my no objection to the proposal may be conveyed to the Government with the specific understanding that the extension as proposed does not wholly mar the prospects of the next incumbent.

13. The stand of the State is that since approval has now been granted by the Chief Justice, the petition must fail. We are unable to agree with this contention. The Chief Justice, while granting the approval, has laid down a specific condition that the extension as proposed does not wholly mar the prospects of the next incumbent. This Court had called for the record of the case, which were produced before us today and we find that the State did not at all take into consideration the stipulation contained in the letter of concurrence. The only action which has been taken by the State after the concurrence was given was to prepare a note for the approval of the Cabinet and the Cabinet in its meeting held on 11th October, 2010 has approved the extension of Respondent No. 2 for a period of one year. The question whether the prospects of any of the eligible persons, including the Petitioner, have been wholly marred or not, has not at all been considered at any level. We also find that one of the person who fell within the zone of choice, namely, N.K. Sharma, is to retire in the year 2011 and in case, extension of one year is granted to Sh. Rana, as now approved by the Cabinet, then it is obvious that the prospects of Sh. N.K. Sharma, who may be junior to the Petitioner but falls within the zone of choice, are totally marred.

14. Further, we find that on 20th August, 2010, a note was put up to the effect

that Respondent No. 2, Shri H.S. Rana is to retire on 30.09.2010 and the Petitioner, Shri Jawahar Lal Sharma and S/Shri Balbir Singh Thakur and Narinder Kumar Sharma are the persons falling in the field of choice for appointment/promotion to the post of Director of Prosecution. Reference was also made to the notification dated 20th September, 2006, whereby a Search Committee had been constituted under the Chairmanship of the Chief Secretary of the State to make suitable recommendations to the said post. This note was put up before the Special Secretary, who again noted that the Search Committee was to be chaired by the Chief Secretary and the Principal Secretary (Home), Principal Secretary (Law) were the members with the Principal Secretary (Personnel) being the Member Secretary. It is not necessary to give the other facts, but it would be pertinent to mention that on 20th September, 2010, the Principal Secretary (Personnel) approved a note whereby the aforesaid Search Committee was constituted to consider the eligibility of the three suitable candidates for the post of Director of Prosecution and it was also clearly mentioned in the note that the recommendations of the Search Committee have to be sent to the Chief Justice of the High Court of Himachal Pradesh for concurrence in terms of Section 25A of the Cr.P.C. Thereafter, a note was put up to fix a date for the meeting of the Search Committee. Surprisingly, instead of the matter being put up before the Search Committee, it was put up before the Principal Secretary (Home), who on 27th September, 2010, put up a detailed note that Respondent No. 2 should be given extension in service. This note was ascertained to by the Chief Secretary as well as by the Chief Minister of the State. Thereafter, the impugned notification was issued.

15. We do not find any material on record to show that the Search Committee ever considered the candidature of the three eligible candidates or that it found them unsuitable to hold the said post. Extension in service is not a right. In fact, Fundamental Rule 56 clearly lays down that every employee shall retire on reaching the prescribed age of superannuation which, in the present case, is admittedly 58 years. Extension in service is an exception to the Rules. No doubt, the State is empowered to grant extension in service, but this has to be in public interest. Whether it was in the public interest to grant extension or not could also not have been decided without the concurrence of the Chief Justice of the High Court and, therefore, it was necessary to place the entire material before the Chief Justice, who then alone could have taken a decision as to whether extension is to be granted to Respondent No. 2 or not.

16. From the records it is apparent that no consultation was done with the other members of the Search Committee and the detailed note of the Principal Secretary (home) was straightaway accepted by the Chief Secretary and thereafter, notification was issued without the concurrence of the Chief Justice. This action, in our opinion, is totally illegal and contrary to the provisions of Section 25A and the law laid down by this Court.

17. We are dismayed to note that the manner in which the State has acted is

totally improper. When an important post, like that of the Director of Prosecution is to be filled up, the Statute requires that concurrence of the Chief Justice of the High Court is to be obtained. Will it be too much to expect of the State to send a proposal at least a couple of months in advance to the Chief Justice stating therein the entire facts and giving the pros and cons of all the persons falling within the field of choice? It is only if this entire material is placed before the Chief Justice that he can take an informed decision as to who is the most suitable candidate to hold such an important post. We, therefore, direct that in future the State shall ensure that whenever any post is to be filled up where the concurrence of the Chief Justice as contemplated u/s 25A Cr.P.C. is required, then a proposal in this regard shall be sent at least two months in advance with the entire service dossier of all the candidates falling within the zone of choice.

18. In view of the above discussion, we dispose of this writ petition with the following directions:

1. That the State shall ensure that on or before 12th November, 2010, the Search Committee, as constituted, shall consider the case of the three eligible officers and give its findings whether any of the three eligible candidates is suitable to hold the post of Director of Prosecution. It is only if the Search Committee finds that none of the three officers are suitable to hold the said post should it recommend that Respondent No. 2 be granted extension in service.

2. Thereafter, not later than 15th November, 2010, the recommendations of the Search Committee alongwith the complete service dossiers of all the concerned officials shall be sent to the Chief Justice, who after considering the same, shall take a decision thereon in terms of Section 25A of the Criminal Procedure Code. We request the Hon"ble Chief Justice to take a decision on this matter as early as possible.

3. Respondent No. 2, Shri H.S. Rana, is permitted to continue as Director (Prosecution) till a decision is conveyed by the Chief Justice. It is, however, made clear that in case no decision is taken till 30th November, 2010, then Shri H.S. Rana will cease to function as Director (Prosecution) and the senior most Joint Director of Prosecution shall be given charge of the said post till the process is completed, in accordance with law.

4. We further direct that in future whenever any post falling within the purview of Section 25A(2) of the Cr.P.C. has to be filled in in terms of Section 25A of the Cr.P.C., then the State shall ensure that the recommendations of the Search Committee and the entire service records of the concerned officials is placed before the Chief Justice at least two months prior to the date when the post is to be filled in.