
(2006) 09 SHI CK 0013
In the High Court Of Himachal Pradesh

Jiwan Lal Sharma

APPELLANT

Vs

S.S. Parmar

RESPONDENT

Date of Decision : 13-09-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 25, 25A

Citation : (2007) 1 ShimLC 58

Hon'ble Judges : V.K. Gupta, C.J.; Surjit Singh, J

Bench : Division Bench

Judgement

V.K. Gupta, C.J.—This Contempt Application relates to and arises out of a judgment passed by a Division Bench of this Court on 19.10.2005 in CWP 1031 of 2005. In the said writ petition, an important question had arisen for this Court's consideration and the question was as to whether the rigour of 3 years' experience as a Joint Director, for promotion to the post of Director Prosecution be persisted with or it should be dispensed with because of the non-availability of eligible Joint Directors linked with the aforesaid pre-requisite of 3 years' experience. This Court had observed that under the Recruitment and Promotion Rules, the post of Director Prosecution was required to be filled up 100% by promotion, and failing that, by deputation. Noticing the aforesaid rule position and the resultant harshness being faced by the incumbent Joint Directors, because of the aforesaid 3 years' experience being an eligibility criteria, this Court observed thus:

After hearing the learned Counsel for the parties, we feel that the stipulation in the Recruitment and Promotion Rules with respect to the requirement of three years' service in the cadre of Joint Directors in fact may be working harshly as far as interests of the petitioner as well as respondent No. 2 and other Joint Directors in the Directorate of Prosecution are concerned. Whether this stipulation serves any useful public purpose or not is not an issue for our consideration in this case but we do feel that because none of the Joint Directors presently employed in the Directorate of Prosecution fulfills the aforesaid

requirement, it shall be worthwhile for the State Government to effectively consider dispensing with this requirement and relaxing the rigour contained in the Recruitment and Promotion Rules about the aforesaid requirement of three years" service in the cadre of Joint Directors. We actually go as far as to observe that it shall be in greater public interest that an incumbent Joint Director is appointed as the Director of Prosecution on regular basis rather than continuing with the system of additional charge of this post being held by an officer who has practically nothing to do with the Directorate of Prosecution and who admittedly has no experience in this line. It is commonly known that the Director of Prosecution is a specialized job and it shall be in public interest that only such persons are appointed in this post who have had enough experience in this line in the past.

2. Even though the discretion and the option to relax the aforesaid rigour of 3 years" experience as an eligibility criterion was squarely left to the State Government, this Court clearly was of the opinion that it shall be in greater public interest that an incumbent Joint Director is appointed as the Director of Prosecution on regular basis rather than continuing with the system of additional charge of this post being held by an officer who has practically nothing to do with the Directorate of Prosecution and who admittedly has no experience in this line. This observation was made in the context of the admitted fact situation that an officer from outside the Prosecution department was holding the additional charge of the post of Director Prosecution.

3. Since according to the petitioner the aforesaid judgment was not complied with, this contempt petition was filed. Reply was originally filed by the Secretary (Home) to the aforesaid contempt application on 5.4.2006. Alongwith the said reply, the Minutes of a meeting held on 6.12.2005 were also enclosed. This meeting actually was held in compliance with a specific direction of this Court contained in the aforesaid order dated 19.10.2005. The Minutes of the said meeting of the Committee held on 6.12.2005 suggest that the Government was not in agreement with the view of this Court about relaxation of the rigour of 3 years" experience, yet the Government decided that "since Director Prosecution does not generally function as a Public Prosecutor and his work is more related to the management of the Directorate, experience in a staff position was more important than mere experience as a Public Prosecutor". These observations are contained in para 5 of the aforesaid Minutes which we reproduce hereinbelow for our ready reference:

...The options were between appointing someone from outside the cadre of Prosecuting Officers or by relaxing the Rules to enable a Prosecuting Officer in the feeder category to be promoted even if he did not have the adequate experience in his present post so long his combined experience was adequate. The Committee was of the view that since Director Prosecution does not generally function as a Public Prosecutor and his work is more related to the management of the Directorate, experience in a "staff position was more

important than mere experience as a Public Prosecutor. The ideal choice would of course be a Prosecuting Officer who also had adequate experience as Deputy Director and Joint Director. In the absence of such an officer, public interest was better served by appointing an officer with the adequate experience to manage the Directorate who could rely on specialized inputs by way of advice from the Prosecution Officers at Joint Director level posted in the Directorate. The Committee was of the view that it would, however, be preferable that such an officer should hold the post of Director Prosecution as his primary responsibility.

4. Based upon the aforesaid observations, therefore, the Government while refusing to relax the rigour of 3 years' experience, continued with the appointment of an officer as Director Prosecution who did not belong to the Prosecution department and who did not have anything to do with the work of Prosecution at all. We are told that presently also this arrangement is continuing.

5. This Contempt matter came up on 4.9.2006 when the following order was passed by this Court:

The affidavit filed by the Secretary (Home) on 5th April, 2006 as a sequel to our order dated 31st March, 2006 naturally did not take into account the provision of Section 25-A Cr.P.C. because this provision has come into force only on 23rd June, 2006. There is no doubt that on and from 23rd June, 2006 the statutory position has not only been changed but it has now been crystallized beyond any shadow of doubt. The position having undergone a total change now calls for a fresh affidavit from the State Government.

List on 13th September, 2006. On that date, fresh affidavit shall be filed indicating the action taken by the State Government between today and that date in the light of the aforesaid Section 25-A Cr.P.C.

(Emphasis supplied by us today)

6. As a sequel to the aforesaid order dated 4.9.2006, an affidavit has been filed by the Deputy Secretary (Home) today in the Court. The entire thrust of this affidavit is that the State Government is planning to amend Section 25-A Cr.P.C. by a State amendment. The affidavit also informs the Court that the Law Department has informed the Government that since the proposed amendment to Section 25-A is repugnant to the plenary provision in the Code, as passed by the Parliament, the State amendment would require assent by the President of India under Article 254(2) of the Constitution of India.

7. The position which thus stands today is that Section 25-A Cr.P.C. is on the Statute book as inserted by the Code of Criminal Procedure (Amendment) Act, 2005. This provision as passed by the Parliament of India came into force with effect from 23.6.2006. For ready reference, Section 25-A reads thus:

25-A. 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 with the concurrence of the Chief Justice of the High Court.

(3) The head of the Directorate of Prosecution shall be the Director of Prosecution, who shall function under the administrative control of the Head of the Home Department in the State.

(4) Every Deputy Director of Prosecution shall be subordinate to the Director of Prosecution.

(5) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under Sub-section (1), or as the case may be, Sub-section (8), of Section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution.

(6) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under Sub-section (3), or as the case may be Sub-section (8), of Section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed under Sub-section (1) of Section 25 shall be subordinate to the Deputy Director of Prosecution.

(7) The powers and functions of the Director of Prosecution and the Deputy Directors of Prosecution and the areas for which each of the Deputy Directors of Prosecution have been appointed shall be such as the State Government may, by notification, specify.

(8) The provisions of this Section shall not apply to the Advocate General for the State while performing the functions of a Public Prosecutor.

8. Mr. Chandel, learned Advocate General appearing for the respondent submits that since the respondent - State is contemplating to amend and substitute Section 25-A by State amendment and because the assent of the President of India would require considerable time for being obtained, the State Government be allowed to carry on with the existing position whereby an IAS Officer is holding the charge of the post of Director Prosecution. Mr. Chandel's alternate submission is that a reading of Sub-section (1) of Section 25-A clearly suggests, according to him, that it is not obligatory for the State Government to follow the mandate contained in Sub-section (2) of Section 25-A. According to Mr. Chandel, Sub-section (2) of Section 25-A applies only if a new Directorate of Prosecution is created by the State Government and that the mandate contained in this sub-section is not applicable to an existing Directorate of Prosecution.

9. We are afraid we cannot persuade ourselves to agree to any of the aforesaid two contentions of Mr. Chandel and for the following reasons.

10. Whether the State Government proposes or contemplates to amend and substitute Section 25-A by a State amendment is something which is for the

State Government to decide. The fact however remains that as far as our State is concerned, presently it is governed by Section 25-A as it presently stands in the Statute book. That is the law of the land. Until this law is changed, varied, modified or substituted by another appropriate law, validly enacted, it is the duty of the State Government as well as of this Court to ensure that the law as it stands today is followed, applied and implemented in letter and spirit. The law is that no one can be appointed or be allowed to hold the charge of the post of Director Prosecution or a Deputy Director Prosecution unless he has been in practice as an Advocate for not less than 10 years. Every such appointment has to be made with the concurrence of the Chief Justice of the High Court. We do not at all agree with the contention of Mr. Chandel that the aforesaid requirement contained in Sub-section (2) applies only to a situation where a Directorate of Prosecution is being created for the first time and that it does not apply to the existing Directorate of Prosecution. A combined reading of Sub-section (1) and Sub-section (2) clearly suggests that whether a Directorate of Prosecution is already in existence or it is to be established after the commencement of the aforesaid Code of Criminal Procedure (Amendment) Act, 2005, no person can be permitted to hold the charge of the office of Directorate of Prosecution until he conforms with the eligibility requirements as contained in Sub-section (2) of Section 25-A after the coming into force of this provision of law. A bare look at Sub-sections (3) to (8) of Section 25-A clearly indicates the legislative intent behind this requirement. The legislative intent is that since the Director of Prosecution performs statutory duties akin to judicial or quasi-judicial functions, functions in the nature of being a Public Prosecutor, Additional Public Prosecutor and a Special Public Prosecutor and the functions include the conduct of cases in the High Court as well as in the Courts subordinate to the High Court, only a person with a legal and a juristic background should be considered eligible and suitable to hold this post. The Parliament understandably enacted the aforesaid provision of law keeping in mind the fact that persons other than those mentioned in Sub-section (2) are not equipped with the necessary wherewithal as well as the bent of mind to perform the functions of the Director Prosecution.

11. Whatever may be the legislative intent or whatever may be the background under which Section 25-A has been enacted, the fact remains that everyone, the State Government as well as this Court, is bound to follow and apply as well as implement this mandatory provision of law. The State Government has unnecessarily been sleeping over the matter and dragging its feet by not conforming with and implementing the aforesaid binding provision of law. We, therefore, totally reject the aforesaid contentions of the State Government.

12. In our order dated 4th September, 2006 (reproduced in the earlier part of this judgment) after noticing the fact regarding the insertion of Section 25-A in the Code, the statutory position thereby having undergone a total and complete change, we had afforded an opportunity to the State Government for filing a fresh affidavit indicating therein the action which the State Government would take in the aftermath of this change. By making this observation this Court

clearly was of the view and thus had hoped that the State Government, understanding and appreciating the binding and mandatory nature of the requirement contained in Sub-section (2) of Section 25-A shall indicate to this Court its action plan vis-a-vis a fixed time frame about the ways and means to implement this statutory provision.

13. The affidavit of the Deputy Secretary (Home) filed today however, suggests to the contrary. It clearly and unambiguously reveals that the State Government does not at all intend to implement, follow and apply Section 25-A at all and that it desires to substitute this Section by the State Amendment. When would the State Amendment Bill be introduced in the legislature of the State? When would it be passed (if at all) and when would it receive the assent of the President, have however not been indicated at all in the said affidavit. What happens in the interregnum? In the interregnum, do we totally forget about Section 25-A as it applies to us today? Does Section 25-A in the interregnum become redundant? Does this Section stand obliterated in the interregnum?

14. Answers to the aforesaid questions naturally have to be in the negative because Section 25-A as it stands today has to be applied, followed and implemented in letter and spirit. There is no escape from this. This is a mandatory and binding provision of law. Had the State Government indicated some course of action to us we would have very happily gone along with the view of the State Government to charter an acceptable course of action. Since the State Government did not adopt such a course of action, we are now left with no option but to ourselves evolve a course of action which we think is in conformity with Section 25-A and which alone would amount to it being implemented in letter and spirit. With a view to thus ensuring total and absolute compliance of the mandate contained in Section 25-A, 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 25-A 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.

15. As far as the present contempt application is concerned in which action for committing contempt of Court is sought to be initiated against the respondent herein, even though the facts and circumstances of the case warrant that action is merited, in the face of changed statutory position we feel that we should not proceed against the respondent-contemnor any further. We accordingly drop the contempt proceedings.

16. The Principal Secretary (Home) shall file his affidavit of compliance with respect to the aforesaid directions before the next date.

List on 22nd September, 2006.

17. Mr. J.K. Verma, learned Deputy Advocate General has taken down the gist of this order for its immediate implementation and compliance in so far as the first part of the order is concerned.

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