
(2011) 06 JH CK 0088

In the Jharkhand High Court

Case No : Writ Petition (S) No"s. 3179 and 3193 of 2011

Narendra Kumar Roy and Bharat Ram

APPELLANT

Vs

The State of Jharkhand and Others
 Krishna Kumar
Mishra and Sanjay Kumar Singh Vs The State of Jharkhand
and Another

RESPONDENT

Date of Decision : 17-06-2011

Acts Referred:

Advocates Act, 1961 — Section 24(1), 24A, 25, 28
Constitution of India, 1950 — Article 233
Criminal Procedure Code, 1973 (CrPC) — Section 25

Citation : (2011) 06 JH CK 0088

Hon'ble Judges : D.N. Patel, J

Bench : Single Bench

Judgement

D.N. Patel, J.—The present writ petitions have been preferred by the Petitioners, who are working as Assistant Public Prosecutors, for appearing in the examination to be held on 19th June, 2011 by the Respondents for the post of Additional District Judges. Upon mentioning the matter before Hon"ble the Acting Chief Justice, these matters have been taken for hearing.

2. Counsel for the Petitioners in all the aforesaid writ petitions have submitted that the only duty Petitioners are performing is to argue out the matters in the trial court as an Assistant Public Prosecutors. Secondly, they have been appointed in exercise of powers u/s 25 of the Code of Criminal Procedure, 1973 and therefore, looking to the duties of the present Petitioners, they have to work only as Advocates in the trial court and they are not performing any other duties whatsoever of the State Government and therefore, as per Article 233 of the Constitution of India, it cannot be said that they are in service of the Government and therefore, they are eligible and qualified to appear in the examination to be held by the Respondents for the post of Additional District Judges.

3. It is further submitted by the counsel for the Petitioners that Rule 49 of the

Bar Council of India Rules, 1995 was initially had a proviso which was omitted in the year, 2001, but, as per the Rules framed by the Bar Council of Bihar u/s 28 of the Advocates Act, 1961, the Law officers are still Advocates and the names of the present Petitioners are on the role of Bar Council of Bihar/Jharkhand.

4. It is further submitted by the counsel for the Petitioners that unlike State of Karnataka, there are no Rules in the State of Jharkhand for the cadre of the Assistant Public Prosecutor and therefore, it is submitted by the counsel for the Petitioners that the decisions rendered by the Hon"ble Supreme Court in Civil Appeal Nos. 947956 of 2003 dated 18th May, 2009 is based upon different facts. The facts of the case is reflected in paragraph No. 3 of the aforesaid decision rendered by the Hon"ble Supreme Court. In the State of Jharkhand as per Jharkhand Bar Council Rules, which have been adopted as Bihar Bar Council Rules, the Law Officers are permitted to be continued on the role of Advocates, despite the fact that they are getting salary. The only duty which is performed by the present Petitioners is to plead the cases on behalf of Government of Jharkhand before the trial court. As the cadre rules for the Assistant Public Prosecutor have not been drafted in the State of Jharkhand, Petitioners are not knowing about any promotional avenues.

5. It is further submitted by the counsel for the Petitioners that the real test to distinguish Advocate and the employee is whether the person is engaged to plead in the court the cases or not. A person, who is engaged to plead in the court can also get a salary. Merely because a person is getting salary that does not mean that he ceased to be a Lawyer. Method of remuneration is not the test, but, the correct test is for what duty a person is engaged.

6. Counsel for the Petitioners is also relied upon several other decisions reported in Sushma Suri Vs. Govt. of National Capital Territory of Delhi and Another, as well as (2001) 2 SCC 365 etc. and has also relied upon several provisions of the Bar Council of India Rules as well as Advocate Act, 1961 especially Section 24(1) (e) and Section 24A as well as Section 25 of the Advocates Act, 1961 and has submitted that the present Petitioners have been appointed only to plead the cases, on behalf of the State, in the trial court as per Section 25 of the Code of Criminal Procedure, 1973. Even as per Section 24(1)(e) of the Advocate Act, 1961, if the Rules made by the State Bar Council permits the Petitioners to be enrolled as an Advocate, they are eligible to be enrolled as an Advocate and as stated hereinabove, within the State of Jharkhand, Bar Council Rules enacted by the Bihar Bar Council are applicable and as per those Rules, the law Officers appointed by the State can continue to be an Advocate on the role of the State Bar Council. The proviso, which is dropped under Rule 49 of the Bar Council of India, 1995 has got no effect unless and until State Bar Council also incorporates/drops such type of provision.

7. It is further submitted by the counsel for the Petitioners that as per paragraph No. 20 of the decision rendered by the Hon"ble Supreme Court reported in (2001) 2 SCC 365, the test is the duty to be performed by the Petitioners and

not the method of getting remuneration.

8. It is further submitted by the counsel for the Petitioners that even in a case decided by the Hon"ble Supreme Court in *Sushma Suri Vs. Govt. of National Capital Territory of Delhi and Another*, the aforesaid test of "a duty to be performed" was established (looking to paragraph No. 10 of the aforesaid decision) and therefore, the only duty, which is performed by the Petitioners, is to plead the cases on behalf of the Government in the trial court differentiates the Petitioners from "employee". Never any duty has been assigned by the State Government other than doing advocacy. They are also on the panel of role of Advocates of the State Bar Council. The chance they are getting in the examination to be held by the Respondents for the post of Additional District Judges comes in a blue moon. Respondents are taking examination after long lapse of time i.e. a decade time and therefore, let the Petitioners be allowed to appear in the examination to be held on 19th June, 2011. Meanwhile, let the Respondents file their reply and the appearance of the Petitioners in examination may be made, subject to the outcome and result of these writ petitions.

9. I have heard counsel for Respondent Nos. 2 and 3, who has heavily relied upon the decision of the Hon"ble Supreme Court in Civil Appeal No. 947956 of 2003 delivered on 18th May, 2009 and has submitted that as stated in paragraph Nos. 6,7 and 8 thereof there is no substance in these writ petitions, hence, the same may be dismissed because Petitioners are full time salaried employees. They are governed by the State Service Code. Disciplinary action can only be taken by the State Government and therefore, as per the aforesaid decision, they are not entitled to appear in the examination for the post of Additional District Judges.

10. Counsel for Respondent Nos. 2 and 3 has also relied upon the several Sections of Advocates Act, 1961 as well as Bar Council of India Rules, especially Rule 49 as it stood prior to and after amendment of the year, 2001.

11. Counsel for the State seeks time to file reply especially for the duties to be performed by the Petitioners. As these matters have been taken by this Court upon mentioning before Court No. 1, the Advocated for the State Government has no information about the Petitioners on factual aspects.

12. Having heard counsel for both the sides and looking to the contentious issues raised in these writ petitions, Rule in all the aforesaid writ petitions.

13. So far as the interim relief is concerned, it appears that there is prima facie case in favour of the present Petitioners for the reason that they are working as Assistant Public Prosecutor before the trial court. It is stated by the counsel for the Petitioners that only the duty they have performed so far is to plead the cases on behalf of the State Government in the trial court. They have not to sit in the Secretariat of the State of Jharkhand. They have not to perform any other duty than to plead the cases on behalf of the Government in the courts. There are no cadre Rules of the State of Jharkhand for the post of Assistant Public

Prosecutor, which compels the Petitioners to do any other job than to plead the matters in the Court. This is a distinguishing feature from the Karnataka Department of Prosecution and Government Litigation Recruitment Rules, 1962. The decision rendered in the Civil Appeal No. 947956 of 2003 as stated in paragraph No. 3 thereof, has a bearing upon the Karnataka Rules, 1962. The position in the State of Jharkhand is different. Moreover, in the facts of these Civil Appeals before the Hon"ble Supreme Court, those candidates had surrendered their sanad/practising licence. This is not the case over here. Moreover, looking to the test laid down by the Hon"ble Supreme Court in (2001) 2 SCC 365, the test is what duty the Petitioners are performing. The method of getting remuneration cannot be the test. It may be per matter, it may be per day or it may be per month. Court is least concerned with the method of payment. Paragraph No. 20 of the aforesaid decision reads as under:

20. ...the test indicated is whether a person is engaged to act or plead in a court of law as an advocate and not whether such person is engaged on terms of salary or payment by remuneration. The essence is as to what such Law Officer engaged by the Government does.

(Emphasis Supplied)

In view of the aforesaid test, prima facie, there is a case in favour of the present Petitioners.

14. It has been held by the Hon"ble Supreme Court as reported in Sushma Suri Vs. Govt. of National Capital Territory of Delhi and Another, in paragraph 10, which reads as under:"

10. Under Rule 49 of the Bar Council of India Rules, an advocate shall not be a fulltime employee of any person, Government, firm, corporation or concern and on taking up such employment, shall intimate such fact to the Bar Council concerned and shall cease to practice as long as he is in such employment. However, an exception is made in such cases of law officers of the Government and corporate bodies despite his being a fulltime salaried employee if such law officer is required to act or plead in court on behalf of others. It is only to those who fall into other categories of employment that the bar under Rule 49 would apply. An advocate employed by the Government or a body corporate as its law officer even on terms of payment of salary would not cease to be an advocate in terms of Rule 49 if the condition is that such advocate is required to act or plead in courts on behalf of the employer. The test, therefore, is not whether such person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to act or plead on its behalf in a court of law as an advocate. In that event the terms of engagement will not matter at all. What is of essence is as to what such law officer engaged by the Government does whether he acts or pleads in court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. If the terms of engagement are such that he does not have to act or

plead, but does other kinds of work, then he becomes a mere employee of the Government or the body corporate. Therefore, the Bar Council of India has understood the expression "advocate" as one who is actually practising before courts which expression would include even those who are law officers appointed as such by the Government or body corporate.

(Emphasis Supplied)

In view of the aforesaid decision also, the test is what duty the candidate is performing and not mere method of payment of remuneration. Moreover, as per Bar Council Rules of State of Bihar, which have been adopted by the State of Jharkhand Bar Council, Law Officers are the Advocates and they are entitled to continue on role of Advocates. Moreover, State of Jharkhand is unable to point out anything about other duties, which can be assigned to the present Petitioners.

15. In view of these facts, irreparable loss will be caused to the Petitioners, if they are not permitted to appear in the examination, which is going to be held on 19th June, 2011. Respondents are taking examination after approximately one decade and therefore, if these petitions are allowed later on and if interim relief is refused virtually, it will tantamount to irreparable loss to the Petitioners. Balance of convenience is also in favour of the present Petitioners. Interim relief is granted by inserting a condition that the appearance of the present Petitioners is allowed in the examination for the post of Additional District Judges provisionally and it will be subject to the result of these petitions and the result of the present Petitioners will not be declared without further order of this Court. The appearance of the present Petitioners will not create any right in favour of the present Petitioners.

16. Counsel for Respondent Nos. 2 and 3 will inform Respondent No. 2 and 3 to allow these Petitioners to appear in the examination on 19th June, 2011 for the post of Additional District Judges.

17. Rule is made returnable on 4th July, 2011. Meanwhile, the Respondent No. 1 shall reply.