

(2006) 01 BOM CK 0008
In the Bombay High Court
Case No : Criminal W.P. No. 702 of 2005

Omprakash Baheti and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 23-01-2006

Acts Referred:

Constitution of India, 1950 — Article 141, 226
Criminal Procedure Code, 1973 (CrPC) — Section 154, 24(8)
Dowry Prohibition Act, 1961 — Section 3, 4
Maharashtra Law Officers (Appointment, Conditions of Service and Remuneration) Rules, 1984 — Rule 22
Penal Code, 1860 (IPC) — Section 304B, 498A

Citation : (2006) CriLJ 3105 : (2006) 4 RCR(Criminal) 737

Hon'ble Judges : D.S. Zoting, J;A.P. Lavande, J

Bench : Division Bench

Advocate : P.C. Madkholkar, for the Appellant; S.G. Loney, Shashank V. Manohar and Shyam Dewani, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—Rule. Respondent waive notice on Rule. Taken up for final hearing by consent of all the parties.

2. By this petition, the petitioners challenge the order dated 4-9-2004 passed by respondent No. 1 by which Shri Avinash Gupta, Advocate, Nagpur has been appointed as Special Public Prosecutor for conducting the Sessions Trial and the incidental proceedings arising out of Cr. No. 204 of 2004 of Police Station, Kotwali, Nagpur, before the Sessions Court, Nagpur. The petitioners have also sought incidental reliefs in the nature of investigation into the matter of appointment of Advocate Gupta as Special Public Prosecutor by the impugned order dated 4/9/2004.

3. We have heard Mr. Madkholkar, learned Counsel for the petitioners, Mr. Loney, learned Additional Public Prosecutor for respondents Nos. 1 and 2 and Mr.

Shashank Manohar, learned Counsel for respondent No. 3.

4. Briefly, the facts leading to filing of the present petition, are as follows:

The petitioners along with one Mahesh Baheti are accused in Sessions Trial No. 464/2005 which is pending before 6th Adhoc Additional Sessions Judge, Nagpur. The charge-sheet was filed under Sections 304-B and 498-A of the Indian Penal Code read with Sections 3 and 4 of Dowry Prohibition Act against the petitioners and said Mahesh, pursuant to F.I.R. filed by respondent No. 3 who is the father of deceased Rekha, the wife of Mahesh, at Police Station, Kotwali, Nagpur which was registered on 10-8-2004.

5. The main challenge in the present petition is to the appointment of Advocate Avinash Gupta as Special Public Prosecutor for conducting Sessions Trial and incidental proceedings arising out of Crime No. 204/2004. In para 7 of the petition, the petitioners have averred that the impugned order has been passed despite the judgment of the Supreme Court and despite the specific directions to modify the said Rules and the said Rules were never modified and in gross contempt of the orders of the Supreme Court by following Rule 22 and in a pure mechanical fashion the Special Public Prosecutors are being appointed at the whims and fancies of private complainants.

6. Mr. Madkholkar, learned Counsel appearing for the petitioners submitted that the impugned order has been passed in clear violation and contrary to the observations and directions given by the Apex Court in the case of Mukul Dalal and Others Vs. Union of India (UOI) and Others, and therefore, the impugned order deserves to be quashed and set aside. He further submitted that in view of the fact that Advocate Avinash Gupta had appeared on behalf of the complainant even before his appointment as Special Public Prosecutor by the impugned order the appointment of Mr. Gupta as Special Public Prosecutor is vitiated. He further submitted that the Public Prosecutor is expected to discharge his duties fairly and ensure a fair trial to the accused. Therefore, in view of the fact that Advocate Gupta had already appeared for the complainant prior to his appointment as Special Public Prosecutor, the petitioners would not get fair trial in the event Advocate Gupta is permitted to conduct the matter as Special Public Prosecutor. Learned Counsel relied upon the judgment of the Apex Court reported in Shiv Kumar Vs. Hukam Chand and Another, . He further submitted that having regard to the impugned Notification, it appears that the State Government had already come to the conclusion that the F.I.R. lodged by the complainant would result in filing of charge-sheet and thereafter in a trial before the Sessions Court which could not have been anticipated by the Government since mere filing of the F.I.R. may not ultimately result in filing of charge-sheet and committal of the case to Sessions Court. According to learned Counsel, the appointment of Advocate Gupta appears to be at the behest of the Complainant and without following the Rules. Learned Counsel further submitted that respondent No. 1 has passed the impugned order mechanically without any application of mind at the behest of respondent No. 3.

7. Per contra, Mr. Loney, learned Additional Public Prosecutor appearing on behalf of respondent Nos. 1 and 2 submitted that in the matter of appointment of Special Public Prosecutor by the impugned order, no judicial review is possible and the petitioners have not made out any case for quashing and setting aside the impugned order. He further submitted that in the matter of Public Prosecutors and Special Public Prosecutors, there cannot be a judicial review. In support of his submission, he relied upon the judgment of the Apex Court in *State of U.P. and Another Vs. Johri Mal*, . According to learned Additional Public Prosecutor, the appointment has been made in terms of the amended Rule 22 of the Rules, which was brought in force by way of amendment on 4th April, 2002.

8. Mr. Manohar, learned Counsel appearing on behalf of respondent No. 3 submitted that the use of the words "Sessions Trial" in the impugned order are not fatal and by virtue of the impugned order, the Special Public Prosecutor has been appointed to conduct not only the Sessions Trial but also all the incidental proceedings arising out of C. R. No. 204/2004. Relying upon Section 24(8) Code of the Criminal Procedure, the learned Counsel submitted that the Special Public Prosecutor can be appointed by the Central or State Governments for the purposes of any case or Class of cases. He further submitted that once F.I.R. is registered u/s 154 of Code of Criminal Procedure disclosing a cognisable offence the Police Officer is bound to investigate the case. According to learned Counsel, the appointment of Advocate Gupta as Special Public Prosecutor has been done by following amended Rule 22 of the Rules and the appointment has been done after application of mind by respondent No. 1 which is evident from the records produced in the present petition. He further submitted that in *Mukul Dalal's case* (supra) the Apex Court has not barred the appointment of Special Public Prosecutor at the request of private complainant but has only set aside the judgment of this Court by which this Court held that once the complainant makes request for appointment of the Special Public Prosecutor, the same must be granted as a matter of rule. He further submitted that the subjective satisfaction reached by respondent No. 1 in appointing Advocate Gupta as Special Public Prosecutor is not open for judicial scrutiny. He further submitted that the mere fact that Advocate Gupta had appeared for the complainant prior to his appointment will not debar Advocate Gupta from being appointed as Special Public Prosecutor if after applying its mind, the respondent No. 1 comes to the conclusion that Advocate Gupta can be appointed as Special Public Prosecutor to conduct the proceedings. He submitted that the Special Public Prosecutor is expected to discharge his duties fairly and the mere fact that Advocate Gupta had appeared for the complainant will not be a ground to hold that the trial would not be fair to the accused. In support of his submission, the learned Counsel relied upon the judgment reported in *Ajay Kumar Vs. State and Another*, and *R. Balakrishna Pillai Vs. State of Kerala and Others*, . He then submitted that this Court should not exercise extra ordinary jurisdiction under Article 226 of the Constitution of India since there is inordinate delay of almost 13 months in filing present petition challenging the impugned order since the petition has been filed

on 24-10-2005 challenging the impugned order dated 4-9-2005.

9. In reply to the submissions made by the learned Counsel appearing for the respondents Mr. Madkholkar submitted that the law laid down by the Apex Court is binding on all in terms of Article 141 of the Constitution of India. In support of his submission, he relied upon the judgment of the Apex Court reported in Ganga Sugar Corporation Ltd. and Others Vs. State of Uttar Pradesh and Others, . He further submitted that fees payable to the Special Public Prosecutor have not been determined by the Principal Secretary, Law and Judiciary Department of the Government. He further submitted that the Apex Court in Mukul Dalal's case having held that the appointment of the Special Public Prosecutor at the request of private complainant cannot be made it will not be proper for this Court to interpret the said judgment differently. In support of his submission he relied upon para 19 of the judgment of the Apex Court reported in G.K. Dudani and Others Vs. S.D. Sharma and Others, .

10. We have considered the submissions made by the learned Counsel appearing for the parties. We have perused the records and we have gone through the authorities cited across the bar on behalf of the respective parties.

11. Before dealing with the challenge to the Notification on merits, we would like to deal with the two submissions made on behalf of the respondents. Insofar as the submission made by the learned Counsel for the respondents that the subjective satisfaction of respondent No. 1 while appointing Advocate Gupta as Special Public Prosecutor is not open to judicial scrutiny is concerned, we do not find any merit. When an action of the Government in appointing Special Public Prosecutor at the request of private complainant is challenged, it is permissible for this Court to scrutinize and find out whether the appointment has been made in terms of the Maharashtra Law Officers (Appointment, Conditions of Service and Remuneration) Rules 1984 (hereinafter referred to as "the Rules") which are applicable. The Apex Court in Mukul Dalai held that the appointment of Special Public Prosecutor at the request of the private complainant as a matter of routine cannot be upheld and consequently set aside the appointment of Special Public Prosecutors which was done in terms of Rule 22 of the Rules as it stood then. The Apex Court also declared that Rule 22 of the Rules as it stood then as bad. Therefore, the ratio laid down in Mukul Dalai's case (supra) is a complete answer to the submission made by the learned Counsel for the respondents. We are also unable to accept the submission of Mr. Manohar that the petition deserves to be dismissed on the ground of laches only. No doubt, the petition has been filed challenging the impugned order after the period of about 13 months but having regard to the nature of the challenge and having regard to the nature of the controversy involved in the petition, we are of the opinion that this is not a fit case which deserves to be dismissed in limine on the ground of laches only. Having regard to the nature of the controversy involved in the petition, we are of the opinion that the petition deserves to be dealt with on merits.

12. Since the appointment of Advocate Gupta as Special Public Prosecutor is

being challenged mainly on the ground that the same is contrary to the ratio laid down by the Apex Court in Mukul Dalai (supra), it would be appropriate to ascertain as to what the Apex Court has laid down in Mukul Dalal's case.

In Mukul Dalal's case the Apex Court was dealing with the appeals challenging the judgments of this Court by which the petitions challenging the appointment of two Advocates as Special Public Prosecutors were dismissed, upholding the appointment of the Special Public Prosecutors in terms of Rule 22 of the Rules as it stood then. This Court held that the complainant had a right to represent his case effectively before the Court and whenever a request is made by a private party to engage an Advocate of his choice to be paid for by him, the request should be granted as a rule; the complainant in such cases is either a victim of the offence or is related to the victim or otherwise an aggrieved person; he has a right to be heard and vindicated and the right to be heard implies a right to be effectively represented at the hearing of the case, he has therefore a right to engage an advocate of his choice. Therefore, there is no reason why the State should refuse him the permission to conduct the prosecution with the help of his Advocate. Rule 22 as it stood then read as under:

Rule 22 : If in any case, civil or criminal, a request is made by any private party, interested in the case, for the appointment of its own advocate as a Special Counsel or Special Public Prosecutor, as the case may be, on the condition that the payment of fees of such advocate will be borne by that party, the Remembrancer of Legal Affairs may, after considering such case on merits, appoint such advocate for that particular case or cases.

13. The Apex Court after making reference to the Judgment of the Kerala High Court in the case of P.G. Narayanankutty v. State of Kerala and Ors. 1982 Cri LJ 2085 observed at paragraphs 9 and 10 as under:

9 : Two questions have now to be dealt with - whether as a rule whenever there is a request made by a private complainant for the appointment of a Special Public Prosecutor, should the same be accepted and whether such Special Public Prosecutor should be paid by the private party availing his services. In most of the states, as we have already observed, the Remembrancer of Legal Affairs looks after the State litigations. He is a responsible officer and normally with judicial experience. When an application for the services of a Special Public Prosecutor or an Assistant Public Prosecutor is made in a given case the power would be vested in him to examine the facts and take decision as to whether the case merits the appointment of a Special Public Prosecutor or an Assistant Public Prosecutor. It could not be appropriate to accept the position that whenever an application is made it should be allowed and a Special Public Prosecutor should be appointed; this would be contrary to the spirit of the scheme of the Code. There may be cases where a power complainant may have begun a proceeding to victimize his opponent. If in such a case the State concedes to the request for appointment of a Special Public Prosecutor there will be travesty of justice. Without screening on the basis of guidelines prescribed or to be prescribed, the

services of a Special Public Prosecutor should not be made available to a private complainant. The primacy given to the Public Prosecutor under the scheme of the Code has a social purpose and the same would be lost if the procedure adopted by Rule 22 of Maharashtra Rules referred to above is accepted or what the High Court has indicated is adopted. We are inclined to observe that the request for appointment of a Special Public Prosecutor should be properly examined by the Remembrancer of Legal Affairs and only when he is satisfied that the case deserves the support of a Public Prosecutor or a Special Public Prosecutor that such a person should be appointed to be in charge of the case.

10 : "The next question would be whether the Special Public Prosecutor should be permitted to be paid by the private complainant. There is considerable force in what has been stated by the Kerala High Court in the case we have referred to above. There may be certain cases where exception may be made, such as where the prosecutor is a public sector undertaking, a bank whether nationalised or not, an educational institute and the like. The rate of fees should be prescribed and the private complainant should be called upon to deposit the fees either with the Remembrancer of Legal Affairs or a prescribed State agency from where the fees would be drawn by the Special Public Prosecutor. To leave the private complainant to pay to the Special Public Prosecutor would indeed not be appropriate. We would make it clear that we do not support the conclusion of the High Court that as a rule whenever there is request of appointment of a Special Public Prosecutor or an Assistant Public Prosecutor, the same should be accepted. The Remembrancer of Legal Affairs should scrutinize every request, keeping a prescribed guideline in view and decide in which cases such request should be accepted, keeping the facts of such case in view. Ordinarily the Special Public Prosecutor should be paid out of the State funds even when he appears in support of a private complainant, but there may be some special case where the Special Public Prosecutor's remuneration may be collected from the private source. In such cases the fees should either be deposited in advance or paid to a prescribed State agency from where the Special Public Prosecutor could collect the same. In view of these conclusions and our disagreeing with the view of the High Court, the appeals shall stand allowed. Rule 22 of the Maharashtra Rules, referred to above, in our view is bad and the State Government should properly modify the same keeping our conclusions in view. The Remembrancer of Legal Affairs of the Maharashtra Government will now decide as to whether in the three cases referred to here, the services of a Special Public Prosecutor, a Public Prosecutor or an Assistant Public Prosecutor should be- provided and in case he comes to the conclusion that such provision should be made, he should decide as to whether the State administration should pay for such Public Prosecutor or the private complainant should be bear the same. There would be no order as to costs.

It is pertinent to note that the Apex Court declared Rule 22 as bad and directed the State Government properly to modify the same keeping in view the conclusions in the said judgment. It appears that thereafter Rule 22 of the Rules

was substituted by an amendment dated 4th April, 2002. The amended Rule 22 reads as under:

Rule 22:

If in any case, civil or criminal, a request is made by any private party, interested in the case, of the appointment of its own advocate as a Special Counsel or Special Public Prosecutor, as the case may be, on the condition that the payment of fees of such advocate will be borne by that party, the party shall deposit the fees, in the Law and Judicial Department, of the Advocate, to be appointed as Special Counsel or Special Public Prosecutor, in advance to the determined by the Principal Secretary and Remembrancer of Legal Affairs, Law and Judiciary Department, Government of Maharashtra, and such fees shall be paid to the Special Counsel or Special Public Prosecutor, as the case may be, on completion of trial.

Provided that, this provision shall not be applicable to the public section undertaking, a bank, whether nationalised or not, an educational institution and the like.

14. The question, therefore, which arises for consideration is whether the appointment of Advocate Gupta by the impugned order is contrary to the ratio laid down by the Apex Court in Mukul Dalal's case. In view of the observations made by the apex court in paragraphs 9 and 10 in Mukul Dalal's case, it is clear that the Apex Court has held that when a request for the services of a Special Public Prosecutor or an Assistant Public Prosecutor is made in a given case the power would be vested in the Remembrancer of Legal Affairs to examine the facts and take decision as to whether the case merits the appointment of a Special Public Prosecutor. However, the Apex Court did not accept the position that whenever such a request is made it should be granted as a rule. The Apex Court further held that when the request for appointment of Special Public Prosecutor is made, the same should be properly examined and only when the remembrancer of Legal Affairs is satisfied that the case deserves the support of a Public Prosecutor or a Special Public Prosecutor that such a person should be appointed to be in charge of the case.

15. Insofar as the fees payable to the Special Public Prosecutor appointed pursuant to the request made by a party are concerned, the Apex Court held that the Special Public Prosecutor should not be permitted to be paid directly by the private complainant except in some exceptional cases where a public sector undertaking, a bank whether nationalised or not, or an educational institute and the like is the complainant and the rate of fees should be prescribed and the private complainant should be called upon to deposit the fees either with the Remembrancer of legal Affairs or a prescribed State agency from where the fees would be drawn by the Special Public Prosecutor. The Apex Court further observed that ordinarily the Special Public Prosecutor should be paid out of the State funds even when he appears in support of a private complainant, but there

may be some special case where the Special Public Prosecutor's remuneration may be collected from the private source and in such cases the fees should be deposited in advance or paid to a prescribed State agency from where the Special Public Prosecutor could collect the same. It is pertinent to note that in the said judgment the Apex Court after setting aside the judgment of this Court directed the Remembrancer of Legal Affairs of Maharashtra Government to decide as to whether the services of Special Public Prosecutor, a Public Prosecutor or an Assistant Public Prosecutor should be provided and that in case he comes to the conclusion that such provision should be made, he should decide as to whether the State administration should pay for such Public Prosecutor or the private complainant should bear the same.

16. On a plain reading of the judgment in Mukul Dalai, it is clear that the Supreme Court has held that the appointment of the Special Public Prosecutor at the request of the private complainant cannot be as a matter of rule but in case such request is made the Legal Remembrancer should scrutinize and come to the conclusion whether there is a case for appointment of a Special Public Prosecutor and in case he comes to the conclusion that the Special Public Prosecutor has to be appointed he should call upon the complainant to deposit the fees payable to Special Public Prosecutor. In view of this ratio laid down by the Apex Court, we are unable to accept the submission of Mr. Madkholkar that the appointment of Special Public Prosecutor cannot be made at the request of a private complainant. No doubt, when such request is made, the request will have to be scrutinized and Legal Remembrancer will have to scrutinize the case and after independently applying his mind come to the conclusion whether such an appointment should be made or not. We are also unable to accept the submission of Mr. Madkholkar that the appointment of Mr. Gupta as a Special Public Prosecutor has been made in mechanical fashion since the records disclose that the Desk Officer, Law and Judiciary Department addressed letter dated 16th August 2004 to District Government Pleader, Nagpur, in connection with the appointment of Advocate Gupta as a Special Public Prosecutor and by reply dated 20-8-2004 the District Government Pleader, Nagpur recommended the appointment of Advocate A. Gupta as Special Public Prosecutor in the case. Therefore, it cannot be said that there is non-application of mind while passing the impugned order by respondent No. 1. Insofar as the argument of Mr. Madkholkar that the fees payable to Advocate Gupta has not been fixed by the Legal Remembrancer is concerned, the same de-serves to be rejected for two reasons. Firstly, no such specific ground has been taken in the petition so as to enable respondent Nos. 1 and 2 to deal with the same and secondly, even on merits it appears that the submission is not well founded. The records disclose that Advocate Gupta quoted Rs. 25,000/- as lump sum fees for the matter which appears to have been accepted by respondent No. 1 and in the impugned order it has been stated that the fees have been already deposited and the same will be paid to Shri Gupta Advocate after completion of the case. That being the position, we do not find any merit in the submission of Mr. Madkholkar that the

fees have not been fixed by the Legal Remembrancer.

17. Insofar as the argument of Mr. Madkholkar that the appointment of Advocate Gupta as Special Public Prosecutor could not have been made for conducting Sessions trial as on 4th September 2004 when the matter was at the stage of investigation and therefore, the impugned notification deserves to be quashed and set aside is concerned, we are unable to accept the same. It has also been mentioned in the impugned order that the Special Public Prosecutor has also been appointed for incidental proceedings arising out of C. R. No. 204/ 2004. Needless to mention that once a crime is registered, the incidental proceedings like bail application or anticipatory bail application by the accused may follow and therefore, it is permissible for the Government to appoint Special Public Prosecutor to appear on behalf of the State even in the incidental proceedings. The mere use of words "Sessions Trial" in the order, in our view does not vitiate the impugned order.

18. The next argument advanced by Mr. Madkholkar is regarding the appearance of Advocate Gupta on behalf of the complainant even prior to his appointment as Special Public Prosecutor. In our opinion, the mere fact that Advocate Gupta had appeared on behalf of the complainant prior to his appointment to assist the Public Prosecutor does not bar respondent No. 1 from appointing him as Special Public Prosecutor in the case. The records disclose that there has been application of mind by respondent No. 1 before appointing Advocate Gupta as Special Public Prosecutor and therefore, it cannot be said that respondent No. 1 has appointed Advocate Gupta as Special Public Prosecutor mechanically at the request of the complainant. No doubt it is expected of Advocate Gupta who has been appointed as Special Public Prosecutor in the case to discharge his duties in the true spirit and in the manner expected of a Special Public Prosecutor. Therefore, in our opinion, we find no merit in the submission made by Mr. Madkholkar. In our opinion the impugned order has been passed in terms of Rule 22 of the Rules and the same has not been made contrary to the observations/directions given in Mukul Dalal's case.

19. In our opinion, it is not necessary to deal with other authorities relied upon by the learned Counsel for the parties in view of the findings given hereinabove.

20. In view of the above discussion, we do not find any merit, in this petition. Consequently rule is discharged with no order as to costs. Interim order dated 7-12-2005 stands vacated.

21. At this stage, Mr. P. C. Madkholkar, learned Counsel for the petitioner prays that the interim order, dt. 7-12-2005 be continued for a period of three weeks. It has been pointed out by Mr. Loney, learned A.P.P. that the proceedings in the trial Court have been stayed in the Revision Application filed by the accused against the order framing charge. Having regard to the findings given by us and to the order passed in the Revision Application filed by the accused, we see no reason to grant the request of learned Counsel for the petitioners. Therefore, the prayer

is rejected.