

(2008) 07 BOM CK 0083

In the Bombay High Court

Case No : Criminal Writ Petition No. 234 of 2008

Prakash Pralhad Patil

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 04-07-2008

Acts Referred:

Conduct of the Legal Affairs of Government Rules, 1984 — Rule 22, 22(1), 22(2), 22(3)
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 2, 24(1), 24(8), 25, 25(1)

Citation : (2008) 110 BOMLR 2183

Hon'ble Judges : R.Y. Ganoo, J;B.H. Marlapalle, J

Bench : Division Bench

Advocate : V.T. Tulpule and Umesh Mankapure, for the Appellant; Ravi Kadam, General, D.S. Mhaispurkar, APP, K.K. Singhvi, Senior Advocate, A.P. Mundargi, instructed by Sudatta Patil and S.B. Shetye for respondent No. 7, Nitin Jamdar, instructed by Vijay Killedar, for the Respondent

Final Decision : Allowed

Judgement

B.H. Marlapalle and R.Y. Ganoo, JJ.—Heard Mr. Tulpule with Mr. Mankapure the learned Counsel for the petitioner.

2. Rule. Respondents waive service. The petition has been finally heard.

3. The petitioner has challenged the order dated 12/10/2007 issued by the Government of Maharashtra through the Department of Law and Judiciary in exercise of its powers u/s 24(8) of the Code of Criminal Procedure, 1973 and by the said order the respondent No. 7 has been appointed as "Special Public Prosecutor" for conducting Sessions Case No. 41 of 2006 pending before the Sessions Court at Islampur in Sangli District. By a subsequent order dated 18/12/2007 issued through the Department of Home, the State Government has fixed the professional fees and directed to be paid from the Government funds as under:

4. The appointment has been challenged on various grounds and it has been

mainly stated that the same is not in keeping with the scheme of Section 24(8) of Cr.P.C. read with Rule 22 of the Rules for the Conduct of the Legal Affairs of Government, 1984 (for short the Rules of Legal Affairs) and the law laid down by the Supreme Court in the case of Mukul Dalal and Others Vs. Union of India (UOI) and Others, as well as the decisions of this Court in the case of Sushil Hiralal Chokhani and Ors. v. State of Maharashtra and Ors. 2005(2) Bom. C.R. (Cri.) 54 and Omprakash Baheti and Others Vs. State of Maharashtra and Others, . The challenge is also on the ground that the impugned order suffers from non application of mind, unreasonableness and arbitrariness. It was also contended that the impugned order is perverse, illegal and not in public interest.

5. On behalf of the Department of Law and Judiciary, affidavit-in-reply has been filed by the Under Secretary in the said Department and on behalf of the Home Department, the Deputy Secretary has filed affidavit-in-reply. It is stated that the present respondent No. 8 submitted an application on 28/3/2007 to the Hon''ble Chief Minister with a request to appoint respondent No. 7 as the Special Public Prosecutor in Sessions Case No. 41 of 2006. In the incident, giving rise to Sessions Case No. 41 of 2006, the applicants father Shri Dilip Sakharam Patil and brother Vikram Dilip Patil were killed in a brutal and broad day light murder in public place on 21/7/2006 and telephonic threats were being received by some of the eye-witnesses to the alleged incident of murder. In order to ensure that there be a fair conduct of the case, it was necessary to make the appointment of Special Public Prosecutor, the guide-lines set out in Rule 22 of the Rules of Legal Affairs were examined and the matter was also referred to the Home Department which, in turn, had called for the opinion of the District Superintendent of Police, Sangli and finally taking into consideration the material collected and after full application of mind to it by the Remembrancer of Legal Affairs (RLA), recommendation was made to the Government for appointment of respondent No. 7 as Special Public Prosecutor. It is further claimed that the respondent No. 4 has strictly followed the prescribed procedure and all the formalities for appointment of the Special Public Prosecutor.

6. Section 24(8) of the Code of Criminal Procedure states,

The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

Rule 22, as originally framed in 1984 reads as under:

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.

In the case of Mukul Dalal (Supra) the Supreme Court held Rule 22 as bad and

stated that the Government should properly modify the said Rule in keeping with the conclusions recorded in the judgment. On 4/4/2002 the Government of Maharashtra amended Rule 22 as under:

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 Judiciary Department, of the Advocate, to be appointed as Special Counsel or Special Public Prosecutor, in advance to be 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 sector undertaking, a bank, whether nationalised or not, an educational institution and the like.

7. Having realised the deficiencies in the amended Rule as well, the Government of Maharashtra vide its Resolution dated 13/9/2004 again amended Rule 22 and the said Rule, applicable as of now, reads as under:

22. Engagement of Special Public Prosecutor.-(1) The Government in the Law and Judiciary Department, either suo motu, or on the request of any aggrieved party or the concerned Department in the Government, may, engage an Advocate who has been in practice as an Advocate for not less than ten years, and having regard to his general repute, legal acumen and suitability, by appointing him, as a Special Public Prosecutor in any criminal case or class of cases, as the case may be:

Provided that, no order under this sub-rule regarding appointment of a Special Public Prosecutor shall be made unless, for the reasons to be recorded in writing, the Remembrancer of Legal Affairs is satisfied, having regard to the nature of the case, gravity of the matter and public interest involved in the matter that such appointment is necessary.

(2) On the request of a private complainant not being the aggrieved party, the Government in the Law and Judiciary Department may, appoint any of the Public Prosecutor or Additional Public Prosecutor as a Special Public Prosecutor in accordance with the provisions of Sub-rule (1), for conducting any such case.

(3) Fees for such Special Public Prosecutor, appointed under Sub-rule (1) or (2), may be borne by the Government or the aggrieved party or the private complainant, as may be directed by the Remembrancer of Legal Affairs;

Provided that, in cases where the aggrieved party is, a Bank or an Institution or Trust or the like, the fees shall be borne by such aggrieved party;

Provided further that, the amount of the fees to be paid to such Special Public Prosecutor, shall be deposited with the Government in the Law and Judiciary Department first, and the same shall be paid by it to such Special Public Prosecutor on completion of the trial, unless directed otherwise by the Remembrance of Legal Affairs.

8. Sub-rule (1) of Rule 22 empowers the Government in the Law and Judiciary Department, either suo motu or on the request of any aggrieved party to engage an Advocate as a Special Public Prosecutor in any criminal case or class of cases. The Advocate sought to be engaged is required to be in practice as an Advocate for not less than ten years and for his appointment regards be had to his general repute, legal acumen and suitability. The proviso below Sub-rule (1) of Rule 22 states that no order under the said sub-rule regarding appointment of Special Public Prosecutor shall be made unless, for the reasons to be recorded in writing, the Remembrancer of Legal Affairs (RLA) is satisfied, having regard to the nature of the case, gravity of the matter and public interest involved in the matter that such appointment is necessary. Sub-rule (2) of Rule 22 is for a private complainant not being the aggrieved party, for appointment of a Public Prosecutor or Additional Public Prosecutor as a Special Public Prosecutor, whereas Sub-rule (3) of Rule 22 states that the fees for such Special Public Prosecutor may be borne by the Government or the aggrieved party or the private complainant, as may be directed by the RLA.

9. It is thus clear that the first part of Rule 22(1) speaks of the requirements to be met by an Advocate for being appointed as a Special Public Prosecutor by the Government, either suo motu or on the request of any aggrieved party, whereas in the second part, under the proviso, the RLA is required to record reasons in writing about his satisfaction on the necessity of such appointment, having regard to the nature of the case, gravity of the matter and public interest involved in the matter that such appointment is necessary.

10. After the Supreme Court decision in the case of S.B. Shahane and others Vs. State of Maharashtra and another, , the Government of Maharashtra through its Home Department issued a G.R. dated 10/1/2000 and laid down, inter alia, that the Sessions cases of special importance would be handled by the Assistant Director of Prosecution and Public Prosecutor and Director of Prosecution will be the head of all the Prosecutors in the State. Section 25A has been inserted in the Code of Criminal Procedure (Amendment Act, 2005) with effect from 23/6/2006 and as per the same, the Director of Prosecution will be the head of the Directorate of Prosecution and shall function under the administrative control of the head of the Home Department in the State. Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under subsection (1) or as the case may be under subsection (8) of Section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution and every Deputy Director of Prosecution shall be subordinate to the Director of Prosecution. Every Public Prosecutor, Additional

Public Prosecutor and Special Public Prosecutor appointed by the State Government under subsection (3) or as the case may be under subsection (8) of Section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed under subsection (1) of Section 25 shall be subordinate to the Deputy Director of Prosecution. Having regards to the G.R. dated 10/1/2000 and the scheme of Section 25A of Cr.P.C., we had raised a query as to whether it is necessary to obtain the opinion of the Director of Prosecution before an order under Rule 22 is passed for the appointment of a Special Public Prosecutor. The response of the learned Advocate General as well as that of Mr. Singhvi, the learned Senior Counsel for respondent No. 7 was in the negative. The learned Advocate General further stated that the provisions of Section 25A of Cr.P.C. have not been made applicable as yet by the State Government as the Directorate of Prosecution has been established by the State Government much before the introduction of the said Section in Cr.P.C. and, therefore, in a given case the issue raised by the court is required to be considered, but in any case it was not necessary for the State Government to obtain the opinion of the Director of Prosecution while passing the impugned order.

We are surprised that the RLA has not briefed the learned Advocate General about the facts, as available on record on this issue. In Criminal Writ Petition No. 628 of 2008 similar appointment made under Rule 22 of Rules of Legal Affairs on 29/11/2007 has been challenged and we have seen from the file that before the said order was passed, the Home Ministry had sought the opinion of the Director of Prosecution. If the petition succeeds on not meeting the requirements of Rule 22 of Rules of Legal Affairs, we need not address to the issue of consultation with the Director of Prosecution while passing the order for appointment of Special Public Prosecutor. At the same time it ought to be noted once Section 25A of Cr.P.C. has been brought into force w.e.f. 23/6/2006, by the Central Government, the State Government has no option but to abide by it though it may seek suitable amendments thereto.

11. Mr. Tulpule, the learned Counsel for the petitioner, has invited our attention to the complaint of respondent No. 8, recorded by the police on 21/7/2006 and pointed out that the incident in which the complainants father died and his brother was seriously injured has obviously taken place on account of the family feud and further pointed out that the respondent No. 8 runs a permit room with licence in his mothers name and, therefore, the request made by respondent No. 8 did not meet any of the reasons set out in the proviso to Rule 22(1) of the Rules of Legal Affairs in as much as the nature of the case was not such that the Public Prosecutor at Sangli could not present the prosecution case before the Sessions Court, the gravity of the matter was not such that the prosecution case was required to be presented by an Advocate with better experience and standing than the Public Prosecutor at Sangli and in any case there was no public interest involved in the matter so as to appoint Special Public Prosecutor. He further pointed out that when respondent No. 8 admittedly has been running a permit room, the State went out of the way to give the legal fees of respondent

No. 7 from the State account.

12. In keeping with the requirements in the first part of Rule 22(1), we had passed an order on 13/6/2008 directing the Director of Prosecution to place on record the track record of respondent No. 7 as available in the record. Despite the affidavit having been presented by Shri R.D. Sankhe, Incharge Director of Prosecution, Maharashtra State, for the second time, the said affidavit does not state that the record available in the office of the Director of Prosecution was perused and as per the same, nothing adverse was noticed. It only states that respondent No. 7 is a well known Advocate. However, in his fairness, Mr. Tulpule did not press the challenge to the impugned order on the ground of the abilities or antecedents of respondent No. 7 and he has limited his challenge only on the reasons to be recorded in writing by the RLA while making such appointment as Special Public Prosecutor.

13. Mr. Kadam, the learned Advocate General has supported the impugned order and by referring to the affidavit-in-reply filed by the Under Secretary in the Department of Law and Judiciary, he submitted that the Government was satisfied on the nature of the offence, the gravity of the offence and the public interest involved necessitating the appointment of a Special Public Prosecutor. He also submitted that once, on the basis of the reasons recorded by the RLA, the Government has issued the impugned order, the scope of its judicial review at the hands of this Court is limited and this Court will not examine the said order as if sitting in appeal over it. Mr. Kadam has also raised a preliminary point and submitted that the petition is required to be dismissed as not maintainable or on account of suppression of facts by the petitioner. The learned Advocate General referred to the averments made in the petition in para 12 and

18. As per Mr. Kadam, if the petitioner did not have sympathy for the accused or the deceased and he has challenged the order only on the ground that it violated the guide-lines as well as law laid down by the Apex Court or he filed the petition in public interest, being a social worker, it was required to be registered as a PIL Petition and to be heard and decided by the appropriate Bench dealing with such petitions. The rejoinder filed by the petitioner was also referred to, wherein he has admitted that his brother is one of the co-accused and as such being a family member, he has the locus standi to file a petition. Mr. Kadam, therefore, submitted that the petitioner is guilty of suppression of material facts in as much as when the petition was registered, the petitioner did not disclose that he was the brother of one of the co-accused and, therefore, he was an aggrieved person and on this ground of suppression of material facts, the petition has to be dismissed. We are not impressed by these arguments. This petition came up initially on the Civil Side and it was registered as Writ Petition No. 57 of 2008. It was never registered as a PIL Petition. As per the order dated 7/1/2008, leave was granted to amend the petition so as to place it on the Criminal Side and, therefore, it was re-registered as Criminal Writ Petition No. 234 of 2008. The question for consideration before us is very limited, namely, whether the

impugned order meets the requirements of Rule 22 of Rules of Legal Affairs.

14. Mr. Singhvi, the learned Senior Counsel appearing for respondent No. 7, while supporting the arguments advanced by the learned Advocate General, has opposed the petition. He admitted that the respondent No. 7 is, as at present, the District Government Pleader and Public Prosecutor for Jalgaon District. On the issue of the antecedents of the applicant (respondent No. 8), it was submitted by the learned Advocate General that the same was irrelevant and what was required to be considered by the Government was the nature and gravity of the incident which is subject matter of the Sessions Case in which the appointment of Special Public Prosecutor is sought to be made. It was submitted that the State Government is not required to consider the antecedents of the persons or body of persons approaching it for appointment of a Special Public Prosecutor. In the body of the petition as well as in his oral arguments, Mr. Tulpule the learned Counsel for the petitioner pointed out that nearly seven non cognizable cases bearing RCC No. 141/05, RCC No. 249/97, RCC No. 81/06, C.R. No. 167/07 and C.R. No. 13/07 were registered against the deceased and on the face of these pending complaints, whether it was in public interest that the impugned order was passed on the representation of the respondent No. 8 Mr. Tulpule also submitted that at Sangli there are in all 36 Public Prosecutors appointed by the State Government and neither the nature nor the gravity of the offence, nor the public interest warranted that respondent No. 7, the Public Prosecutor at Jalgaon was appointed as the Special Public Prosecutor in Sessions Case No. 41 of 2006 pending before the learned Additional Sessions Judge at Islampur in Sangli District. He submitted that the registration of C. Rs. against the deceased or is family members, was never considered before the impugned order was passed and hence it is vitiated on that ground.

15. On the issue of scope and extent of power of judicial review, a three Judge Bench in the case of State of U.P. and Another Vs. Johri Mal, held as under:

The scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi judicial or administrative. The power of judicial review is not intended to assume a supervisory role or don the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the Courts step into the areas exclusively reserved by the supreme lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review succinctly put are:

(i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies.

(ii) A petition for a judicial review would lie only on certain well-defined grounds.

(iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.

(iv) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a Court is limited to seeing that Tribunal functions within the limits of its authority and that its decisions do not occasions miscarriage of justice.

(v) The Courts cannot be called upon to undertake the Government duties and functions. The Court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a Judge should not be invoked as a substitute for the judgment of the legislative bodies. (See *Ira Munn v. State of Illinois* 1876 (94) US (Supreme Reports) 113).

The Supreme Court further clarified that while exercising the power of judicial review the Court is more concerned with the decision making process than the merit of the decision itself. But while examining and scrutinizing the decision making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. To a limited extent of scrutinizing the decision making process, it is always open to the Court to review the evaluation of facts by the decision maker and malicing of law can also be a ground for judicial review.

16. As per Section 25 of Cr.P.C. that every trial before a court of Sessions, the prosecution shall be conducted by a Public Prosecutor. As per Section 2(u) of Cr.P.C., "Public Prosecutor" means any person appointed u/s 24, and includes any person acting under the directions of a Public Prosecutor. Section 301 of Cr.P.c. deals with the appearance by Public Prosecutor and it reads as under:

301. Appearance by Public Prosecutor.- (1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

Undoubtedly, the Public Prosecutors have greater responsibility and they are required to perform statutory duties independently having regard to various provisions contained in Cr.P.C. The Public Prosecutors while presenting a prosecution case have a duty to see that innocent persons may not be convicted as well as an accused guilty of commission of crimes does not go unpunished.

17. The law laid down by the Supreme Court and this Court as well as other High

Courts for the appointment of Special Public Prosecutor could be formulated as under:

(a) The appointment of a Special Public Prosecutor is not to be made for the asking and it is not that whenever an application is made, it should be allowed and a Special Public Prosecutor is appointed.

(b) Without scrutinizing ,on the basis of the guide-lines prescribed, the services of a Special Public Prosecutor should not be made available to a private complainant.

(c) The request for appointment of a Special Public Prosecutor should be properly examined by the RLA and only when he is satisfied, having regards to the nature of the case, gravity of the matter and public interest involved in the matter, that such appointment is necessary.

(d) An Advocate being appointed as a Special Public Prosecutor has to be in practice for not less than ten years and regard must be had to his general repute, legal acumen and suitability.

(e) Before acceding to the request by any private party for appointment of a Special Public Prosecutor, it is necessary for the RLA to get himself satisfied about the necessity of such appointment having regard to the nature of the case, gravity of the matter and public interest involved therein. Such satisfaction should be reflected from the order recorded in writing by the RLA while approving the appointment.

(f) The RLA must be satisfied that the case wherein such appointment is requested for deserves and the prevailing circumstances need the appointment of a Special Public Prosecutor.

(g) The points relating to the persons reputation and experience at Bar should find place in the consideration by the RLA and it should not be a mechanical exercise on his part.

(h) Such appointment shall be, on consideration of all the relevant factors in relation to a particular case or class of cases and the consideration thereof should be apparent from the order of appointment issued by such authority and it is not necessary that the notification for such appointment need reflect the entire order itself.

(i) The payment of fees of the Special Public Prosecutor, the quantum as well as source of payment should not only be specified but should also be reasonable and justified.

The Division Bench of this Court in the case of Sushil Hiralal Chokhani (Supra) further stated as under:

...As already observed above, the said Rules require that the appointment of a Special Public Prosecutor has necessarily to be by a reasoned order in writing by

the Remembrance of Legal Affairs. The required criteria prescribed for an Advocate to be appointed as Special Public Prosecutor is satisfied or not is necessarily to be considered by Remembrancer of Legal Affairs before engaging any Advocate as the Special Public Prosecutor in a particular case or class of cases. So also, consideration of involvement of the public interest in the matter or matters, as the case may be, is a pre-requisite for approval of the proposal for appointment of a Special Public Prosecutor and further that such a consideration has to be in accordance with the rules framed and the guidelines laid down by the Apex Court and the same should be clearly revealed from the order itself, and such order should be by Remembrancer of Legal Affairs.

The reasoned order would obviously mean that the order should reflect consideration of all the relevant materials necessary for approval of the proposal regarding the appointment of the Special Public Prosecutor. Once an authority passing the order is required to disclose the consideration of the relevant factors while passing the order itself, it is needless to say that the order on the face of it should disclose the said consideration. The law that an order passed by the statutory authority must be judged on the fact of it, as the reasons contained therein cannot be supplemented on an affidavit, is well settled..... In any case, when the order is challenged on account of non-consideration of materials and non-application of mind by the concerned authority, the respondents cannot merely dump the records before the Court and leave it to the Court to scrutinise the records to satisfy itself about the consideration of those materials and application of mind by the concerned authority. It is primarily for the concerned authority to satisfy the Court about such consideration of the relevant materials and application of mind by such authority before passing the order and for that matter, it would be absolutely necessary for the concerned authority to file affidavit in that regard and not by any other person. Besides, the affidavit should be of relevant facts. What merits is the quality, what persuades is the authoritative statement, what recognizes the authority is the authorship of the decision. Being so, neither the quantity weighs, nor an unauthoritative statement counts.

18. In the instant case, the RLA has not filed affidavit-in-reply and instead the Under Secretary has filed the reply and this does not meet the above stated observations made by the Division Bench of this Court in Sushil Hiralal Chokahnis case (Supra). Rather than setting aside the impugned order on this sole ground, we deem it appropriate to consider the affidavit filed by the Under Secretary on behalf of respondent No. 4 and examine, whether the record placed before us supports the said affidavit. The relevant averments, justifying the impugned order and as made in the return filed by the Under Secretary, are as under:

....I further say application was forwarded to the Law and Judiciary Department and the same was processed by following provisions of Section 24(8) of Criminal Procedure Code read with Rule 22 of the Maharashtra Law Officers Rules and the guidelines laid down by the Hon''ble Supreme Court of India.

The matter was referred to the Home Department for remarks regarding payment of fees. The matter was considered by the Home Department and after ensuring the willingness of Respondent No. 7 and taking into consideration the nature and gravity of offence, the Home Department decided to bear the fees of Respondent No. 7 as claimed by him.

The matter was then again processed by Law and Judiciary Department and submission was made to the Government, clearly stating grounds for appointment of Special Public Prosecutor, nature and gravity of offence and since it was brought on record that the murder was committed on the alleged cause on account of dispute over payment of hotel charges, molestation of a girl, although superficially it appears to be the personal dispute between two groups of the complainant and the accused persons, the element of public interest in so far as maintenance of law and order is involved.

Taking into consideration the material collected and brought on record and after full application of mind to it by the Remembrancer of Legal Affairs, the recommendation was made to the Government for appointment of Respondent No. 7 as the Special Public Prosecutor. The Government has approved the proposal and thereafter, the impugned Notification dated 12th October, 2007 was issued.

It is thus obvious that the Respondent No. 4 has strictly followed the prescribed procedure and all the formalities of appointment of special public prosecutor. Although sufficient number of additional public prosecutors are appointed for Sangli District and the trial could have been entrusted to them, yet taking into consideration peculiar nature, gravity of offence and circumstances brought on record, it was necessary to make appointment of Special Public Prosecutor in this case, at the cost of the Government in order to inspire confidence in the people at large that the Government wishes to ensure that trials are being prosecuted seriously and the Government wants to enforce proper law and order situation.

19. We are sorry to observe that the said averments made in the return are not supported from the record and the averments made in the return cannot justify the order under challenge. The record shows that the respondent No. 8 submitted an application dated 28/3/2007 to the Hon"ble Chief Minister and it was placed before the Hon"ble Chief Minister on 29/3/2007. It was not received by the Home Department or the Department of Law and Judiciary of the State. The applicant-respondent No. 8 stated that the chargesheet was filed against six accused (accused No. 1 is the brother of the present petitioner), the entire Walwa Taluka was under terror because of the incident of murder of the applicants father and brother on 21/7/2006 and in protest the residents of Takari village had closed the market for two days in support of their demand to arrest the accused, the Congress Party workers from village Takari and the surrounding areas had maintained calm and, therefore, no untoward incident had taken place, late Shri Dilip Patil was a Congress Party Leader and to ensure that the trial is not conducted under pressure or fear, it was necessary that the prosecution was

represented by a Special Public Prosecutor, respondent No. 7 be appointed as such and if would be appointed, the complainant and the witnesses to the incident would get a solace. It is pertinent to mention that the applicant did not ask for the Special Public Prosecutors fees to be borne by the State Government. However, on 20/4/2007 the applicant-respondent No. 8 addressed a letter to the Principal Secretary in the Department of Law and Judiciary and stated that he would not be able to bear the professional fees of respondent No. 7 on his appointment as Special Public Prosecutor.

20. On 29/3/2007 itself the Hon"ble Chief Minister had passed the order, "Please appoint". On 30/3/2007 the Department of Law and Judiciary submitted a note referring to the application dated 28/3/2007 and the order passed by the Hon"ble Chief Minister. The note clearly stated that there should be no objection to call for the opinion of the District Government Pleader and Public Prosecutor at Sangli regarding the request made for the appointment of the Special Public Prosecutor and also the consent of the applicant to pay the fees and deposit the same with the State Government. The Section Officer on 30/3/2007 addressed a letter to the District Government Pleader and Public Prosecutor at Sangli inviting his opinion. On the same day i.e. on 30/3/2007 a letter was also addressed to the applicant-respondent No. 8 to deposit the legal fees so payable. The note also stated to submit justification for the appointment of a Special Public Prosecutor in place of the Public Prosecutor.

By his letter dated 17/4/2007, Shri V.K. Mohite, the District Government Pleader, Sangli, addressed to the Section Officer in the Law and Judiciary Department stated as under:

The learned District Government Pleader also referred to the law laid down by the Supreme Court in the case of Mukul Dalal (Supra) and reiterated that it was not necessary to appoint Special Public Prosecutor in Sessions Case No. 41 of 2006. At the same time on 18/4/2007 the District Superintendent of Police, Sangli addressed a letter to the Section Officer in the Law and Judiciary Department, stating that in the investigation, solid evidence was collected and in view of the terror spread in the public, it was necessary to ensure that the culprits are given the highest sentence and, therefore, the appointment of respondent No. 7 as Special Public Prosecutor was necessary.

On 27/4/2007 a statement by way of a Chart was prepared and a note was submitted by the Section Officer in the Law and Judiciary Department and in Column No. 8 of the said statement it was clearly pointed out that the District Government Pleader at Sangli had opposed the appointment of Special Public Prosecutor. It also recorded the request of the applicant-respondent No. 8 to pay the fees to respondent No. 7 from the Government funds. The Solicitor and Joint Secretary recorded his opinion on the said note as under:

Discussed, seen and read. Applicant is incapable of paying the fees to Shri Ujwal Nikam on account of his financial position. In this case the District

Superintendent of Police at Sangli has recommended the appointment of Special Public Prosecutor. It is necessary to submit the proposal to the Home Department. If the Home Department approves, Shri Nikam could be appointed on payment of fees from the Government account. Hence, there should be no objection for forwarding the file to Home Department. 30/4/2007.

21. The note was approved by the Principal Secretary and RLA (Shri A.P. Bhangale) on 7/5/2007. The Home Department prepared a note on 6/6/2007 and concluded the note in the following words:

This proposal was approved by the Principal Secretary in the Home Department on 12/6/2007 and the Home Minister approved it on 13/6/2007. On 23/8/2007 the Section Officer in the Home Department put up a note referring to the Rules of 1984 and more particularly Rules Nos.18 to 23 therein and stated that the application of respondent No. 8 was required to be considered in keeping with the said Rules and, therefore, the following information should be called from the Director of Prosecution, Maharashtra State, Mumbai with a copy to the District Superintendent of Police, Sangli on the following issues:

(i) What is the nature of the crime?

(ii) Is the Public Prosecutor looking after the case, as of now?

(iii) Is it necessary to appoint Special Public Prosecutor instead of the Public Prosecutor?

This note was approved Secretary, but the Joint Secretary (Legal) in the Home Department put up his remark, by the Deputy

Superintendent of Police, Sangli has sent recommendation on page 15 to 17. In view of the order passed by the Hon'ble Chief Minister, be sent to the Law and Judiciary Department with reference to the appointment.

The Principal Secretary in the Home Department on 27/8/2007 remarked,

Please enquire from Mr. Nikam if he is willing to take up such case.

It is pertinent to note that the Principal Secretary and RLA did not record his opinion on this note, either way. On 3/9/2007 the Home Department prepared a note approving the rates of fee payable to respondent No. 7 and at the same time reiterated the recommendation made by the District Superintendent of Police at Sangli and the note concluded to seek orders as to whether the Law and Judiciary Department should be requested to proceed with the appointment of respondent No. 7. This note was approved by the Home Minister again referring to the recommendations made by the Superintendent of Police, Sangli and the order passed by the Hon'ble Chief Minister on the application submitted by respondent No. 8 and the file was directed to be sent to the Law and Judiciary Department with the further clarification that the fees will be borne by the Home Department. On 26/9/2007 this note was placed before the Principal Secretary, Law and Judiciary Department and he merely signed without recording any

opinion. On 27/9/2007 the Section Officer in the Law and Judiciary Department prepared a note. The Solicitor and Joint Secretary on 28/9/2007 remarked,

Proposal is of Home Department. The case is of double murder. Though reason for the incident was casual, the murder had taken place in broad day light. Hence, the case is serious. Please approve the appointment of Shri Ujwal Nikam as Special Public Prosecutor.

The note was placed before the Principal Secretary and RLA on the same day i.e. on 28/9/2007 and he merely signed, without recording any opinion. The note was approved by the Minister of State for Law and Judiciary on 28/9/2007 and finally it was approved by the Hon''ble Chief Minister on 4/10/2007. We have recorded our observations from the file only with a view to examine whether the requirements of Rule 22 were complied or fulfilled.

22. It is thus clear from the original file submitted before us that,

(a) The Principal Secretary and RLA did not record any opinion for his satisfaction as required under the proviso to Rule 22 (1) of the Rules of Legal Affairs and consequently the Hon''ble Home Minister as well as the Hon''ble Chief Minister was not made aware of the legal requirements governing the appointment of the Special Public Prosecutor.

(b) The proposal was noted solely on the basis of the order passed by the Hon''ble Chief Minister on 29/3/2007 on the application submitted by the respondent No. 8 and the recommendation sent by the District Superintendent of Police at Sangli.

(c) Though the note prepared by the Section Officer in the Home Department on 23/8/2007 suggested for calling the opinion of Director of Prosecution, obviously the proposal was never referred to the Director of Prosecution.

(d) Neither the Home Department nor the Law and Judiciary Department recorded any reasons disagreeing with the recommendation sent by the District Government Pleader and Public Prosecutor at Sangli in response to the letter addressed by the Law and Judiciary Department to him and the note finally put up before the Hon''ble Home Minister as well as the Hon''ble Chief Minister did not refer to the recommendations of the District Government Pleader and Public Prosecutor at Sangli opposing the application of respondent No. 8.

(e) Despite the fact that the applicant-respondent No. 8 was running a permit room (the license of permit room is in the name of his mother), there is nothing on record to support the opinion recorded on the file that the applicant was financially weak and was, therefore, not in a position to bear the fees of respondent No. 7.

23. We, therefore, reiterate that the affidavit submitted before us by the Under Secretary in the Department of Law and Judiciary is contrary to the record and it is misleading to say the least. The Principal Secretary and RLA did not perform

his role as has been set out in the judgment of this Court in the case of Sushil Chokhani (Supra). It appears that the Principal Secretary and RLA simply did not find it necessary to bring it to the notice of the Government the legal principles governing the appointment of a Special Public Prosecutor, for the reasons best known to him. The Principal Secretary and RLA is a Senior District Judge deputed by the High Court and these judicial officers must remember that in a democratic polity the rule of law is the hallmark of democracy. It is their bounden duty to record the legal position on any proposal so as to enable the Government to take a decision. It is another aspect, if the Government proceeds to take a decision overruling such legal opinion, but the legal opinion must be recorded. It was incumbent on the part of the Principal Secretary and RLA to bring to the notice of the Government the law laid down by the Supreme Court in Mukul Dalals case (Supra) as well as the law laid down by this Court in Sushil Chokhanis case for the appointment of the Special Public Prosecutor u/s 24(8) of Cr.P.C. read with Rule 22 of the Rules of Legal Affairs as amended in the year 2005. The said Rule clearly states that no order thereunder regarding appointment of Special Public Prosecutor shall be made unless, for the reasons to be recorded in writing, the RLA is satisfied having regard to the nature of the case, gravity of the matter and public interest involved in the matter that such an appointment is necessary. It is thus clear that there is nothing on record to show that the requirements of Rule 22(1) of the Rules of Legal Affairs was satisfied except the opinion of the District Superintendent of Police, Sangli and such an opinion cannot be a reason to hold that the RLA was satisfied having regard to the nature of case, gravity of the matter and public interest involved in the matter that such an appointment was necessary. The scheme of Rule 22(1) clearly states that unless the RLA records his satisfaction for the appointment of the Special Public Prosecutor having regard to the nature of the case, gravity of the matter and public interest involved in the matter, the State Government cannot pass an order appointing the Special Public Prosecutor. It is for the State Government to be satisfied about the credentials of the Advocate being appointed as a Special Public Prosecutor. However, the Government cannot issue the order unless the RLA, for the reasons to be recorded and having regard to the nature of the case, gravity of the matter and the public interest involved in the matter, recommend such appointment. In the instant case the RLA has done precious little and, in fact, nothing, except to put his signature on the proposal received by the Home Ministry or on the proposal submitted before the Hon"ble Chief Minister. 24. The Superintendent of Police, Sangli did not refer to the criminal complaints registered against the deceased and his family members and in the affidavit in reply filed by the State, there is no denial to the pendency of these cases, as has been stated by the petitioner and referred to hereinabove. It is also admitted that the incident of 21/7/2006 has taken place on account of the family feud between the two groups. A multiple murder in broad day light by itself cannot be a reason for appointment of a Special Public Prosecutor and that too at the Government expenses. If the submissions of the learned Advocate General are accepted that the antecedents of the applicant approaching the State Government are not

required to be considered for the appointment of the Special Public Prosecutor, it would not be possible for the State Government to deny such appointment even in the cases of gang wars which are not uncommon to the cities like Mumbai, Thane, Pune etc. While dealing with the cases in which the Special Public Prosecutor could be appointed by the State, the Supreme Court in the case of Mukul Dalal (Supra) stated as under:

... There may be instances where a case instituted on a private complaint is really a public cause. In such a case the prosecution though initiated by a private individual is really one which should be taken over by the State. If the complainant thereof approaches the State for assistance in a case of that type by appointing a Special Public Prosecutor or an Assistant Public Prosecutor to support the prosecution it would be for the Legal Remembrancer or the District Magistrate to favourably consider such a request and it would ordinarily be expected that government would appoint a Special Public Prosecutor to take charge of the prosecution. There may also be cases of private complainants where for various other reasons it would be appropriate for the State to support the prosecution by appointing a Public Prosecutor or a Special Public Prosecutor to look after the case. Instances of this type would be cases where the victims are of economically backward classes who are not in a position to vindicate their rights through court without the assistance of the State. Here again the Public Prosecutors services may be placed at the disposal of the complainant. It is well known position in Criminal Jurisprudence that the State is the prosecutor and that is why the primary position is assigned to the Public Prosecutor and where the Public Prosecutor appears, the request of the complainant or the victim to be represented by any other counsel is subject to permission of the court.

The recommendations Superintendent of Police, Sangli reason to justify or uphold the DSP was aware that there are made by District cannot be the sole impugned order. The 36 State Prosecutors at Sangli and despite the fact that he claimed to have collected solid/impeccable evidence during investigation, it is not known why and how he came to the conclusion that none of these 36 Public Prosecutors was competent enough to handle the prosecution case. Even otherwise, it was imperative for the RLA to be satisfied for the reasons to be recorded in allowing the application made by the respondent No. 8 for appointment of the Special Public Prosecutor. The Home Ministry neither bothered to refer to the opinion recorded by the District Government Pleader at Sangli opposing such appointment, nor it placed the said opinion before the Hon'ble Chief Minister. The RLA was duty bound to set out reasons as to why he did not agree with the opinion recorded by the District Government Pleader at Sangli opposing the appointment of Special Public Prosecutor as requested by the respondent No. 8. The deceased being the leader of a particular political party can be never a reason for appointment u/s 24(8) of Cr.P.C. read with Rule 22 of the Rules of Legal Affairs. When such appointments are made, despite the District Government Pleader and Public Prosecutor opposing for the same, it is a clear indication that the prosecution had no faith in his abilities and/or any of the

Public Prosecutors at the District Level and, therefore, this is one more reason why it was necessary for the RLA to record his reasons disagreeing with the opinion of the District Government Pleader. In short, we are satisfied that Sessions Case No. 41 of 2006 was not such a special case so as to warrant appointment of a Special Public Prosecutor, in addition to the fact that in the appointment order of respondent No. 7, the requirements of the Rule 22(1) have not been complied with. The power u/s 24(8) of Cr.P.C. read with Rule 22(1) of the Rules of Legal Affairs is required to be used sparingly and in public interest, wherein the nature and gravity of the criminal cases requires the State assistance and one of such cases could be where the complainants are appraisers and under privilege community or group or a section of such social element. If the evidence collected by the investigating agency during investigation is claimed to be solid or impeccable, that itself could be a reason that the prosecution was required to be entrusted to any of the existing Public Prosecutors for Sangli District and for this reason as well the recommendation of the DSP does not come across .

25. The parameters laid down by their Lordships in the above case may not be exhaustive and they may well be taken as exemplary, the fact remains that the request for appointment of Special Public Prosecutor must be found to be necessary in public interest and it cannot be for the asking. The applicant is a permit room owner and his application has been processed by the RLA solely on the basis of the order passed by the Hon"ble Chief Minister on 29/3/2007 and without recording the reasons, which reasons the RLA was duty bound to record and, therefore, in our considered opinion, in the appointment of respondent No. 7, the requirements of the proviso to Rule 22(1) of the Rules of Legal Affairs have not been complied with as is evident from the record we have referred to hereinabove and when the appointment does not meet the requirements of the said Rule, it certainly is vitiated and will have to be quashed and set aside under the powers of judicial review.

26. In the premises, the petition succeeds. The impugned order for the appointment of respondent No. 7 as a Special Public Prosecutor in Sessions Case No. 41 of 2006 is unsustainable and the same is hereby quashed and set aside. Rule is made absolute.