

(2013) 01 PAT CK 0081
In the Patna High Court
Case No : CWJC No. 13177 of 2009

Shambhu Kumar and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 24-01-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 309

Criminal Procedure Code, 1973 (CrPC) — Section 24, 24(4), 24(5), 24(5), 24(6)

Citation : (2013) 1 PLJR 977

Hon'ble Judges : Samarendra Pratap Singh, J

Bench : Single Bench

Advocate : Bibhuti Pandey in 1317 and 15561, Sanjay Kumar Giri in 1317, Suresh Chandra Giri, Pravin Kumar Sinha in 15561, Madan Pd. Singh-2 and Arun Kumar Singh in 16120, for the Appellant; Anjani Kumar in 15561, for the Respondent

Judgement

Samarendra Pratap Singh, J.—All the batch of three writ applications is taken up together and with the consent of parties is being disposed of at the stage of admission as the facts and issues are common to all. Whereas in C.W.J.C. No. 13177 of 2009 and C.W.J.C. No. 15561 of 2008, the Assistant Public Prosecutors themselves are petitioners, C.W.J.C. No. 16120 of 2008 is being represented by its Association through its General Secretary, Himanshu Ranjan who is also petitioner no. 2 in his individual capacity as well. I will refer to C.W.J.C. No. 15561 of 2008 as lead case.

2. The petitioners have sought implementation of the provisions of Section 24(6) Cr.P.C. in the matter of appointment of Public Prosecutors and Additional Public Prosecutors, as well as quashing of panel of Additional Public Prosecutors approved by the Government for different districts, contained in Annexure-1 series, u/s 24(4)(5) Cr.P.C. A prayer has also been made to restrain the respondents particularly Law Department from taking any further steps in the matter of appointment of Public Prosecutors or Additional Public Prosecutors in the State of Bihar other than from prosecuting officers.

3. The petitioners were appointed Assistant Public Prosecutors by the State Government in the year 1989-90 on recommendation of the Bihar Public Service Commission. By now they have served as a Member of the Prosecuting Agency for more than 20 years. They have relied on Section 24(6) particularly the "Explanation" part inserted by Act 25/2005 as well as on Bihar Prosecution Manual, 2003 framed under Article 309 of the Constitution of India which led to establishment of regular cadre of Prosecution Agency.

4. Elaborating their submissions, the petitioners state that Section 24(6) mandate that where there exists a regular cadre of prosecuting agency, the State shall appoint the Public Prosecutors or Additional Public Prosecutors only from the person constituting such cadre. On this basis, the petitioners argue that the Government does not have any choice but to appoint Public Prosecutors or Additional Public Prosecutors from amongst the persons constituting such cadre, subject to proviso to Section 24(6) Cr.P.C. The proviso makes an exception and state that if in the opinion of the State Government no such suitable persons are available, the appointment may be made from the panel of names prepared by the District Magistrate under sub-section (4) of Section 24 in consultation with the District Judge. The case of petitioners is that a regular cadre of prosecuting agency now exists and only if the persons constituting such cadre do not have suitable persons to be appointed as Public Prosecutors or Additional Public Prosecutors, then only resort to Section 24(4) can be undertaken. As per Explanation inserted by Act 16/84 for the purpose of Section 24(6), a regular cadre of prosecuting officers would mean cadre of prosecuting officers which include therein a post of Public Prosecutor by whatever name called and which provides for promotion of Assistant Public Prosecutor by whatever name called. Furthermore, Prosecuting Officer means a person by whatever name called appointed to perform the function of a Public Prosecutor or an Assistant Public Prosecutor.

5. The petitioners state that the State Government is contemplating appointment of Public Prosecutor in terms of Section 24(4) Cr.P.C. which is in teeth of Section 24(6) Cr.P.C. save and except if the case would fall under its proviso. Even the State of Jharkhand is appointing Additional Public Prosecutor and Public Prosecutor from amongst the Assistant Public Prosecutors. Furthermore, as early as in 1990s, the Government had decided to fill up 10% posts of Public Prosecutors and Additional Public Prosecutors from amongst the Assistant Public Prosecutors. The Government in order to strengthen the functioning of the prosecuting agency has brought amendment to Section 25(A) for establishing Directorates of Prosecution consisting of Director of Prosecution and as many Deputy Director of Prosecution, as may be required. The head of the Directorate of Prosecution would be the Director of Prosecution who shall function under the administrative control of the head of the Home Department, and the Law Department would have no competence to appoint Public Prosecutors and Additional Public Prosecutors which matter would fall within arena of Home Department. The grievance of the petitioners is that the Government is not

paying any heed to their representations as well as to mandate of law. The petitioners have filed Interlocutory Applications being I.A. No. 354 of 2009 in C.W.J.C. No. 15561 of 2009 and I.A. No. 161 of 2010 in C.W.J.C. No. 13177 of 2009 for interim stay on appointment of Public Prosecutor and Additional Public Prosecutors by respondents from panel prepared u/s 24(4).

6. As stated above, I will invariably resort to C.W.J.C. No. 15561 of 2008 for the purposes of referring to the pleadings made both on behalf of the petitioners as well as the respondents. Counter affidavits have been filed on behalf of the Prosecution Directorate, Home Secretary, Department of Home Police, Government of Bihar as well as on behalf of respondent no. 5, the Law Department. The State has even annexed prosecution manual as Annexure-A to the supplementary counter affidavit filed on 27.6.2011.

7. The case of the respondent State in short is that it is not under any compulsion to make appointment in terms of Section 24(6), as the mandatory character of the provision stands diluted by Bihar Amending Act 16 of 1984 w.e.f. 24.8.1984.

8. The amendment has made it discretionary to appoint Public Prosecutor and Additional Public Prosecutor from amongst the regular cadre of prosecution officers subject to the provisions of eligibility conditions mentioned in sub-section (7)(8)(9) of Section 24 Cr.P.C. Thus, the State Government would be within its right to make appointment in terms of Sections 24(4) and 25(5) of Cr.P.C. It is further stand of the State that the appointment of Public Prosecutor and Additional Public Prosecutor by the Law Department cannot be said to be violative of Section 24 Cr.P.C. Clause of Prosecution Manual, 2003 too states that the Public Prosecutor and Additional Public Prosecutor appointed from the cadre of Bihar Prosecuting Officer would function under Law Department. Furthermore Clause 30 of the Prosecution Manual grants discretion to the Government to appoint Public Prosecutor and Additional Public Prosecutor from amongst Assistant Prosecuting Officers as and when the former would consider it fit and proper. Clause 3 of Prosecution Manual re-designates a Assistant Public Prosecutor as an Assistant Prosecution Officer. Furthermore, the Assistant Prosecution Officers, Sub-Divisional Prosecution Officers, District Prosecution Officers and the Divisional Prosecution Officers would constitute Bihar Prosecution Service. Clause 32 of the Prosecution Manual state that the Assistant Prosecuting Officer would be a Class-II Gazetted Government employee and its appointment would be made by the Government on recommendation of Bihar Public Service Commission on requisition made by the Home Police Department. The respondents state that the Government if so thinks it expedient may appoint Public Prosecutor from the District Prosecution Officers and Divisional Prosecution Officers and Additional Public Prosecutors from Sub-Divisional Prosecution Officers. The argument of State is that as per clause 30, whenever the State Government decides to appoint Assistant Prosecution Officer to the post of Public Prosecutor or Additional Public Prosecutor of the district, then for sake of parity,

the District Prosecution Officer has been kept at par with Public Prosecutor and Sub-Divisional Prosecution Officer with Additional Public Prosecutor. The respondent State submits that the post of Public Prosecutor or Additional Public Prosecutor is not a cadre post of Assistant Public Prosecutor/Assistant Prosecution Officer. The respondent No. 2 in his affidavit dated 22.4.2011 stated that the Assistant Public Prosecutors are posted in magisterial courts, and at the moment the working strength of such officers is about 349 as against sanctioned post of 753. The present working strength is thus inadequate enough to cater to the need of even the Magisterial Courts and in case Public Prosecutors or Additional Public Prosecutors are posted from amongst them, the functioning of such Courts would virtually collapse. The Home Department has sent requisition for selection of 285 Assistant Prosecution Officer to B.P.S.C. between the years 2006 to 2010. The B.P.S.C. has not completed the selection process as yet.

9. A counter affidavit has been filed on behalf of the Director of Prosecution, respondent no. 4 sworn by Assistant Prosecution Officer. Respondent No. 4 states that he would have no objection, if Public Prosecutor, Additional Public Prosecutor are appointed from the cadre of Prosecution Officer.

10. Before I take up rival submissions for considerations, it would be necessary to notice that dispute between the Government vis-a-vis Assistant Public Prosecutors, as well as Government vis-a-vis direct appointees u/s 24(4) of Cr.P.C. for the post of Public Prosecutor and Additional Public Prosecutor is some what proverbial and has been subject to judicial scrutiny.

11. In past, two sets of writ applications were filed with divergent and diametrically opposite prayers. One set of writ application was filed by the Assistant Public Prosecutor seeking a direction to the respondents to consider their case for appointment to the post of Public Prosecutor and Additional Public Prosecutor in view of mandate of Section 24(6) Cr.P.C. as amended in the year 1978. The other writ application bearing C.W.J.C. No. 2888 of 1994 (Jaidhari Roy and Others Vs. State of Bihar and Others) was filed by Public Prosecutor and some Additional Public Prosecutors praying therein to restrain the Government from making appointment of Public Prosecutor and Additional Public Prosecutor from amongst the Assistant Public Prosecutor in the State of Bihar in view of Section 24(6) Cr.P.C., as amended by Bihar Act 16/84. The contention of the Public Prosecutors appointed under Sections 24(4) and (5) of Cr.P.C. was that in view of 1984 Amendment to Section 24(6), it was no longer incumbent upon the Government to necessarily make appointment of Public Prosecutor, Additional Public Prosecutor from amongst the Assistant Public Prosecutor.

12. The Division Bench comprising Hon''ble Mr. Justice L.M. Sharma and Hon''ble Mr. Justice M.P. Verma (as their Lordships then were) took a diametrically opposite view. While his Lordship, Hon''ble Mr. Justice L.M. Sharma allowed the writ application, Hon''ble Mr. Justice M.P. Verma was of the view that the Assistant Public Prosecutors are not entitled to be appointed as Public Prosecutor or Assistant (sic--Additional?) Public Prosecutors. On account of difference of

opinion between the two learned Judges of the Division Bench, the matter was referred to a third Judge namely Hon"ble Mr. Justice S.K. Chattopadhyay, who allowed the writ application agreeing with Hon"ble Mr. Justice L.M. Sharma. His Lordship took the view that there was regular cadre of Prosecuting Officer in the State of Bihar and as such the Assistant Public Prosecutor is entitled to be appointed to the post of Public Prosecutor and Additional Public Prosecutor.

13. The other category of writ application, namely C.W.J.C. No. 2888 of 1994, filed by Public Prosecutor and Additional Public Prosecutor (Jaidhari Roy and Others Vs. State of Bihar and Others) came for consideration before a Division Bench comprising of Hon"ble Mr. Justice S.K. Mookerji and Hon"ble Mr. Justice B.P. Singh (as his Lordships then was). Their Lordships allowed the writ application filed by the Public Prosecutors and Additional Public Prosecutors holding that in view of 1984 Amendment to Section 24(6) it was not incumbent upon the Government to appoint Public Prosecutor and Additional Public Prosecutor from amongst the Assistant Public Prosecutor in terms of Section 24(6). They further held that as there is no regular cadre of Assistant Public Prosecutor, they cannot be considered for appointment in terms of Section 24(6) which mandates the existence of regular cadre of Prosecuting Officer. The Division Bench, however, opined that the Assistant Public Prosecutors can also be considered for appointment as Public Prosecutor and Additional Public Prosecutor if they otherwise qualify the necessary eligibility conditions mentioned in sub-sections (7) and (9) of Section 24 of the Cr.P.C. In such cases, it will be open to the District Magistrate in consultation with the District Judge to recommend the name of such eligible Assistant Public Prosecutor for appointment as Public Prosecutor and Additional Public Prosecutor. In which eventuality, the Assistant Public Prosecutor has to resign his service as the post of Public Prosecutor and Additional Public Prosecutor are tenure post in view of Rule 137 of the Bihar Practice and Procedure Manual. Rule 137 of the Bihar Practice and Procedure Manual lays down the term of appointment of Public Prosecutors which shall ordinarily be for a term of three years, though the incumbent may be eligible for reappointment on expiry of such term. Rule 137 of the Bihar Practice & Procedure Manual is quoted hereinbelow:--

137. Terms of appointment of Public Prosecutors and Government Pleaders.--All appointment to the posts of Public Prosecutors or Government Pleaders or to the combined posts of Public Prosecutor and Government Pleader shall ordinarily be for a term of three years. The incumbent of the post will be eligible for re-appointment on expiry of his term of appointment.

14. I am informed by both the parties that SLP was preferred before the Hon"ble Supreme Court against both orders being Civil Appeal No. 5507 of 1997 arising out of SLP No. 1400/95 heard analogous with Civil Appeal Nos. 5508 and 5509 of 1997 arising out of SLP Nos. 14878 and 14879 of 1995. In spite of repeated opportunities, the parties were not able to produce certified copy or photocopy of order of Hon"ble Apex Court. Towards the end, a typed copy of the order of

Hon''ble Apex Court was filed before the court. The order of Hon''ble Apex Court as appearing in the typed copy reads as follows:--

Leave granted.

Heard counsel for the parties. It appears to be that when two different divisional benches are of different views it reasonably proper to get the legal proposition resolved by a larger Bench. In these matters the learned counsel of both the parties have submitted that impugned order should be set aside and the matter should be remanded back to the High Court with a direction that question involved it, these matters be decided by the Full Bench of the High Court to order accordingly.

The appeals are thus disposed off.

15. This court time and again enquired from the counsel of both the parties as well as office but none of them were able to give a definite answer whether the said matter has been decided by the Full Bench or not. In such circumstances, with the consent of the parties, this batch cases have been taken for hearing, as the petitioners have placed reliance upon Explanation inserted by Act 25 of 2005 to Section 24(6), creation of cadre of Prosecution Officers under Prosecution Manual, 2003; and establishment of Directorate of Prosecution by insertion of Section 25(A) by 2005 Amendment, all being subsequent development with respect to legal propositions.

16. The consideration of the issues in hand would require noticing of the relevant laws, rules and conventions relating to appointment of Assistant Public Prosecutor, Public Prosecutor and Additional Public Prosecutor, the legislative history of which is also noticed in the case of Jaidhari Roy and Others Vs. State of Bihar and Others . This court would only be referring to the factual aspects and not the ratio decidendi of the case as both the Division Bench judgments are said to be set aside by the Hon''ble Apex Court with the consent of parties which has already been quoted in earlier paragraph.

17. The Government by notification dated 18.5.1953 constituted a separate cadre of Public Prosecutor for conducting prosecution of State cases before the Magisterial Courts. The aforesaid cadre of Police Prosecutor consisted of Senior District Prosecutor of the rank of Dy. S.P., District Prosecutor of the rank of Inspector of Police and Assistant Prosecutor of the rank of Sub-Inspector of Police. The prosecutor had to be enrolled under the Police Act and to appear in uniform while on duty. These prosecutors could conduct prosecution of the State cases in Magisterial Courts only. There was no post of Public Prosecutors/ Assistant Public Prosecutors in the cadre. In view of the recommendation of the Law Commission of India that the prosecuting agency should be separate and may not be a counter-part of the Police Department, and in view of the provisions of Section 25 of the Code of Criminal Procedure, the Government of Bihar issued a circular/letter dated 30th March, 1974 re-designating the police prosecutor constituted under Government notification dated 18.5.1953 as

Assistant Public Prosecutor. The requirement of wearing uniform while on duty was dispensed with. The Senior District Prosecutors were re-designated as Assistant Public Prosecutor Grade-I, District Public Prosecutor was re-designated as Assistant Public Prosecutor Grade-II and Assistant District Prosecutor was called Assistant Public Prosecutor Grade-III. Subsequently, the Government by resolution dated 10.3.1981 brought the Assistant Public Prosecutor of all grades under control of Director, Prosecution, Government of Bihar, and they were directly under the control of Home (Police), Department, Government of Bihar.

18. In 1978, Section 24 of Cr.P.C. was substituted and Section 24(6) was introduced by Act 45 of 1978. As per Section 24(4) the District Magistrate in consultation with Sessions Judge would prepare a panel of names of persons who is to be appointed as Public Prosecutor or Additional Public Prosecutor for the district u/s 24(5). Section 24(5) requires that the State Government would not appoint any one outside the panel of names prepared by the District Magistrate under sub-section (4) of Section 24 Cr.P.C. Section 24(6) which started with a non-obstante clause states that where there exists a regular cadre of Prosecuting Officer, the State Government shall appoint a Public Prosecutor or Additional Public Prosecutor only from amongst the persons constituting such cadre. The aforesaid provisions was subject to further exception that if no suitable person is available in such cadre of Prosecuting Officer, the Government may appoint a person as Public Prosecutor or Additional Public Prosecutor as the case may be from the panel of names prepared by the District Magistrate in sub-section (4). Section 24 of Cr.P.C. as it exists without Explanation part of sub-section (6) of Section 24 introduced in 2005 is quoted herein for convenience:--

24. Public Prosecutors--(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutor, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class or class of cases in any district, or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutor or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public

Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).

(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel or names prepared by the District Magistrate under sub-section (4).

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) 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.

(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person has been in practice as a Pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.

19. Section 25 of Cr.P.C. which deals with appointment of Assistant Public Prosecutors is quoted hereinbelow:--

25. Assistant Public Prosecutors.--(1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

(1A) The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the Courts of Magistrates.

(2) Save as otherwise provided in sub-section (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

(3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case:

Provided that a police officer shall not be so appointed--

(a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or

(b) if he is below the rank of inspector.

20. Section 24(6) had undergone State Amendment vide Bihar Act 16 of 1984. In Section 24, the following sub-section (6) shall be substituted:--

(6) Notwithstanding anything contained in sub-section (5) where in a State there exists a regular cadre of Prosecuting Officers, the State Government may also appoint a Public Prosecutor or an Additional Public Prosecutor from among the persons constituting such cadre.

21. It is thus be evident that till the year 1984, the State Government was necessarily required to appoint Public Prosecutor and Additional Public Prosecutor in terms of Section 24(6) provided there was a regular cadre of prosecuting agency. In case of regular cadre of Public Prosecutor, the Government had no option but to appoint Public Prosecutor and Additional Public Prosecutor from amongst the Prosecuting Officer. Only if no suitable candidate was available in such cadre of Prosecuting Officer for appointment to the post of Public Prosecutor or Additional Public Prosecutor, the Government could have made appointment from the panel of names prepared by the District Magistrate under sub-section (4). But the legal position changed due to Bihar Amendment 16/84 in Section 24(6). Now even if the cadre of regular Prosecuting Officer as envisaged u/s 24(6) is available, the Government would be under no compulsion to make an appointment from such cadre. The Bihar Amendment 16 of 1984 diluted the mandatory character of Section 24(6) relegating the compulsion embodied in Section 24(6) Cr.P.C. discretionary and directory.

22. The other issue that requires consideration is as to what would constitute "Regular Cadre of Prosecuting Officers" featuring in Section 24(6). The answer is provided in "Explanation" inserted by 2005 Amendment under Act 25/2005 which is quoted hereinbelow:--

Explanation.--For the purposes of this sub-section,--

(a) "regular Cadre of Prosecuting Officers" means a cadre of Prosecuting Officers which includes therein the post of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors, by whatever name called, to that post;

(b) "Prosecuting Officer" means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public Prosecutor under this Code.

23. Before I advert to the explanation portion quoted above, it would be relevant to notice that the term "Regular Cadre" and the issue whether a regular cadre of Prosecuting Officer in terms of sub-section (6) of Section 24 of the Code existed in the State of Kerala and also in the State of Uttar Pradesh came up for

consideration before the Hon"ble Apex Court in the case of K.J. John, Assistant Public Prosecutor, Grade-I, Palai Vs. The State of Kerala and others, . The Hon"ble Apex Court held that the regular cadre of Prosecuting Officer comprised the service of Assistant Public Prosecutor at the lowest level and Public Prosecutor at the top. Hon"ble Apex Court further held that in case of regular cadre of Prosecuting Officer did not go up to the Public Prosecutor at the top, the State Government cannot be considered as bound to appoint Public Prosecutor or Additional Public Prosecutor only from amongst the persons constituting such cadre under the Code of Criminal Procedure for conducting the cases of Sessions Court. The relevant extract of order of Hon"ble Apex Court is quoted hereinbelow:--

7. With a view to consider the submissions urged on behalf of the parties, it is necessary first to notice the decision of the Supreme Court in K.J. John case (supra).

The question which arose for consideration before the Supreme Court was whether in the State of Kerala as also in the State of Uttar Pradesh there existed a regular cadre of Prosecuting Officers in terms of sub-section (6) of Section 24 of the Code. After considering various aspects of the matter the Court declared the law in the following words:--

20. A combined reading of sub-section (6) and sub-sect. (9) of Section 24 gives a clue to the intention of the Legislature in determining the scope of the expression "regular cadre of Prosecuting Officers" occurring in sub-section (6). The intention of introducing sub-section (6) and the deeming fiction in sub-section (9) was in order to safeguard the promotional rights of Prosecuting Officers in such of the States where there is already in existence regular cadre consisting of a hierarchy of Prosecuting Officers going to the top level of Additional Public Prosecutors and Public Prosecutors. In sub-sec. (9) the expression "Prosecuting Officers" has been used as taking in any persons holding the post of Public Prosecutor, Assistant Public Prosecutor or any other Prosecuting Officer by whatever name called. Sub-sec. (6) independently can grant no benefit to the Prosecuting Officers unless the clause of deeming fiction contained in sub-sec. (9) makes them eligible for appointment as a Public Prosecutor or Additional Public Prosecutor. Sub-sec.(9) clearly speaks with regard to the service rendered as a Public Prosecutor or as Additional Public Prosecutor, or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called to be counted as the period as if such person had been in practice as an advocate for the purposes of sub-section. (7) & sub-sec. (8). Thus we are clearly of the view that the expression "regular cadre of Prosecuting Officers" contained in sub-sec. (6) of S. 24 must comprise a regular cadre of Prosecuting Officers going up to the level of Additional Public Prosecutor and Public Prosecutor. It may be important to note that so far as the State of Kerala is concerned under Rule (5) of the Kerala Government Law Officer (Appointment & Conditions of Service) and Conduct of Cases Rules, 1978, it has been stated that the Legal Advisor to

the Vigilance Department, Additional Legal Advisor to the Vigilance Department and Assistant Public Prosecutor Gr-I shall belong to the State Cadre in the sense that for the purpose of appointment, probation, seniority, discharge of probationers and approved probationer for want of vacancy, the State shall be the unit whereas in the case of Assistant Public Prosecutor Gr-I, the District concerned shall be unit for all such purposes. Thus, if we take the argument of learned counsel for the appellant to its logical conclusion, the result would be that in a State if there existed a cadre of Prosecuting Inspectors or Assistant public Prosecutors only in that case also the State Government would be bound to appoint Public Prosecutor and Additional Public Prosecutor only from among such cadre under sub-section (6) of Section 24. It could not have been the intention of the Legislature while enacting sub-section (6) of Section 24 of the Code. It was also contended on behalf of the petitioners that in case the meaning to the expression "regular cadre of Prosecuting Officer" under sub-section (6) of Section 24 is given as to consist of a regular cadre of Prosecuting Officers going upto Public Prosecutor at the top, then there is no benefit to such persons by enacting sub-sections (6) and (9) in section 24 of the Code. We find no force in this contention. The basic intention of the Legislature was to appoint Public Prosecutors and Additional Public Prosecutors from the advocate having at least seven years practice. Section 24 as initially contained in Section 24 of the Code did not make any Prosecuting Officer even of the cadre of Public Prosecutor prior to 1973 as eligible for being appointed as Public Prosecutor or Additional Public Prosecutors, they were made eligible by substituting section 24 by the Amending Act of 1978 by introducing a new provision under sub-section (9) of Section 24. In this background when we consider the provision of sub-section (6) of Section 24 which makes it incumbent to appoint Public Prosecutors only from a regular cadre of Prosecuting Officers. It can only be applied in case of such regular cadre which may go upto the level of Public Prosecutor.

Note: (The underlining is mine for emphasis)

24. The Hon''ble Apex Court went on to observe that there is another difficulty in the way of Assistant Public Prosecutor as the post of Public Prosecutor and Additional Public Prosecutor are tenure post. The Hon''ble Court opined that the State Government is competent to keep such post of Public Prosecutor and Additional Public Prosecutor as tenure post for some period based on contract and not for regular permanent appointment under any service rule. As such till such posts are tenure post to be filled on contract basis, the Assistant Public Prosecutor cannot claim any right to be appointed on such post under sub-section (6) of Section 24 Cr.P.C. However, they would be eligible to be considered with any Advocate of seven years standing if willing to join such post on tenure basis. The question also stands answered by the judgment of the Hon''ble Supreme Court in K.J. John's case. The Hon''ble Court observed as follows:--

22. There is another insurmountable difficulty which exists in the way of the appellant and the petitioners in as much as the State Government has made the

posts of Public Prosecutor and Additional Public Prosecutors and as tenure posts. It lies within the competence of the State Government to keep such posts of Public Prosecutor and Additional Public Prosecutor as tenure posts for some period based on contract and not to such posts as regular or permanent under any service rule. In this view of the matter till such posts are tenure posts, to be filled on contract basis for some period, the Assistant Public Prosecutors who are members of a regular service cannot claim any right to be appointed on such posts under sub-sec. (6) of S. 24 of the Code of Criminal Procedure. They are also eligible to be considered with any advocate of seven years standing if willing to join such post on tenure basis by the District Magistrate in consultation with the Sessions Judge. We cannot accept the contention of the learned counsel for the petitioners in this regard that Assistant Public Prosecutors can be appointed on such tenure posts on deputation and may return back to their parent service after completion of the period of such a tenure posts. The State of U.P. in its counter has clearly brought out the distinction in those two kinds of posts in the manner and terms of their appointment, discharge of duties, emoluments etc. The Assistant Public Prosecutors have avenues of Promotion in their own cadre and no argument can however be advanced in interpreting the provision of sub-section (6) of Section 24 on this basis.

(emphasis supplied)

25. The petitioners have contended that in view of framing of Prosecution Manual, 2003 now there is regular cadre of Assistant Public Prosecutor going up to the level of the Public Prosecutor. Clause 3 of Prosecution Manual, 2003 provides for constitution of Bihar Prosecution Service. From the date of its enforcement the Assistant Public Prosecutor would be known as Assistant Prosecution Officer. Clause 3 provides for appointment of Assistant Prosecution Officer, Sub-Divisional Prosecution Officer, District Prosecution Officer and Divisional Prosecution Officer, who would constitute Bihar Prosecution Service. On this basis, the petitioners contended that there is a regular cadre of Prosecution Officer as it includes a post of a Public Prosecutor by whatever name called and also provides for promotion of Assistant Public Prosecutor by whatever name called. Clause 3 of Bihar Prosecution Manual, 2003 are quoted hereinbelow:--

26. I am not in agreement with the submission of learned counsel for the petitioners that a regular cadre of Prosecution Officer going up to the level of Public Prosecutor at the top exists. It would appear from Clauses 7, 8 and 9 that though there is a cadre of Prosecution Officer, there is no regular cadre of Assistant Prosecuting Officer going up to the level of Public Prosecutor as envisaged in K.J. John case (supra). Here, we find that there is a Prosecution Officer at the Sub-divisional level, District level as well as Divisional level. The function of the Divisional Prosecution Officer, the Sub-Divisional Prosecution Officer and the District Prosecution Officer are elaborated in Clauses 7, 8 and 9 of Bihar Prosecution Manual, 2003. Clauses 7, 8 and 9 of Bihar Prosecution Manual,

2003 are quoted hereinbelow:--

27. As per clause 7, there would be a Divisional Prosecution Officer in every Divisional Headquarter appointed on promotion from amongst Prosecution Officers. All Prosecution Officer of the districts within the Division, would be under his direct control and supervision. He would be in a rank of Class-I Gazetted Officer and would work as per general guidance of Divisional Commissioner. His office would be situated in the office premises of the Divisional Commissioner. Similarly, as per clause 8, District Prosecution Officer would be incharge of District Prosecution Office and would be also posted so on promotion from Bihar Prosecution Service and would be the Controlling Officer of all Prosecuting Officers of their respective districts and Sub-Division. The Sub-Divisional Prosecution Officer as enumerated in Clause 9 would be Incharge of Sub-Divisional Prosecution Office and he too from amongst the officers promoted from Bihar Prosecution Service. Thus, the Divisional Prosecution Officer would be senior in rank to District Prosecution Officer being its Controlling Officer as well as being its promotional post.

28. It is quite evident from clause of Prosecution Manual, 2003 that a Public Prosecutor can be appointed from officers not below the rank of District Prosecution Officer as well as Divisional Prosecution Officer. Clause 30 of Bihar Prosecution Manual, 2003 is quoted hereinbelow:--

29. It appears from the hierarchy set out from Clauses 7, 8 and 9 of Prosecution Manual, 2003 as well as from counter affidavit that Divisional Prosecution Officer is a promotional post of District Prosecution Officer which in turn is a promotional post from Sub-Divisional Prosecution Officer. Furthermore, the Sub-Divisional Prosecution Officer is a promotional post of Assistant Prosecution Officer. As per clause both District Prosecution Officer and Divisional Prosecution Officer can be considered for appointment as Public Prosecutor. In other words, though a Divisional Prosecution Officer may be available, a District Prosecution Officer can be made Public Prosecutor. As such, the post of District Prosecution Officer even if we equate it with post of Public Prosecutor, irrespective of its nomenclature, such post is not going to level of Public Prosecutor at the top because Divisional Prosecution Officer is a promotional post of District Prosecution Officer. The matter could have been different if there was no such post as Divisional Prosecution Officer in the Prosecution Manual, 2003 and there would have been no difficulty in agreeing with the submissions of petitioners that there exists a regular cadre with a post of Public Prosecutor going at the top as laid down in K.J. John case (supra).

30. Clause 30 of Prosecution Manual, 2003 nonetheless provides that in case the Government decides to appoint Public Prosecutor and Additional Public Prosecutor from Assistant Prosecution Officer, then for the sake of parity, the District Prosecution Officer has been kept at par with the Public Prosecutor and Sub-Divisional Prosecution Officer with Additional Public Prosecutor." The clause further lays a limitation that the Government may, if it deem it expedient,

appoint Public Prosecutor from amongst District Prosecution Officer, Divisional Prosecution Officer and Additional Public Prosecutor from Sub-Divisional Prosecution Officer. Here too the Government in terms of Clause 30 is not under compulsion to necessarily appoint Public Prosecutor from Prosecuting Officers.

31. Even assuming that Prosecution Rule, 2003 provides a regular cadre in terms of Section 24(6) read with its Explanation, still the Government would not be bound to make appointment of Public Prosecutors or Additional Public Prosecutors from Assistant Public Prosecutors by whatever name called in view of the 1984 amendment vide Amendment Act 16/84, to Section 24(6) which dilutes the mandatory nature of provision so far as State of Bihar is concerned. Furthermore, Clause 30 of Bihar Prosecution Manual also gives discretion to the Government either to make appointment or not to make appointment of Public Prosecutor and Additional Public Prosecutor from the cadre of Assistant Public Prosecutor/Assistant Prosecution Officer or Bihar Prosecution Service as constituted under Clause 3 thereof, even if there is a regular cadre of Prosecution Officer going to the level of Public Prosecutor.

32. It is relevant to state that the Law Commission of India suggested that the post of Public Prosecutor must always be filled by the member of the Bar from panel prepared by the District Magistrate in consultation with the Sessions Judge. The Commission further suggested that 50% of the post of Additional Public Prosecutor in a district must always be filled by the bar from the panel prepared by the District Magistrate u/s 24(4) in consultation with the Sessions Judge and remaining 50% of the post of Additional Public Prosecutor in a district should be filled from amongst Public Prosecutor who are in regular cadre of Prosecuting Officer. The Commission suggested that 50% post of Additional Public Prosecutor to be filled by the Assistant Public Prosecutor should be from a panel prepared by the State Level Committee consisting of (a) a retired High Court Judge/sitting High Court Judge, nominated by the Chief Justice of that High Court, (b) the Law Secretary in the State Government, (c) an officer of the rank of Secretary of that State, and (d) Director of Prosecution.

33. The Law Department, respondent no. 5, has stated in paragraph 7 of the supplementary counter affidavit that after due consideration of 197th report of the Law Commission of India, the Government of Bihar has accorded its assent to the suggestion of the Law Commission and views and comments of Government of Bihar has been communicated to the Ministry of Home, Government of India, New Delhi vide letter dated 27.7.2011. The relevant extract of 197th report of the Law Commission of India on Public Prosecutor's appointment is quoted hereinbelow:--

.....We have, therefore, suggested that the post of Public Prosecutor must always be filled by a member of the Bar from a panel prepared by the District Magistrate in consultation with the Sessions Judge, that 50% of the posts of Addl. Public Prosecutor in a District must also be filled by the Bar from the panel prepared by the District Magistrate under Sec. 24(4) in consultation with the

Sessions Judge and remaining 50% of the posts of Addl. Public Prosecutor in a District must be filled from among Asst. Public Prosecutors who are in the Regular Cadre of Prosecuting Officers.

We have also recommended an express provision to be inserted in Sec. 24(4) that the Sessions Judge must recommend names of lawyers who have personally conducted substantial number of sessions cases and who bear good character. If such a Central Amendment is brought, in case the State Amendments omit the provision of consultation with the Sessions Judge and the selection of members of the Bar with such experience and good character, such a procedure will offend Art. 14.

Likewise, in regard to Sec. 24(6), 50% of posts of Addl. Public Prosecutor, must be filled by Asst. Public Prosecutors from a panel prepared by a State Level Committee consisting of (a) a retired High Court Judge/sitting High Court Judge, nominated by the Chief Justice of that High Court, (b) the Law Secretary in the State Government, (c) an officer of the rank of Secretary of that State, and (d) the Director of Prosecution. That Committee must assess the merit, experience, previous record of performance of the Asst. Public Prosecutors and it must be ensured that the persons selected bear good character.

We have also stated that within six months of the proposed amendment to the Code. State Governments must constitute a regular Cadre of Prosecuting Officers consisting of 50% of Posts of Addl. Public Prosecutors in a District and all the Asst. Public Prosecutors in the State.

The above recommendations answer all the questions posed by the PMO in its letter to the Home Ministry.

34. It is expected that the State of Bihar would honour its own commitment and would act in terms of the recommendation of the Law Commission to which it has accorded its consent.

35. In the backdrop of the aforesaid discussions made in the foregoing paragraphs, no mandamus can be issued directing implementation of Section 24(6) Cr.P.C. in appointment of Public Prosecutor and Additional Public Prosecutor from Prosecuting Officers, as it would be in teeth of State Amendment substituted vide Act 16/84 substituting the word "may" in place of "shall" in Section 24(6) Cr.P.C. The insertion of Explanation inserted by Act 25/2005 to the proviso to section 24(6) would not be of much help even assuming their exists even a regular cadre of Prosecuting officers, as long as the State Amendment 16/84 to Section 24(6) is not altered or declared invalid. Even the Prosecution Manual, 2003 on which the petitioners have placed reliance, also allows discretion under Clause 30(d) to the Government in the matter of appointment of Public Prosecutor and Additional Public Prosecutor from amongst the Prosecution Officers.

36. In the facts of the case, I issue following directions:--

(i) As the cadre of Prosecuting Officers is working at the moment at less than half of its strength, I direct the Government to complete the process of selection for which requisition of 285 Assistant Public Prosecutor was made to B.P.S.C. between the years 2006 to 2010 expeditiously preferably within six months. All concerned would act accordingly to ensure compliance in public interest so that trial in Courts may not suffer.

(ii) The Government would take steps for appointment of 50% of Additional Public Prosecutor from cadre of Prosecution Officers as per its own affidavit and consent accorded to recommendation of Law Commission.

(iii) The Government in terms of earlier assurance as noted in foregoing paragraphs may in its discretion consider at least appointing 10% of Public Prosecutor under Clause 30(d) as well as substituted section 24(6) amended under Act 16/84 from amongst Prosecution Officers.

(iv) The Government of Bihar would act in terms of Section 25(A) inserted vide Act 25/2005 and take steps for appointment of a regular Director of Prosecution as well as Deputy Director of Prosecution to strengthen the functioning of Prosecution Agency in absence of which the provision would remain only a paper worth.

37. Before parting with the order, I must express my appreciation for due assistance rendered by learned counsel for the parties in the case. With the aforesaid observations and directions, these writ application stands disposed of.