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(1991) 12 PAT CK 0001

In the Patna High Court

Case No : C.W.J.C. No. 1208 of 1983

Sri. Nivas Narayan and Others — APPELLANT

Vs

The State of Bihar and Others — RESPONDENT

Date of Decision : 18-12-1991

Acts Referred:

Citation : (1991) 12 PAT CK 0001

Final Decision : Allowed

Judgement

S.K. Chattopadhyaya, J.—This writ application was earlier heard by a Division Bench of this Court comprising of L.M. Sharma and M.P. Varma, JJ. and two judgments in this case were delivered on 23rd September, 1983 by the two Hon''ble Judges. On difference between the two, the matter has been placed before me for hearing.

2. While Sharma, J., after dealing with the facts and law of the case allowed the writ application by issuing a writ of mandamus as against the concerned Respondents directing them to corsider the case of the Petitioners for the purpose of appointments in the posts of the Public Prosecutors and Additional Public Prosecutors in accordance with Section 24(6) of the Code of Criminal Procedure (as amended'' in 1978) before making any appointment to the said posts, Varma, J, however, after assigning his reasons dismissed the writ application.

3. The facts of the case, in short, are that the Petitioners are Assistant Public Prosecutors posted in different districts of the State of Bihar and have filed the present petition for a direction to the Respondents for considering their cases for appointment as Public Prosecutors (P.P. in short) and Addl. Public Prosecutors (A.P.P. in short). The claim is based on the provisions of Section 24(6) of the Code of Criminal Procedure (as amended in 1978) (hereinafter referred to as ''the Code'').

4. The State Government created a separate cadre of Police Prosecutors in the

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year 1953 by its decision dated 18th May, 1953 as contained in Annexure ''1''. The Cadre consisted of three ranks of (i) Senior District Prosecutors of the rank of Deputy Superintendent of Police, (ii) District Prosecutors of the rank of Inspector of Police and (iii) Assistant District Prosecutors of the rank of Sub Inspector of Police. A written competitive test was held for appointment to the post of Assistant District Prosecutors. The candidates were required to have a degree in law and minimum two years law practice at the bar. Petitioners fulfilled the conditions and were appointed as Assistant District Prosecutors on the different dates, which have been detailed in paragraph ''8'' of the writ application.

5. The provisions of the new Code of Criminal Procedure, 1973, which came into force on 1.7.1974 introduced some vital changes in the scheme relating to the Prosecutors. Following the recommedation of the Law Commission of India that the prosecuting agency should be separated and made independent of its administrative counter-part, that is the Police Department, Section 25 of the Code enjoined that no police officer shall be eligible to be appointed as Assistant Public Prosecutor (subject to certain exceptions). Section 24 of the Code dealt with the Public Prosecutors in general, inter alia, providing for condition and procedure in regard to their appointment. In view of these provisions, the State Government issued a circular on the 30th of March, 1974, as contained in Annexure ''2'' by which the Police Prosecution Officers were re-designated as Assistant Public Prosecutors and they ceased to be under the control of the police. Earlier, they were required to wear police uniform which requirement also ceased to apply. A scheme in regard to the administrative control of this Cadre was adopted, but pending its implementation, the same was kept under the Inspector General of Police.

6. This Court had the occasion to deal with the question as to whether the A.P.Ps. continued under the administrative control of the Inspector General of Police and this Court C.W.J.C. No. 965 of 1977 held that the Petitioner had ceased to be a police officer and hence the Superintendent of police had no jurisdiction to supervise his case. Similarly dealing with Anr. case being C.W.J.C. No. 226 of 1978, disposed of by a common judgment, this Court directed the State Government to pass appropriate orders so that the Prosecutors did not continue under the administrative control or the Inspector General of Police. Judgment of the same has been annexed to the writ application as Annexure ''3'' Accordingly, the State Government decided that the Directorate of Prosecution and the Cadre of the Prosecuting Officers would be under the direct control of the Home Department.

7. After the introduction of the new Sub-section (6) of Section 24 of the Code in 1978 the Bihar Police Prosecutors Association representing the Petitioners started demanding the implementation of the new provision. The matter was examined by a High Power Committee under the Chairmanship of the then Chief Secretary and it has been asserted in paragraph ''22'' of the writ application that the said committee in its meeting dated 11.10.79 finally decided that since there was

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regular Cadre of the Prosecuting Officers in Bihar, appointments to the posts of Public Prosecutors and Addl. Public Prosecutors should be made by promotion of the existing Public Prosecutors.

8. When Petitioner No. 3 under an individual claim, he received a copy of the communication as contained in Annexure ''3'' dated 9.12.1979 that his case had been forwarded or passing necessary orders. It is said that however, the command of Section 24(6) of the Code remained unheeded, the decision of the high Power Committee ignored and the claim of the Petitioners neglected.

9. It has been further stated by the Petitioners that there are many vacancies in the posts of Public Prosecutors and Addl. Public Prosecutors in the districts, but the cases of the Petitioners who fully qualify according to the conditions laid down by the Code are not being considered. The District Magistrates who have to prepare panels are including other persons in the same and ignoring the right of the Petitioners. The Petitioners, therefore, pray for issuing an appropriate writ of mandamus.

10. No counter affidavit has been filed on behalf of the State or other Respondents controverting the averments made by the Petitioners. The application was, however, opposed by the learned Advocate General.

11. In 1978, Section 24 was substituted by a new section and Sub-section (6) thereof, which has been relied upon by Mr. Mihir Kumar Jha, learned Counsel for the Petitioners, reads as follows:

(6) Notwithstanding anything contained in Sub-section (5), where in 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 of names prepared by the District Magistrate under Sub-section (4).

12. Sharma, J. after discussing the provisions as laid down in Section 24(6) of the Code has come to the conclusion that provisions of Section 24(6) of the Code is mandatory which direct the appointment to the posts of Public Prosecutor and Addl. Public Prosecutor only from amongst the persons constituting the cadre. After coming to the conclusion that provisions of Section 24(6) of the Code are mandatory in nature, Sharma J. directed the Respondents to consider the cases of the Petitioners for the purpose of appointment in the posts of Public Prosecutors and Addl. Public Prosecutors.

13. Varma, J. on the other hand, has taken into consideration the provisions as laid down in Advocates'' Act, 1961 and has come to a finding to the effect that the term ''Advocate'' cannot have any other connotation except what has been

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given in the Advocates'' Act, 1961. Varma, J. came to finding that no person can be considered for being appointed as a Public Prosecutor or an Addl. Public Prosecutor for a District, unless he has been in regular practice as Advocate for not less than seven years. The reasonings given by Varma, J. further indicate that he did not accept the contention of the Petitioners that their experieces as ''Prosecutors'' for seven years and more equated with that of the practices of an Advocate for the same period for consideration for appointment us Public Prosecutors and Addl. Public Prosecutors.

14. Mr. Jha, learned, Counsel appearing on behalf of the Petitioners, while supporting the judgment of Sharma, J. pointed out that the reasonings given by Sharma, J. are acceptable, inasmuch as, there is specific finding that there exist a separate cadre for the Prosecutors within the meaning of Section 24(6) of the Code in the State of Bihar. According to Mr. Jha, existence of Cadre in the State of Bihar with specified promotional avenue in the Cadre has not been controverted by the Respondents. Moreover, Petitioner No. 3 was communicated by letter dated 29.12.79, as contained in Annexure ''8'' that his case has been referred to the State Government for needful favourable orders.

15. Learned Advocate General appearing on behalf of the Respondents has submitted that conclusion of Varma, J. will stand, but nonetheless, the reasonings would be different. The argument of the learned Advocate General is that unless there is a cadre existing in the State of Bihar, there is no question of either appointment or consideration as laid down in Section 24(6) of the Code. His argument, that the appointment of the Petitioners are on tenure post and as sucn no right to be appointed, inasmuch as, there is no regular cadre existing in the State of Bihar. According to him, reasonings given by Varma, J. cannot be sustained as Varma J. has not taken into consideration the provisions as laid down in Sub-section (9) of Section 24 of the Code. According to learned Advocate General, if this provision would have been taken into consideration by Varma, J., he would not have come to the reasonings given by him in his judgment.

16. The Division Bench judgment, as stated either, was delivered on the 23rd September, 1983 and the State of Bihar has since amended the provisions, as contained in Section 24(6) of the Code, by substituting its provisions. This amendment has come into existence with effect from 24.8.1984 by Bihar Act No. 16 of 1984. Thus, it is clear that this amendment was introduced after the judgment of the Division Bench.

16. Bihar Amendment to Section 24(6) reads, as follows:

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.

17. In the aforesaid amendment, it has been clearly stated that for Sub-section

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(6) of Section 24, the following Sub-section shall be substituted and shall always be deemed to have been substituted, meaning thereby that this amendment to Sub-section (6) was always in existence. From mere persual of the amended provisions, it is clear that before such amendment the legislature took into consideration of the fact that there exists a separate cadre. The amendment provision is specific that the State Government may also appoint a Public Prosecutor or an Addl. Public Prosecutor from among the persons constituting such cadre. In my opinion, if this cadre would not have been ia existence as the learned Advocate General has tried to canvass, there was no necessity for such amendment in 1984.

18. Taking into consideration this amendment, I am in respectful agreement with Sharma, J. that a separate cadre of the Prosecutors within the meaning of Section 24(6) of the Code is in existence in the State of Bihar.

19. In this connection, it is useful to point out that in the proviso to Section 24(6) of the Code option has been given to the State Government to appoint a person as Public Prosecutor or Addl. Public Prosecutor only from among the persons constituting such panel by the District Magistrate under Sub-section (4) where, in the opinion of the State Government no suitable person is available in such cadre for such appointment.

20. Taking into consideration the provision of law and uncontroverted averments made in the application, I am of the opinion that the case of Petitioners must be considered by the State Government in its true perspective while making appointment of Public Prosecutors and Addl. Public Prosecutors.

21. My aforesaid view is supported by a recent decision of the Supreme Court in the case of K.J. John, Assistant Public Prosecutor, Grade-I, Palai Vs. The State of Kerala and others, .

22. In the aforesaid decision, while rejecting the claim of the Petitioner, the Supreme Court has come to a conclusion that:

A combined reading of Sub-section (6) and Sub-section (9) of 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.

23. In the aforesaid case, the Supreme Court rejected the prayer of the Appellants of that case on the ground that there was no cadre in existence either in the State of Kerala and U.P. and as such the State Government of Kerala and U.P. are not bound to appoint Public Prosecutors and Additional Public Prosecutors only from among the persons constituting such cadre.

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24. On the contrary, as has been held by me above, there is a cadre in existence in the State of Bihar and in view of Bihar amendment to Section 24 Sub-clause (6), the State Government may also appoint a Public Prosecutor or an Addl. Public Prosecutor from among the persons constituting such cadre.

25. Varma, J, while rejecting the prayer of the Petitioners, has taken into consideration the definition of the term ''Advocate'', af has been given in the Advocates'' Act, 1961 and has come to the conclusion that unless a person satisfies all the pre-conditions of Section 24 of the Code, his case cannot be considered for being appointed as P.P. or A.P.P. I am in respectful disagreement with him, inasmuch as, Varma, J. has not taken into consideration the provisions as laid down in Sub-clause (9) of Section 24 of the Code.

26. Sub-section (9) of Section 24 reads as follows:

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 Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be period during which such person has been in practice as an Advocate.

27. I have already indicated above that in the case of K.J. John v. The State of Kerala and Ors. (supra), the Supreme Court has interpreted the provisions as laid down in Sub-section (9) of Section 24 and has held that in Sub-section (9), the expression "Prosecuting Officers" has been used as taking any person holding the post of Public Prosecutors, Assisting Public Prosecutors or any other Prosecuting Officer by whatever name called. The Supreme Court has further held that sub-section (6) independently can grant no benefit to the Prosecuting Officers unless the clause of deeming fiction contained in Sub-section (9) makes them eligible for appointment as a Public Prosecutor or Addl. Public Prosecutor:

28. Varma, J has failed to take into consideration the clear mandate of Sub-section (9) of Section 24 which speaks with regard to the service rendered as a Public Prosecutor or as Addl. 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 purpose of Sub-section (7) and Sub-section (8) of Section 24 of the Code.

29. In view of the aforesaid authoritative decision on the Supreme Court, I am of the opinion that the conclusion reached by Varma, J. that no Petitioner fulfilled the conditions as laid down in Section 24 of the Code and as such they are not entitled to be considered for being appointed, is not logical and against the provisions of law. In my considered opinion, the reasonings given by Sharma, J. for allowing the writ petition are in consonance with the provisions as laid down in Section 24 of the Code and as such I am in agreement with the findings arrived at by Sharma, J.

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30. In the result, the writ application is allowed and the concerned Respondents are directed to consider the case of the Petitioners for the purpose of appointments in the posts of the P.P. and A.P.P. in accordance with Section 24(6) of the Code before making any appointment to the said posts.

31. In the facts and circumstances of the case, there will be no order as to costs.

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