

(2023) 04 PAT CK 0045

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 8473 Of 2019

Sushil Kumar Choudhary

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 11-04-2023

Acts Referred:

Constitution Of India, 1950 — Article 233, 246, 246(1), 246(2), 246(3), 254, 254(1), 309
Bihar Prosecution Manual, 2003 — Rule 5, 5(2)(II)
Code of Criminal Procedure, 1973 — Section 25A, 25A(II)
Insolvency and Bankruptcy Code, 2016 — Section 13, 14
Maharashtra Relief Undertakings (Special Provisions) Act, 1958 — Section 4

Citation : (2023) 04 PAT CK 0045

Hon'ble Judges : Ashutosh Kumar, J; Harish Kumar, J

Bench : Division Bench

Advocate : Dinu Kumar, Ritika Rani, Vardan Mangalam, Ritu Raj, P.K. Shahi, Md. Nadim Seraj, Apurva Kumar, Avinash Chandra

Final Decision : Allowed

Judgement

We have heard Sri Dinu Kumar, learned Advocate for the petitioner and Sri P.K. Shahi, learned Advocate General assisted by Mr. Nadim Seraj, G.P.-5 for the State.

Though nobody appears today for Union of India but affidavit on its behalf has been filed, which supports the case of the petitioner.

The issue pertains to interpretation of Section 25(A) of the Code of Criminal Procedure, 1973 which was incorporated in the Code in the year 2006 by Amendment Act 25 of 2005.

It provides that (1) the State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and many Deputy Directors of Prosecution as it thinks fit. (2) A person shall be eligible to be appointed as a Director of Prosecution or a Deputy Director of Prosecution only if he has been in

practice as an Advocate for not less than ten years and such appointment shall be made with the concurrence of Hon'ble the Chief Justice of the High Court.

After about ten years of the incorporation of the aforementioned provision in the Code, the State of Bihar, in exercise of powers conferred under proviso to Article 309 of the Constitution of India and Section 25(A) of the Cr.P.C., 1973 proposed for amendment in Bihar Prosecution Manual, 2003 (hereinafter called 'Manual') which was assented by the Governor of Bihar.

The amendments proposed and carried out were in Rule 5 of the Bihar Prosecution Manual, 2003 which provision has been substituted by new Rule 5.

According to the amendment, the minimum age and experience qualification has been prescribed as ten years in Bihar Prosecution Service.

Mr. Kumar submits that the aforementioned amendment in Manual is repugnant to the provisions contained in Section 25(A) of the Cr.P.C., 1973 and therefore, the same is required to be struck down as invalid.

It has been adumbrated by Mr. Kumar that Section 25A of the Code, being a Central Legislation, prescribing a minimum eligibility requirement for appointment as Director or Deputy Director of Prosecution as ten years of experience as an Advocate cannot be diluted in any manner by any state legislation.

The amendments carried out in the Manual in Rule 5 provides for a totally different eligibility and experience criterion, which is way higher than what has been prescribed in the Central legislation (Cr.P.C.) in Section 25(A).

With the aforementioned amendment in Manual, the avenue for joining such service is limited to only such persons who have served and have gained experience in the prosecution service of the State of Bihar.

It is therefore submitted that to that extent i.e. the prescription of qualification in the State Legislation, brought out under the powers conferred under Article 309 of the Constitution is bad as it does not pass the muster of constitutionality of a State Legislation in the same field in which the Central Legislation operates.

Mr. Kumar has also referred to a judgment of the Madras High Court in *S. Thamizharasan Vs. the State of Tamil Nadu* (decided on 26.11.2009) by a Division Bench, which prohibits any change in the eligibility requirement pre-fixed/prescribed in the Central Legislation.

Thus, the sum and substance of the argument of the writ petitioner is that the State, in its rule making authority, was incompetent to modify or vary the prescription of age and experience as provided under Section 25(A) of the Code of Criminal Procedure, 1973.

He laments that pursuant to the aforementioned amendment and the direction of a Single Judge of this Court in a batch of writ petitions, the lead case being CWJC

No. 13177 of 2009, the appointment process was initiated and Advertisement No. 33 of 2017 was issued against which the process of recruitment began.

He further submits that even if the appointment process, pursuant to the changed rule in the Manual has been concluded, that ought to be declared a nullity in the eyes of law as the prescription of age and experience in the Manual was beyond the competence of the rule making authority.

In support of the aforementioned proposition, Mr. Kumar has referred to the judgment of the Supreme Court in Small Scale Industries Manufacturers Association (Registered) Vs. Union of India and Others (2021) 8 SCC 511.

The relevant paragraphs are being extracted hereinbelow:

29. The tests of repugnancy as enunciated in the judgments of this Court are threefold: first, there may be a direct inconsistency or conflict between the actual terms of the competing statutes; second, even if there is no direct conflict, where Parliament has intended to occupy the entire field by enacting an exhaustive or complete code, the State law in the same field would be repugnant and inoperative; and third, a conflict may arise where the State Legislature has sought to exercise its powers over the same subject-matter as the legislation by Parliament.

(III) Article 254 of the Constitution and repugnancy

61. Repugnancy of a statute enacted by the State Legislature with a Central statute on a subject in the Concurrent List may arise in any one or more of the following modes: First, there may be an inconsistency or conflict in the actual terms of competing statutes; second, though there is no direct conflict between a State and Central statute, the latter may be intended to be an exhaustive code in which event it occupies the whole field, excluding the operation of the State law on the subject in the Concurrent List; and third, even in the absence of an actual conflict, repugnancy may arise when both the State and Central statutes seek to exercise power over the same subject-matter.

(III) Article 254 and repugnancy

81. In view of the language of Article 254, the State law would be void only if it is inconsistent with and repugnant to a law made by Parliament in the Concurrent List and, in such an event, only to the extent of the repugnancy.

113. The distribution of legislative powers in Part XI of the Constitution envisages that parliamentary legislation extends to the entire territory of India or its part while State legislation extends law to the whole or any part of a State. Under Article 246, the legislative power to make laws "with respect to" any of the matters enumerated in List I of the Seventh Schedule - the Union List is entrusted to Parliament. Clause (1) of Article 246 which embodies this principle is prefaced with a non obstante provision which gives it precedence over clauses (2) and (3). Article 246(2) enunciates the principles governing the exercise of

legislative power "to make laws with respect to any of the matters enumerated in List III of the Seventh Schedule, the Concurrent List. Clause (2) begins with a non obstante provision which gives it precedence over clause (3). Clause (2) embodies the principle that Parliament and [subject to clause (1)] the legislature of any State have the power to make laws with respect to any of the matters in List III. Clause (3) stipulates that the legislature of any State has the exclusive power to make laws for the State or any part of it "with respect to any of the matters enumerated in List II", the State List. Some of the salient features of Article 246 need to be noticed:

113.1. An exclusive power has been entrusted to Parliament to legislate on matters enumerated in List I.

113.2. The plenary power entrusted to Parliament to legislate with respect a to a matter enumerated in List I is reaffirmed by the non obstante provision which operates notwithstanding anything in clauses (2) and (3).

113.3. On matters which have been enumerated in List III:

113.3.1. Parliament has the power to make laws notwithstanding clause (3).

113.3.2. The State Legislature also has the power to make laws subject to clause (1).

113.4. The State Legislatures have the exclusive powers to make laws for the State or any part of it with respect to matters in List II, this power being subject to clauses (1) and (2).

113.5. Clauses (1) and (2) of Article 246 employ non obstante provisions in respect of:

113.5.1. The exclusive power entrusted to Parliament over List I matters.

113.5.2. The power entrusted to Parliament over List III matters.

113.6. Though, the legislature of a State has exclusive power to make laws with respect to matters on the State List, this is subject to clauses (1) and (2).

This plods the petitioner to ask for striking down of the new Rule 5 in the Manual and start the process afresh for filling up the posts.

Mr. P.K. Shahi, learned Advocate General has submitted that in principle he has no opposition to the fact that the State Legislation in the same field cannot survive, if it is repugnant to the Central Legislation, to the extent of the repugnancy, except with the assent of the President but he submits that in this case, the petitioner has chosen to challenge the constitutionality of Rule 5 of the Manual after the process of appointment was completed way back in the year 2017.

He reiterates the argument of Mr. Kumar that because of the direction of the learned Single Judge of this Court in a batch of writ petitions asking the State

Government to fill up all posts and give effect to Section 25(A) of the Cr.P.C. such appointments were made.

The appointments against the said advertisement for the post of Director of Prosecution and the Deputy Directors of Prosecution has been concurred by Hon'ble the Chief Justice of the High Court of Patna as mandated under Section 25(A) (II) of the Code of Criminal Procedure, 1973.

He further submits that true it is that to that extent viz. prescription of a different qualification and experience in the State Legislation runs counter to the requirements under Section 25(A) of the Cr.P.C., 1973 but upsetting the apple-cart now with approximately 500 persons having been appointed and promoted and working now in various districts of the State of Bihar, it would not be appropriate to annul their appointments; albeit there is no insistence for protecting the amended Rule 5 of Manual for future.

In support of the aforementioned arguments, the learned Advocate General has submitted that the issue could be examined from another point of view viz. that any person having experience in prosecution service of the State of Bihar is compulsorily required to be an Advocate and if he has served in the State of Bihar in its prosecution service, it would be a given fact that such person has had the experience of an Advocate for ten years. Even otherwise, the work-profile of an Advocate and Director of Prosecution and Deputy Director of Prosecution are same but with a different orientation.

In support of the aforesaid submission, Sri Shahi has referred to the Judgment of the Supreme Court in case of Deepak Aggarwal Vs. Keshav Kaushik (2013) 5 SCC 277 in the context of Article 233 of the Constitution of India.

However, the major thrust of argument of Mr. Shahi is that now after the appointments have been made and the appointees are working for the last six years, any decision to strike down Rule 5 of the Bihar Prosecution Manual, 2003 should operate prospectively, in which case necessary amendment shall be made in the Manual with respect to prescription of age and experience to be in consonance with the requirements under Section 25(A) of the Cr.P.C., 1973.

After having heard the learned counsel for the parties, we find that even though the work-profile of the Director of Prosecution and the Deputy Directors of Prosecution is similar to that of an Advocate with experience in Courts of Law but that cannot be a justification for excluding such persons who would have the experience of an Advocate for ten years but who have not joined prosecution service. This amendment in the Manual has only restricted the number and scope of aspirants seeking job in prosecution service of the State of Bihar.

The argument of the State that Section 25(A)(2) provides for a minimum of ten years of experience as an Advocate, but by inference it does not preclude any raising of the bar with respect to such minimum qualification, is not acceptable to us if seen from another angle.

True it is that any person more than ten years of age also would be eligible for being appointed as an Officer of the Prosecution Service but persons with only ten years of experience as an Advocate cannot be ousted in terms of the mandate of the Central Legislation.

The argument of Mr. Shahi that an employer has the freedom to fix the experience qualification considering the requirements of the service would not be applicable in this instance when the amendment in the Manual with respect to experience makes it more onerous in the sense that only persons having ten years of experience in prosecution service would be eligible. What would be the eligibility for entering into the prosecution service is not known and therefore fixing such requirement different from what has been prescribed in the Central Legislation cannot be permitted.

The Supreme Court while deciding the constitutionality of Maharashtra Relief Undertakings (Special Provisions) Act, 1958 in *Innovative Industries Ltd. Vs. ICICI Bank and Another* 2018 (1) SCC 407 found that the insolvency code which was a parliamentary law was an exhaustive code on the subject matter of insolvency in relation to corporate entities which was made under Entry 9 to the list 3 of the 7th Schedule. Maharashtra Relief Undertakings (Special Provisions) Act, 1958, which is an earlier enactment provided that the State Government may take over the management of the Relief Undertaking, after which a temporary moratorium in much the same manner as that contained in Sections 13 and 14 of the Insolvency Code of 2016 takes place under Section 4 of the Maharashtra Act. It was found that unless the Maharashtra Act was out of the way, the parliamentary enactment would be hindered and obstructed in such a manner that it will not be possible to go ahead with Insolvency Resolution process outlined in 2016 Code.

It was categorically held that if a State law in either the State list or the concurrent list is of such a nature that it would bring the provisions of the Central Act into direct collision with each other, the State Act, to that extent must yield to the Central Legislation as it would be repugnant to the Central Act as specified under Article 254 of the Constitution of India.

In order to decide the question of repugnancy, the Supreme Court in *Innovative Industries Ltd. (supra)* has laid down certain unavoidable propositions viz. that (A) it must be shown that the two enactments in question contained is inconsistent and irreconcilable, making it absolutely impossible for both to stand together or operate in the same field; (B) if two statutes occupying a particular field and there is no more possibility of both the statutes operating in the same field without coming into collision with each other, then the State Law shall not be repugnant to the Central Law; (C) When there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes would continue to operate in the same field.

It would be apposite to refer to the observations in *G.P. Stewart v. Brojendra Kishore Roy Chaudhury* of AIR 1939 Calcutta 628 in which case there arose the necessity of considering the meaning of repugnancy.

Justice B.N. Rao, who delivered the judgment in the aforementioned case held that "it is sometimes said that two laws cannot be said to be properly repugnant unless there is a direct conflict between them; as when one says "do" and the other "don't", there is no true repugnancy if it is possible to obey both the laws".

This in the opinion of the Bench was too narrow a test and the reason ascribed was that there may well be cases of repugnancy where both laws say don't but in different ways. If the Central Legislation which can be considered to be paramount legislation is not exhaustive or unqualified but itself permits or recognizes other laws, restricting or qualifying the general provisions made in it, then any qualification or restriction introduced by another law cannot be said to be repugnant to the provisions of the paramount legislation.

In the instant situation, though a permission has been granted to the State Government to establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as deemed necessary and fit, but what would be their qualification has been conclusively laid down in Sub-clause 2 of Section 25(A) of the Code of Criminal Procedure, 1973.

The requirement under the Central Act is that only such person who has been in practice as an Advocate for not less than ten years would be considered for appointment after the concurrence with the Chief Justice of the concerned High Court.

The basic minimum qualification, therefore, has been fixed which cannot be altered. If the State Legislation, as in the present case, provides for a higher minimum bar, the provisions contained in Clause 2 of Section 25(A) (Central Legislation) would not remain operative to that extent. There could be difference in a situation when the State Legislature would have provided that preference would be given to persons in the Prosecution service. Such flexibility was available to the State Government but not to raise the minimum bar provided in the Central Act. The expression used in the Central Act is that only such person would be considered to be appointed as Director of Prosecution or a Deputy Director of Prosecution, if he has practiced as an Advocate for not less than ten years.

The argument of Mr. Shahi that the State Government under 25(A) has the flexibility of prescribing higher minimum bar as an employer, is not correct. This prescription in the State law of a higher minimum bar makes Clause-2 of Section 25(A) inoperative.

In *Hoechst Pharmaceuticals Ltd. Vs. State of Bihar* 1983 (4) SCC 45, it has been clarified as to how under Article 254 of the Constitution, there could be reconciliation of two competing laws. Article 254 makes a provision, firstly, as to

what would happen in the case of conflict between the Central and the State laws with regard to subjects enumerated in the concurrent list and secondly for resolving such conflict. Article 254(1) enunciates the normal rule that in the event of a conflict between the Union and the State law in the concurrent field, the former prevails over the latter.

Clause (1) of Article 254 further lays down that if a State law relating to concurrent subject is repugnant to Union law relating to that subject, then whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void.

However, there is an exception to this general rule which has been engrafted in Article 254 itself i.e., if the President of India assents to a State law which has been reserved for its consideration, then in that case, the State law shall prevail, notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject.

In such a case, the Central Act will give way to the State Act only to the extent of inconsistency between the two and no more.

It is apodictic that in the present case, the subject matter concerning the two legislations are in the same field, which is relatable to the concurrent list in the 7th Schedule of the Constitution of India.

As noted above, the State law prescribes a higher minimum bar thereby shifting the goal-post farther with respect to eligibility.

In our considered opinion, the State law cannot further lower or enhance the qualification or else Section 25(A) of the Code of Criminal Procedure, 1973 in Clause-2 thereof would not remain operative.

For the aforementioned reasons, we decide to and declare that the amendment in Rule 5(2)(II) of the Bihar Prosecution Manual, 2003 does not pass the constitutional muster and therefore has to go.

The aforementioned is struck down as invalid after having noted that the other Sub-clauses in Rule 5 are in consonance with the provisions contained in Section 25(A) of the Code of Criminal Procedure, 1973.

Now coming to the metier issue whether the appointment process which was begun in the light of Rule 5 of the Manual and got concluded, could be salvaged.

We have noted the submission of the State that the question of constitutionality was raised two years after the process got concluded and persons were appointed on the posts of Director of Prosecution and Deputy Directors of Prosecution, it would be absolutely impracticable to annul their appointments at this stage. The appointees have put in six years in service and therefore, we are of the view that their appointments ought not to be disturbed.

However, the State is directed to modify Rule 5 of the Bihar Prosecution Manual,

2003 forthwith, to bring it in consonance with the provisions contained in Section 25(A) of the Code of Criminal Procedure, 1973 and any future appointment process shall abide by the requirements under Section 25(A) of the Code of Criminal Procedure, 1973.

The writ petition stands allowed and disposed of accordingly.