

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI.

O.A. 1722A/87
MP 316/88

Date of decision 23-12-1988

Shri V.A. Gupta

.....Petitioner

Vs.

Union of India & Others

.....Respondents

For the Petitioner

.....Shri R.P. Oberoi,
Advocate

For the Respondents

.....Mrs. Avinash Ahlawat
with Shri Mukul Talwar,
Advocate

CORAM:

THE HON'BLE MR. P.K. KARTHA, VICE CHAIRMAN(J)

THE HON'BLE MR. D.S. MISRA, ADMINISTRATIVE MEMBER

1. Whether Reporters of local papers may be allowed to see the Judgment? *Yes*
2. To be referred to the Reporter or not? *Yes*

(Judgment of the Bench delivered by Hon'ble
Mr. P.K. Kartha, Vice Chairman(J))

The sole question arising for consideration in the present application filed under Section 19 of the Administrative Tribunals Act, 1985 and the Misc. Petition, is whether a person who is appointed by the Administrator of the Union Territory of Delhi as Additional Public Prosecutor in exercise of the powers conferred on the Administrator by Section 24(3) of the Code of Criminal Procedure, 1973

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is legally entitled to the scale of pay prescribed for the post of Additional Public Prosecutor in the Directorate of Prosecution of the Delhi Administration under the relevant Recruitment Rules.

2. The notification issued by the Administrator on 25.5.85 reads as follows:-

"

NOTIFICATION

No.F.4/6/85-HOME(G): In exercise of the powers conferred by Section 24(3) of the Code of Criminal Procedure, 1973 the Administrator of the Union Territory of Delhi is pleased to appoint the following Senior Prosecutors/Prosecutor as Additional Public Prosecutors for the Union Territory of Delhi, with immediate effect:-

- | | | |
|----|-------------------|-------------------|
| 1. | Sh. S.S. Mayer | Senior Prosecutor |
| 2. | Sh. A.N. Tandon | - do - |
| 3. | Sh. Jeet Ram | - do - |
| 4. | Sh. S.K. Dutta | - do - |
| 5. | Shri R.D. Sharma | - do - |
| 6. | Sh. D.K. Kathuria | - do - |
| 7. | Sh. V.A. Gupta | Petitioner |

2. The appointment shall not confer upon the officers concerned any right for regular appointment in vacancies against the sanctioned strength of Additional Public Prosecutors or in the matter of seniority etc. and they shall not be entitled to any extra remuneration on this account.

By order and in the name of the Administrator of the Union territory of Delhi.

(S.S. Khullar)
DY. SECRETARY HOME(GENERAL)
DELHI ADMINISTRATION: DELHI.

No.F.4/6/85-Home(G)

Dated the: 25-5-1985"

(Vide Annexure A pages 12 & 13 of the Paper-Book)

3. From the aforesaid notification, it will be seen that the persons at S.Nos. 1 to 6 are Sr. Prosecutors while the applicant whose name figures at S.No.7 is a Prosecutor.

4. The greivance of the applicant is that though he was appointed as Additional Public Prosecutor in terms of the aforesaid notification, he has not been paid the scale of pay and allowances admissible to Additional Public Prosecutors which is higher than that of Prosecutors.

5. There are 15 posts of Senior Prosecutors in the Directorate of Prosecution and the Department of Prevention of Food Adulteration and 12 posts of Additional Prosecutors in the Directorate of Prosecution in the pay scale of Rs.840-1200 (pre-revised). Prosecutors are in the pay scale of Rs.650-960(pre-revised).

6. In para 2 of the aforesaid notification, it has been stipulated that the appointment shall not confer upon the officers concerned any regular appointment in vacancies against the sanctioned strength of Additional Public Prosecutors or in the matter of seniority etc. and they shall not be entitled to any extra remuneration on this account. This stipulation has been called in question in the present application.

7. The applicant has annexed to the Misc. Petition the final seniority list of the Prosecutors working in the Directorate of Prosecution in the Delhi Administration as on 24.6.1982. It will be seen therefrom that the persons mentioned at S.Nos. 1 to 6 of the aforesaid notification dated 25.5.85 figure at S.No.27, 28, 29, 30, 32 and 33 and the name of the petitioner which figures at S.No.7 of the aforesaid notification finds place at S.No.72 of the seniority list.

8. The applicant has stated that he has challenged the seniority list of 1982 in which his seniority was reduced from S.No.10 to S.No.72 and that this matter is pending in this Tribunal as T.906/85. In the aforesaid case, he has also filed Misc. Petitions claiming that he should be considered by the DPC, that the DPC considered him but the result of the DPC has been kept under Sealed Cover and that one post of Sr. Prosecutor/Additional Public Prosecutor (regular) has been kept vacant. In that case, the applicant moved an MP for his protection from being denotified and reverted. He has been given temporary protection by means of a stay by another Bench of this Tribunal.

9. In the present application, the applicant has prayed that the respondents should be directed to pay him the salary and other benefits with effect from 25.5.85 onwards, which are being paid to the other Additional Public Prosecutors. In other words, he is claiming the higher pay scale of Rs.840-1200 (pre-revised) as against the scale of the Prosecutor which is Rs.650-960(pre-revised).

10. The respondents have contended in their counter affidavit filed in the main application as well as ⁱⁿ the MP that the notification dated 25.5.85 only permitted the applicant to appear in the Court on behalf of the Delhi Administration and on that ^{basis,} he was only entitled to the pay of Prosecutor which rank he holds at present. He would be entitled to the pay of Additional Prosecutor only if he is promoted to that post.

11. The respondents have further pointed out that in the Union Territory of Delhi, there exists a regular cadre of prosecuting officers. Prior to 1980, Advocates used to be appointed as Additional Public Prosecutors, but after the decision of the Delhi High Court in C.W. 772/79 (R.K. Kochhar Vs. Lt. Governor Delhi & Others) the post of Additional Public Prosecutors were being filled by promotion of Prosecutors/Sr. Prosecutors. ^{or} in the rank. There were no Recruitment Rules for appointment of Public Prosecutors till 28.1.1987 when the rules were notified.

12. The contention of the respondents is that officers including Prosecutors, Sr. Prosecutors and Chief Prosecutors used to be appointed Additional Public Prosecutors only for the purposes of Section 24(3) of the Code of Criminal Procedure, 1973 and it was not ^{order of} promotion. ^(to the post Addl.P.P.) Regular recruitment and appointment to the post of Additional Public Prosecutor started only after the Recruitment Rules were brought into force in 1987. Respondents have also denied the allegation of the applicant that he was duly selected from amongst the Prosecutors and promoted as Additional Public Prosecutors vide the notification dated 25.5.85. According to them, there was no selection and no promotion involved. He was notified as Additional Public Prosecutor for the purpose of Section 24(3) of the Code of Criminal Procedure, 1973 on the recommendations of the Director, who felt that "as the petitioner had put a long span of service, he may be given a chance to show his worth" but he ultimately failed to do so.

They have also alleged that the work and conduct of the applicant was far from satisfactory and hence they wanted to denotify him, which action has been stayed by another Bench of this Tribunal referred to earlier.

11. To our mind, the applicant can succeed in the present application only if he can establish that posts of Additional Public Prosecutors exist in terms of Section 24(3) of the Code of Criminal Procedure, 1973 and that persons are to be appointed to those posts. In this context it would be necessary to consider the system of appointment of Public Prosecutor under the old Code of Criminal Procedure, 1898 and the new Code. Section 492 of the old Code which corresponds to section 24 & 25 of the new Code, reads as follows:

- "492.(1) The Central Government or the State Government may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors.
- (2) * * * The District Magistrate, or, subject to the control of the District Magistrate, the Sub-Divisional Magistrate, may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below such rank as the State Government may prescribe in this behalf, to be Public Prosecutor for the purpose of any case."

12. It will be noticed that under the old Code, the appropriate Government may appoint one or more "officers" to be called Public Prosecutor. Power of appointment also vested in the District Magistrate in certain cases.

13. Under the New Code, qualifications have been prescribed for appointment of a person as a Public prosecutor or as Additional Public Prosecutor. He should have been in practice as an Advocate for not less than seven years.

The District Magistrate no longer enjoys the power to appoint a Public Prosecutor. Sub Section (1) of Section 24 provides, inter alia, that 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 Prosecutors 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. Sub Section 2(2) deals with the appointment of Public Prosecutors for the purpose of conducting any case or class of cases in any district, or local area. Sub Section (3) under which the applicant and six others were appointed as a Additional Public Prosecutors reads as follows: -

"(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."

Sub-Section (4) provides that 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 Prosecutors or Additional Public Prosecutors for the district. Such appointments should be from a panel prepared by the District Magistrate in view of the provisions of Sub Section 5. Sub-Section (6) which deals with the appointment of Public Prosecutor

or Additional Public Prosecutor from persons belonging to a regular cadre of Prosecuting Officers reads as follows:

(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, not 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)."

13. Thus, it will be clear that the appointment of Public Prosecutors under Section 24 of the new Code is for the purpose of conducting criminal cases in the courts. These are statutory appointment. The Section is silent on the question whether the appointees ^{or} should be the officers of the Government or not. Even a person who is not a Government servant is eligible for appointment as Public Prosecutor or Additional Public Prosecutor if he had been in practice as an Advocate for the prescribed period. In view of this, no provision has been made in Section 24 - and understandably so - regulating the terms and conditions of the appointment, including pay and allowances of the persons so appointed. It is pertinent to mention that there are similar statutory appointments which had been made where the statute does not lay down the terms and conditions of the appointment or regulate the pay and allowances admissible to the incumbents. For example,

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Section 9 of the Delhi Sales Tax Act, 1975 deals with the sales tax authorities. Sub-section(1) of this Section provides ^{that} ~~for~~ carrying out the purpose of this Act, the Administrator shall appoint a person to be the Commissioner of Sales Tax. Sub Section (2) provides that : -

"To assist the Commissioner in the execution of his functions under this Act, the Administrator may appoint as many Additional Commissioners of Sales Tax, Sales Tax Officers and such other persons with such designations as the Administrator thinks necessary."

As against the above, there are statutes in which the persons have been appointed to perform statutory duties provision have been made to pay ^{or} ~~the~~ salaries and allowances to such persons.

~~xxxxxxxxxxxxxxxxxx~~. For example, Section 14 of the Aluminium Corporation of India Ltd. Acquisition Act, 1981 deals with the appointment by the Central Government of Commissioners of payments and other persons to assist the Commissioner. Sub-Section(4) of Section 14 that "salaries and allowances of the Commissioner and other persons appointed under this Section shall be defrayed out of the Consolidated fund of India."

14. " We are of the opinion that appointment of Public Prosecutor and Additional Public Prosecutor under the Code of Criminal Procedure, 1973 is a statutory appointment to perform certain functions envisaged in that section and these are not appointments to posts under Central Government or the State Government, as the case may be. In a state where there is a regular cadre of Prosecuting Officers, however, the State Government shall appoint them as Public Prosecutors or Additional Public

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Prosecutors unless that Government is of the opinion that no suitable person is available in the cadre for such appointment.

15. That the appointment of Public Prosecutor or Additional Public Prosecutor under Section 24 of the Code of Criminal Procedure, 1973 is not an appointment to a post under the appropriate Government is borne out from the decision of the Gujarat High Court in Dilipbhai Chhotalal Vs. State, 1971 (Vol. XII) Gujarat Law Reporter 999. In that case which dealt with the interpretation of Section 492 of the Code of Criminal Procedure, 1898 (corresponding to Section 24 of the new Code) one of the contentions raised by the petitioner was that the expression "appoint" occurring in Section 492(1) implies that it was obligatory on the State Government to fix the scale and quantum of fees payable to the Special Public Prosecutor. In this context reference was made to the decision of the Supreme Court in General Manager, Southern Railway Vs. Rangachari, AIR 1962 SC 36 and of the Patna High Court in Sukhnandan Thakur Vs. State of Bihar, AIR 1967 Patna 617. The Gujarat High Court held that the word appoint in Section 492 does not bring within its fold all the matters which the word "appoint" is held to embrace in Article 16(1) of the Constitution. The following extracts from the judgement are relevant:

"In General Manager, Southern Railway v. Rangachari, AIR 1962 SC 36 the expression "appointment" occurring in Article 16(1) of the Constitution has been interpreted by the Supreme Court in para 14 at page 50 of the report to mean all the terms and conditions of service pertaining to that office.

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Similarly in Sukhnandan Thakur v. State of Bihar A.I.R. 1967 Patna 617, the word "appointment" occurring in Article 16(1) was interpreted as applying both to the case of appointment as well as of termination and the expression was given an enlarged meaning as pointed out in the course of the judgement. In our opinion, however, these two decisions cannot assist the petitioner. All that these two decisions lay down is that while interpreting the expression "appointment" in the context of Article 16(1) of the Constitution, one should not confine it merely to appointment at the initial stage but having regard to the object and context, it should also include promotion, termination etc. The interpretation put upon that expression with reference to the particular setting in which the word occurs in Article 16(1) having regard to the object of the said Article cannot be pressed into service while interpreting the word "appoint" occurring in sec.492(1) of the Code. The word "appoint" in sec.492 would in the context in which it appears only mean the initial appointment and would not necessarily be within its fold all the matters which the word "appoint" is held to embrace in Article 16(1) of the Constitution."

15A. It is no doubt true that in a state where there exists a regular cadre of Prosecuting Officer, it is incumbent on the State Government to appoint persons from that ^{cadre} as Public Prosecutor or Additional Public Prosecutor unless the Government is of the opinion that no suitable person is available in the State. (vide K.J. John Vs. State of Kerala, 1981 Cr.L.J. 121).

16. In the instant case, the respondents have stated that the recruitment rules regarding Public Prosecutors were notified only in January, 1987. There is nothing to indicate from the record that the persons who were appointed as Additional Public Prosecutors by the impugned notification dated 25.5.1985 belonged to a regular cadre of Prosecuting Officers of the Delhi Administration at that point of time. Therefore, it was open to the Delhi Administration to appoint any one who was eligible for appointment as Public Prosecutor or Additional Public

Prosecutors in 1985 under Section 24 of the Code of Criminal Procedure 1973 and the appointees need not necessarily be even officers of the Government. The fact that by the impugned order officers of the Government were appointed as Additional Public Prosecutors is hardly relevant. Similarly no special advantage can be claimed by the applicant merely because he was appointed as one of the Additional Prosecutor overlooking the claims of several of his juniors in the seniority list which was published by the Delhi Administration in 1982.

17. Shri Oberoi the learned counsel for the applicant heavily relied upon the recent decisions of the Supreme Court enunciating the principle of 'equal pay for equal work'.* He also emphasised, ^{as applicant} the fact that the nature of duties performed by the and the responsibilities shouldered on him were identical with those of Additional Public Prosecutors in the Delhi Administration who were in the pay scale of 840-1200 (pre-revised). He also highlighted the fact that the applicant was appointed by the impugned notification dated 25.5.1985 in preference to several of his seniors in the

* Cases cited by the learned counsel for the applicant.

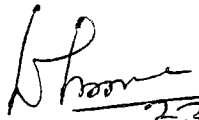
1. Surinder Singh and Another Vs. The Engineer-in-Chief, CPWD and Ors. A.T.R. 1986 S.C. 76.
 2. M/s. Mackinnon Mackenzie Co. Ltd. Vs. Audrey De'costs, AIR 1987 SC 281.
 3. West Bengal State Electricity Board and Ors. Vs. Desh Bandhu Ghosh, AIR 1985 SC 722.
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service.

18. In our opinion, the decision of the Supreme Court relied upon by Shri Oberoi are not relevant in the present context. As we have already pointed out, the appointments of Public Prosecutors under Section 24 of the Code of Criminal Procedure are statutory appointments and the holders of such appointments are not holders of civil posts under the Union or the State as the case may be. In case Government servants are appointed as Public Prosecutors, they have to look to the service to which they belong for their conditions of service including pay scales, promotion and the like. There is also no indication that the appointments made under the impugned notification dated 25.5.1985 were from a regular cadre of Prosecuting Officers. The regular cadre did not come into existence in 1985. Our attention was drawn to the creation of certain posts of Public Prosecutors and Additional Public Prosecutors under the Delhi Administration on 26th December, 1983. Creation of posts by itself will not have the effect of constituting a regular cadre within the meaning of sub-section (6) of Section 24 of the Code of Criminal Procedure.

19. In the light of the foregoing, we see no merit as regards the main reliefs prayed for in the present application and the same is liable to be dismissed. The applicant has, however, ^{also} prayed for grant of any other relief or reliefs which

are fit in the circumstances of the present case. In this context, we may point out that while the applicant cannot claim the pay scale of Additional Public Prosecutor merely by virtue of his appointment by the impugned notification dated 25-5-1985, it has resulted in arousing hopes and expectations of the applicant for higher pay scales.. Since the recruitment rules for the posts in the Directorate of Prosecution have been made in 1987, the respondents should fill up the posts in accordance with those rules expeditiously so as to form a regular cadre of Prosecuting Officers. Once the regular cadre is formed, all appointments should be made in conformity with the provisions of Section 24(6) of the Code of Criminal Procedure, 1973 and a fresh notification under Section 24(3) should be issued thereafter in supersession of the impugned notification dated 25-5-1985. The application is disposed of with the above directions, with no order as to costs.


23/12/87
(D.S. MISRA)
MEMBER (A)


23/12/88
(P.K. KARTHA)
VICE CHAIRMAN