

Dhira Devi Vs. Md. Jamaluddin Khan and Others

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Court : Guwahati

Decided On : Jan-07-2016

Judge : The Honourable Acting Chief Justice Mr. T. Vaiphei & L.S. Jamir

Appeal No. : Writ Appeal No. 323 of 2015

Appellant : Dhira Devi

Respondent : Md. Jamaluddin Khan and Others

Judgement :

Judgment and Order (CAV)

1. The sole question which falls for consideration in this appeal is whether the learned Single Judge was correct in holding that there was violation of Section 24 of the Code of Criminal Procedure, 1973 (Cr-PC) in the appointment of the appellant inasmuch as the consultation between the District Magistrate, Barpeta (respondent and the learned Sessions Judge, Barpeta was not reduced to writing. The material facts are hardly in dispute. Suffice it to say that the appellant (the respondent No. 5 in the writ petition) was appointed as the Assistant Public Prosecutor, Bajali on 2-6-2012 till her engagement as Additional Public Prosecutor on 20-2-2015 after replacing the respondent No. 1 (the writ petitioner). The respondent No. 1 had been appointed as Additional Public Prosecutor, Bajali on 29-8-2002. It would appear that the respondent 2 issued the WT message dated 19-1-2012 to the respondent 5 requesting him to furnish a fresh panel of Advocate

at the ratio of 1:3 for appointment to the post of Additional Public Prosecutor (One post) and the post of Assistant Government Advocate (one post), which was marked to the Chief Judicial Magistrate, Barpeta and the Sub-Divisional Judicial Magistrate, Barpeta. The Sub-Divisional Judicial Magistrate, (M) Bajali thereafter forwarded a panel of advocates through the letter dated 7-3-2014 to the respondent No. 4 three names for the posts of Additional Public Prosecutor and Assistant Government Pleader/Advocate by maintaining the ratio of 1:3 excluding the name of the respondent No. 1. These three names were then forwarded by the respondent No. 5 to the respondent No. 2 for the appointment to the said posts vide the letter dated 1-4-2014. After receiving the aforesaid communication, the respondent No. 4 issued the Notification dated 2-2-2015 relieving the respondent No. 1 from the post of Additional Public Prosecutor, Bajali and also relieving the appellant from the post of Assistant Public Prosecutor, Bajali with immediate effect. Another Notification was issued on the same day appointing the appellant as the Additional Public Prosecutor, Bajali. Following the latter notification, the appellant joined the post of Additional Public Prosecutor in the Court of the Additional Sessions Judge, Bajali on 20-2-2015. Aggrieved by this, the respondent No. 1 filed WP(C) No. 1598/15 before this Court, and the learned Single Judge by the impugned judgment allowed the writ petition, quashed the appointment of the appellant and remanded the case to the respondent authorities for decision in accordance with law.

2. We have heard Mr. M.K. Choudhury, the learned senior counsel for the petitioner, assisted by Mr. H.K. Das, the learned counsel for the appellant, Mrs. B. Goyal, the learned Government Advocate representing the State of Assam and Mr. H. Ali, the learned counsel for the respondent No. 1. The first contention of the learned senior counsel is that the learned Single Judge has completely overlooked the fact that the panel had been prepared by the Deputy Commissioner, Barpeta, after following the procedure laid down in Section 24 Cr.-PC and after consulting the District and Sessions Judge, Barpeta and has in the process erroneously come to the conclusion that no such consultation had taken place: the original record with respect to the said consultative process ought to have been perused by the learned Single Judge before coming to such conclusion. He further maintains that Section 24 Cr-PC nowhere requires such consultation to be

reduced into writing in the form of minutes; the consultation between the Deputy Commissioner and the Sessions Judge is in conformity with the law laid down by the Apex Court in *State of UP v. Johri Mal*, (2004) 4 SCC 714 as the nature of appointment of Additional Public Prosecutor is in the nature of professional engagement. According to the learned Single Judge, the learned Single Judge completely misunderstood the meaning of the term consultation when no uniform meaning can be given to such word, which would vary depending upon the situation and the context in which the word appears in the Constitution or in an enactment or rule or regulation: this alone will entail the interference of this Court. Contending that there was no illegality or arbitrariness in the appointment of the appellant as Additional Public Prosecutor, the learned senior counsel urges this Court to set aside the impugned judgment and restore the appellant to the post of Additional Public Prosecutor without further delay.

3. Mrs. B. Goyal, the learned Government Advocate, Assam, supports the impugned decision and submits that there was no illegality in the appointment process of the respondent No. 1 as the same was done in accordance with the provisions of Section 24(4) and (5) Cr-PC by preparing a panel of advocates by the Deputy Commissioner, Barpeta in consultation with the Sessions Judge, Barpeta. She submits that the appellant had been continuing as the Additional Public Prosecutor, Barpeta for about 13 years and has no vested right to continue to remain there perpetually; no legal right of the appellant is violated by terminating his engagement. Mr. H. Ali, the learned counsel for the respondent No. 1 supports the impugned judgment and submits that no interference is called for. According to him, there was violation of Section 24 Cr-PC in the appointment of the appellant as the Additional Public Prosecutor as the same was not done after due consultation between the Deputy Commissioner, Barpeta and the Sessions Judge, Barpeta. The learned Single Judge has, therefore, rightly quashed the appointment of the appellant as there were no record showing that consultation process had taken place between the Deputy Commissioner, Barpeta and the Sessions Judge, Barpeta consistent with the requirement of Section 24(4) and (5) Cr-PC, for which the interference of this Court is not called for.

4. Section 24 Cr-PC deals with the appointment of Public Prosecutor and Additional Public Prosecutor, which is in the following terms:

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 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.

(2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case 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 Prosecutors 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 of names prepared by the District Magistrate under sub-section (4).

[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.]

(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:

Provided that the Court may permit the victim to engage an advocate of this choice to assist the prosecution under this sub-section.]

(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.

5. There is no dispute at the bar that in the State of Assam, there is no regular Cadre of Prosecuting Officers and, as such, the appointment of Public Prosecutor and Additional Public Prosecutor shall have to be made in accordance with the provisions of Section (4) and (5) of the Code, namely, by preparation of a panel of names of persons, who are, in the opinion of the District Magistrate, after consulting the Sessions Judge, fit to be appointed as Public Prosecutor and

Additional Public Prosecutor for the district. Though the District Magistrate is the authority to prepare such panel of names, it is obligatory upon him to consult the Sessions Judge of the district before completing such exercise. Thus, the term consultation is the crucial. One controversy is already settled in a catena of decisions rendered by the Apex Court, one of which is *Land T Mcneil Ltd. v. Government of Tamil Nadu*, AIR 2001 SC 844 where it has been held that consultation does not mean concurrence. Whether the term consultation in Section 24 Cr-PC will have the same interpretation as the term consultation used in Article 124 of the Constitution was one of the issues debated in *State of U.P. v. Johri Mal*, (2004) 4 SCC 714. This is what the Apex Court said:

53. This Court in *Supreme Court Advocates-on-Record Assn. v. Union of India*²² held that the word consultation is capable of giving different meanings in different contexts. The word consultation occurring in Article 124 of the Constitution of India was given a particular construction having regard to the relevant significant context in which the same was used. Having regard to the provisions of the Constitution, the Court felt that the meaning of the word consultation cannot be confined to its lexical definition. ²² (1993) 4 SCC 441 54. In *Special Reference No. 1 of 1998*, Re¹ this Court stated: (SCC p. 762, para 12)

12. The majority view in *Second Judges case* is that in the matter of appointments to the Supreme Court and the High Courts, the opinion of the Chief Justice of India has primacy. The opinion of the Chief Justice of India is reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation . It is to be formed after taking into account the view of some other judges who are traditionally associated with this function . The opinion of the Chief Justice of India so given has primacy in the matter of all appointments . For an appointment to be made, it has to be in conformity with the final opinion of the Chief Justice of India formed in the manner indicated . It must follow that an opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy in the matter of appointments to the Supreme Court and the High Courts and the Government is not obliged to act thereon.

55. Appointment of the District Government Counsel cannot be equated with the appointments of the High Court and the Supreme Court Judges. A distinction must be made between professional engagement and a holder of high public office. Various doctrines and the provisions of the Constitution which impelled this Court to give meaning of consultation as concurrence and wherein the Chief Justice of India will have a primacy, cannot be held to be applicable in the matter of consultation between the District Magistrate and the District Judge for the purpose of preparation of a panel of the District Government Counsel.

56. We would, however, like to lay stress on the fact that the consultation with the District Judge must be an effective one. The District Judge in turn would be well advised to take his colleagues into confidence so that only meritorious and competent persons who can maintain the standard of public office can be found out.

6. The scope and ambit of the term consultation again came up for consideration before the Apex Court in *State of UP and another v. Johri Mal*, (2004) 4 SCC 714. After reviewing a plethora of case-laws, the Apex Court came to the following conclusions:

26. The result of the above discussion leads to the following conclusions:

(1) Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or at least satisfactory solution. There should be meeting of minds between the proposer and the persons to be consulted on the subject of consultation. There must be definite facts which constitute the foundation and source for final decision. The object of the consultation is to render consultation meaningful to serve the intended purpose. Prior consultation in that behalf is mandatory.

(2) When the offending action affects fundamental rights or to effectuate built-in insulation, as fair procedure, consultation is mandatory and non-consultation renders the action ultra vires or invalid or void.

- (3) When the opinion or advice binds the proposer, consultation is mandatory and its infraction renders the action or order illegal.
- (4) When the opinion or advice or view does not bind the person or authority, any action or decision taken contrary to the advice is not illegal, nor becomes void.
- (5) When the object of the consultation is only to apprise of the proposed action and when the opinion or advice is not binding on the authorities or person and is not bound to be accepted, the prior consultation is only directory. The authority proposing to take action should make known the general scheme or outlines of the actions proposed to be taken be put to notice of the authority or the persons to be consulted; have the views or objections, take them into consideration, and thereafter, the authority or person would be entitled or has/have authority to pass appropriate orders or take decision thereon. In such circumstances it amounts to an action after consultation .
- (6) No hard and fast rule could be laid, no useful purpose would be served by formulating words or definitions nor would it be appropriate to lay down the manner in which consultation must take place. It is for the Court to determine in each case in the light of its facts and circumstances whether the action is after consultation ; was in fact consulted or was it a sufficient consultation .
- (7) Where any action is legislative in character, the consultation envisages like one under Section 3(1) of the Act, that the Central Government is to intimate to the State Governments concerned of the proposed action in general outlines and on receiving the objections or suggestions, the Central Government or Legislature is free to evolve its policy decision, make appropriate legislation with necessary additions or modification or omit the proposed one in draft bill or rules. The revised draft bill or rules, amendments or additions in the altered or modified form need not again be communicated to all the concerned State Governments nor have prior fresh consultation. Rules or Regulations being legislative in character, would tacitly receive the approval of the State Governments through the people s representatives when laid on the floor of each House of Parliament. The Act or the Rule made at the final shape is not rendered void or ultra vires or invalid for non-consultation.

7. Having given our thoughtful consideration to the submissions of the learned counsel appearing for both the parties,, we are of the firm view that the concept of consultation envisaged by Section 24(5) Cr-PC cannot but be the one covered by conclusion (5) of the judgment in Johri Mal case (supra). The question to be decided now is whether there was consultation between the District Magistrate, Barpeta district and the Sessions Judge, Barpeta in conformity with conclusion (5) of Johri Mal case. The findings of the learned Single are to the following effect:

31. Thus, two things are noticeable. Firstly, the panel of names was prepared by the Sub-Divisional Judicial Magistrare (M), Bajali who forwarded the same to the Deputy Commissioner, Barpeta vide letter dated 7-3-2015. Copy of the said letter was marked to the Senior Government Pleader, Barpeta with reference to his letter dated 25-2-2014. Secondly, the Deputy Commissioner, Barpeta forwarded the panel to the Government by mentioning that the panel was prepared in consultation with the District and Sessions Judge, Barpeta.

32. As noticed above, the panel was prepared by the Sub-Divisional Judicial Magistrate and in her forwarding letter to the Deputy Commissioner dated 7-3-2015 there is no mention about any discussion or consultation with the District and Sessions Judge. However, in the letter of the Deputy Commissioner forwarding the panel to the Government it was mentioned that the same was prepared in consultation with the District and Sessions Judge, Barpeta. The stand of the District and Sessions Judge is that Deputy Commissioner, Barpeta appeared to have verbally consulted the hen District and Sessions Judge, Barpeta. There is no record or minute of such consultation. It is not known when such consultation took place or about the broad contours of the consultation. As discussed above, for consultation to be effective and meaningful it is necessary that the minutes of such consultation in writing which will ensure greater transparency and fairness in the decision-making process. In the absence of recorded minutes of consultation, it would not be discernible as to how or what consultation took place or whether such consultation took place at all. /thus, the manner in which the petitioner was removed from the office of Additional Public Prosecutor, Bajali and respondent No. 5 in his plac is not in conformity with the requirement of sub-Section (4) and (5) of Section 24 Cr.-P.C. Following the law laid down by the Supreme Court as above,

appointment of respondent No. 5 is required to be interfered with though this Court would refrain from directing the State to continue with the appointment of the petitioner as Additional Public Prosecutor. This is within the discretion of the State and in view of what has been discussed above, it is expected that the State would exercise the discretion in a fair and reasonable manner.

8. We have perused the record relating to the consultation process in the appointment of the appellant and found that there was indeed some consultation between the District Magistrate, Barpeta and the Sessions Judge, Barpeta when the former was proposing to prepare the panel of names for advocates for the appointment. By the letter dated 7-3-2014 of the Sub-Divisional Judicial Magistrate, Bajali, Pathsal addressed to the District Magistrate/Deputy Commissioner, Barpeta, he forwarded a panel of three names including the appellant for the post of Additional Public Prosecutor indicating therein their respective ages, the period of their practices and their present assignment. The District Magistrate, Barpeta thereafter vide his letter dated 26-3-2014 forwarded to the Sessions Judge, Barpeta the said panel of names requesting the latter to give his comment. The Sessions Judge, Barpeta by his letter dated 29-3-2014 informed the District Magistrate, Barpeta that those advocates in the panel so forwarded seems fit and proper and no comment on panel of Advocates. In the light of such correspondences, we are of the opinion that there was consultation between the District Magistrate/Deputy Commissioner, Barpeta and the Sessions Judge, Barpeta consistent with conclusion (5) of Johri Mal case. Incidentally, the Additional Public Prosecutor to be appointed is to work in Bajali Judicial Court, and the names of the panel of lawyers were shortlisted by none other than the Sub-Divisional Judicial Magistrate, Bajali, who would arguably be at the vantage point to assess the merit/potential of the local lawyers for such appointment. It could, however, be argued that the consultation process should have been done in a more sophisticated manner, but, then, the kind of consultation contemplated by Section 24(4) and (5) Cr-PC cannot be equated with the concept of consultation contemplated in Article 124 of the Constitution as already held in Johri Mal case. It was after consulting the two most important functionaries of the District Judiciary, the District Magistrate, Barpeta, forwarded the name of the appellant for the post of Additional Public Prosecutor, Barpeta Judicial Courts, and if the State

Government, having satisfied about the fitness of the appellant for the appointment, decided to appoint and has appointed her, it will not be proper for this Court to question the wisdom of such appointment. The procedure laid down in Section 24 Cr-PC for the appointment of Additional Public Prosecutor has, in our opinion, been substantially complied with, though not to satisfaction of the writ petitioner. The learned Single Judge did not have the opportunity to peruse the file relating to the appointment process in question and has in the process come to an erroneous decision, which warrants our interference. The following observations of the Apex Court in Johri Mal case (supra), though rendered in the context of extension of tenure of Public Prosecutor and District Counsel have, in our considered view, completely answered the contentions of the learned counsel for the respondent No. 1:

40. So long as in appointing a counsel the procedures laid down under the Code of Criminal Procedure are followed and a reasonable or fair procedure is adopted, the court will normally not interfere with the decision. The nature of the office held by a lawyer vis- -vis the State being in the nature of professional engagements, the courts are normally chary to overturn any decision unless an exceptional case is made out. The question as to whether the State is satisfied with the performance of its counsel or not is primarily a matter between it and the counsel. The Code of Criminal Procedure does not speak of renewal or extension of tenure. The extension of tenure of Public Prosecutor or the District Counsel should not be compared with the right of renewal under a licence or permit granted under a statute. The incumbent has no legal enforceable right as such. The action of the State in not renewing the tenure can be subjected to judicial scrutiny inter alia on the ground that the same is arbitrary. The courts normally would not delve into the records with a view to ascertain as to what impelled the State not to renew the tenure of a Public Prosecutor or a District Counsel. The jurisdiction of the courts in a case of this nature would be to invoke the doctrine of Wednesbury unreasonableness as developed in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. ((1947) 2 All ER 680: (1948) 1 KB 223 (CA))

9. For what has been stated in the foregoing, the appeal is allowed. The impugned judgment dated 1-10-2015 is hereby set aside. However, the parties are directed

to bear their own costs.

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