

Jaidhari Roy and ors. Vs. State of Bihar and ors.

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Court : Patna

Decided On : Jul-21-1994

Judge : S.K. Mookerji and Bisheshwar Prasad Singh, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 24, 24(1), 24(2), 24(3), 24(5), 24(6), 24(7), 24(8), 24(9), 25 and 26(6); Code of Criminal Procedure (CrPC) (Amendment) Act, 1978; [Advocates Act, 1961](#); Police Act; Bihar Practice and Procedure Manual Rules - Rule 137; Kerala Government Law Officer (Appointment and Conditions of Service) and Conduct of Cases Rules, 1978 - Rule 5; Bihar Code of Criminal Procedure (CrPC) (Amendment) Act, 1984 - Sections 24(6)

Appeal No. : Civil Writ Jurn. Case No. 2888 of 1994

Appellant : Jaidhari Roy and ors.

Respondent : State of Bihar and ors.

Advocate for Def. : Chandramauli Kumar Pd., A.A.G.III and S.N Jha and Mihir Kumar Jha, Advs.

Advocate for Pet/Ap. : Shyama Prasad Mukherjee, Markandeya Singh and Anil Kumar, Advs.Rajendra Pd. Singh, Sakil Ahmad Khan and Krishna Pd. Singh, Advs. No. 2 and Jitendra Pd. Singh and Ramchandralal Das, Advs.

Judgement :

Bisheshwar Prasad Singh, J.

1. Petitioner NO. 1 herein was appointed as a Public Prosecutor of Vaishali district in the year 1990 for a term of three years under Section 24 of the Code of Criminal Procedure. Other petitioners were similarly appointed as Additional Public Prosecutor of different districts of the State. Respondent Nos. 4 to 15 were appointed as Assistant Public Prosecutor. The move of the Government to appoint Public Prosecutors/Additional Public Prosecutors from amongst the Assistant Public Prosecutors in the State of Bihar under Section 24(6) of the Code of Criminal Procedure (as amended by Bihar Act 16 of 1984) has led to the filing of this writ petition. The petitioners contend that in terms of Section 24(6) of the Code of Criminal Procedure, as amended, there does not exist a regular cadre of prosecuting Officers in the State of Bihar, and consequently the State Government cannot appoint a Public Prosecutor or Additional Public Prosecutor from amongst the Assistant Public Prosecutors in the State, who do not belong to such regular cadre of prosecuting Officers as envisaged by Sub-section (6) of Section 24 of the Code of Criminal Procedure. It is their submission that in the absence of a regular cadre of prosecuting officers, it is not open to the State Government to act under Sub-section (6) of Section 24 of the Code of Criminal Procedure. They contend that 'a regular cadre of prosecuting officers' means a regular cadre of prosecuting officers going upto the level of Additional Public Prosecutor and Public Prosecutor. Reliance is placed upon a decision of the Supreme Court in *K. J. John v. State of Kerala* : 1990 CriLJ1777 and it is submitted that since the cadre of prosecuting officers in the State of Bihar does not include the post of Public Prosecutor/Additional Public Prosecutor, and the Assistant Public Prosecutors are authorised only to conduct cases on behalf of the State before the magisterial Courts, the said Assistant Public Prosecutors cannot be considered to belong to a regular cadre of Prosecuting Officers envisaged under Sub-section (6) of Section 24 of the Code. In the absence of a regular cadre of prosecuting Officers, the State must act in accordance with other provisions of Section 24, and must appoint as Public Prosecutors/Additional Public Prosecutors persons who are eligible and possess the necessary qualification and experience. 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.

2. The facts of the case may first be noticed. The petitioners claim that they were duly appointed as Public Prosecutors/Additional Public Prosecutors under Section 24 of the Code. On the other hand, respondent Nos. 4 to 15 are Assistant Public Prosecutors. They are full time employees of the Government and have been appointed in a regular manner. By Government notification dated 18-5-1953 a separate cadre of police Prosecutors for conducting prosecution of State cases before magisterial Courts was established. The aforesaid cadre of police prosecutors consisted of (1) senior District Prosecutors of the rank of Deputy Superintendent of Police, (2) the District Prosecutors of- the rank of Inspector of Police and (3) Assistant District Prosecutors of the rank of Sub Inspector of Police. These Prosecutors were required to be enrolled under the Police Act and to appear in uniform while on duty. The method of recruitment of such Prosecutors was laid down. These Prosecutors were to conduct prosecution of State cases in magisterial Courts only. There was no post of Public Prosecutors/Additional Public Prosecutors in the cadre.

In view of the recommendation of 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, whereby the members belonging to the cadre of Police Prosecutors established under Government Notification dated 18th May, 1953, were redesignated as Assistant Public Prosecutors. They were not required to wear police uniform, and pending finalisation with regard to the exercise of administrative control over the cadre, they were initially kept under the control of the Inspector General of Police. The Senior District Prosecutors were redesignated as Assistant Public Prosecutor Grade I, the District Public Prosecutor was redesignated as Assistant Public Prosecutor Grade II and the Assistant District Prosecutor was redesignated as Assistant Public Prosecutor Grade III. The other conditions of service of such Prosecutors remained the same. The continuance of such Prosecutors under the administrative control of Inspector General of Police was questioned before this Court in *Lakhan Lal v. State of Bihar*

(1992) 2 Pt LJR 340. The judgment of this Court in Lakhan Lal (supra) held that the Assistant Public Prosecutors should not be allowed to continue under the administrative control of the Inspector General of Police, and that the State Government must take necessary steps to place them under the control of another person within three months. Consequently by resolution dated 10th March, 1981, the Assistant Public Prosecutors of all grades were placed under the control of the Director of Prosecution, Government of Bihar, and they were directly under the control of Home (Police), Department, Government of Bihar.

3. On these facts the petitioners contend that respondent Nos. 4 to 15 did not belong to a 'regular cadre of prosecuting Officers,' because a regular cadre of prosecuting Officers envisages a cadre of prosecuting officers with the Public Prosecutor/ Additional Public Prosecutor at the top and Assistant Public Prosecutors at the bottom. The necessary pre-condition for the application of Sub-section (6) of Section 24 of the Code is the existence of such a regular cadre of prosecuting officers. Since such a regular cadre does not exist, respondents Nos. 4 to 15 cannot be considered for appointment as Public Prosecutor/Additional Public Prosecutor. The cadre of prosecuting Officers, such as it exists in the State of Bihar, is not a regular cadre of prosecuting officers. The cadre does not include the post of Public Prosecutor/Additional Public Prosecutor, and the officers of the cadre can conduct cases only before the magisterial Courts. It is, therefore, their contention that the move of the Government to appoint Public Prosecutors/Additional Public Prosecutors from amongst the Assistant Public Prosecutors of such a cadre is in breach of the provisions of Section 24 of the Code of Criminal procedure. The Government should, therefore, be restrained from appointing such Assistant Public Prosecutors as Public Prosecutors/ Additional Public Prosecutors, and they should appoint Public Prosecutors/Additional Public Prosecutors such persons as are eligible and qualified for appointment having regard to the other provisions of Section 24 of the Code.

4. No counter-affidavit has been filed on behalf of respondent Nos. 4 to 15, but a counter-affidavit has been filed on behalf of respondent No. 2, namely, the Commissioner-cum-Secretary, Home (Police), Government of Bihar, Patna. The

counter-affidavit merely points out the existence of a separate cadre of police Prosecutors for conducting prosecution of State cases in magisterial Courts. It refers to the order of the Government dated 18th May, 1953 to which I have referred earlier, and it also refers to other facts stated by the petitioners with regard to the manner in which the Police Prosecutors were redesignated as Assistant Public Prosecutors etc. The counter-affidavit further points out that in view of the Government Notification dated 25th July, 1982 there was merger of the posts of Assistant Public Prosecutors Class III, and Assistant Public Prosecutor Class II into one class. It is further pointed out that there are 336 permanent posts of Assistant Public Prosecutors and 9 temporary posts of Assistant Public Prosecutor. There is also junior Selection grade and Senior Selection Grade of Assistant Public Prosecutors. Later on, more posts of Assistant Public Prosecutors were sanctioned and the total number of sanctioned posts of Assistant Public Prosecutors is 562. Like other Government servants the Assistant Public Prosecutors are also given time-bound promotion.

5. Several intervention applications have been filed and in the interest of Justice we have heard counsel representing the intervenors. Dr. Sadanand Jha, counsel appearing on behalf of respondent No. 14 submitted that the petitioners have sought the relief that the case of the private respondent should not be considered since they do not belong to a regular cadre of prosecuting officers. He submitted that having regard to the decision of the Supreme Court in K. J. John's case (1990) Cri LJ 1777) (supra), it could not be said that there was a regular cadre of prosecuting Officers' in the State of Bihar. Even so, the question still arose as to whether the Assistant Public prosecutors belonging to a cadre of prosecuting officers can be considered for appointment having regard to the provisions of Sub-section (6) and (9) of Section 24 of the Code of Criminal Procedure. He relies upon the same judgment of the Supreme Court and submits that in view of the deeming fiction introduced in Sub-section (9) of Section 24 of the Code, respondent Nos. 4 to 14 and others like them who had rendered service as Assistant Public Prosecutor or other prosecuting Officers are eligible and qualified for appointment as Public Prosecutor deeming the service rendered by them as such to be the period during which they have been in practice as an advocate. He, therefore, submitted that the experience of respondent Nos. 4 to 15 and other

Assistant Public Prosecutors has not been ignored by Section 24 of the Code and, therefore, such of them as are found eligible for appointment as Public Prosecutor/Additional Public Prosecutor by applying the deeming fiction in Sub-section (9) should be considered for appointment. He submitted that even if the aforesaid respondents could not claim that Public Prosecutors/Additional Public Prosecutors should be appointed exclusively from the cadre of Prosecutors under Section 24(6) of the Code, such of them as are eligible having regard to their experience by application of Sub-section (9) of Section 24 of the Code, may be considered for appointment. They cannot be excluded from consideration merely because they belong to a cadre of prosecuting officers which is not a 'regular cadre of prosecuting officers' within the contemplation of Section 26(6) of the Code.

6. Mr. Mihir Kumar Jha, counsel appearing on behalf of Bihar Prosecution Services Association, intervenes submitted that the Government proposed to appoint Public Prosecutors/Additional Public Prosecutors from amongst Assistant Public Prosecutors belonging to the cadre of prosecuting officers, such as it exists in the State of Bihar, on the basis of the judgment of this Court. The petitioners cannot contend that the judgment of this Court should not be implemented, and the prayer of the petitioners to hold that the judgment and order of this Court is not binding, must be rejected. Counsel representing the Bihar State Bar Council and the Bihar Yuva Adhibakta Kalyan Samittee, interveners, have fully supported the case of the petitioners. However, Mr. Tej Bahadur Singh, counsel appearing on behalf of three of the Assistant Public Prosecutors, who had sought to intervene in this writ petition, submitted that the Assistant Public Prosecutors having no promotional avenue, the Government has not acted unreasonably in giving them ten per cent posts of Public Prosecutor/Additional Public Prosecutor. The procedure for appointment of Assistant Public Prosecutors was the same as one adopted in the appointment of Munsifs in the judicial service. In fact, the Government had earlier absorbed some of the departmental Prosecutors in the regular Indian Police Service and, therefore, it would not be unreasonable to give them some representation as Public Prosecutor/Additional Public Prosecutor. According to him, more than ten percent of the posts of Public Prosecutor/Additional Public Prosecutor should be given to the Assistant Public

Prosecutors serving in the State of Bihar under the Director of Prosecution.

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 (1990 Cri LJ 1777) (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: (at Pp. 1785 and 1786 of Cri LJ).

'20. A combined reading of Sub-section (6) and Sub-section (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 Subsection (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-section (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-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 Additional Public Prosecutor. Sub-section (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) and Sub-section (8). Thus we are clearly of the view that the expression 'regular cadre of cadre of Prosecuting Officers' contained in Sub-section (6) of Section 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 probationers for want of vacancy, the State shall be the unit whereas in the case of Assistant Public Prosecutor, Gr. II, 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 Officers' 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-section (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 advocates having atleast 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 provisions of Sub-section (6) of Section 24 which makes it incumbent to appoint public prosecutor and Additional 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.

21. In view of these circumstances we find that the Kerala High Court is right in taking the view that the expression 'regular cadre of Prosecuting Officers' comprised a service with Assistant Public Prosecutor at the lowest level and Public

Prosecutors at the top. In case a regular cadre of Prosecuting Officers did not go up to Public Prosecutor at the top, the State Government cannot be considered as bound to appoint Public Prosecutor or Additional Public Prosecutor only from among the persons constituting such cadre under the Code of Criminal Procedure for conducting cases in the Sessions Court.'

8. The respondents have fairly not contended before us, having regard to the Judgment of the Supreme Court in K. J. John's case (1990 Cri LJ 1777). That in Bihar there exists a regular cadre of prosecuting Officers as envisaged by Sub-section (6) of Section 24 of the Code, obviously because the cadre of prosecuting Officers, such as it exists in the State of Bihar, does not comprise a service with Assistant Public Prosecutors at the lowest level and Public Prosecutors at the top. Obviously, therefore, the Government cannot be compelled to appoint Public Prosecutors or Additional Public Prosecutors only from amongst the persons constituting such cadre. In this context, however, I must notice the amendment to the main part of Sub-section (6) of Section 24 of the Code brought about by Bihar Act 16 of 1984. The amended main part of Sub-section (6) of Section 24 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.'

9. It was submitted on behalf of the State that in view of the amendment to Sub-section (6) of Section 24 in its application to the State of Bihar, Sub-section (6) does not operate as a compulsion, compelling the Government to appoint a Public Prosecutor or an Additional Public Prosecutor only from amongst the persons constituting a regular cadre of prosecuting Officers. The word 'shall' has been substituted by the word 'may' and the intention of the legislature was to grant a discretion to the State Government to appoint a Public Prosecutor or an Additional Public prosecutor from amongst the persons constituting such cadre. It was submitted that under the unamended Sub-section (6) of Section 24 of the Code if there was a regular cadre of prosecuting officers, the State Government had no

option but to appoint a Public prosecutor or an Additional Public Prosecutor only from amongst the persons constituting such a cadre. In view of the amendment brought about by Bihar Act 16 of 1994 even if such a regular cadre of prosecuting officers exists, the State is not bound to appoint a Public Prosecutor or an Additional Public Prosecutor from amongst the persons constituting such a cadre. It is not necessary for me in this case to express any opinion as to whether the amendment brought about by Bihar Act 16 of 1984 has the desired effect. What is significant, however, is that for the application of Sub-section (6) of Section 24, Whether unamended or amended, the existence of a regular cadre of prosecuting Officers is a precondition. Obviously, therefore, if there does not exist a regular cadre of prosecuting officers in the State of Bihar, Sub-section (6) of Section 24 of the Code does not come into operation. In any event, even if the amendment has brought about the desired result, it curtails the right of the members of the regular cadre of prosecuting Officers, inasmuch they cannot claim as a right that only members of such regular cadre can be considered for appointment as Public Prosecutor or Additional Public Prosecutor, which, they could under the unamended Sub-section (6) of Section 24 of the Code.

10. In view of the judgment of the Supreme Court in K. J. John's case (1990 Cri LJ 1777) two principles of law appear to be well-settled. Firstly, 'regular cadre of prosecuting officers' contained in Sub-section (6) of Section 24 of the Code must comprise a regular cadre of prosecuting officers going upto the level of Additional Public Prosecutor and Public Prosecutor. Secondly, Assistant Public Prosecutors who are members of a regular service, though they cannot claim any right to be appointed on such post under Sub-section (6) of Section 24 of the Code, they are eligible to be considered with any advocate of seven years standing if willing to join such post on tenure basis, subject to their eligibility as laid down in Sub-section (7) and (8) of the Code read in the light of deeming fiction as contained in Sub-section (9) thereof.

11. Having regard to the settled position in law, counsel for the respondents did not dispute that in the State of Bihar there does not exist a regular cadre of prosecuting officers, because admittedly the service to which the private respondents belong is a service in which there is no post of Public Prosecutor or

Additional Public Prosecutor. It is, therefore, an admitted position before us that the Assistant Public Prosecutors conducting cases before the magisteral Courts in the State of Bihar under the control and supervision of the Director of Prosecution do not belong to a regular cadre of Prosecuting Officers, as contemplated by Section 24 of the Code. Such being the position, the proposal of the State to appoint Public Prosecutors/Additional Public prosecutors from amongst such Assistant Public Prosecutors cannot be sustained in law. However, the other contentions raised before us must also be noticed.

12. It was submitted on behalf of the State that the Government proposed to fill up the posts of Public Prosecutor/Additional Public Prosecutor from amongst the Assistant Public Prosecutors on the basis of the judgment and order of this Court holding that such Assistant Public Prosecutors belong to a regular cadre of Prosecuting Officers. Mr. Mihir Kumar Jha, counsel appearing on behalf of one of the interveners, submitted that this Court should not issue a writ directing the Government not to follow the judgment and order of this Court, He further submitted that there is no justification for a review of the judgment earlier rendered by this Court. I may only notice that none of the respondents has contended that this writ petition is barred by the principles of res judicata obviously because neither the petitioners in this writ petition nor their representatives in interest were parties in the earlier writ petition.

On the other hand, the petitioners contend that the judgment of this Court in the earlier writ petition is per incuriam, it being in the teeth of the judgment of the Supreme Court which was binding upon the Court and which was brought in its notice. It is submitted that the law as laid down by the Supreme Court must be given full effect notwithstanding an erroneous judgment of this Court rendered on an earlier occasion in ignorance of the Principal of law settled by the Supreme Court.

13. The Writ petition being C.W.J.C. No. 1208 of 1983 was filed before this Court by Assistant Public Prosecutors Posted in different districts of Bihar praying for a direction to the respondents for considering their cases for appointment as Public Prosecutor and Additional Public Prosecutor. The claim was based on the

provision of Section 24(6) of the Code of Criminal Procedure, as amended in the year 1978. The learned Judges constituting the Division Bench which heard the writ petition in the first instance differed in their opinion, and while L.M. Sharma, J. (as he then was) was of the opinion that the writ petition should be allowed, M.P. Verma, J. was of the opinion that the writ petition deserved to be dismissed. The Division Bench delivered its order on 23rd September, 1983 much before the judgment of the Supreme Court in K. J. John's case (1990 Cri LJ 1977) (supra) which was delivered in July 1990. Obviously, the learned judges constituting the Division Bench did not have the benefit of the decision of the Supreme Court in K. J. John's case. L.M. Sharma, J. after noticing the provisions of the Code and the manner in which the Assistant public prosecutors were appointed, came to the conclusion that a separate cadre of prosecuting officers was clearly created in the year 1953. He was, therefore, of the view that Sub-section (6) of Section 24 applied to the facts of the case which mandatorily directed appointment to the posts of public prosecutors and Additional Public Prosecutors only from amongst the persons belonging to the said cadre, unless no suitable person for appointment was available in the cadre. He, therefore, held that the respondents could not ignore the claim of the petitioners and consequently directed the State to implement and act upon the provision of Section 24(6) of the Code after considering the cases of Assistant Public Prosecutors who were members of the cadre of prosecuting officers.

13-A. M.P. Verma., J., on the other hand, took the view that in view of Sub-section (5) of Section 24 of the Code a person to be appointed as a Public Prosecutor and Additional Public Prosecutor must be an advocate, who has been in practice for not less than seven years. An advocate must mean an advocate under the [Advocates Act, 1961](#). He, therefore, held that no person could be considered for appointment as Public Prosecutor or Additional Public Prosecutor unless he had been in regular practice as an advocate for not less than seven years. He, therefore, held that the scheme of the code was to exclude Police Prosecutors from appointment in the matter of appointment of Public Prosecutor and Additional Public Prosecutor. He was of the view that the experience as Assistant Public Prosecutor before the magisterial courts was of no avail.

14. On a difference of opinion between the two learned Judges of the Division Bench, the matter was referred to a third Judge, S.K. Chattopadhyaya, J. who by his judgment and order dated 18-12-1991 allowed the writ petition agreeing with the opinion of L.M. Sharma, J. The learned judge held, agreeing with the finding of L.M. Sharma, J. that there was a regular cadre of prosecuting officers in the State of Bihar. He was of the view that Sub-section (6) of Section 24 was amended by Bihar Act 16 1984 providing that where in a State there exists a regular cadre of Prosecuting Officers, the State Government may appoint a Public Prosecutor or an Additional Public Prosecutor from amongst the persons constituting such cadre. He observed 'that from a perusal of the amended provision, it is clear that before such amendment the legislature took it into consideration the fact that there exists a separate cadre. The amended provision is specific that the State Government may also appoint a Public Prosecutor or an Additional Public Prosecutor from amongst the persons constituting such cadre. In my opinion, if this cadre would not have been in existence as the learned Advocate General has tried to canvass, there was no necessity for such amendment in 1984. Taking into consideration this amendment, I am in respectful agreement with Sharma, J. that a separate cadre of Prosecutors within the meaning of Section 24(6) of the Code is in existence in the State of Bihar.' It will thus appear that Chattopadhyaya, J. was greatly influenced by the amendment to Sub-section (6) of Section 24 by Bihar Act 16 of 1984. He was of the view that if a regular cadre of prosecutors did not exist in the State of Bihar, there was no need for the legislature to amend Sub-section (6) of Section 24. While considering this aspect of the matter, the learned Judge did refer to the judgment of the Supreme Court rendered in K.J. John's case (1990 Cri LJ 1777) but he considered the aforesaid judgment of the Supreme Court in a different context. After noticing the judgment of the Supreme Court he observed :

'23. In the aforesaid case, the Supreme Court rejected the prayer of the appellants in 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.

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.

15. In my view, the judgment of Chattopadhyaya, J. for whom I have great respect, is per incuriam. The Supreme Court in K. K. John's case (1990 Cri LJ 1777) had laid down in clear terms that a regular cadre of Prosecuting Officers must comprise a service with Assistant Public Prosecutors at the lowest level and Public Prosecutors at the top. Since in the State of Kerala and in the State of Uttar Pradesh the cadre of prosecuting officers did not include Public Prosecutors or Additional Public Prosecutors, it was held that that was not a regular cadre of Prosecuting Officers. In the case before us it is admitted by all the parties concerned that the cadre of Prosecuting Officers, such as it exists in the State of Bihar, does not include the posts of Public Prosecutor or Additional Public Prosecutor, and further that the Assistant Public Prosecutors are authorised to conduct cases on behalf of the State only in magisterial courts. The Division Bench did not have the benefit of the judgment of the Supreme Court in K. J. John's case, but the learned third Judge noticed the judgment of the Supreme Court, but did not notice the principle laid down by the Supreme Court as aforesaid. He noticed the observation of the Supreme Court only in so far as it related to the argument advanced before the Supreme Court with regard to the interpretation of Sub-section (9) of the Section 24 of the Code. I have no doubt that if the observations of the Supreme Court were brought to his notice or were noticed by the learned Judge, he would have certainly come to a different conclusion.

16. In my considered view, therefore, the Judgment of this Court in Sri Nivas Narayan v. State of Bihar, .1992 (2) Pat LJR 118) must be held to be per incuriam and not a binding precedent. On the other hand, the Judgment of the Supreme Court in K. J. John's case (1990 Cri LJ 1777) lays down the law in clear terms and there is no ambiguity so as to leave scope for any other argument before this Court. It being the admitted case of the parties that the cadre of Prosecuting Officers in the State does not include the posts of Public Prosecutor and Additional Public

Prosecutor, such a cadre cannot be considered to be a 'regular cadre of Prosecuting Officers' within the meaning of Sub-section (6) of Section 24 of the Code.

17. This, however, does not put an end to the controversy before us. No doubt, the Assistant Public Prosecutors, such as respondent Nos. 4 to 15 cannot claim appointment as Public Prosecutor/ Additional Public Prosecutor on the basis of Sub-section (6) of Section 24 of the Code. The question, however, which still arises for consideration is whether they are qualified and eligible for appointment as Public Prosecutor/Additional Public Prosecutor in view of Sub-section (9) of Section 24 of the Code. This question also stands answered by the judgment of the Supreme Court in K. J. John's case (1990 Cri LJ 1777). The Court observed (at p. 1786 of Cri LJ):

'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 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 make 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-section (6) of section 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 tenure posts. The State of U.P. in its counter has clearly brought out the distinction in these 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)

18. It was not disputed before us that in the State of Bihar as well the posts of Public Prosecutor/ Additional Public Prosecutor are tenure posts, and they are appointed for a tenure of three years. In this connection reference was made to rule 137 of the Bihar Practice and Procedure Manual which provides that all appointments to the posts of Public Prosecutors or Government Pleaders or to the combined posts of Public Prosecutors and Government Pleaders shall ordinarily be for a term of three years. The incumbent of the post will, however, be eligible for reappointment on expiry of his term of appointment.

Obviously, therefore, the same difficulties arise in the case of Assistant Public Prosecutors in the State of Bihar as were pointed out by the Supreme Court in the aforesaid judgment. The Court, however, observed that such Assistant Public Prosecutors are also eligible to be considered with any advocate of seven years standing who are willing to join such post on tenure basis.

19. Under Section 24 of the Code, as it was originally enacted, there was no provision for appointment of Public Prosecutors or Additional Public Prosecutor from amongst the persons belonging to a regular cadre of prosecuting officers. The unamended section, therefore, provided only for appointment of advocates with seven years standing as Public Prosecutor/Additional Public Prosecutor. After the amendment of the Section in the year 1978 sub-section (6) provided for appointment of Public Prosecutor or Additional Public Prosecutor only from amongst the persons constituting a regular cadre of prosecuting officers. The proviso operates only if no suitable person is available for such appointment. Sub-section (7) lays down that 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. It is, therefore, clear that even a person belonging to the regular cadre of prosecuting officers was eligible for appointment as Public Prosecutor/Additional Public Prosecutor only if he has been in practice as an advocate for not less than seven years. Two situations may be visualised.

Firstly, where a person was appointed to the regular cadre of prosecuting officers after having put in seven years of practice. In such a case he had the requisite qualification for being appointed as a public prosecutor or Additional Public Prosecutor, and this qualification was not lost merely because he joined service and became a member of the regular cadre of prosecuting officers. Secondly, an advocate without the requisite experience may have been appointed to the regular cadre of prosecuting officers. The legislature thought that such a person should not be deprived of an opportunity of becoming a public prosecutor/Additional Public Prosecutor, and for giving effect to this policy Sub-section (9) of Section 24 provided that the period during which the person has been in practice as a pleader or rendered service as public prosecutor or as an Additional Public Prosecutor or Assistant Public prosecutor or other prosecuting officers, by whatever name called, shall be deemed to be the period during which such a person has been in practice as an advocate. Obviously, therefore, the experience gained by such Prosecutors or Assistant Public Prosecutors was equated with the experience that an advocate gains at the Bar, and even if he was not eligible for appointment as a Public Prosecutor/ Additional Public Prosecutor when he joined service as such prosecutor, he could acquire the qualification by experience as such prosecutor.

20. The question then arises whether Sub-section (9) in its application is limited to persons belonging to a regular cadre of prosecuting officers or whether the benefit of that Sub-section is available to other prosecutors by whatever name called, who do not belong to a regular cadre of prosecuting Officers. The Supreme Court observed that even such persons as are not eligible under Sub-section (6) of Section 24 of the Code may be eligible to be considered with any advocate of seven years standing if willing to join such post on tenure basis. In my view, the benefit of Sub-section (9) must be extended to persons, who have rendered service in a cadre which may not qualify as a regular cadre of Prosecuting Officers. If the intention of the legislature was to confer such benefit only on members of a regular cadre of Prosecuting Officers, the legislature could have used the same words in Sub-section (9) of Section 24. The words used in Sub-section (9) are 'Public Prosecutor/Additional Public Prosecutor, Assistant Public Prosecutor or other Prosecuting Officers by whatever name called. Sub-section (9), therefore, conceives of Prosecuting Officers by whatever name called and is

not confined to prosecutors belonging to a regular cadre of prosecuting Officers. This is obviously because if members of the regular cadre of Prosecuting Officers could acquire the necessary eligibility and qualification by experience, there was no good reason to deprive other Assistant Public Prosecutors not belonging to a regular cadre of Prosecuting Officers, from acquiring such eligibility and qualification on the basis of experience.

I have therefore, no doubt in coming to the conclusion that a person, who does not belong to a regular cadre of Prosecuting officers, but is appointed as a Prosecuting Officer by whatever name called, may qualify for appointment as a Public Prosecutor or Additional Public Prosecutor if he has the requisite experience as prescribed by Sub-section (7) read with Sub-section (9) of Section 24 of the Code. He cannot claim such appointment under Sub-section (6) of Section 24, as he cannot claim promotion to the higher post, since he does not belong to such cadre. The Supreme Court also ruled out the possibility of his appointment as a Public Prosecutor on deputation. What, therefore, follows is that such a Prosecuting Officer belonging to a service, if selected for appointment as a Public Prosecutor, has to resign his service to join the post of Public Prosecutor. If he is willing to do so, there can be no objection to his being appointed a public Prosecutor/ Additional Public Prosecutor, since he has the necessary qualification and experience prescribed for the post.

21. Mr. Mihir Kumar Jha, counsel for one of the interveners had cited authorities before us and had submitted that this was not a case for review of the earlier Judgment of this court. In the view I have- taken, it is not necessary to consider this argument because the question of review does not arise in his case. I have come to the conclusion that the earlier Judgment of this Court was per incuriam, since it ignored the principle of law laid down by the Supreme Court in K. J. John's case (1990 Cri LJ 1777) (Supra). Even assuming that the judgment may not be perincuriam, so far as this Bench is concerned, it is bound by the decision of the Supreme Court, and a Judgment of any other court which is not consistent with the Judgment of the Supreme Court has to be ignored. As I have pointed out earlier, the learned Judge to whom the case was referred on a difference of opinion between the two Judges, who had earlier heard the Writ Petition, did not notice the

principle laid down by the Supreme Court in K. J. John's case that the expression 'regular cadre of Prosecuting Officers' under Sub-section (6) of Section 24 means a regular cadre of Prosecuting Officers going up to the Public Prosecutor at the top.

22. I have held that a Prosecuting Officer not belonging to a regular cadre of Prosecuting Officers may also be eligible for appointment as a Public Prosecutor/Additional Public Prosecutor if he has the requisite experience as laid down under Sub-section (7) of Section 24 read with Sub-section (9) thereof. It is, therefore, not possible to allow this writ petition as prayed for. But, in the facts of the case and in view of the above findings, I hold that Assistant Public Prosecutors such as respondent Nos. 4 to 19, who do not belong to a regular cadre of Prosecuting Officers, are also eligible to be considered for appointment as a Public Prosecutor/Additional Public Prosecutor, if they have the necessary qualification and experience as laid down in Sub-section (7) of Section 24 of the Code read with Sub-section (9) of that section. It will, therefore, be open to the District Magistrate in consultation with the District Judge to recommend the names of such eligible Assistant Public Prosecutors for appointment as a Public Prosecutor/Additional Public Prosecutor. However, if such an Assistant Public Prosecutor is ultimately selected for appointment and offered the post on tenure basis, he must resign his service before accepting the appointment on tenure basis. The Writ Petition is disposed of in these terms. There will be no order as to costs.

S.K. Mookerji, J.

23. I agree.

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