

Rajendra Shankar Tripathi Vs. State of U.P. and ors.

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SooperKanoon Citation : sooperkanoon.com/477350

Court : Allahabad

Decided On : May-02-1978

Reported in : 1979CriLJ243

Judge : T.S. Misra and ; Prem Prakash, JJ.

Appellant : Rajendra Shankar Tripathi

Respondent : State of U.P. and ors.

Judgement :

T.S. Misra, J.

1. In the month of Aug. 1977 applications were invited by the District Magistrate, Unnao, for appointment of Public Prosecutor for his District. The petitioner as also opposite party No. 3 along with other persons applied for the same. Opposite party No. 3 was ultimately appointed Public Prosecutor, Unnao on 30th Dec., 1977. He took over the charge of the office on 31st Dec, 1977.

2. The petitioner has moved this petition under Article 226 for a writ in the nature of quo warranto requiring opposite party No. 3 to show his title to the post of Public Prosecutor.

3. The case of the petitioner is that the opposite party No. 3 was not eligible for being appointed as Public Prosecutor inasmuch as he had not been in practice as

an Advocate for 7 years or more on the date of his appointment. It was not in dispute that the opposite party No. 3 was enrolled as pleader on 10th Sept., 1945. Thereafter he was enrolled as Advocate on 27th Oct., 1977. The contention of the petitioner, therefore, was that the opposite party No. 3 had hardly put in two months practice as an Advocate when he was appointed Public Prosecutor of the District of Unnao. The petition has been resisted by the opposite parties. Sri Roop Krishna Topa, an Upper Division Assistant, Nyaya (Vidhi Mantrana) Anubhag, U. P. Civil Secretariat, Lucknow, has filed a counter-affidavit on behalf of opposite party No. 1. Similarly opposite party No. 3 has also filed his affidavit. In the counter-affidavit filed on behalf of opposite party No. 1 it has been stated that since opposite party No. 3 was a Pleader of 31 years standing, he was fully qualified for appointment as District Government Counsel (Criminal), Unnao. Further, it has been stated that the opposite party No. 3 was an Advocate enrolled by the U. P. Bar Council when he was appointed as District Government Counsel (Criminal), Unnao, Hence he was eligible for being appointed to that office and the provisions of Section 24(5) of the Cr.P.C. were not in any manner violated. The case of the opposite party No. 3, as set out in his counter-affidavit, is that he has been a legal practitioner of about 33 years standing in Unnao, that he was enrolled as Advocate on 27th Oct., 1977, after having put in 33 years of practice at the Bar, that he was appointed District Government Counsel (Criminal) in terms of Chap. XXI of the Legal Remembrancer's Manual and had taken over charge in pursuance of the communication received from the District Magistrate's office dated Dec. 29, 1977. In support of his contention the opposite party No. 3 has placed reliance on paras. 21.01, 21.04, 21.05 and 21.06 of Chap. XXI of the Legal Remembrancer's Manual. In the alternative, it has been pleaded that the provisions of Section 24(5) are discriminatory and are hit by Articles 14 and 16 of the Constitution.

4. On behalf of the petitioner it was urged that the appointment of the opposite party No. 3 was violative of the provisions of Section 24(5), Cr.P.C. which reads as follows:

A person shall only be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under Sub-section (1) or Sub-section (2), if he has

been in practice as an Advocate for not less than 7 years.

The submission was that admittedly the opposite party No. 3 had not been in practice as Advocate for 7 years or more. He was not eligible for being appointed as Public Prosecutor¹ and, therefore, the appointment was illegal and a writ of quo warranto should issue. The contention on behalf of the opposite parties was that the term 'Advocate' used in Section 24(6) of the Code has to be construed in the manner it is understood in common parlance. learned Counsel for the opposite parties submitted that an Advocate is one who Advocates the cause, and, therefore, when a person is enrolled as a Pleader, he should also be deemed to be an Advocate for the purpose of Section 24(5) of the Code. In this connection it was also urged that the term 'Advocate' has not been defined in the Code whereas 'Pleader' has been denned therein. Reference was made to Chaps. XXIV and XXIX of the Code, more particularly Sections 304 and 385, to contend that the term Pleader would embrace within its ambit 'Advocate' also. Since opposite party No. 3 has been in practice for more than 32 years when he was appointed as Public Prosecutor, he possessed the requisite qualification. Further it was submitted that the writ of quo warranto should not issue in the instant case as the office of the Public Prosecutor is not a public office.

5. We shall, first, proceed to consider whether the office of the Public Prosecutor is a public office.

6. The scope of quo warranto proceedings was examined by the Supreme Court in *Univ. of Mysore v. Govinda Rao* : [1964]4SCR575 . Gajendragadkar, J., speaking for the Court, observed (at page 494):

Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any (person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the enquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office.

Before a writ of quo warranto can be Issued, the relator must satisfy the Court, Inter alia, that the office in question is a public office and is held by usurper without

legal authority. This necessarily leads to the inquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not

7. The first thing, which we have, therefore, to see, is whether the office of the Public Prosecutor is an independent substantive public office. Examining the question, the Madras High Court in *A. Mohambaram v. M. A. Jayavelu* : AIR1970 Mad63 held that the office of Public Prosecutor involves duties of public nature and of vital interest to the public. Section 494, Cr.P.C. (old), vests in the Public Prosecutor a discretion to apply to the Court for its consent to withdraw from the prosecution of any person. The consent, if granted, has to be followed by the discharge of the person or his acquittal, as the case may be. The provisions of Sections 417, 493 and 422 of the old Cr.P.C. also emphasise the importance of that office. Analogous provisions are to be found in the new Code of Criminal Procedure. For example, under Section 378(1) of the new Cr.P.C. the State Government may in any case direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. Similarly, under Section 377(1) the State Government may in any case of conviction on a trial held by any Court other than a High Court, direct the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy. Under Section 301 of the Code the Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal. Section 321 of the Code enables the Public Prosecutor or Assistant Public Prosecutor in charge of a case to withdraw, with the consent of the Court, at any time before the judgment is pronounced, from the prosecution of any person' either generally or in respect of any one or more of the offences for which he is tried. The Public Prosecutor has thus to perform public duties of vital importance. The initiative under Section 321 is that of the Public Prosecutor and what the Court has to do is only to give its consent and not to determine any matter judicially. This section gives a general executive discretion to the Public Prosecutor to withdraw from the prosecution subject to the consent of the Court which may be determined on many possible grounds. (See *State of Bihar v. Ram Naresh Pande* : 1957 CriLJ567). The word 'office' came to be construed by the Supreme Court in a number of cases, the latest being *Kanta*

Kathuria v. Nanak Chand Surana : [1970]2SCR835 . The definition of 'office' as given by Justice Rowlat in Great Western Rly. Co. v. Bater ((1922) 8 Tax Cas 231) was quoted with approval. Justice Rowlat had observed at page 235:

Now it is argued, and to my mind argued most forcibly, that that shows that what those who use the language of the Act of 1942 meant; when they spoke of an office or employment which was a subsisting, (permanent, substantive position which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders, and if you merely had any man who was engaged on whatever terms, to do duties which were assigned to him, his employment to do those duties did not create an office to which those duties were attached. He hereby was employed to do certain things and that is an end of it, and if there was no office or employment existing in the case as a thing, the so-called office or employment was merely an aggregate of the activities of the particular man for the time being.

This definition of Justice Rowlat was approved by Lord Atkin at p. 246 and was accepted by Lord Atkin and Lord Wright in McMillan v. Guest (H. M. Inspector of Taxes) ((1943) 24 Tax Cas 190) Lord Wright observed at p. 202 as under:

The word 'office' is of indefinite content; its various meanings cover four columns of the New English Dictionary, but I take as the most relevant for purposes of this case the following. 'A position or place to which certain duties are attached, especially one of a more or less public character.' This, I think, roughly corresponds with such approaches to a definition as have been attempted in the authorities, in particular (1922) 2 AC 1...where the legal construction of these words, which had been in Schedule E since 1803 (43 Geo. III, C. 122, Section 175), was discussed.

The definition by Lord Wright was quoted with approval by the Supreme Court in Civil Appeal No. 1832 of 1967, D/- 15-10-1968 (SC). In Kanta Kathuria's case (supra) it was the common case of both the parties that the Government Pleader held an office. This being the position in law, we are of the view that the office of the Public Prosecutor is a substantive public office.

8. This now takes us to the second question as to whether the opposite party No. 3 is a usurper of the office of Public Prosecutor. Sub-section (5) of Section 24 of the Code prescribes the essential qualification of a Public Prosecutor. Only that person is eligible to be appointed as Public Prosecutor who has been in practice as an Advocate for not less than 7 years. In other words, any person, who does not have this requisite qualification, would not be eligible for being appointed as a Public Prosecutor. The emphasis is on the length of practice as an Advocate. The contention on behalf of the opposite party No. 3 was that if a person had practised for 7 years or more as Pleader and was an Advocate at the time of his appointment as a Public Prosecutor he would be satisfying the requirement of Sub-section (5) of Section 24. We find no merits in the contention. The ordinary and plain meaning of the term 'Advocate' is a person who has been enrolled as an Advocate. Thus a person on the roll of Advocate is an Advocate. A person, who was enrolled as a Pleader and was not on the roll of Advocate would not, therefore, be said to be an Advocate. The term 'Pleader' has been defined in the Cr, P. C. as follows:

'Pleader', when used with reference to any proceeding in any Court, means a person authorised by or under any law for the time being in force, to practice in such Court, and includes any other person appointed with the permission of the Court to act in such proceeding.

The amplitude of the term 'Pleader', as defined in Section 2(q) of the Code, is very wide. It includes any person who has been appointed with the consent of the Court to act in any proceeding in the Court.

9. Sub-section (5) of Section 24 does not use the term 'Pleader'. It rather uses the term 'Advocate'. The earlier statutes on the subject may at this stage be referred to for understanding the meaning of the term 'Advocate', The Legal Practitioners Act, 1879, defines 'legal practitioner' as meaning an Advocate, Vakil or Attorney of any High Court, a Pleader, Mukhtar or Revenue Agent. This indicates that an Advocate was distinct from a pleader, but he was covered within the definition of the term 'legal practitioner'. Section 41 of the said Act empowered the High Court to make rules as to the qualifications and admission of proper persons to be 'Advocates of

the Court', and subject to such rules, to enroll such and so many Advocates as it thought fit. This provision also makes it manifest that persons enrolled under Section 41 were called Advocates. The Indian Bar Councils Act, 1926 defined an 'Advocate' as meaning one 'entered in the roll of advocates of a High Court under the provisions of this Act'. Section 8 of that Act provides that no person would be entitled as of right to practice in any High Court unless his name was entered in the roll of 'the advocates of the High Court maintained under this Act'. Section 8(2) required the High Court to prepare and maintain 'a roll of advocates of the High Court' in which should be entered the names of (a) all persons who were, as Advocates, Vakils or Pleaders, entitled as of right to practice in the High Court immediately before the date on which this section came into force in respect thereof; and (b) all other persons who were admitted to be 'Advocates of the High Court' under the Act. Similarly, Section 14(1) of the Act provided that an Advocate, i. e., one whose name was entered under this Act in the roll of advocates of a High Court, shall be entitled as of right to practice in the High Court of which he is an advocate. Referring to these provisions, it was held in Prof. Chandra Prakash Agar-wal v. Chaturbuj Das Parikh : [1970]3SCR354 that the expression 'an advocate of a High Court', as used in Article 217(2)(b) of the Constitution, must mean an advocate whose name has been enrolled as an advocate of a High Court. Section 2 of the Advocates Act defines 'Advocate' as an Advocate entered in any roll under the provisions of the Act. Section 16 recognises two classes of Advocates, namely, senior Advocates and other Advocates, Similarly there are other provisions in the Act which deal with the method and enrolment of an Advocate, his right to practice and other disciplinary matters. Section 51 of the Act provides that on and from the appointed day, references in any enactment to an Advocate enrolled by a High Court in any form of words shall be construed as reference to an Advocate enrolled under this Act, The date of enforcement of the Advocates Act is 24th Jan. 1962, Therefore, any reference in any enactment and for that purpose in the Cr.P.C. to an Advocate would be a reference to an Advocate enrolled under the Act. It was not in dispute In the instant case that the opposite party No. 3 has been enrolled as an Advocate under the Advocates Act of 1961 on 27th Oct. 1977. The Cr.P.C. with which we are presently concerned, was brought in force on 1st April, 1974. The reference to the term 'Advocate' under

Section 24(5) of the Code must, therefore, be a reference to an Advocate enrolled under the Advocates Act, 1961. The opposite party No. 3 having been enrolled on 27th Oct. 1977, had not put in seven years practice as an Advocate on 30th Dec. 1977, when he was appointed Public Prosecutor. He did not, therefore, have the requisite qualifications and was not eligible to be appointed as Public Prosecutor. His appointment was, therefore in contravention of law and hence illegal. He is a usurper to the, office of the Public Prosecutor.

10. No argument was made on behalf of the opposite party No. 3 that Section 24(5) of the Cr.P.C. is ultra vires.

11. In the result, the petition is allowed. The opposite party No. 3 being a usurper to the office of Public Prosecutor, Unnao is ousted from that office. Let a writ of quo warranto issue accordingly.' The order dated 24th Dec. 1977, appointing opposite party No. 3 as Public Prosecutor, Unnao, is quashed. In the circumstances of the case, the parties shall, however, bear their own costs.

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