

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (S) No.884 of 2015**

1. Cheedeelal Yadaw, son of Shri D. R. Yadaw, aged 59 years, R/o. Gondpara, P. S. City Kotwali, Bilaspur, Tehsil and District Bilaspur (Chhattisgarh)
2. Laxmikant Tiwari, son of Shri M. L. Tiwari, aged 40 years, R/o. Ganga Nagar, Sector-2, Mangala, P. S. Civil Lines, Bilaspur, Tehsil and District Bilaspur (Chhattisgarh)

---- Petitioners**Versus**

1. State of Chhattisgarh, through Secretary, Law and Legislative Affairs Department, Mantralaya, Mahanadi Bhawan, Raipur (Chhattisgarh)
2. Sanjay Namdeo, S/o. S. L. Namdeo, aged about 48 years, R/o. A. G. P. Office, Civil Court, Bilaspur (Chhattisgarh)
3. Kundan Singh Thakur, S/o. Shri P. P. Singh, aged about 46 years, R/o. Sarkanda, Bangalipara, Gali No.3, Bilaspur (Chhattisgarh)

---- Respondents

For Petitioners : Mr. Sanjay S. Agrawal, Advocate.

For Respondent No.1 : Mr. Varun Sharma, Panel Lawyer.

For Respondent No.2 & 3 : Mr. Vinod Deshmukh, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal**Order on Board****21/12/2015**

1. The petitioners were appointed by the State Government on the post of Additional Public Prosecutor/Additional

Government Pleader by order dated 10.01.2012 (Annexure P/2) for a period of one year on probation or till attaining the age of 62 years, whichever is earlier, terminable with one month's notice by either party. Services of the petitioners were not confirmed by express order of the State Government in terms of Paragraph 17 of the Chhattisgarh Law Department Manual (hereinafter referred to as "the Manual"), holding the petitioners services to be satisfactory. However, they were allowed to continue till appointment of respondent No. 2 and 3 i.e. 07.03.2015. Thereafter, the petitioners have filed the instant writ petition on 16.03.2015 holding that order dated 28th June, 2014 (Annexure P/1) by which the State Government requisitioned the names of eligible advocates for appointment of Additional Government Pleader/Additional Public Prosecutor and order appointing respondent No. 2 and 3 on the post of Additional Public Prosecutor are unsustainable and bad in law, as the petitioners tenure would end in the month of January, 2015 as their probation period is one year and further three years period is provided in Paragraph 18 of the Manual, therefore, order impugned is bad in law and deserves to be set-aside.

2. Return has been filed by the respondent No.1/State as well as respondents No.2 and 3 opposing the writ petition stating *inter alia* that the writ petition as framed and filed is not maintainable and the petitioners are not entitled for any relief.
3. Mr. Sanjay S. Agrawal, learned counsel appearing for the petitioners would submit that since express order not confirming the services of the petitioners was not passed by the State Government, therefore, the petitioners deemed to have been confirmed on the said post upon expiry of one year and therefore, by virtue of the provisions contained in Paragraph 18 of the Manual, they will hold the post for a total period of four years and as such, they are entitled to continue till 9th January, 2016 and impugned order/ communication dated 28th June, 2014 (Annexure P/1) and order dated 07.03.2015 (Annexure P/2) deserve to be quashed.
4. Mr. Varun Sharma, learned Panel Lawyer for the respondent No.1/State would submit that the petitioners were appointed only for a period of one year, they were not confirmed on the said post and by virtue of Paragraph 18 of the Manual, they were allowed to continue till the respondents No.2 and 3 were appointed and as such, the writ petition deserves to be dismissed.

5. Mr. Vinod Deshmukh, learned counsel appearing for respondents No.2 and 3 would submit that petitioner No.1 has participated in the selection process for the post of Additional Government Pleader-cum-Additional Public Prosecutor and petitioner No.2 has participated in the selection process for the post of Government Pleader-cum-Public Prosecutor and their names were also sent to the State Government by the District Bar Association, Bilaspur, but having been not selected/appointed on the said post, they have filed the instant writ petition on 16.03.2015 questioning the appointment of respondent No.2 and 3. He would further submit that the writ petitioners having participated in selection process which was initiated for the above-stated post, are not entitled to challenge the said process as the petitioners were not successful in the said process and as such, the writ petition deserves to be dismissed.
6. I have heard learned counsel appearing for the parties, and given thoughtful consideration to the submissions raised therein and also gone through the record with utmost circumspection.
7. It is not in dispute that the petitioners were appointed on the post of AGP/APP by order dated 10.01.2012 on

probation for a period of one year and their probation were not confirmed as required by Paragraph 19 of the Manual by the State Government by express order and period of probation was also not extended by the State Government and thereafter, by the impugned memo dated 28th June, 2014, the State Government requisitioned the panel from the District Magistrate, Bilaspur in which petitioner No.1 claimed his candidature for the post of Additional Government Pleader-cum-Additional Public Prosecutor and petitioner No.2 claimed his candidature for the post of Government Pleader-cum-Public Prosecutor, which is apparent from the memo of District Bar Association, Bilaspur dated 14.07.2014 and their names were forwarded to the District and Sessions Judge, Bilaspur pursuant to the letter dated 30.07.2014. Thereafter respondent No.3 was appointed by State Government on 10.03.2015 on the post of Additional Government Advocate-cum-Public Prosecutor and respondent No.2 was appointed on the post of Additional Government Advocate on 10.03.2015. The petitioners filed this writ petition only on 16.03.2015 before this Court questioning the memo Annexure P/1 and order appointing respondent No. 2 and 3 on the said post.

8. It is trite that appointment to the post of District Counsel is professional engagement; no status of public nature is conferred on the incumbent. The Chhattisgarh Law Department Manual is merely a completion of executive instructions and it has not been issued by State Government in accordance with Article 166(3) of the Constitution of India.

9. The law relating to appointment of Additional District Government Counsel, Assistant District Government Counsel came up for consideration before the Supreme Court in the matter of **State of U.P. v. Johri Mal**¹ and it has been held that appointment of Additional District Government Counsel is professional engagement and they do not enjoy the statutory right with respect to renewal of tenures and holder of the office of Public Prosecutor doesn't hold a "civil post" and held as under:-

"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-à-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

1 (2004) 4 SCC 714

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*².

41. In *Om Kumar v. Union of India*³ it was held that where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the Constitutional Courts as primary reviewing courts to consider the correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. For judging the arbitrariness of the order, the test of unreasonableness may be applied. The action of the State, thus, must be judged with extreme care and circumspection. It must be borne in mind that the rights of the Public Prosecutor or the District Counsel do not flow under a statute. Although, discretionary powers are not beyond the pale of judicial review, the courts, it is trite, allow the public authorities sufficient elbow space/play in the joints for a proper exercise of discretion.

44. Only when good and competent counsel are appointed by the State, the public interest would be safeguarded. The State while appointing the Public Prosecutors must bear in mind that for the purpose of upholding the rule of law, good administration of justice is impera-

2 (1947) 2 ALL ER 680

3 (2001) 2 SCC 386

tive which in turn would have a direct impact on sustenance of democracy. No appointment of Public Prosecutors or District Counsel should, thus, be made either for pursuing a political purpose or for giving some undue advantage to a section of the people. Retention of its counsel by the State must be weighed on the scale of public interest. The State should replace an efficient, honest and competent lawyer, inter alia, when it is in a position to appoint a more competent lawyer. In such an event, even a good performance by a lawyer may not be of much importance.”

Their Lordships concluded that in matters of extension or renewals of the terms of the Public Prosecutor, the State is required to act fairly and reasonably and State must follow the principles laid down in Legal Remembrancer’s Manual by observing as under:-

“46. The Code of Criminal Procedure does not provide for renewal or extension of a term. Evidently, the legislature thought it fit to leave such matters at the discretion of the State. It is no doubt true that even in the matter of extension or renewal of the term of Public Prosecutors, the State is required to act fairly and reasonably. The State normally would be bound to follow the principles laid down in the Legal Remembrancer’s Manual.”

Their Lordships finally concluded in Paragraph 75 that in the matter of appointment of District Government Counsel, Article 14 will be attracted to a limited extent, if State acts in defiance, deviation and departure of principles of law by holding as under:-

“75. In the matter of engagement of a District Government Counsel, however, a concept of

public office does not come into play. However, it is true that in the matter of counsel, the choice is that of the Government and none can claim a right to be appointed. That must necessarily be so because it is a position of great trust and confidence. The provision of Article 14, however, will be attracted to a limited extent as the functionaries named in the Code of Criminal Procedure are public functionaries. They also have a public duty to perform. If the State fails to discharge its public duty or acts in defiance, deviation and departure of the principles of law, the court may interfere. The court may also interfere when the legal policy laid down by the Government for the purpose of such appointments is departed from or mandatory provisions of law are not complied with. Judicial review can also be resorted to, if a holder of a public office is sought to be removed for reason *dehors* the statute.”

10. Recently, in the matter of **State of Uttar Pradesh and others v. Rakesh Kumar Keshari and another**⁴, their Lordships of the Supreme Court, while following the law laid down in the matter of **Johri Mal**(supra) have held in no uncertain terms that nature of office held by lawyer (Government Advocate) vis-a-vis State is in nature of professional engagement and is not a civil post and therefore, there is no right of appointment or renewal of their post and choice lies with State Government and courts should be very circumspect in interfering with the decision of Government unless an exceptional case is made out. Paragraph 31 of report states as under:-

4 (2011) 5 SCC 341

“31. This Court in the said case has further ruled that so long as in appointing a counsel, the procedure laid down in the L.R. Manual is followed and a reasonable or fair procedure is adopted, the court would normally not interfere with the decision. What is emphasised by this Court is that the nature of the office held by a lawyer vis-à-vis the State being in the nature of professional engagement, the courts are normally chary to overturn any decision unless an exceptional case is made out. According to this Court 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 and the extension of tenure of the Public Prosecutor or the District Counsel should not be compared with the right of renewal under a licence or permit granted under a statute. What is laid down as firm proposition of law is that an incumbent has no legally enforceable right as such and the action of the State in not renewing the tenure can be subjected to judicial scrutiny inter alia only on the ground that the same was arbitrary. It is also held that the court normally would not delve into the records with a view to ascertain as to what impelled the State not to renew the tenure of the Public Prosecutor or a District Counsel and the jurisdiction of the courts in a case of this nature would be to invoke the doctrine of “Wednesbury unreasonableness”.”

11. In a more recent judgment in the matter of **State of Uttar Pradesh v. Ajay Kumar Sharma and others**⁵, their Lordships of the Supreme Court have again reiterated the principles of law laid down in matter of **Johri Mal** (supra) and held that State must have freedom to appoint counsel of their choice and confidence. Paragraph 16 of the report pertinently states as under:-

5 Civil Appeal No.13727 of 2015 decided on 26.11.2015

“16. It is beyond cavil that it is in the interest of the dispensation of criminal justice that competent counsel possessing integrity should alone be appointed, since otherwise, there is a strong possibility of miscarriage of justice. In choosing them, the State will not only have to be satisfied of their forensic competence, but also that they are bereft of any criminal antecedents. This, however, does not mean that the persons presently discharging the duties of Additional District Government Counsel, Assistant District Government Counsel, Panel lawyers and Sub District Government Counsel stand appointed to civil posts, thereby creating a right of continuity.

In our opinion, which is an echo of that articulated in *Johri Mal*, the State, like any other litigant, must have the freedom to appoint counsel in whom they repose trust and confidence. The only expectation is that the choice made by the State should not be such as could defeat the sacred and onerous responsibility of ensuring that the justice is meted out to all citizens. In *Johri Mal*, this Court has categorically rejected the claim of an advocate to continuous renewal or re-appointment as a government Advocate. We entirely agree with this exposition of the law. We think that the correct approach is to ensure the competency of advocates being considered for appointment of Additional District government Counsel, Assistant District Government Counsel, Panel lawyers and Sub District Government Counsel.

It seems to us that it would be an incorrect approach to start this process by considering the re-appointment or renewal of existing Government Counsels since that would dilute, nay, dissolve the discretion of the Government to appoint advocates whom they find trustworthy. The High Court has followed the second approach leading to the dissatisfaction of the State Government and their resentment that their realm of discretion has been eroded for no justifiable reason.”

12. It is quite vivid by law laid down by the Supreme Court in this behalf that engagement of lawyer as an Additional Public Prosecutor by State Government is purely a professional engagement and they don't occupy a "civil post" and State Government must act fairly and reasonably in appointing them and in renewal as well. Applying the principles of law laid down by the Supreme Court in the above quoted decisions, coming back to the facts of the present case, it would appear that the petitioners were engaged on the post of Additional Government Advocate/Additional Government Pleader for a period of one year, they were not reappointed for further period and they were allowed to continue till appointment of respondent No. 2 and 3 by virtue of Paragraph 18 of the Law Departmental Manual which provides that notwithstanding the expiry of the period, a Government Pleader or Additional Government Pleader shall continue as such, until he is reappointed or his successor is reappointed. The submission of learned counsel for petitioners that in absence of dissatisfaction arrived regarding work and conduct of petitioners in respect of their services, the petitioners are entitled to continue for a period of initial one year and further period of three years total four years is not correct. As already held, the

petitioners were appointed initially for a period of one year by order dated 10.01.2012 and after completion of one year, fresh names were requisitioned by Department of Law and Legislative Affairs, by memo dated 28.06.2014 in which petitioners also submitted their candidatures, thereby conceding that their tenure has come to an end on expiry of one year and further they continued on the post by virtue of provision contained in paragraph 18 of Manual till 07.03.2015, on which respondent No.2 and 3 were appointed in the said post of Additional Government Pleader. In the considered opinion of this Court, the State Government, while discontinuing the services of the petitioners herein and appointing the respondent No.2 and 3, has followed the procedure laid down in Manual by adopting a fair and reasonable procedure, therefore this Court would not like to exercise jurisdiction under Article 226 of the Constitution of India in light of the law laid down by the Supreme Court in the matters of **Johri Mal** (supra), **Rakesh Kumar** (supra) and **Ajay Kumar Sharma** (supra) especially when petitioners themselves without demur or protest participated in appointment procedure initiated for appointment of Additional Government Pleader after completion of their tenure, and they challenged their discontinuance and subsequently initiated procedure only

after they were not reappointed and respondent No. 2 and 3 were appointed in their place as such, challenge after being unsuccessful is impermissible in law. [See **Ranjan Kumar & others v. State of Bihar and others**⁶].

13. As a fallout of the above-stated legal analysis, I am unable to hold that discontinuance of petitioners as Additional Government Pleader and engagement of respondent No. 2 and 3 on the post of Additional Government Pleader w.e.f. 07.03.2015 suffers from vice of arbitrariness or contrary to paragraph 18 of Manual, warranting interference by this Court under Article 226 of the Constitution of India.
14. Resultantly, writ petition being devoid of merit, deserves to be and is accordingly dismissed, but without imposition of cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge

6 (2014) 16 SCC 187

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (S) 884 of 2015

PETITIONERS Cheedeelal Yadaw and another

Versus

RESPONDENTS : State of Chhattisgarh and others

Head Note

(English)

Appointment of lawyer as Government Advocate is professional engagement by the State Government and Additional Public Prosecutor/AGP doesn't hold "civil post".

(हिन्दी)

एक अधिवक्ता के रूप में शासकीय वकील की नियुक्ति राज्य शासन द्वारा व्यावसायिक अनुबंध है तथा अतिरिक्त लोक अभियोजक/अतिरिक्त शासकीय वकील सिविल पद धारण नहीं करता है।

(Bablu Bhanarkar)
P.S. to Hon'ble Shri
Justice Sanjay K. Agrawal