

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 1004 OF 2014

Balasaheb Potdar

..Petitioner

v/s.

The State of Maharashtra .

..Respondents

Mr. Uday P Warunjikar for the Petitioner.

Mr.S.K.Shinde, PP a/w. Mr.K.V.Saste, APP for the Respondent/State.

**CORAM : RANJIT MORE &
SMT. ANUJA PRABHUDESSAI, JJ.
DATED : MARCH 26, 2015.**

P.C.

1. Heard Mr. Warunjikar, learned Counsel for the petitioner and Mr. Shinde, learned PP for the State.
2. This petition is filed invoking the jurisdiction of this Court under Article 226 of the Constitution of India, 1950 challenging the legality and propriety of order dated 25.10.2013 issued by the Law and Judiciary Department of the State of Maharashtra. By the said order, the petitioner's application dated 26.6.2013 for appointment of Special Public Prosecutor to conduct the trial in Sessions Case No. 48 of 2013 pending on

the file of the learned Addl. Sessions Judge, at Kolhapur came to be rejected.

3. Mr. Warunjikar, learned Counsel for the petitioner submitted that the impugned order does not disclose any reasons in support thereof nor does it disclose independent application of mind. He submits that the public interest demands that Special PP should be appointed to conduct the trial of Sessions Case No.48 of 2013, more particularly considering the position that one of the accused is the sitting Corporator. Mr. Warunjikar relied upon the provisions of Section 22 of The Maharashtra Law Officers (Appointment, Conditions of Service and Remuneration) Rules, 1984 & The Rules for the Conduct of the Legal Affairs of Government. (hereinafter referred to as “said Rules”). In support of his contention he has relied upon the decision of the Apex Court in case of Mukul Dalal V/s. Union of India [(1988) 3 SCC 144], the decisions of Division Bench of this Court in the case of Sushil Chokhani v. State of Maharashtra [2005(2) Bom.C.R. (Cri.) 654], Omprakash Baheti & Ors. v. State of Maharashtra [2006 Cri. L.J. 3105], and Prakash Patil v. State of Maharashtra [2008 ALL MR (Cri) 2051].

4. Mr. Shinde, learned PP contested the petition and submitted that the impugned order does disclose the reasons in support thereof and also

discloses application of mind. He submitted that the impugned order is administrative order and this court is not sitting in appeal. He submitted that the scope of judicial review of such orders is very limited. He also relied upon the case of Mukul Dalal and the decision of the Apex Court in State of Maharashtra v. Prakash Patil [2009(12) LJSoft. (S.C.) 346]. Mr. Shinde relied upon the noting of law department on the file and submitted that this is not a case in which interference is required.

5. Having considered the rival submissions of the respective counsel and having gone through the copy of the petition along with the annexures annexed thereto, and the relevant provisions and the ratio of the decisions cited above, we do not find any merit in the petition.

6. Sections 24 and 25 of the Code of Criminal Procedure, 1973 deals with appointment of public prosecutors and Assistant Public Prosecutors, whereas sub-section 8 of Section 24 provides for appointment of Special Public Prosecutor for the purpose of any case or class of cases.

7. In the case of Mukul Dalal & Ors. Vs. Union of India & Ors. (1988) 3 SCC 144 the Apex Court, while dealing with the issue of appointment of Special Public Prosecutor has held that :-

“....When an application for the services of a Special Public Prosecutor or an Assistant Public Prosecutor is made in a given

case, the power would be vested in him (remembrance of legal affairs) to examine the facts and take decision as to whether the case merits the appointment of a Special Public Prosecutor or an Assistant Public Prosecutor. It would not be appropriate to accept the position that whenever an application is made it should be allowed and the Special Public Prosecutor should be appointed; this would be contrary to the spirit of the scheme of the Code....We are inclined to observe that the request for appointment of the Special Public Prosecutor should be properly examined by Remembrance of Legal Affairs and only when he is satisfied that the case deserves the support of a Public Prosecutor or a Special Public Prosecutor that such a person should be appointed to be in charge of the case.The Remembrancer of Legal Affairs should scrutinize every request, keeping a prescribed guideline in view and decide in which cases such request should be accepted, keeping the facts of such case in view.”

8. The Apex Court while holding Rule 22 of the Maharashtra Law Officers (Appointment, Conditions of Services and Remunerations) Rules, 1984 as bad, directed the State to modify the same. In keeping with the conclusions of the Apex Court in the said case, the State of Maharashtra amended the said Rule and Rule 22 as applicable today reads thus:-

“22. Engagement of Special Public Prosecutor:-(1) *The Government in the Law and Judiciary Department, either suo motu, or on the request of any aggrieved party or the*

concerned Department in the Government, may, engage an Advocate who has been in practice as an Advocate who has been in practice as an Advocate for not less than ten years, and having regard to his general repute, legal acumen and suitability, by appointing him, as a Special Public Prosecutor in any criminal case or class of cases, as the case may be:

(1) Provided that, no order under this sub-rule regarding appointment of a Special Public Prosecutor shall be made unless, for the reasons to be recorded in writing, the Remembrancer of Legal Affairs is satisfied, having regard to the nature of the case, gravity of the matter and public interest involved in the matter that such appointment is necessary.

(2) On the request of a private complainant not being the aggrieved party, the Government in the Law and Judiciary Department may, appoint any of the Public Prosecutor or Additional Public Prosecutor as a Special Public Prosecutor in accordance with the provisions of sub-rule (1), for conducting any such case.

(3) Fees for such Special Public Prosecutor, appointed under sub-rule (1) or (2), may be borne by the Government or the aggrieved party or the private complainant, as may be directed by the Remembrancer of Legal Affairs:

Provided that, in cases where the aggrieved party is, a Bank or an Institution or Trust or the like, the fees shall be borne by such aggrieved party;

Provided further that, the amount of the fees to be paid

to such Public Prosecutor, shall be deposited with the Government in the Law and Judiciary Department first, and the same shall be paid by it to such Special Public Prosecutor on completion of the trial, unless directed otherwise by the Remembrancer of Legal Affairs.”

9. The Division Bench of this court in the case of Sushil Chokani (supra) has relied upon the principle laid down by the Apex Court in Mukul Dalal's case and the scope of amended Rule 22 and made following observations “-

..... The decision of the Apex Court in Mukul Dalal's case (supra) and the amended Rule 22 make it abundantly clear that apart from following the guidelines prescribed in the said decision for an appointment of the Special Public Prosecutors at the request of the private party, the Remembrancer of Legal Affairs must be satisfied that the case wherein such appointment is requested for deserves and the prevailing circumstances need the appointment of a Special Public Prosecutor. Besides that, a person to be appointed should be efficient one to conduct the case. Obviously, the points relating to the person's reputation and experience at bar should find place in the consideration by the Remembrancer of Legal Affairs. It should not be a mechanical exercise on the part of the Remembrancer of Legal Affairs. It has to be on consideration of all the relevant factors for the purpose of

appointment of a Special Public Prosecutor in relation to a particular case or class of cases and the consideration thereof should be apparent from the order of appointment issued by such authority. Undoubtedly, the notification need not reflect the entire order itself and the authority would, undoubtedly, be entitled to justify the appointment by referring to such order in case there is any challenge to the appointment of a person to be a Special Public Prosecutor. Even as regards the payment of fees of the Special Public Prosecutor, the quantum as well as the source of payment should not only be specified but should also be reasonable and justifiable.

18. Considering the provisions of law and the guidelines laid down by the Apex Court, it is clear that for the purpose of appointment of Special Public Prosecutor on request by a private party, the same should be preceded by a proper inquiry regarding the need for such appointment in the matter and the reputation, experience and ability of the advocate proposed to be appointed as Special Public Prosecutor and the same should be by the Remembrancer of Legal Affairs and the consideration of all these aspects should be reflected in the order passed in relation to such appointment. The order should disclose the application of mind by the Remembrancer of Legal Affairs to all the relevant factors.”

10. The Division bench of this Court in *Omprakash Baheti v. State of*

Maharashtra again considering the ratio of the Apex Court in Mukul Dalal's case made following observations:

“On plain reading of the judgment in Mukul Dalal, it is clear that the appointment of the Special Public Prosecutor at the request of the private complainant cannot be as a matter of Rule but in case such request is made, the Legal Remembrancer should scrutinize and come to the conclusion whether there is a case for appointment of a Special Public Prosecutor and in case he comes to the conclusion that the Special Public Prosecutor has to be appointed, he should call upon the complainant to deposit the fees payable to the Special Public Prosecutor. In view of this ratio laid down by the Apex Court, we are unable to accept the submission of Mr. Madholkar that the appointment of Special Public Prosecutor cannot be made at the request of a private complainant. No doubt, when such request is made, the request will have to be scrutinized and Legal Remembrancer will have to scrutinize the case and after independently applying his mind come to the conclusion whether such an appointment should be made or not”.

11. The scheme of the Code and the Rule 22 of the Maharashtra Law Officers (Appointment, Conditions of Services and Remunerations) Rules, 1984, as well as the decision of the Apex Court in the case of Mukul Dalal

(supra) makes it abundantly clear that it is the duty of the Public Prosecutor to conduct the prosecution before the Court of Sessions, unless the complainant makes an application for Special Public Prosecutor and the legal Remembrancer upon scrutinizing the request, is satisfied that the case deserves appointment of Special Public Prosecutor.

12. The facts of the present case reveals that, the son of the petitioner had collected an amount of Rs.61,50,000/- from 33 persons by giving false promise that those persons will be provided employment in Vivekanand Shikshan Sanstha. It is alleged that since the son of the petitioner did not provide employment to these persons despite taking huge amount, the accused in Sessions Case No.48 of 2013 kidnapped the petitioner's son and recovered an amount of Rs . 1 Crore. The accused are accordingly charged for offence under Section 365, 452, 347, 385, 504, 506, 364A r/w. 34 of IPC.

13. The application at Exhibit 6 reveals that the petitioner had sought for appointment of Special Public Prosecutor on the ground that one of the accused is a Corporator. He also made grievance the FIR was registered only after he had filed the writ petition. He also made a grievance that the FIR was not registered under the relevant sections.

14. The Legal Remembrancer called for a report of the DGP. The report

of DGP stated that there are competent public prosecutors at Kolhapur to conduct the said Sessions case. The DGP, however, did not have any objection for appointment of Special Public Prosecutor. The legal Remembrancer thereafter rejected the request vide the impugned order at Exhibit H.

15. A perusal of the impugned order reveals that the Legal Remembrancer has considered the nature and gravity of the case as well as the report of the DGP and the guidelines laid down by the Supreme Court in Mukul Dalal's case and concluded that the case is not covered by the guide lines of Mukul Dalal's case. It was also held that no public interest is involved to appoint Special Public Prosecutor to lead the trial in the Sessions Court. We are therefore unable to accept the argument of Mr. Warunjikar that there is no application of mind or that no reasons are disclosed in support of the impugned order.

16. Mr. Warunjikar, while emphasizing the need for appointment of Special Public Prosecutor submitted that the office bearers of the said Vivekanand Shikshan Sanstha are the political leaders and the accused who is a Corporator has a strong nexus with these political leaders. He has further submitted that these facts have not been considered by the Legal Remembrancer.

17. The allegations of nexus between the political leaders and the Corporator are made for the first time in this petition, and, therefore there was no occasion for the Remembrancer of Legal Affairs to consider such allegations. The DGP was also not required to give any inputs as the Remembrancer was not bound by the inputs, the recommendation or the opinion of DGP. It was within the exclusive domain of the Remembrancer of Legal affairs to examine the application and evaluate the need for appointment of a Special Public Prosecutor in the light of the Rules and the Principles laid down by the Apex Court in the case of Mukul Dalal, and in our considered view the Legal Remembrancer has indeed applied his mind to the facts of the case and has taken a decision that the case does not warrant appointment of Special Public Prosecutor. We do not find any reason to interfere with the said finding.

18. At this stage it would be advantageous to refer to the decision of the Apex Court in State of Maharashtra v. Prakash Patil (supra), the Apex Court made following observations :

“The State opposed the petition on several grounds: primarily indicating that the scope of Judicial Review of the executive, administrative and quasi-judicial action, was extremely limited and this is not a case where any interference was called for and scanned as if the High Court was hearing an appeal against a decision taken. The scope for judicial review has been examined by this

court in several cases. It has been consistently held that the power of judicial review is not intended to assume a supervisory role or don the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the supreme lex to other organs of the State. A mere wrong decision, without anything more, in most of the cases will not be sufficient to attract the power of judicial review. The supervisory jurisdiction conferred upon a court is limited to see that the authority concerned functions within its limits of its authority and that its decisions do not occasion miscarriage of justice.”

19. So far as the present case is concerned, we have already concluded that the Legal Remembrancer has applied his mind to the facts of the case, the nature and seriousness of allegations and of the offence, involvement of public interest and upon being satisfied has opined that the case does not involve public interest. In our view this is not a fit case to interfere with the order.

20. The writ petition is therefore dismissed.

(ANUJA PRABHUDESSAI, J.)

(RANJIT MORE, J.)

