

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

WRIT PETITION NO. 5005 OF 1999
WITH
CIVIL APPLICATION NO 6414 OF 1999
WITH
CIVIL APPLICATION NO 4348 OF 2015

1. MAHARASHTRA STATE PUBLIC PROSECUTORS
ASSOCIATION - THROUGH ITS PRESIDENT
Shri Shivram Vyankatesh Choudhary
Age: 47 years, Occu: Govt. Serving
Presently serving as Astt. Public Prosecutor
at Parbhani. R/o Parbhani.
2. RATAN S/O EKNATHRAO SHIRSATH
Age: 52 years, Occu: Govt. Service
Presently serving as Addl. Public Prosecutor
Pune [Posted at Pune, discharging duties
of Selection Grade Police Prosecutor]
3. RAMESHWAR S/O LAXMINARAYAN KAHALE
Age: 49 years, Occu: Govt. Service
Presently serving as Addl. Public Prosecutor
at Akola, R/o Akola.
4. MADHAV S/O YESHWANTRAO MUNDHE
Age: 50 years, Occu: Govt. Service
Presently serving as Addl. Public Prosecutor
at Jalna.
5. NANDKUMAR S/O BHALCHANDRA KULKARNI
Age: 52 years, Occu: Govt. Service
Presently serving as Addl. Public Prosecutor
at Aurangabad, R/o Aurangabad.
6. Sk. Jafar S/o Sk. Hussain
Age: 46 years, Occu: Govt. Service
Presently serving as Addl. Public
Prosecutor at Parbhani.
7. Sanjay S/o Purushottamrao Deshmukh,
Age: 50 years, Occu: Assistant Public
Prosecutor, R/o Aurangabad, Tq. and
Dist. Aurangabad.

8. Ramkishan S/o Ranganathrao Tandale,
Age: 54 years,
Occu: Assistant Public Prosecutor,
R/o Aurangabad Tq. and Dist.
Aurangabad.
9. Shyam S/o Bhalchandra Deshpande,
Age: 47 years,
Occu: Assistant Public Prosecutor,
R/o Aurangabad, Tq. and
Dist. Aurangabad.

....Petitioners.

Versus

1. THE STATE OF MAHARASHTRA
Through its Chief Secretary
Mantralaya, Mumbai - 32.
2. THE MINISTRY OF HOME AFFAIRS
Govt. of Maharashtra
Through its Home Secretary
Mantralaya, Mumbai -32.
3. THE MINISTRY OF LAW & JUDICIARY
Govt. of Maharashtra
Through its Secretary
Mantralaya, Mumbai -32.
4. THE DIRECTOR OF PROSECUTIONS
Ministry of Home Affairs
Govt. of Maharashtra
'Kutir No. 6', Bhind Yeshodhan Bldg.,
Dinshaw Wacha Road,
Mumbai - 20

....Respondents.

Mr. P.R. Katneshwarkar, Advocate for petitioners.

Mr. Ashutosh Kumbhakoni, Advocate General with Mr. Akshay Shinde, Advocate and Mr. A.B. Girase, Government Pleader for respondents.

**CORAM : T.V. NALAWADE AND
SUNIL K. KOTWAL, JJ.**

RESERVED ON : 12/07/2017
DECIDED ON : 25/07/2017.

JUDGMENT : [PER T.V. NALAWADE, J.]

. The petition is filed by the Association of Prosecuting Officers of Maharashtra State working in the Courts of Magistrate and Sessions Court for relief of declaration that the amendment to section 24 viz. 24 (6-A) introduced to the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.' for short) by the State Government is repugnant to the Act of Parliament and it is void in view of Article 254 of Constitution of India. Relief of direction against the State Government that it should act in accordance with the provisions of section 24 (1), 24 (6) of Cr.P.C. and make appointments of Public Prosecutors, Additional Public Prosecutors and Assistant Directors for working in Sessions Court and High Court is claimed. Relief of direction that appointments be made from the cadre of Assistant Public Prosecutors to these posts is claimed. Relief of direction is claimed to allow the promoted Additional Public Prosecutors to work in Sessions Court (in district) and High Court. Both the sides are heard. The notes of written arguments are also filed by the respondents.

2) The reliefs of aforesaid nature are claimed as the State Government is appointing Public Prosecutors, Additional Public

Prosecutors to work in High Court and Sessions Court on contract basis from the members of Bar. Due to such appointments, the Assistant Public Prosecutors selected as per the Rules framed by the State Government under Article 309 of Constitution of India are not getting appointments to the posts of Public Prosecutors and also to most extent, to the posts of Additional Public Prosecutors. It appears that though as per the Rules framed, some Assistant Public Prosecutors are promoted to the posts of Additional Public Prosecutors and they are posted to work in Sessions Court in districts, the Public Prosecutors are not assigning work to them. It is contention that the State Government is deliberately and intentionally not acting in accordance with the provisions of section 24 (1), 24(6) of Cr.P.C. as enacted by Parliament.

3) In view of points involved in the matter the provisions of Constitution of India with regard to the legislative powers of Parliament and the State Legislature need to be considered to some extent. Similarly, the Rules framed by the State Legislature under Article 309 of Constitution of India need to be considered for considering the aforesaid claims.

4) The provisions of part XI and particularly Articles 245, 246 and 254 of Constitution of India and entry numbers 1 and 2 of

list III of Concurrent List given in the Seventh Schedule of Constitution of India show that the Parliament and the State Legislature both have power to legislate on criminal law, the subject involved in the present matter. There is no dispute about this point and so, this Court is not discussing this point in detail.

5) The contention made for the petitioners in the present proceeding that the provisions made by the Parliament will prevail over the provision made by the State, the amendment made to section 24 of Cr.P.C., needs to be addressed. It appears that the provision of section 6-A in section 24 of Cr.P.C. was added in the year 2014 and at the same time, the proviso which was given to sub-section (6) of section 24 was deleted. In view of the provisions of Article 254 of Constitution of India and as amendment was made subsequent to the enactment of Cr.P.C., it needs to be held that so far as the powers of the Parliament and the State Legislature are concerned, in view of the Article 254, atleast at present, the provision made by the State Government can be enforced if there is no other hurdle. This is due to wording of Article 254 (2) of Constitution of India and it runs as under :-

"254.Inconsistency between laws made by Parliament and laws made by the Legislatures of States.-

(1)

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

6) In view of the aforesaid provision of constitution of India, it can be said that on the date of petition, in the year 1999, in view of the law made by Parliament, section 24 of Cr.P.C. the law was in support of the contentions made by the petitioners. This provision cannot be, however, read in isolation in view of the Rules made by the State Government under Article 309 of Constitution of India. Whether the amendment viz. sub-section (6-A) of section 24 is in consonance with spirit of section 24 and whether this provision can be used against the petitioners, is the question which needs to be decided in the present matter. For that, the Rules framed under Article 309 of Constitution of India also need to be considered.

Similarly the developments which took place due to some steps taken by the State Legislature to comply the directions given by Apex Court need to be considered.

7) The provision of section 24, as amended in the year 1978, was as under :-

"24. Public Prosecutors. - (1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conduction in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case or class of cases in any district or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel

of names of persons, who are, in his opinion, fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).

(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).

Explanation. - For the purposes of this sub-section,-

(a) "regular Cadre of Prosecuting Officers" means a Cadre of Prosecuting Officers which includes therein the post of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors, by whatever name called, to that post;

(b) "Prosecuting Officer" means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, an Additional Public

Prosecutor or an Assistant Public Prosecutor under this Code.

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor:

(9) For the purposes of sub-section (7) and sub-Section(8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor as an Additional Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate."

The provision of section 24 (1) of Cr.P.C. is in respect of appointment of Public Prosecutors and Additional Public Prosecutors which need to be made for conducting prosecutions, appeals and other proceedings on behalf of the Government in the High Court. The remaining part of the section viz. section 24 (2) to 24 (9) relates to the appointment of Public Prosecutors and Additional Public Prosecutors

which need to be made in any district. Plain reading of these two separate portions of section 24 of Cr.P.C. show that different schemes are provided for making such appointments in respect of work in High Court and in respect of work in District Court. The petitioners are not appointed as provided in section 24 (1) of Cr.P.C. It is their case that they are appointed as provided in section 25 of Cr.P.C. and their service conditions are governed by the Rules framed by the State Legislature and by promotion they are entitled to get posts of Additional Public Prosecutor and Public Prosecutor. Due to this single circumstance and the rules framed by State Government the contention of the present petitioners that they need to be promoted and appointed on the posts of Public Prosecutors and Additional Public Prosecutors for working in High Court as provided in section 24 (1) of Cr.P.C. cannot be accepted. Relevant rules are quoted at proper place.

8) The provisions of Cr.P.C. show that the State Legislature made amendment to section 24 of Cr.P.C. first time in the year 1981 and that amendment provides as under :-

"Maharashtra.- In its application to the State of Maharashtra, in section 24,-

- (a) in sub-section (1), delete the words "after consultation with the High Court,";
- (b) in sub-section (4), for the words "in consultation

with the Sessions Judge", substitute "with the approval of the State Government". - Maharashtra Act 34 of 1981, section 2 (w.e.f. 20-5-1981)."

9) By making aforesaid amendment in the year 1981, it can be said that the State Government took it to itself the procedure for preparing panel of the names of persons mentioned in section 25 (5) of Cr.P.C. and excluded the role of Sessions Judge. However, the provision of section 24 (6) of Cr.P.C. was not touched till the year 2014 and so, even after making amendment in the year 1981, as per the provision of section 24 (6) of Cr.P.C., the priority could have been given to the Prosecuting Officers to get appointments to the posts of Public Prosecutors and Additional Public Prosecutors. But regular cadre of prosecuting officers mentioned in section 24 (6) of Cr.P.C. was not in existence at that time. In view of this position, the State Government continued to make appointments by following procedure like preparing panel of members of Bar as provided in provision of section 24 (4) and 24 (5) of Cr.P.C. as amended in the year 1981.

10) Admittedly, due to some decisions given by the Apex Court like in the case reported as **1995 Suppl (3) SCC 37 (S.B. Shahane Vs. State of Maharashtra**, the Government of

Maharashtra created a separate cadre of Assistant Public Prosecutors under section 25 of Cr.P.C. for working in the Courts of Magistrate. The learned Advocate General submitted that this cadre created by the State Government does not fall in the definition of 'regular cadre' given in explanation (1) of sub-section (6) of section 24 of Cr.P.C. He placed reliance on some observations made by the Apex Court in the case reported as **(1990) 4 SCC 191 (K.J.John, Asstt. Public Prosecutor Grade I, Palai Vs. Vs. State of Kerala)**. This Court has carefully gone through the interpretation made by the Apex Court in this reported case. After considering the provision of section 24 of Cr.P.C. and the Kerala Government Law Officers (Appointment and Conditions of Service) and Conduct of Cases Rules 1978, the Apex Court made it clear that there was no 'regular cadre' available in Kerala as provided in explanation (1) of sub-section (6) of section 24 of Cr.P.C. It is laid down that the expression 'regular cadre' of Prosecuting Officers comprises a service with Assistant Public Prosecutors at the lowest level and Public Prosecutors at the top. This position of law is still there and so, this interpretation needs to be used in the present matter also.

11) In section 2 (u) of Cr.P.C. the definition of 'Public Prosecutor' is given, which is as under :-

"(u) "Public Prosecutor" means any person appointed

under section 24, and includes any person acting under the directions of a Public Prosecutor;"

Due to aforesaid definition and the provisions of section 24 and 25 of Cr.P.C., the Prosecuting Officers called by name as Public Prosecutors and Additional Public Prosecutors and appointed as such can only work in Sessions Court and High Court. The provision of section 24 (7) shows that it is possible to appoint members of Bar, on these posts who have put in practice of seven years.

12) The learned Advocate General stressed much on the powers given by Article 309 of Constitution of India to the State Government and the Rules framed by the State Government viz. Maharashtra Law Officers (Appointment, Conditions of Service and Remuneration) Rules 1984 (hereinafter referred to as 'the Rules of 1984' for short). In Rule 13 (3) of the Rules of 1984, the procedure for appointment of Public Prosecutor and Additional Public Prosecutor is given and it is similar to the procedure given in section 24 (4) and (5) of Cr.P.C. as amended by the State Government in the year 1981 and it reads as under :-

"(3) The District Magistrate in Brihan Mumbai, or as the case may be, in every district shall invite applications from advocates in such manner as he thinks fit, for inclusion of the names of suitable

candidates from amongst them, with the approval of the Government, in the panel for appointment of Public Prosecutor or Additional Public Prosecutor for Brihan Mumbai, or as the case may be, for a district; and the Committee consisting of the person nominated by the Advocate General and the Collector of the concerned District, shall conduct the interviews of the candidates and recommend to the Government, the names of the candidates which in its opinion are most suitable and meritorious for such appointment; and the Government shall select the candidates recommended for any such appointment."

The provision of the Rule 13 (2) of the Rules of 1984 refers to make the appointments to be made for working in High Court. In Chapter IV of the Rules of 1984, the duties of Public Prosecutors and Additional Public Prosecutors working in High Court and Sessions Court are given. These Rules show that the State Government wanted to exercise its power to make appointments of Public Prosecutors and Additional Public Prosecutors by selecting them from members of Bar and at that time, there was no intention as such to create regular cadre as mentioned in section 24 (6) of Cr.P.C. By using this Rule, the State Government kept on appointing Prosecuting Officers.

13) It is already mentioned that it is not disputed that in the

year 1995, first time separate cadre of Assistant Public Prosecutor was created by the State Government. For that, the provision of section 25 of Cr.P.C. needs to be considered first. The section reads as under :-

"25. Assistant Public Prosecutors.-(1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

(1-A) The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the Courts of Magistrates.

(2) Save as otherwise provided in sub-section(3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

(3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case:

Provided that a police officer shall not be so appointed-

(a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or

(b) if he is below the rank of Inspector."

This provision shows that it was made clear that the Prosecuting Officers were not to work under investigating agency, the police

officers.

14) In exercise of powers given under Article 309 of Constitution of India, the State Government made Rules to regulate the recruitment to the posts of Assistant Public Prosecutors mentioned in section 25 of Cr.P.C. and these Rules are called as the Assistant Public Prosecutor, Group-B in Directorate of Public Prosecutions, Maharashtra State (Recruitment) Rules, 1995 (hereinafter referred to as 'the Rules of 1995'). The aforesaid Rules show that advocates having more than five years practice in High Court and in courts subordinate thereto can be appointed as Assistant Public Prosecutors if they fulfill other conditions given in these Rules. These Rules also show that the appointments are to be made through Public Service Commission of the State. The appointments are to be made on probation of two years and the persons appointed on these posts are transferable anywhere in the State of Maharashtra.

15) In exercise of powers conferred by Article 309 of Constitution of India, the State Government made Rules which are called as the Deputy Director, Assistant Director and Public Prosecutor and Additional Public Prosecutor (Group-A) in the Directorate of the Public Prosecutions, Maharashtra State

(Recruitment) Rules, 1997 (hereinafter referred to as 'the Rules of 1997'). These Rules supercede all previous Rules and on this subject there were Rules of 1984. Rules 5 and 6 of these Rules of 1997 run as under :-

"5. Appointment to the post of the Additional Public Prosecutor (Group-A) in the Directorate shall be made either :-

(a) by promotion on the basis of strict selection from amongst the persons holding the post of Assistant Public Prosecutor form the cadre of Assistant Public Prosecutor who has served for a period of not less that 5 years on regular basis as Prosecutor;

(b) by nomination from amongst the person who,-

(i) are not more than thirty six years of age,

(ii) possess a degree in law,

(iii) possess experience of working as an Advocate in the High Court or in a Court subordinate thereto, for a period of eight years.

6. Notwithstanding anything contained in sub-clause (iii) of clause (b) of rule 5, if at any stage of selection, the Commission is of the opinion that sufficient number of candidates possessing the requisite experience are not available to fill up the vacancies reserved for candidates belonging to Scheduled Caste, Scheduled Castes converts to Buddhism, Scheduled Tribes, Denotified Tribes or Nomadic Tribes, then the Commission may in the matter of such selection, relax the condition in the respect of period of experience set out therein and select suitable candidate belonging to such Castes or

Tribes."

16) By making the Rules of 1997, the State Government kept open two sources for the appointments to the posts of Public Prosecutors and Additional Public Prosecutors. Rules 7 and 8 of the Rules of 1997 are also relevant and they run as under :-

"7. A person appointed to the post of Additional Public Prosecutor by nomination shall be on probation for a period of two years.

8. Appointed to the post of Additional Public Prosecutor by way of nomination and promotion shall be made in the ratio of 50 : 50."

17) Rules 5 to 8 of the Rules of 1997 and Rules of 1995 if read in aforesaid sequence show that they created cadres of Prosecuting Officers like Assistant Public Prosecutors and Additional Public Prosecutors. The appointments to the posts of Additional Public Prosecutor can be made by the nomination as provided in Rule 5 (b) of these Rules. As many as 162 posts of the cadre of Additional Public Prosecutors as provided in aforesaid Rules are created in this State and 26 posts of Public Prosecutors are created, but the State Government has been appointing all the Public Prosecutors and most of the Additional Public Prosecutors on contract basis for fixed number of years.

18) Rule 4 of the Rules of 1997 runs as under :-

"4. Appointment to the post of Assistant Director and Public Prosecutor (Group-A) in the Directorate shall be made by promotion on the basis of Strict Selection from amongst the persons holding the post of the Additional Public Prosecutor from the cadre of Additional Public Prosecutor or Officer on the equivalent post who has served for a period of not less than 3 years on regular basis in the Directorate."

This Rule shows that a person who is initially appointed as Assistant Public Prosecutor as provided in section 25 of Cr.P.C. and as per Rules of 1995, can be promoted up to the post of Public Prosecutor, though his designation may be as Assistant Director and Public Prosecutor (Group A). These Rules show that regular cadre as mentioned in section 24 (6) of Cr.P.C. is created by the State Government. Thus, after the Rules of 1984 new Rules were made under Article 309 of Constitution of India and regular cadre of the Prosecuting Officers is created. First time in the year 2014 by making aforesaid amendment to section 24 of Cr.P.C., the State Government created conflicting provision.

19) By Maharashtra Act No. XXXIII of 2014, section 24 of Cr.P.C. came to be amended and the amendment is as follows :-

""(6-A) Notwithstanding anything contained in

sub-section (6), the State Government may, subject to the provisions of sub-sections (4) and (5), appoint a person who has been in practice as an advocate for not less than seven years, as the Public Prosecutor or Additional Public Prosecutor for the district."

20) If the provisions made by the Parliament only is read, it can be said that in view of the Rules of 1995 and 1997, it was mandatory for the State Government to consider first the persons constituting 'regular cadre' of Prosecuting Officers for making appointments to the posts of Public Prosecutors and Additional Public Prosecutors. Due to introduction of aforesaid sub-section (6-A), the State Government has attempted to create a discretion which can enable the State Government to ignore the persons from regular cadre while making appointments to the posts of Public Prosecutors and Additional Public Prosecutors.

21) The aforesaid provisions show that the provision of sub-section (6-A) already mentioned is in conflict with the Rules of 1997 made by the State Government under Article 309 of Constitution of India. For deciding the present matter, it needs to be kept in mind that only the proviso of sub-section (6) of section 24 of Cr.P.C. is deleted by the State amendment of 2014. The Rules of 1997 are not touched by the State Government and further the remaining portion

of sub-section (6) of section 24 is still there. The definition of 'Public Prosecutor' in section 2 (u) of Cr.P.C., the provisions of section 24 of Cr.P.C. show that after becoming Additional Public Prosecutor, the person holding such posts needs to be allowed to work in Sessions Court. Though in some cases like mentioned in section 437 (1) of Cr.P.C., the Public Prosecutor is required to be heard by Magistrate, ordinarily they are expected to work in Sessions Court (District Court) and High Court.

22) The Assistant Public Prosecutors appointed as per the Rules of 1995 have the right to be considered for getting the promotional posts mentioned in the Rules of 1997. Thus, they need to be considered for their appointments even to the post mentioned in Rule 4 of the Rules of 1997 which is described as Assistant Director and Public Prosecutor (Group-A). For getting that post as per the Rules of 1997, the Additional Public Prosecutors, who are appointed by nomination as provided in Rule 5 of Rules of 1995 can also be considered. However, in this State, there are no Additional Public Prosecutors appointed as per Rule 5 of the Rules of 1997. When such Rules are there, it is not possible for the State to give go-bye to these Rules and deprive the persons appointed under the Rules of 1995 to get posts of Public Prosecutors. These Rules have legislative character and in the case reported as **(2006) 4 SCC 1**,

[Secretary, State of Karnataka and Ors. Vs. Umadevi (3) and Ors.], the Constitution Bench has observed that if such Rules under Article 309 of Constitution of India are made, the Government can make appointments ordinarily in accordance with such Rules. Thus, the persons appointed on contract basis cannot compete with regular cadre and cannot affect the rights of regular cadre.

23) There are not only aforesaid Rules, but there is record to show that as per the Rules of 1995, the posts of Assistant Public Prosecutors were created and the persons came to be appointed on those posts as per the procedure given in the Rules of 1995. Some are promoted by following the Rules of 1997, but most of them are in waiting due to the circumstance that the State Government has continued to appoint Additional Public Prosecutors and Public Prosecutors as provided in section 24 (4) and (5) of Cr.P.C. and as provided in Rule 13 (3) of the Rules of 1984. At the cost of repetition, it needs to be mentioned that section 24 (6) of Cr.P.C. is not deleted and further, the Rules of 1995 and 1997 are not repelled or altered by the State Government. In view of the power of the State Government to make Rules under Article 309 of Constitution of India and aforesaid circumstances, presumption is not available in favour of the State that those Rules are repelled or altered. In that regard, it also needs to be kept in mind that the rights of the

persons already appointed as per the Rules of 1995 cannot be taken away by making new Rules which will affect the service conditions of these persons. Appointment on contract basis in such cases of all Additional Public Prosecutors and Public Prosecutors is against spirit of section 24.

24) It is also not possible to give harmonious construction to the procedure given in sub-section (6-A) of section 24 of Cr.P.C. and the Rules of 1995 and 1997. Due to the existence of aforesaid Rules framed under Article 309 of Constitution of India, the amendment to section 24 made in the year 2014 viz. addition of sub-section (6-A) has not opened the door for the Government to make appointments otherwise than provided in the procedure prescribed in the Rules of 1997. These Rules of 1995 and 1997 have binding effect and they shall apply and prevail over the amendment made by the State viz. addition of sub-section (6-A) to section 24 of Cr.P.C. In view of this position of law, the persons who are already appointed on the posts of Public Prosecutors and Additional Public Prosecutors (on contract basis) by using the provisions of section 24 (4), (5) and (6-A) have no right as such to continue to work on those posts. As these appointments are made by the Government on contract basis which could not have been done, they need to be removed.

25) If the State Government wants to use the power shown in section 24 (6-A) of Cr.P.C., it needs to do the needful with regard to the Rules of 1997. It needs to be observed that the provisions of sections 24 and 25 give only necessity of appointments of independent Prosecuting Officers and as soon as the State Government creates a regular cadre as mentioned in section 24 (6) of Cr.P.C. and explanation 'a' given to section 24 (6) of Cr.P.C., the State Government is not expected to fall back to sections 24 (4) and 24 (5) and avoid the procedure prepared by it under Article 309 of Constitution of India. Rules of 1984 are superceded by the Rules of 1997. Thus, the main relief claimed in the petition viz. the consideration of Assistant Public Prosecutors appointed as per the Rules of 1995 to consider them for giving promotions to the posts of Additional Public Prosecutors and Public Prosecutors in the names mentioned in the Rules of 1997 needs to be given to them.

26) The record produced shows that after the decision of the Apex Court given in Civil Application No. 676/1982 on 21.4.1995, the State Government issued Government Resolution ('GR' for short) dated 20.5.1997 for compliance of the directions given by the Apex Court. By this GR, the State Government separated the Prosecuting Officers from investigating agency, from the control of superior police officers. The Rules of 1995 were already framed and

separate posts of Directors and other Officers were created by the GR of 20.5.1997. As many as 162 posts of Additional Public Prosecutors were created for districts and 26 posts of Assistant Directors and Public Prosecutors for the 26 districts were created showing that posts of Public Prosecutors were promotional posts for Additional Public Prosecutors. In spite of creation of these posts and making of the Rules of 1997 for making appointments of the Additional Public Prosecutors (50% of the total posts) by nomination, they were not filled. It appears that after creation of the posts under GR of 20.5.1997, promotions were given to 26 Assistant Public Prosecutors to the posts of Additional Public Prosecutors. There is one more order issued in accordance with GR of 20.5.1997 and it is dated 14.9.1999 and under that order, promotions were given to as many as 53 Assistant Public Prosecutors to the posts of Additional Public Prosecutors. It appears that 50% of the posts created even in 1997 were not given to the Assistant Public Prosecutors as mentioned in the GR of 1997 and the Rules of 1997. Further, at the cost of repetition, it needs to be mentioned that the procedure for appointment on remaining 50% posts of Additional Public Prosecutors as provided in Rules of 1997 was not followed. This shows that the State Government wanted to make appointments of the persons of its choice and impartiality in the appointment process was not observed. These circumstances need

to be considered as background in the present proceeding.

27) Before parting with the decision, we must observe that the procedure given for making appointments of Public Prosecutors and Additional Public Prosecutors in the Rules of 1997 will ensure to large extent the competency of persons selected, the independence of the Prosecuting Officers and also their accountability. The term 'independence' has significance as described by the Apex Court in **S.B. Shahane's** case cited supra and other catena of cases and that independence can be achieved in real sense by following the procedure given in the Rules of 1995 and 1997. In the result, we pass the following order.

ORDER

- I) The petition is partly allowed.
- II) The respondents/State Government is hereby directed to act as per the Rules of 1997 and make appointments of Public Prosecutors and Additional Public Prosecutors for districts. Till the Rules of 1997 as mentioned above are in existence, they will prevail and apply in favour of the petitioners, the persons appointed under the Rules of 1995. It is further declared that these Rules cannot be altered in such a way that they will adversely affect the service

conditions of the persons already appointed as per the Rules of 1995. Further direction is given to the State to process the matters of the persons appointed under the Rules of 1995 to give them benefit of the Rules of 1997. Time of six months is given to the State for such processing of the matter.

III) Considering the possibility that more number of Additional Public Prosecutors are appointed on contract basis than required and the difficulties which the State Government may face, 50% posts of Additional Public Prosecutors which are to be created in districts as per the requirement on the date of this decision will go to the persons appointed as per the Rules of 1995. It will be open to the State Government to make assessment about the requirement of the posts of Additional Public Prosecutors for each district as on the date of the decision. The State Government is to appoint the Additional Public Prosecutors of the quota of promotion on the basis of posts made available in the year 1997 and for that the process is to be completed within three months.

IV) The relief claimed by the petitioners to consider them for the appointments on the posts of Public Prosecutors and Additional Public Prosecutors for working in High Court is refused.

V) Civil applications are disposed of accordingly.

Rule is made absolute in aforesaid terms.

. After pronouncement of the judgment, learned A.G.P. Shri. S.B. Pulkundwar submitted that the State wants to challenge the order and wants to take proper steps and for that, State wants stay to the execution and operation of the decision. Time of two months is given. But this stay will not operate in respect of the entitlement of the Assistant Public Prosecutors to get 50% quota as provided in aforesaid Rules. That needs to be implemented immediately.

[SUNIL K. KOTWAL, J.]

[T.V. NALAWADE, J.]

ssc/