

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.10661 of 2017

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Manzer Hassan Khan, Son of Late Nehal Hassan Khan, resident of Kaghzi Mohalla
(Captain Colony), P.S.- Biharsharif, District- Nalanda.

.... Petitioner/s

Versus

1. The State of Bihar.
2. Special Secretary (Law), Govt. of Bihar, Patna.
3. Secretary, Law Department, Bihar, Patna.
4. District Magistrate, Nalanda at Biharsharif.
5. Md. Qaiser Imam, Son of not known, Public Prosecutor, Nalanda at Biharsharif.

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 13876 of 2017

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Gajendra Prasad, Son of Late Vimal Prasad, Resident of Mohalla- Bhanwar Pokhar
Bagicha, P.S.- Pirbahore, Town & District- Patna.

.... Petitioner/s

Versus

1. The State of Bihar through the Secretary, Department of Law, Govt. of Bihar, Patna.
2. The Secretary, Department of Law, Govt. of Bihar, Patna.
3. The Joint Secretary, Department of Law, Govt. of Bihar, Patna.
4. The District Magistrate, Patna.
5. The Senior Superintendent of Police, Patna.

.... Respondent/s

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Appearance :

(In CWJC No.10661 of 2017)

For the Petitioner/s : Mr. Rajendra Prasad Singh, Sr. Adv. with
Mr. Rajeev Ranjan, Adv.
Mr. Ravi Kumar Singh, Adv.
Mr. Mohammed Abu Haidar

For the Respondent/s : Mr. Lalit Kishore, A.G.
Mr. Anjani Kumar, AAG-4
Mr. Prashant Pratap- GP-2
Mr. Gyan Shankar, AC to GP-2

(In CWJC No.13876 of 2017)

For the Petitioner/s : Mr. Yogesh Chandra Verma, Sr. Adv. with
Mr. Shakti Suman Kumar, Adv.

For the Respondent/s : Mr. Lalit Kishore, A.G.
Mr. Md.Raishul Haque, SC-10
Mr. Binay Kuma, AC to SC-10

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

C.A.V. JUDGMENT

Date: 26-02-2018



The two writ petitions filed under Article 226 of the Constitution of India raise a common issue of removal of the petitioners from the post of Public Prosecutor having been appointed under section 24 of the Code of Criminal Procedure and hence they have been heard analogous and with the consent of the parties are being disposed of at the stage of admission itself.

The petitioner in CWJC No.10661 of 2017 has prayed to quash the order bearing Memo No.7613 dated 21.12.2016 (misprinted as 21.3.2016) issued under the signature of the Special Secretary, Law Department, Government of Bihar, Patna addressed to the District Magistrate, Nalanda (Biharsharif), whereby he has been removed from the post of Public Prosecutor, Nalanda (Biharsharif) and has been directed to hand over the files allotted to him to Md. Quiser Imam, Additional Public Prosecutor, Nalanda (Biharsharif). A copy of such order is impugned at Annexure 1 to the said writ petition.

In similar manner the petitioner in CWJC No.13876 of 2017 has prayed for quashing of the order bearing Memo No.5529 dated 15.9.2017 issued under the signature of the Secretary, Law Department addressed to the District Magistrate, Patna, whereby he has been informed that the petitioner has been removed from the post of Public Prosecutor, Patna. By the same order the Additional



Public Prosecutor, Shri Vijay Kumar Sinha has been authorized to discharge the duties of the Public Prosecutor by way of interim arrangement. A copy of such order is impugned at Annexure 4 to the said writ petition.

Mr. Rajendra Prasad Singh, learned senior counsel assisted by the Advocate on record Mr. Rajeev Ranjan has appeared for the petitioner in CWJC No.10661 of 2017 (hereinafter referred to as the 'first writ petition') while Mr. Yogesh Chandra Verma, learned senior counsel has appeared for the petitioner in CWJC No.13876 of 2017 (hereinafter referred to as the 'second writ petition') along with the Advocate on record Mr. Shakti Suman Kumar. The State of Bihar is represented through a battery of lawyers led by the learned Advocate General Mr. Lalit Kishore assisted by Mr. Anjani Kumar, learned Additional Advocate General No.4, Mr. Md. Raisul Haque , Standing Counsel No.10, Mr. Binay Kumar, AC to SC 10, Mr. Prashant Pratap, learned Government Pleader No.2, Mr. Gyan Shankar and Mr. Lala S.N. Rais, AC to GP-2.

The facts leading to the writ petitions are in a very narrow compass and briefly stated, is that the petitioner in CWJC No.10661 of 2017 was appointed as the Public Prosecutor, Nalanda vide order bearing Memo No.4847 dated 31.7.2015 of the Law Secretary, a copy of which is placed at Annexure 2 to the 'first writ petition'.



The order is issued under the signature of the Secretary, Law Department and is addressed to the petitioner. The order clearly stipulates that the appointment is for a period of 3 years from the date the petitioner assumes office. Meaning thereby the appointment is valid at least until 30.7.2018. The subsequent letter of the Secretary, Law Department bearing Memo No.4848 dated 31.7.2015 forming part of Annexure 3 series gains importance because it confirms that the petitioner had been reappointed to the post for a further period of 3 years. The District Magistrate, Nalanda vide his letter bearing No.1537 dated 24.8.2015 informed the petitioner about the appointment, a copy of which again forms part of Annexure 3 series. According to the petitioner, the District Magistrate, Nalanda unilaterally recommended for his removal vide letter bearing No.2184 dated 16.11.2016 addressed to the Secretary, Law Department, Bihar, Patna, a copy of which is present at Annexure 4. The recommendation for removal was on grounds that the petitioner is not discharging his duties properly and has not been placing the stand of the Government before the court in effective manner. According to the petitioner, such recommendation was unilateral and without even seeking any explanation from the petitioner.

It is the case of the petitioner that although no show cause was asked from him but on gathering information about the



recommendation that he obtained a copy of the same and filed his explanation to each of the allegations vide his letter dated 3.12.2016 forming part of Annexure 4 series. According to the petitioner, despite the District Judge appreciating his work and certifying his character through certificates enclosed at Annexure 5 series yet the order of removal was passed by the Law Department vide Memo No.7613 dated 21.12.2016 without bothering to give an opportunity to the petitioner to explain the situation and which has been impugned at Annexure 1 to the writ petition. Feeling aggrieved the petitioner is before this Court.

A similar grievance is raised by the petitioner in CWJC No.13876 of 2017 who is Ex. Public Prosecutor of Patna district and was earlier appointed as Additional Public Prosecutor in the year 1992. The petitioner was appointed as the Public Prosecutor vide letter bearing No.4857 dated 31.7.2015 of the Secretary, Law Department, a copy of which is enclosed at Annexure 1 to the said writ petition. The appointment was for a period of 3 years from the date he assumes the office. Meaning thereby the appointment was valid at least until 30.7.2018. According to the petitioner, he received a show cause from the District Magistrate, Patna charging him of not placing the stand of the Government properly before the court and which had resulted in interim orders being passed by the



court on the bail applications filed by the accused involved in illegal mining cases. The petitioner was show caused on this interim order to be filed within 24 hours before the District Magistrate, Patna. A copy of the show cause is impugned at Annexure 2 and is resting on the advisory issued by the Law Department as contained in Memo No.5201 dated 6.9.2017 forming part of Annexure 2 series. The petitioner clarified the position through his explanation dated 12.9.2017 at Annexure 3. It was informed that even if the State who is a party to the proceeding is at liberty to seek information from its lawyers, but seeking an explanation was not proper. He has further stated that each Law Officer presents the case before the court to his best ability and whereafter the discretion lies with the court to pass any order. He explained that despite the opposition led by him to the bail application and even though initially the court passed orders that “no coercive steps be taken for arrest” but on the final hearing of the bail application on receipt of diary, the prayer was rejected and the details of which has also been given by the petitioner in his explanation. The grievance of the petitioner is that despite the position explained that he faces removal through the order impugned dated 15.9.2017 of the Secretary, Law Department addressed to the District Magistrate, Patna impugned at Annexure 4 to the writ petition. Feeling aggrieved the petitioner is before this Court.



Mr. Rajendra Prasad Singh, learned senior counsel appearing on behalf of the writ petitioner in CWJC No.10661 of 2017 has referred to the appointment order at Annexure 2 to the said writ petition to submit that the appointment was for a period of 3 years with no stipulations of curtailment. According to the learned senior counsel unless there are substantial reasons with the respondents, the tenure could not have been curtailed. He next refers to the recommendations of the District Magistrate, Nalanda addressed to the Secretary, Law Department seeking removal of the petitioner at Annexure 4 to submit that the District Magistrate, Nalanda without verifying the facts has complained of the failure of the petitioner to discharge his duty diligently in reference to 3 cases, namely:

- (a) Giriyak P.S. Case No.267 of 2016;
- (b) Chandi P.S. Case No.174 of 2016; and
- (c) Laheri P.S. Case No.329 of 2013.

Learned senior counsel has referred to the supplementary affidavit filed in the proceeding and with particular reference to the statement present at paragraph 3 submits that the bail of the accused in Giriyak P.S. Case No.267 of 2016 was opposed by the Additional Public Prosecutor and not the petitioner. In reference to Sessions Case No.430 of 2016 arising from Laheri P.S. Case No.329 of 2013



it was informed that the criminal case was being conducted by the Additional Public Prosecutor Mr. S.M. Aslam and not the petitioner. So far as Chandi P.S. Case No.174 of 2016 is concerned it was clarified that the bail to the main accused was granted by the learned Additional Sessions Judge, Hilsa and not by the Sessions Court at Biharsharif and the said bail was opposed by the Additional Public Prosecutor Mr. Raja Ram Singh and not the petitioner. It is thus the argument of Mr. Singh, learned senior counsel that the recommendation was founded on a misconception and the removal is mechanical. He submits that the engagement of the petitioner is not private in nature rather is statutory and cannot be ended on whims as well as on non-est grounds. With reference to the impugned order of removal he submits that the grounds for removal are non-existent.

It is on the direction of this Court that the file relating to the impugned action of removal was produced by the learned Advocate General and in reference to the note-sheet at page 81-84 he submits that the exercise is mechanical. Learned counsel in support of his contention that the appointment of the Public Prosecutor is of special nature, has relied upon a judgment reported in **2009 Cri.LJ 3493 (All. High Court) (Rajesh Kumar Kulshrestha vs. State of U.P.)** and in reference to paragraphs 11 to 14 of the judgment he submits



that in similar situation faced by the Additional District Government Counsel who was removed without due opportunity that the order was set aside.

Learned senior counsel has next referred to a Division Bench judgment of this Court reported in **1992(2) PLJR 258 (Uday Nath Roy vs. State of Bihar)**. Referring to the opinion of the Division Bench at paragraph 11 of the judgment he submits that the Division Bench has held that such appointment cannot be cancelled unless there are cogent reasons for terminating the appointment and a mere change in Government cannot be one such reason. It is submitted that the Division Bench taking note of the failure of the Government to furnish the materials justifying the removal has quashed the termination order. According to the learned senior counsel the judgment of the Division Bench in the case of **Uday Nath Roy (supra)** would squarely apply to the present case. It is argued that a plain reading of the order of removal would confirm that the State respondents is not in possession of any definite material for such removal and that is why the words “कतिपय कारण” has been used as a foundation for such removal. He submits that the counter affidavit filed by the respondents at paragraphs 3 and 7 simply accuses the petitioner of not discharging his duties properly but for support of such allegation, the affidavit refers to such cases



which have not even been conducted by the petitioner as explained in the supplementary affidavit. According to the learned senior counsel, the order passed is in violation of principles of natural justice, contrary to the terms of appointment and the allegation of misconduct is resting on no material.

Raising similar issues Mr. Yogesh Chandra Verma has stood up to defend the petitioner in the 'second writ petition'. In reference to the show cause of the District Magistrate, Patna at Annexure 2 he submits that simply because the Sessions Court at Patna had granted interim protection to the accused in the mining cases that the petitioner was put to show cause even though the bail applications of the accused were ultimately rejected by the court as explained by the petitioner vide Annexure 3. He submits that the mechanical manner in which removal has been passed is that despite no other allegation facing the petitioner yet the order has been passed by the Secretary, Law Department impugned at Annexure 4 to the writ petition.

Adopting the issues raised by Mr. Singh to question the order of removal he submits that the order is based on no material as there is no material to support that his conduct is wanting rather the order is whimsical and simply because an interim relief was granted to the accused in mining cases which did not suit the State that such



extreme action has been taken. Learned senior counsel while relying upon the judgment of this Court rendered in the case of **Uday Nath Roy** (supra) has referred to a judgment of the Supreme Court reported in **(2016)6 SCC page 1 (State of Punjab vs. Brijeshwar Singh Chahal)**. He submits that the issue of appointment of Law Officers at the district level and the High Court level by the State Government came up for consideration and the Supreme Court taking note of the opinion expressed in the judgments passed on the issue has summed up its opinion at paragraph 41 which every State Government is expected to follow. According to the learned senior counsel, the office of a Public Prosecutor is a statutory post and cannot be interfered with at the whims of the State Government nor even by a change in the political set up.

According to the learned senior counsel appearing on behalf of the petitioner(s) in the two cases, it is only on account of change in the political set up which has resulted in the impugned orders even in absence of any material on record to drive home the allegation of misconduct against the petitioners.

Mr. Lalit Kishore, learned Advocate General has led the arguments for the respondents in the two writ petitions and his main plank in opposition of the contention raised is that the relationship between the State and the petitioners is purely professional and the



appointment of the petitioners on the post of Public Prosecutor is akin to a client-lawyer relationship based on trust. He submits that the post of Public Prosecutor is not a civil post that it would require a formal procedure to be followed for removal rather the moment the Government would loose trust in its counsel, it would be well within its jurisdiction to remove him from the post. He further submits that in the nature of the dispute raised where it is the professional relationship between the State and the petitioners which is being put to test this Court may not exercise its extraordinary jurisdiction under Article 226 of the Constitution of India. According to the learned Advocate General, there are materials present for the removal of these petitioners and it is on being satisfied that the Government has chosen to remove them from their respective post which removal does not warrant any interference.

Learned Advocate General in support of his contention has relied upon a judgment of the Supreme Court reported in **(2004)4 SCC 714 (State of U.P. vs. Joharimal)**. In reference to the opinion of the Supreme Court expressed in paragraphs 10 and 22 to 25 of the judgment he submits that the scope of interference in such matters under Article 226 of the Constitution of India stands well discussed. He submits that the Supreme Court in course of examination of a similar removal of a Additional District Government Counsel



appointed under section 24 of the Code of Criminal Procedure has held that the Court will have no jurisdiction to entertain a writ application in a matter governed by contract as no public law element would be involved. With reference to the opinion expressed in paragraphs 37 to 40 and 68 he submits that the appointment of Public Prosecutor has been held tenure appointment and thus the proviso to Article 309 of the Constitution of India is not applicable in their cases and thus no mandamus can be issued in such cases. According to learned Advocate General even if the prayer for ‘certiorari’ would persuade this Court yet no reinstatement can be ordered because these petitioners have lost the trust of the State.

Learned Advocate General has next referred to an unreported judgment of the Supreme Court rendered in Civil Appeal No.11199 of 2017 (**The State of Maharashtra & Anr. vs. Kishor M. Gadhave Patil**). In reference to the opinion expressed in paragraphs 14, 18, 19 and 22 of the judgment he submits that a similar removal being challenged before the Supreme Court on grounds of stigma being attached, the Supreme Court without interfering with the cancellation order has simply modified the same to remove the stigma. It is submitted that in the said case although initially the Law Officer concerned was removed for alleged misconduct under rule 30(5) of the Maharashtra Law Officers



(Appointments, Conditions of Service and Remuneration) Rules, 1984 (hereinafter referred to as 'the Rules') but the Supreme Court taking note of the circumstances modified the cancellation order to be treated as one passed under rule 30(6) of 'the Rules' which vested power in the Government to terminate appointment by one month notice or by paying one month retainer fee in lieu of such notice. It is allowing one month retainer fee in lieu of such notice that the appeal was disposed of.

Learned Advocate General has next diverted his attention to rule 143 of the Bihar Practice and Procedure Manual to submit that the Collector is vested with full power to recommend removal of a Government Pleader by submitting a report before the Legal Remembrancer i.e. Law Secretary either directly or through the Commissioner and the Legal Remembrancer would accordingly report the matter to the Government.

The learned senior counsel appearing for the petitioners in their brief rejoinder to the arguments of the learned Advocate General have distinguished the judgments relied upon by the learned Advocate General to submit that whereas the case of **Joharimal** (supra) was a case of extension of contract and when the Supreme Court has held that there cannot be a mandamus to the State Government to extend the contract, in so far as the unreported



judgment in the case of **Kishor M. Gadhave Patil** (supra) is concerned paragraphs 19 and 20 of the judgment would confirm that ‘the Rules’ empowers the State Government of Maharashtra to terminate a contract on grounds of conduct or by giving one month advance notice under rule 30(5) and (6) of ‘the Rules’ which discretion is not available either in the Code of Criminal Procedure or in the Bihar Practice and Procedure Manual.

I have heard learned counsel for the parties and I have perused the records.

The sequence of events is not in dispute rather the contest is on the issue:

- (a) Whether an appointment of a Public Prosecutor under section 24 of the Code of Criminal Procedure, can be terminated midway through the tenure even in absence of any statutory provision to such effect?
- (b) Whether even assumingly such power is vested with the State to terminate the same, whether there was substantive materials present for such removal?
- (c) Whether the appointment and continuation of a Public Prosecutor under section 24 of the Code of Criminal Procedure would be governed by the doctrine of pleasure and is terminable at the choice of the State Government?



- (d) Whether the Bihar Practice and Procedure Manual vests jurisdiction in the District Magistrate to recommend for removal of a Public Prosecutor appointed under section 24 of the Code of Criminal Procedure;
- (e) Whether in the nature of explanation given by the two petitioners to the allegation, the order of removal accompanies any reason to justify such action? and
- (f) Whether the 'loss of trust' maxim applied by the learned Advocate General to defend the impugned action really bails out the respondents from the action complained of?

The factual details in respect of the two petitioners have already been discussed and require no reiteration. Suffice it to say that whereas the appointment order of the petitioner Manzer Hassan Khan bearing Memo No.4848 dated 31.7.2015 at Annexure 3 series to the 'first writ petition' would confirm that the said petitioner had been appointed for a second successive tenure as a Public Prosecutor, Nalanda having earlier served to the satisfaction of the respondents and thus was given a reappointment, in so far as the petitioner Gajendra Prasad is concerned, he was appointed on removal of the erstwhile public prosecutor vide order dated 31.7.2015 at Annexure 1 to the 'second writ petition'.

In between the appointment of these petitioners vide



orders aforementioned and their respective termination vide order dated 21.12.2016 in so far as petitioner Manzer Hassan Khan, the Public Prosecutor, Nalanda is concerned and the order dated 15.9.2017 in so far as the petitioner Gajendra Prasad, the Public Prosecutor, Patna is concerned, there is no whisper of allegation facing these petitioners.

The records in the two writ proceedings as well as the records produced by the learned Advocate General relatable to the removal of these two petitioners would confirm that apart from the reasons assigned in the order of respective removal as well as the stand taken by the respondents in the respective counter affidavit filed in the two writ petitions, there is no other allegation facing these petitioners.

The issue thus would be whether the allegation facing the petitioners are serious enough so as to warrant a removal midway through their tenure on the 'loss of trust' principle as advanced by the learned Advocate General.

While the allegation facing the petitioner Manzer Hassan Khan can be gathered from the recommendation of the District Magistrate, Nalanda made to the Secretary, Law Department through letter dated 16.11.2016 at Annexure 4 series to the 'first writ petition', the allegation facing the petitioner Gajendra Prasad



can be gathered from the show cause served on him by the District Magistrate, Patna dated 8.9.2017 at Annexure 2 to the 'second writ petition'.

It has already been discussed hereinbefore that the petitioner Manzer Hassan Khan was charged with not discharging his duty as a Public Prosecutor to the best of his ability in respect of three cases, namely:

- (a) Giriyak P.S. Case No.267 of 2016;
- (b) Chandi P.S. Case No.174 of 2016; and
- (c) Laheri P.S. Case No.329 of 2013.

It would be relevant to mention here that the District Magistrate, Nalanda before making his recommendation to the Secretary, Law Department vide letter dated 16.11.2016 seeking removal of the petitioner from the post of Public Prosecutor, Nalanda did not even think it necessary to seek a response from the petitioner. Such is the whimsical manner in which the matter has proceeded. Equally whimsical is the decision of the State Government in ordering removal of the petitioner through order bearing Memo No.7613 dated 21.12.2016 impugned at Annexure 1 to the 'first writ petition' which fails to qualify the reasons accompanying such removal. The words used in support of such removal is 'कतिपय कारण' which, in my opinion, is as vague as it can



be and certainly cannot be a foundation for such extreme action. The mindless manner in which the matter has been handled is well discerned from the fact that no opportunity was given to the petitioner to explain the situation, before the District Magistrate, Nalanda made a recommendation for such removal and even though the petitioner after seeking such information has clarified the position through letter dated 3.12.2016 which forms part of Annexure 4 series yet the respondents were not willing to correct themselves. Each of the allegation in the 3 police cases referred to above has been explained by the petitioner Manzer Hassan Khan in the 'first writ petition' at paragraph 3 of the supplementary affidavit which goes uncontested because there is no reply by the State to contest the clarification given by the petitioner therein.

Similar whimsical action accompanies the removal of the petitioner Gajendra Prasad as Public Prosecutor, Patna and which can be gathered by the show cause present at Annexure 2 to the 'second writ petition'. In my opinion the contents of the show cause would confirm that the State acting through the District Magistrate, Patna has crossed all limits of propriety for it is a case of its own kind where a party to a proceeding has served a show cause on its counsel and the reason is that despite opposition by the petitioner in the 'second writ petition' to the bail applications filed by some of



the accused in mining cases, the court in seisin of the matter has been pleased to order for 'no coercive steps be taken against the accused until the pendency of the bail applications'. In my opinion, in the nature of the order passed by court below in granting interim protection pending disposal, no misconduct could be attached on the part of the Public Prosecutor, Patna rather it is wholly unbecoming on the part of the District Magistrate, Patna in questioning the petitioner in not effectively opposing the bail applications which resulted in an interim order, even though the said bail applications were ultimately dismissed as explained by the Public Prosecutor in his explanation dated 12.9.2017 at Annexure 3 to the 'second writ petition'. Wisdom still eluded the respondent-State who have yet proceeded to order for removal of the petitioner in the 'second writ petition' vide order dated 15.9.2017 and again the reasons are missing.

While the records in the 'first writ petition' would confirm that the instance of 3 cases relied upon by the District Magistrate, Nalanda to recommend for removal of the Public Prosecutor was not even been handled by the petitioner in the 'first writ petition', in so far as the petitioner in the 'second writ petition' is concerned, the reasons are preposterous and in my opinion reasons assigned for his removal is a subterfuge for the real object behind the removal



because a success or failure in a judicial proceedings unless accompanied with substantive materials of trustworthy character, can never be a reason for a termination of such appointments, which is not the case in hand.

As I have observed, it is on the direction of the Court that the learned Advocate General has produced the records in the 2 removals and which do not indicate any reason apart from the reasons so assigned in the stand taken by the State in the counter affidavit filed in the two writ petitions.

Primarily three issues have been raised by Mr. Lalit Kishore, learned Advocate General to support the impugned orders i.e.:

- (a) The relationship of a client-Advocate is based on trust and since the State had lost trust in the petitioner(s) hence there was no point of continuing with them;
- (b) The District Magistrate is amply empowered under rule 143 of the Bihar Practice and Procedure Manual to recommend such removal; and
- (c) Even if the reasons are not assigned in the impugned orders, it is in the best interest of the petitioners as it would have affected their career.

In my opinion, the issues canvassed by the learned



Advocate General are not supported from the materials on record. It is not the case of the respondents either in the records produced or in the counter affidavit that the two petitioners by their acts, have lost the trust of the State Government rather the removal is point specific and it is on alleged failure by the petitioners to succeed in some of the cases which in the opinion of the State were not properly handled by them which has led their removal. As stated neither the stand taken in the counter affidavit nor the records of the proceedings produced by the learned Advocate General would confirm that the petitioners by their conduct had lost the trust of the State. At least no material to such effect stands discussed in any part of the proceedings. In other words the argument advanced by the learned Advocate General on the 'loss of trust maxim' is in fact to provide justification to an otherwise illegal act of the State by supplementing reasons which is impermissible in view of the legal position settled by the Supreme Court in the judgment reported in **AIR 1978 SC 851 (Mohinder Singh Gill Vs. The Chief Election Commissioner, New Delhi)**.

The reliance of the learned Advocate General on rule 143 of the Bihar Practice and Procedure Manual is also thoroughly misconceived because it relates to removal, suspension and punishment of a Government Pleader and not a Public Prosecutor.



The two posts are distinct and which is eloquent from the provisions underlying rule 137 of the said Manual which deals with the appointment of a Public Prosecutor and a Government Pleader separately. Rule 137 very clearly provides that the post of Public Prosecutor or Government Pleader or combined post of Public Prosecutor and Government Pleader shall be made ordinarily for a term of 3 years. Even though the provisions present at Rule 137 and 138 do relate to the appointment of Public Prosecutor and Government Pleader but the empowerment for removal vested in a Collector is limited to that of a Government Pleader and does not extend to a Public Prosecutor. The Collector thus is not vested with any jurisdiction either to show cause a Public Prosecutor or to recommend for his removal to the Legal Remembrancer who is the Secretary, Law Department in the present contest rather it is the State Government alone, who may exercise such powers in an appropriate case.

The discussions above would confirm that the very recommendation by the District Magistrates, Nalanda and Patna respectively for removal of the two petitioners was void inasmuch as no power is vested in a District Magistrate –cum- Collector of a district to recommend removal of a Public Prosecutor under rule 143 of the Bihar Practice and Procedure Manual.



The third issue, as regarding non-assigning of reasons, which has been explained by the learned Advocate General, as a measure to favour the petitioners in career, in my opinion, again falls flat on the law settled by the courts and an extreme action of such kind has to be accompanied with equally justifiable reasons. Reference is made to the judgment of the Supreme Court reported in **(2010)9 SCC 496 (Kranti Associates (P) Ltd. Vs. Masood Ahmed Khan)** paragraph 14 to 47.

The records do confirm that in the nature of explanation given by the petitioners in the 'first writ petition' in his reply as well as in the supplementary affidavit as well as the explanation given by the petitioner in the 'second writ petition' present at Annexure 3, the recommendation had lost its foundation and certainly could not be a basis for the impugned orders. The orders of removal in such circumstances are resting on no ground and is a whimsical decision of the State Government may be for reasons other than those projected in the present proceedings.

Even though much has been argued by the learned Advocate General as to the contractual relationship between the parties in reference to the judgments which stands noted hereinabove, in the nature of contest at hands, I am persuaded to make reference to the opinion of the Courts on the issue, which in



fact while preserving the right of the State to the choice of its counsel has deprecated arbitrary actions, whether in appointment or removal of Public Prosecutors.

A similar issue came up for consideration before the Supreme Court in the case of **Shrilekha Vidyarthi vs. State of U.P. reported in (1991)1 SCC 212** where, by a stroke of pen all District Counsel (Civil, Criminal, Revenue) in the State of U.P. were removed and order for preparation of fresh panel was passed. Similar arguments were advanced by the learned Additional Advocate General for the State of U.P. in defence of the orders of removal as stands noted at paragraph 13.

Repelling such argument of the Additional Advocate General the Supreme Court held as follows:

“17. We are, therefore, unable to accept the argument of the learned Additional Advocate General that the appointment of District Government Counsel by the State Government is only a professional engagement like that between a private client and his lawyer, or that it is purely contractual with no public element attaching to it, which may be terminated at any time at the sweet will of the government excluding judicial review. We have already indicated the presence of public element attached to the ‘office’ or ‘post’ of District Government Counsel of every category covered by the impugned circular. This is sufficient to attract Article 14 of the Constitution and bring the question of validity of the impugned circular within the scope of judicial review.

18. The scope of judicial review permissible in the present case, does not require any elaborate consideration since even the minimum permitted scope of judicial review on the ground of arbitrariness or



unreasonableness or irrationality, once Article 14 is attracted, is sufficient to invalidate the impugned circular as indicated later. We need not, therefore, deal at length with the scope of judicial review permissible in such cases since several nuances of that ticklish question do not arise for consideration in the present case.

19. Even otherwise and sans the public element so obvious in these appointments, the appointment and its concomitants viewed as purely contractual matters after the appointment is made, also attract Article 14 and exclude arbitrariness permitting judicial review of the impugned State action. This aspect is dealt with hereafter.”

In the case of **Uday Nath Roy** (supra) a similar cancellation of appointment of Public Prosecutor came up for consideration before the Division Bench of this Court. The Division Bench taking note of the judgment of the Supreme Court in the case of **Shrilekha Vidyarthi** (supra) and some other judgments on the issue has held that the office of a Public Prosecutor is possessed with attributes of a public office which cannot be whittled down by assertion that the engagement was purely professional between a client and his lawyer. The observation of the Division Bench at paragraphs 5 to 11 would be relevant for the purpose which is reproduced hereunder:

5. It is now well settled having regard to the law laid down by the Supreme Court in **Kumari Shrilekha Vidyarthi etc. v. State of U.P. and others** (A.I.R. 1991 SC 537) that having regard to the functions performed by the Public Prosecutor which relate to a public performance entrusting him with the responsibility of so acting only in the interest of administration of justice,



invest the Public Prosecutors with the attribute of holder of a public office, which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it. It was held that though the appointment of a Public Prosecutor is not to be equated with appointment to a post under the Government in the strict sense, it did not necessarily mean that it results in denuding the office of its public character, and that the appointment may be terminated even during currency of the term by only communicating the decision of termination without communicating the reasons which led to the termination. It does not mean that the appointment is at the sweet will of the Government which can be terminated at any time, even without the existence of any cogent reason during the subsistence of the term. The reasons for the decision may not be stated in the order, but they must exist, otherwise the decision would be arbitrary. Termination of an appointment without existence of any cogent reason in furtherance of the object for which the power is given would be arbitrary and, therefore, against the public policy.

6. In **Mundrika Prasad Sinha v. State of Bihar** (A.I.R. 1979 S.C. 1871) the Supreme Court clearly held that The Court sounded a warning that it is in the best interest of the State that it should engage competent lawyers without hunting for political partisans regardless of capability. Public offices and Government Pleaderships are one- shall not succumb to Tammany Hall or subtler spoils system, if purity in public office is a desideratum.

7. It is, therefore, futile to equate the office of the Public Prosecutor with a political office. The Public Prosecutor holds a public office and is charged with the duty of so acting as to best serve the interest of administration of justice. His appointment is not due to his political affiliation, but in recognition of his merit as a competent and honest lawyer. He is not to be directed by the Government, and in all cases must give his honest opinion. He is appointed by the Government, but is also an officer of the Court and, therefore, fairness, objectivity and impartiality are the hall marks of that office.

8. Learned Advocate General sought to distinguish



the decision in **Kumari Shrilekha Vidyarthi's case** (supra) on the ground that in that case by one order the Government had sought to terminate the appointment of all State counsels, whereas in the instant case the Government has considered the case of the petitioner separately and passed an appropriate order. It may be that in **Kumari Shrilekha Vidyarthi's case** the Government sought to terminate the employment of all Government counsels. In that sense the factual background of the two cases may be different. That, however, will not make any difference in principle, because the two principles which that judgment lays down, have universal application. Firstly, it has been held that the office of the Public Prosecutor is invested with the attribute of a holder of a public office. Secondly, it has been laid down that before any decision is taken to terminate such an appointment, there must be some cogent reason justifying the action. ...

... ..

9.

10. The second aspect of the submission urged by the Advocate General is about the Public Prosecutor enjoying the confidence of the Government. The confidence must not be confused with mere closeness with the political powers that be. The existence of confidence or loss of confidence must be judged by reference to the actions of the person holding a public office and not by his closeness to the political ruler of the State. The Government may be justified in losing confidence in the holder of a public office, if it is shown that the holder of the public office has acted in disregard of his duties and obligations and/or has acted in illegal manner contrary to public interest. If there was any evidence to show that the Government had before it material to show that the actions of the petitioner were such as were not in the interest of administration of justice, the Government may have been justified in terminating the appointment of the petitioner in accordance with law. ...

11. It, therefore, follows that the appointment could not be cancelled unless there was some cogent reason for terminating the appointment. Mere change of Government cannot be a cogent reason for the removal of a Public Prosecutor,



particularly when there is nothing against the conduct of the Public Prosecutor and nothing to show that he had acted in such a manner as to lose the confidence of the Government. The reason, therefore, furnished to the Court justifying the removal of the petitioner as a Public Prosecutor is not germane and, therefore, the order terminating or cancelling the appointment of the petitioner cannot be upheld.”

Learned Advocate General has primarily relied upon the judgments of the Supreme Court rendered in the case of **Joharimal** and **Kishor M. Gadhave Patil** (supra) in support of his submission. In my opinion, neither of the cases would apply to the issue in contest for it is in completely different context that the opinion was expressed by the Supreme Court.

In so far as the case of **Joharimal** (supra) is concerned, the matter related to extension/ renewal of the term of District Government Counsel as manifest from paragraph 1 of the judgment and it is in this context that the Supreme Court in paragraph 40 of the judgment has held that the incumbent has no legal enforceable right and any denial of such renewal can only be tested on the anvil of arbitrariness and thus Courts should normally not delve into the records to find the reason for such denial. Learned Advocate General has failed to take notice of the exception carved out by the Supreme Court even after preserving such right as found in paragraph 41, 74 and 75 of the judgment, wherein the Supreme Court while



discussing nature of appointment of a Public Prosecutor and the District Government Counsel, has proceeded to hold as such:

“75. 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 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 reasons dehors the Statute.”

Testing the case of the petitioners in the backdrop of the legal principles so settled by the Supreme Court it is manifest that there is no allegation facing the petitioners other than those discussed in the recommendation of the District Magistrate, Nalanda and Patna respectively. The explanation given by the two petitioners to those allegations have found no answer either in the order(s) impugned in the two writ petitions or in the counter affidavits filed in the present proceedings. While Section 24 of the Code of Criminal Procedure does not provide any tenure for a Public Prosecutor, Rule 137 of the Bihar Practice and Procedure Manual prescribes a period of three years which is extendable for a further period. As I have already discussed while there is a tenure fixed for



a Public Prosecutor as well as the Government Pleaders which is extendable by reappointment on expiry of such term as present in Rule 137, interestingly Rule 143 even though enables the Collector of the District to recommend for removal or suspension of a Government Pleader, no such power has been vested in the Collector to recommend for removal of the Public Prosecutor.

While observing as such, I certainly do not intend to record that the State is powerless in terminating a Public Prosecutor midway through the term but then there has to be substantive reasons accompanying such extreme action. A success or failure in a judicial proceeding certainly cannot be made a foundation for such extreme action until such time there are materials to support that such result was on account of collusion by the Public Prosecutor concerned which would certainly fall within the ambit of misconduct. Such is not the position existing.

The other judgment relied upon by the learned Advocate General in support of his submission rendered in the case of **Kishor M. Gadhave Patil** (supra) is in a completely different context. In the said case while the writ petitioners succeeded before the High Court, in the appeal preferred by the State before the Supreme Court the judgment of the High Court was stayed and during the pendency of the appeal before the Supreme Court, the tenure of the writ



petitioners expired as noted in paragraph 10 of the judgment. The Supreme Court taking note of the peculiar circumstance so existing and the alternative submission made by the writ petitioners as stands noted in paragraphs 14, 15 and 16 of the judgment as also taking note of the enabling provisions present in Rule 30(5) and (6) of 'the Rules', which inter alia vested powers in the State to terminate the tenure of a Law Officer for an act of misconduct or by giving him one month advance notice respectively and also taking note of the fact that the tenure had expired, modified the order of cancellation by treating the same as one passed under Rule 30(6) of 'the Rules' which enabled the State of Maharashtra to terminate the tenure of its Law Officers midway by giving one month notice or one month retainer fee in lieu thereof.

In so far as the State of Bihar is concerned, there is no provision in the Bihar Practice and Procedure Manual which enables the State to terminate the services of a Public Prosecutor midway through the tenure even though it enables the Collector to make such recommendation in so far as the Government Pleader is concerned.

In my opinion, where the post of Government Pleader and the Public Prosecutor have been distinctly dealt under Rules 137 and 138 in the matter of appointment, a conscious omission by the framer of the Rules to exclude a Public Prosecutor from the



provisions of Rule 143, certainly learned Advocate General cannot be permitted to enlarge its scope to vest power in a District Collector to recommend for removal of a Public Prosecutor as well.

An appointment of a Public Prosecutor under section 24 of the Code of Criminal Procedure is not an ordinary appointment rather is of a special kind and is made in consultation with the Sessions Judge in so far as the appointment in the district is concerned and similarly consultation is made with the High Court where the appointments are to be made in the High Court. The appointment orders of the two petitioners present at Annexures 2 and 3 series to the 'first writ petition' and Annexure 1 to the 'second writ petition' confirms that the appointment was for a period of 3 years. The Supreme Court in the judgment of **Brijeshwar Singh Chahal** (supra) has very exhaustively dealt with the nature of appointment of a Public Prosecutor together with the procedure to be followed therein which mandates consultation with the District Judge concerned and though the present appointments in question has been made in such manner i.e. with consultation of the District Judge but surprisingly when it is the matter of removal, the District Magistrate while making his recommendations has bypassed this essential step. In my opinion until such time that the view formed by the authorities of the State for removal of the



Public Prosecutor is either endorsed by the District Judge concerned or the State is in possession of materials to differ therefrom, no removal can be carried out midway through the tenure of a Public Prosecutor.

The records in the case of Manzer Hassan Khan at Annexures 5 series encloses certification by the District and Sessions Judge, Nalanda lending appreciation to the duty discharged by the said petitioner but all these accompanying factors has eluded the wisdom of the State to result in the orders impugned which are patently arbitrary and smacks of a whimsical decision.

Another interesting feature of contest is that the orders impugned in the writ petition which proceeds to order for removal of the two petitioners from their respective posts, is not even addressed to them rather is an information given to the District Magistrate. Such is the casual manner in which a statutory post of a Public Prosecutor has been dealt.

The issues outlined by me stands answered accordingly.

For the reasons discussed, the order bearing Memo No.7613 dated 21.12.2016 of the Secretary, Law Department, impugned at Annexure 1 to C.W.J.C.No.10661/2017, together with the order bearing Memo No. 5529 dated 15.9.2017 of the Secretary, Law Department, impugned at Annexure 4 to C.W.J.C.No.13876/2017,



cannot be upheld and are accordingly quashed and set aside.

The two petitioners are restored to their post of Public Prosecutor, Nalanda and Public Prosecutor, Patna respectively and would be entitled to their retainer fee as admissible from the date of their respective removal all through and which should be paid within a period of 3 months of receipt/production of a copy of this judgment.

The writ petitions are allowed with no order as to costs.

(Jyoti Saran, J)

SKPathak/-

AFR/NAFR	AFR
CAV DATE	09-11-2017
Uploading Date	28-02-2018
Transmission Date	NA

