

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.16891 of 2017

Vijay Kumar Vimal Son of Sri Pitambar Sahay R/o Village- Godah, P.O. Sakhwa,
P.S. Hasanpur, Distt. Samastipur.

.... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Govt. of Bihar, Old Secretariat, Patna.
2. The Chief Secretary, Govt. of Bihar, Old Secretariat, Patna.
3. The Law Secretary, Department of Law, Govt. of Bihar, Old Secretariat, Patna.
4. The Joint Secretary, Government of Bihar, Patna.

.... Respondent/s

With

Civil Writ Jurisdiction Case No. 17232 of 2017

Deepak Kumar, Advocate, Patna High Court, S/o Birendra Kr. Singh, R/o Mahavir
Nagar Colony, Beur, Anisabad, Patna.

.... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Patna.
2. The Minister-in- Charge, Law Department, Govt. of Bihar.
3. The Advocate General, Patna High Court.
4. The Principal Secretary, Law Department, Govt. of Bihar.
5. The Legal Remembrancer and Secretary, Law Department.
6. The Principal Secretary, General Administration Department, Govt. of Bihar.
7. The Principal Secretary, Home (Police) Department, Govt. of Bihar.

.... Respondent/s

With

Civil Writ Jurisdiction Case No. 19057 of 2017

Anjana Gupta about 49 years, D/o Late Shyam Lal Gupta, resident of 404 Mahuai
Kothi Apartment North S.K. Puri, Phulwari Patliputra, Patna.

.... Petitioner/s

Versus

1. The State of Bihar, through the Chief Secretary Govt. of Bihar Old Secretariat, Patna.
2. The Chief Secretary Govt. of Bihar, Old Secretariat Patna.
3. The Law Secretary Department of law Govt. of Bihar Old Secretariat, Patna.
4. The Joint Secretary Govt. at Bihar Patna.

.... Respondent/s

With

Civil Writ Jurisdiction Case No. 7098 of 2018

Navnit Kumar, Son of Mahesh Pd. Ray, Advocate, Patna High Court, Resident of



Bahadurpur Bagicha, Rajendra Nagar, District- Patna-16

.... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Patna.
2. The Minister -in-Charge, Law Department, Govt. of Bihar, Patna.
3. The Principal Secretary, Law Department, Govt. of Bihar, Patna.
4. The Principal Secretary, General Administration Department, Govt. of Bihar, Patna.
5. The Principal Secretary, Home (Police), Department, Govt. of Bihar, Patna.
6. The Legal Remembrancer and Secretary, Law Department.

.... Respondent/s

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Appearance:

(In CWJC No. 16891/2017)

For the Petitioner/s : Mr. Dinu Kumar, Advocate.

For the Respondent/s : Mr. Pushkar Narain Shahi, AAG 6 with
Mr. Manish Kumar, AC to AAG 6.

(In CWJC No.17232 of 2017)

For the Petitioner/s : Ms. Anju Mishra, Advocate.

For the Respondent/s : Mr. Pushkar Narain Shahi, AAG 6 with
Mr. Manish Kumar, AC to AAG 6.

(In CWJC No.19057 of 2017)

For the Petitioner/s : Ms. Shikha Roy, Advocate.

For the Respondent/s : Mr. Pushkar Narain Shahi, AAG 6 with
Mr. Manish Kumar, AC to AAG 6.

(In CWJC No.7098 of 2018)

For the Petitioner/s : Ms. Anju Mishra, Advocate with
Mr. Deepak Kumar, Advocate.

For the Respondent/s : Mr. Pushkar Narain Shahi, AAG 6 with
Mr. Manish Kumar, AC to AAG 6.

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date: 16-07-2018

These four writ applications have been preferred invoking
the extraordinary writ jurisdiction of this Court under Article 226 of



the Constitution of India, challenging the Bihar Law Officers (Engagement) Rules, 2017 (hereinafter referred to as “the Rules, 2017”).

2. The petitioners are seeking a declaration that the Rules, 2017 is *ultra vires* to Article 14 of the Constitution of India read with Section 30 of the Advocates Act, 1960 (hereinafter referred to as the ‘Act’). The Rules, 2017 has been challenged on the grounds *inter alia* that certain provisions of the Rules, 2017 are in complete conflict with the procedures prescribed and the guidelines issued by the Hon’ble Supreme Court in the case of **State of Punjab and another vs. Brijeshwar Singh Chahal & Anr.**, reported in **(2016) 6 SCC 1**, is fit to be declared *void ab initio*. In CWJC No.19057 of 2017 challenge is also based on the alleged violation of Section 4 of Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1991 (hereinafter referred to as “the Act, 1991”) as the Rules, 2017 does not provide for reservation for differentlyabled persons and for women of all categories.

Submissions of the Petitioners.

3. Mr. Dinu Kumar, learned counsel leading the arguments assisted by Mrs. Anju Mishra, Advocate and Mrs. Sikha



Roy, Advocate, has taken this Court through the various provisions of the Rules, 2017 published in Bihar Gazette (Extraordinary) dated 30th October, 2017, placed at Annexure-1 to CWJC No.16891 of 2017. Earlier in course of hearing of the writ applications when attention of this Court was drawn towards the fact that the Rules, 2017 has been framed by the Government of Bihar in exercise of its power under Article 309 of the Constitution of India taking as if the Law Officers/Government Counsel are holders of civil posts and there would be a relationship of employer and employee, this Court raised certain queries with regard to the action of the State in taking recourse to Article 309 of the Constitution of India for framing of the Rules, 2017 and it was indicated prima-facie that framing of Rules under Article 309 of the Constitution of India may lead to certain consequences, and may confer a status on the Law Officers/Government Counsel, and further with reference to the judgment of the Hon'ble Madras High Court in **W.P. No. 12951 of 2017 (V. Vasanthakumar, Advocate vs. the Chief Secretary, Government of Tamil Nadu)** decided on 28.04.2018 when the Government Counsel was called upon to seek instruction and address this Court as to what the State Government has to say with regard to the principles now laid down in the case of **V. Vasanthakumar, Advocate** (supra), the State Government has filed a third



Supplementary Counter Affidavit sworn on 15.05.2018. The statements made in Paragraph 3 of the third Supplementary Counter Affidavit filed on behalf of the State Respondent Nos.3 and 4 reads as under:-

“That the present supplementary counter is being filed to answer the query made by this Hon’ble Court vide order dated 09.03.2018 as to whether the Government is willing to amend the Bihar Law Officers (Engagement) Rules, 2017 to be one under Article 162 of the Constitution of India.

That it is humbly submitted that as per the advice of the learned Advocate General, Government of Bihar the notification dated 30th October, 2017, the Bihar Law Officers (Engagement) Rules, 2017 is being rectified and it has been decided to notify the Bihar Law Officers (Engagement) Rules, 2017 under proviso to Article 309 of the Constitution of India read with Article 162 of the Constitution.”

4. Today, in course of hearing as well Mr. P.N. Shahi, learned A.A.G-4 representing the State submits that steps have already been taken by the State Government to notify the Rules, 2017 under Article 162 of the Constitution of India.

5. Mr. Dinu Kumar, learned senior counsel representing the petitioners, however, submits that the Rules, 2014 even if notified under Article 162 of the Constitution of India may require certain changes/amendments to make it on the line of the judgments of the Hon’ble Apex Court in the case of **Brijeshwar Singh Chahal** (supra), **Dinesh vs. Union of India and others**, reported in (2016)4 PLJR 1131, and also in terms of the guidelines laid down by the Hon’ble



Madras High Court in the case of **V.Vasanthakumar, Advocate** (supra). Mr. Kumar has made the following submissions before us:-

5.1 Referring to Rule 4(1), learned counsel submits that the Rules, 2017 provides for constitution of a Search Committee for searching the names and preparing the panel of advocates for making recommendation to the Selection Committee for engagement of different categories of Law Officers in the Patna High Court and in the Supreme Court of India. The Committee shall consist of (a) the Advocate General of Bihar who will act as Chairman (b) the Principal Secretary, General Administration Department and (c) the Principal Secretary, Home (Police) Department. Under sub-rule 2 of Rule (4) the Search Committee has to prepare a panel of names of advocates, not more than upto twice the number determined under Rule 3(5) of the Rules, 2017, on the basis of the eligibility criteria set out under the Rules, 2017 and their experience, integrity, reliability, reputation, merit and suitability and submit its recommendation to the Selection Committee through the Law Department for engagement of such Advocates as Law Officers in the Patna High Court and the Supreme Court of India. According to sub-rule (3) of Rule 4, the Search Committee has to formulate its own procedure for seeking willingness and preparation of the panel of the names of the advocates for engagement as Law Officers. It is submitted that even though it is the



mandate of sub-rule (3) of Rule 4 that the Search Committee has to formulate a procedure for seeking willingness and preparation of the panel but such procedure cannot be *de hors* the directions and guidelines issued by the Hon'ble Supreme Court of India in the case of **Brijeshwar Singh Chahal** (supra).

5.2 It is further submitted that the Search Committee while formulating the procedure would be obliged to consider the provisions of the Act, 1991 and the judgment of Hon'ble Patna High Court in the case of **Dinesh** (supra) as also the judgment of the Madras High Court in the case of **V.Vasanthakumar, Advocate** (supra). In this connection, learned counsel invites attention of this Court towards the judgment of the Hon'ble Apex Court in the case of **Brijeshwar Singh Chahal** (supra) which has been held to be binding all over the country in view of Article 141 of the Constitution of India. The Hon'ble Supreme Court has held that the appointment of Law Officers is not just a professional engagement by the State, it has a public element attached to it and, therefore, government and its instrumentalities are under an obligation to engage the most competent lawyers and the method of appointment should be free from arbitrariness. Learned counsel submits that the Hon'ble Madras High Court had occasion to consider this aspect of the matter in the case of **V. Vasanthakumar, Advocate** (supra) wherein it has been



categorically held that “**there can be no dispute with the judgment of the Hon’ble Supreme Court in the case of State of Punjab & Anr. vs. Brijeshwar Singh Chahal & Anr. (supra) which has been held to be binding all over the country in view of Article 141 of the Constitution of India.**”

6. Referring to the judgment of the Hon’ble Madras High Court, Mr. Dinu Kumar, learned counsel submits that in the said case also Rule 5(4) of the Rules, 2017 provided that the Advocate General shall forward the list of advocates as per the eligibility norms prescribed in Rule 4, to the Government after preliminary scrutiny for selection of Law Officers and the Government shall place the same to the Selection Committee but it was contended before the High Court that Rule 5 stipulating the method of appointment of Law Officers in the High Court was discriminatory. In the absence of any requirement of publication of notices inviting applications for appointment as Law Officers, a large section of eligible lawyers have been denied equality of opportunity to offer themselves for selection, empanelment and/or appointment as Government Law Officers.

7. The Hon’ble Madras High Court while dealing with the said submission held that the Advocate General is only to make a preliminary scrutiny of the applications received from eligible lawyers



and forward the names of all eligible candidates to the Government after a preliminary enquiry. In the said case, it has been held that the Rule does not authorize the Advocate General to selectively hold-back eligible candidates and, after the names are forwarded by the Advocate General to the government, the government is required to place the same before the Selection Committee comprising the Advocate General, the Secretary (Public), the Secretary (Home) and the Secretary (Law) for selection. It was further held that any interested person can find out whether any candidate has been held-up for the reason, if any, for the same by making application under the Right to Information Act. Most importantly the Hon'ble Madras High Court held that **“The requirement to notify selection has to be read into the impugned rule”**.

8. Learned counsel further submits that when it was contended before the Hon'ble Madras High Court that the conferment of powers on the Advocate General to forward the names of eligible advocates to the government for selection was also repugnant to the spirit of the judgment of the Hon'ble Supreme Court in the case of **Adi Pherozshah Gandhi vs. H.M.Seervai**, reported in **AIR 1971 SC 385**, and **Brijeshwar Singh Chahal** (supra), though the Hon'ble Madras High Court did not accept the said submission and distinguished those judgments cited at the Bar in the facts of the case



but in Paragraph 14 of its judgment the Hon'ble Madras High Court taking note of **Brijeshwar Singh Chahal** (supra) reiterated that the government is required to evolve a just procedure for selection and the method chosen by them must demonstrate that search for the meritorious was undertaken and was not affected by any extraneous circumstances.

9. In the present case it is the contention of Mr. Dinu Kumar, learned counsel, that under Rule 5 there is a provision for constitution of the Selection Committee and the Advocate General has been made a Member of the Selection Committee, therefore, the presence of the Advocate General both in the Search Committee as well as Selection Committee would not be just and proper. It is pointed out that no procedure or method of selection has been prescribed under the Rules, 2017. Pointing out sub-rule (2) of Rule 5, learned counsel submits that even though it provides for selection on the basis of eligibility criteria set out under the Rules and their experience, integrity, reliability, reputation, merit and suitability but no methodology has been evolved to judge the integrity, reliability, reputation, merit and suitability and, therefore, in absence of a clear provision on this behalf there will be no compliance with the eligibility criteria and it will all depend upon the discretion of the Selection Committee in the matter of final empanelment of



Government Counsel/Law Officers.

10. By pointing out sub-rule (6) of Rule 5, Mr. Dinu Kumar would submit that under sub-rule (6) it is provided that the Search Committee while making recommendation of the names of the Advocates for their engagement on various categories of posts shall have regard to the facts that the list of the Advocates so recommended contains proper representation of all sections of the society. According to Mr. Dinu Kumar, the words '**proper representation of all sections of the society**' indicate about some political considerations would be taking place in the matter of engagement of lawyers. It is further submitted that under Rule 9(i) it is only an Advocate on Record, who has been in practice for not less than three years, shall be eligible for engagement. Under proviso to sub-rule (i) of Rule 9, the discretion has been vested with the Advocate General that he may, in exceptional case, also recommend to the government while making the recommendation to relax both or either of the requirements for an advocate who is found by him to be very competent and deserving to be engaged as Assistant counsel.

11. It is his submission that this provision would be discriminatory for two reasons, firstly, that the advocates who are duly qualified and have been conferred permanent enrolment numbers



by the Bar Council are not even being considered for their appointment as Law Officers/Government Counsel and, secondly, that while there is a Search and Selection Committee envisaged for appointment of Law Officers and Government Counsel, the discretion vested with the Advocate General alone to recommend the name of an advocate, who does not fulfill the two requirements of sub-rule (i) of Rule 9, is not just and proper and such discretion would be contrary to the scheme of the Rules, 2017 and the guidelines of the Hon'ble Supreme Court in the case of **Brijeshwar Singh Chahal** (Supra). It is submitted that there cannot be a discrimination between an Advocate and an Advocate on Record and for arguments sake even if it is accepted that an Advocate who is not an Advocate on Record may be considered only in exceptional case by virtue of his competence, such power of consideration should be vested only with the Search Committee and the Selection Committee, the Advocate General or any other Member of the Search Committee may suggest name of a competent advocate and consider him for empanelment following the procedures for this purpose.

12. Further, Mr. Kumar has pointed out from sub-rule (ii) of Rule 9 that according to sub-rule (ii) the Assisting Counsel engaged under sub-rule (i) shall not appear or argue on behalf of the government independently in any proceeding after completion of



pleadings or during the course of final arguments therein before any of the Courts mentioned under the said sub-rule (i). It is his submission that this provision is *ultra vires* the provisions of Section 30 of the Advocates Act. It is discriminatory as well and such a clause is likely to create a kind of hindrance in the disposal of cases in the court of law. It is submitted that when an Assisting Counsel is engaged by virtue of his competence and after undergoing the search and selection procedure and the government hands over the power to draft a petition and assist the Government Counsel, the Additional Advocate General and the Advocate General in the court proceedings, it cannot be said that they are debarred from making submissions at the final stage of the case. Learned counsel submits that such a provision is bad and is liable to be set aside. Similarly, Mr. Kumar has challenged the eligibility conditions prescribed under Rule 6 of the Rules, 2017 and Rule 13 has been assailed by submitting that the same needs to be classified.

13. From the aforementioned submissions it is evident that the concern of the petitioners in all these cases is with regard to the procedures and methods which are required to be adopted by the government in the matter of appointment of Law Officers and Government Counsel. They are looking for a kind of assurance through the Rules made for that purpose be in tune with the guidelines



issued by the Hon'ble Supreme Court in the case of **Brijeshwar Singh Chahal** (supra) and the other judgments of the Courts including the judgment of the Madras High Court in the case of **V.Vasanthakumar, Advocate** (supra) and those are duly followed and given effect to while notifying the Rules, 2017 under Article 162 of the Constitution of India.

Submissions of the State.

14. On the other hand, Mr. P.N. Shahi, learned Additional Advocate General 4, has supported the provisions made under the Rules, 2017 and submits that the presence of the Advocate General in the Search Committee and then in Selection Committee cannot be said to be unjustified considering the fact that the Advocate General is the head of the team who defend the State Government in the Hon'ble High Court, and he is the most experienced person who can, by virtue of his ability at the Bar, assist the Committee (s) in course of search and selection. It is further submitted that the Rules, 2017 clearly provides that the Search Committee constituted under sub-section (1) of Section 4 shall prepare the panel containing the names of the advocates including the Senior Advocates on the basis of the eligibility criteria set out under the Rules, 2017 and their experience, integrity, reliability, reputation, merit and suitability and



shall submit its recommendation to the Selection Committee. Learned A.A.G-4 has drawn the attention of this Court towards Rule 6 which provides the eligibility in order to be considered for his engagement as a Law Officer. According to Rule 6, a designated Senior Advocate or an Advocate on Record who has been practicing in the Patna High Court or Supreme Court of India or an Advocate who has been practicing in the Civil Courts of Bihar, possesses the standing in terms of number of years of practice as stated in sub-clause (i) to (viii) under sub-rule (1) of Rule 6 shall be eligible for consideration for appointment as a Law Officer.

15. According to the standing in terms of number of years prescribed for engagement as an Additional Advocate General for the High Court, it is necessary that the Advocate concerned possess a standing of not less than 20 years at the Bar or he should be a designated Senior Advocate of the High Court. For being a Government Advocate or an Additional Standing Counsel in the Supreme Court of India, the advocate should be in practice for not less than 15 years in the High Court or in the Supreme Court of India. For engagement as a Standing Counsel in the Patna High Court he should be in practice as an Advocate for not less than 10 years in the Patna High Court and further for a Government Pleader for the Patna High Court or for the Civil Courts of Bihar he should be in practice as an



Advocate for not less than 10 years in the Patna High Court or in the Civil Courts of Bihar respectively for that Court for which the engagement is to be made. The rules further provides that for a Public Prosecutor for the Patna High Court or for the Civil Courts of Bihar, the Lawyer should be in practice for not less than 10 years in the Patna High Court or in the Civil Courts of Bihar respectively for that Court for which the engagement is to be made. It is also pointed out that for an Additional Public Prosecutor for the Patna High Court or for the Civil Courts of Bihar the Lawyer should be in practice as an Advocate for not less than 7 years in the Patna High Court or in the Civil Courts of Bihar respectively, as stated above. Further, for an Additional Government Pleader for the Civil Courts of Bihar, the Advocate concerned should be in practice as an Advocate for not less than 7 years in the Civil Courts of Bihar.

16. Mr. Shahi, learned A.A.G-4, further submits that the Rule 7 provides for disqualification of the Law Officer under the conditions mentioned therein. Regarding Rule 9(i) it is his submission that no challenge may be thrown to the provisions contained therein whereby an Advocate on Record who has been in practice for not less than 3 years in this Court shall only be engaged for the Patna High Court and the Supreme Court of India or for any other Courts of Law. It is submitted that the power vested in the Advocate General to



recommend an Advocate on Record to be attached with the Law Officers, except Government Pleader, Assistant Government Pleader, Public Prosecutor and Additional Public Prosecutor, for assisting them in performing their duties as Law Officers under Rule 8(b) of the Rules cannot be found fault with.

17. Mr. Shahi further submits that the proviso to clause (i) of Rule 9 rightly confers discretion upon the Advocate General to recommend, in exceptional case, the name of an Advocate by relaxing both or either of the two requirements if the Advocate General finds that the concerned Advocate is very competent and deserving to be engaged as Assisting Counsel.

18. As regards sub-rule (ii) of Rule 9, Mr. Shahi, learned A.A.G-4, submits that an Assisting Counsel is engaged only for a limited purpose to assist the Law Officer with whom he is attached in terms of clause (i) of Rule 9 and, therefore, a provision has been made that in any proceeding, after completion of pleadings, the Assisting Counsel shall not independently appear or argue during the course of final arguments therein before any of the Courts mentioned under the said sub-rule (i). It is submitted that the Assisting Counsel because of his lesser experience at the Bar sometime may not be able to defend the case of the Government efficiently and properly at the stage of



final arguments and, therefore, this provision as contained under clause (ii) of the Rules, 2017 has rightly been brought in. Mr. Shahi, learned A.A.G-4 has also supported the minimum standing at Bar condition as prescribed under Rule 6 of the Rules, 2017 with regard to Additional Advocate General, Government Advocates, etc.

19. In response to the challenge to Rule 13 of the Rules, 2017, which confers power on the Advocate General to engage for the Patna High Court and the Supreme Court of India, on such terms and fee as may be fixed, in consultation with the Administrative Department and the Law Department, an Advocate for the Government as a Special Public Prosecutor or a Special Counsel who is not a Law Officer under these Rules, in case(s) involving important issue(s) for the Government, specially revenue or in public interest, learned A.A.G-4 submits that this power has been conferred upon the Advocate General being the Chief and Principal Law Officer, therefore, it has been left to his wisdom to make such engagements, therefore, the challenge to this provision is to be rejected on this ground alone.

20. Mr. Shahi, learned A.A.G-4, would thus conclude that the Rules, 2017 needs no interference by this Court and the Government would be fully within its right to notify the said Rules,



2017 in exercise of its power under Article 162 of the Constitution of India.

Considerations.

21. We have heard learned counsel for the parties at length and went through the pleadings available on the records. In order to appreciate the rival submissions at the Bar it seems just and proper to reproduce the Rules, 2017 for a ready reference here-in-below:-

“30th October 2017

The Bihar Law Officers (Engagement) Rules, 2017

No. C/EH-07/17-6537—In exercise of powers under Article 309 of the Constitution of India, the Governor of Bihar hereby makes the following Rules to provide for system of engagement of Law Officers for the State of Bihar for the Patna High Court, the Supreme Court of India, other Courts of Law, Tribunals, etc. in a transparent, fair and objective manner and to regulate their engagement, remuneration, duties and other terms and conditions and for matters connected therewith and incidental thereto:-

1. Short title and commencement—

(1) These Rules may be called the Bihar Law Officers (Engagement) Rules, 2017.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Definitions:- In these rules, unless the context otherwise requires:-

(a) "Advocate" means an advocate as defined under the Advocates Act, 1961;

(b) "Advocate General" means a person appointed under Article 165 of the Constitution of India as Advocate General for the state of Bihar and includes any person appointed to act temporarily as such;

(c) "Advocate on Record" means an Advocate on Record as



per the applicable Rules of the Patna High Court and the Supreme Court of India,

(d) "Assistant Counsel" means an Advocate not being a Law Officer but engaged to provide assistance to Law Officer under Rule 9 of these Rules;

(e) "Category" means the category of post of Law Officers specified in Rule 3 of these Rules and includes such other categories of Law Officers, as may be determined by the Government from time to time;

(f) "Engaging Authority" means the Government;

(g) "Government" means the Government of the State of Bihar;

(h) "Government Counsel" means an Advocate engaged under Rule 5(4) of these Rules;

(i) "Law Officers" means an Advocate engaged under these Rules as a Law officer in the Office of the Advocate General by the Government and includes a special Public Prosecutor or a Special Counsel;

(j) "Public Prosecutor" means an Advocate appointed under section 24 of the Code of Criminal Procedure, 1973 to be a Public Prosecutor for the Patna High Court or for the Sessions Division and includes Additional Public Prosecutor, Additional Public Prosecutor (Senior Panel) and Special Public Prosecutor;

(k) "Selection Committee" means a committee constituted under Rule 5 of these Rules; (l) "Search Committee" means a Committee constituted under Rule 4 of these Rules;

(m) "Special Public Prosecutor" or "Special Counsel" means an Advocate or a Senior Advocate engaged under Rule 11 of these Rules.

(n) "Research Counsel" means an Advocate engaged under Rule 14 of these Rules.

3. Categories of Law Officers—

(1) The following Categories of Law Officers may be engaged for the Patna High Court, namely:-

(a) the Additional Advocate General,

(b) the Government Advocate,

(c) the Government Pleader,

(d) the Standing Counsel,



(e) the Public Prosecutor,

(f) the Additional Public Prosecutor

(g) the Additional Public Prosecutor (Senior Panel)

(2) The following Categories of Law Officers may be engaged for the Supreme Court of India, namely:-

(a) the Standing Counsel,

(b) the Additional Standing Counsel.

(3) The following Categories of Law Officers may be engaged for the Civil Courts of Bihar, namely:-

(a) the Public Prosecutor,

(b) the Government Pleader,

(c) the Additional Public Prosecutor,

(d) the Additional Government Pleader.

(4) The above categories of Law Officers and the number of Law Officers to be engaged under each categories shall be fixed and/or modified, from time to time as required, by the Government based on an assessment made by the Government in consultation with the Advocate General.

(5) The Government while making assessment under sub-Rule(4) above may take into consideration of various aspect, namely, the workload of legal cases involving the Government, the total number of Courts (sanctioned and working), the nature of work involved, specialization in subject matters and any other relevant material or aspect, as it deems fit.

(6) The Government shall be the Engaging Authority for the Law Officers belonging to the various categories of posts under these Rules and the Law Officers so engaged shall hold such posts during the pleasure of the Government.

4. Search Committee—

(1) There shall be a Search Committee for searching the names of and preparing the panel of Advocates for making recommendation to the Selection Committee for engagement of different categories of Law Officers in the Patna High Court and in the Supreme Court of India. This Committee shall consist of the following, namely:-

(a) The Advocate General, Bihar Chairman;

(b) The Principal Secretary, General Administration Department Member; (c) The Principal Secretary, Home



(Police) Department Member.

(2) The Search Committee shall prepare a panel of names of Advocates , not more than up to twice the number as determined under Rule 3(5) of these Rules, on the basis of the eligibility criteria set out under these Rules and their experience, integrity, reliability, reputation, merit and suitability and submits its recommendation to the Selection Committee through the Law Department for engagement of such Advocates as Law Officers in the Patna High Court and the Supreme Court of India.

(3) The Search Committee shall formulate its own procedure for seeking willingness and preparation of the panel of the names of the advocates for engagement as Law Officers in the Patna High Court and the Supreme Court of India.

5. Selection Committee and Engagement—

(1) The Selection Committee shall consist of the following, namely:-

(a) The Minister-in-Charge, Law Department Chairman,

(b) The Advocate General Member,

(c) The Legal Remembrancer and Secretary, Law Department Member Secretary

(2) The Selection Committee, on receipt of the recommendation made by the Search Committee under Rule 4(2) of these Rules, shall recommend to the Government for engagement of such Advocates as Law Officers in Patna High Court and the Supreme Court of India on the basis of the eligibility criteria set out under these Rules and their experience, integrity, reliability, reputation, merit and suitability.

(3) On the recommendations made by the Selection Committee under sub-Rule (2), the Government shall, by order, make the engagement of Law Officers to the various categories of posts in Patna High Court and the Supreme Court of India and shall issue order(s) of engagement of Law Officers including such terms and conditions as may be determined by the Government in this regard from time to time.

(4) The Government Counsel for Tribunals, other adjudicatory bodies constituted by or under any law or any other Court of law of the State, except the Civil Courts, or in case so specially required for any particular Department of the Government shall also be engaged by following the provisions of and on the basis of eligibility and criterion under these Rules by the Government and



such Counsels shall discharge the duties similar to those of the Law Officers under these Rules.

(5) (i) For engagement of Law Officers for Civil Courts of Bihar as mentioned in Rule 3(3) of these Rules and Search Committee shall consist of the following namely:-

(a) For Public Prosecutor-The District Magistrate and the Superintendent of Police of the concerned District.

(b) For Government Pleaders-The District Magistrate and the Additional Collector of the concerned District.

(c) For Additional Public Prosecutor-The District Magistrate, the Superintendent of Police and the Public Prosecutor of the concerned District. (d) For Additional Government Pleader-The District Magistrate, the Additional Collector and the Government Pleader of the concerned District. (ii) The Search Committee constituted under Rule 5(i) in consultation with the District and Sessions Judge for the concerned district shall prepare a list of names of Advocates on the basis of the eligibility criteria set out under these Rules and their experience, integrity, reliability, reputation, merit and suitability and submit it to the Legal Remembrancer and Secretary, Law Department.

(iii) The list so forwarded by the District Collector shall be placed before the Selection Committee constituted under Rule 5(i) of these Rules and based on the eligibility and qualifications as provided under these Rules and also their experience, integrity, reliability, reputation, merit and suitability the Selection Committee shall prepare a panel of names of Advocates for engagement by the Government on the categories of posts mentioned in Rule 3 (3) of these Rules. On such recommendations made by the Selection Committee, the Government shall, by order, make engagement of Law Officers to the various categories of Posts in the Civil Courts of Bihar. Provided that the engagement of Public Prosecutor and Additional Public Prosecutor in the Patna High Court and the Civil Courts of State shall be made as per the provisions as contained in Section-24(3) of the Code of Criminal Procedure, 1973.

Provided further that in respect of such selection, the provisions of sub-section (6) of section 24 of the Code of Criminal Procedure, 1973 as substituted by Bihar Act 16 of 1984 shall be applicable.

(6) The Search Committee while making recommendation of the names of the Advocates for their engagement on various categories of posts shall have regard to the facts that the list of the Advocates so recommended contains



proper representation of all sections of the society.

(7) The Search Committee of the district shall recommend the names of the Advocates, upto twice of the number of vacancy of the Law Officers as determined under Rule 3(5) of these Rules.

6. Eligibility—

(1) In order to be eligible to be engaged as a Law Officer, an Advocate shall be:-

(a) a citizen of India and registered with a Bar Council constituted under the Advocates Act, 1961; and

(b) a designated senior Advocate or an Advocate on record, who has been practicing in the Patna High Court or Supreme Court of India or an Advocate who has been practicing in the Civil Courts of Bihar;

(c) possesses the following standing in number of years of practice against the respective categories and being an income tax assessee for at least three financial years from the financial year in which engagement is to be made:-

(i) For an Additional Advocate General for the Patna High Court he has been in practice as an Advocate for not less than 20 years or a designated Senior Advocate of the Patna High Court;

(ii) For a Standing Counsel for the Supreme Court of India Court he has been in practice as an Advocate for not less than 20 years in the Supreme Court of India;

(iii) For a Government Advocate for the Patna High Court or for an Additional Standing Counsel for the Supreme Court of India he has been in practice as an Advocate for not less than 15 years in the Patna High Court or in the Supreme Court of India respectively for that Court for which the engagement is to be made;

(iv) For a Standing Counsel for the Patna High Court he has been in practice as an Advocate for not less than 10 years in the Patna High Court;

(v) For a Government Pleader for the Patna High Court or for the Civil Courts of Bihar he has been in practice as an Advocate for not less than 10 years in the Patna High Court or in the Civil Courts of Bihar respectively for that Court for which the engagement is to be made;

(vi) For a Public Prosecutor for the Patna High Court or for the Civil Courts of Bihar he has been in practice for not less than 10 years in the Patna High Court or in the



Civil Courts of Bihar respectively for that Court for which the engagement is to be made;

(vii) For an Additional Public Prosecutor for Patna High Court or for the Civil Courts of Bihar he has been in practice as an Advocate for not less than 7 years in the Patna High Court or in the Civil Courts of Bihar respectively for that Court for which the engagement is to be made;

(viii) For an Additional Government Pleader for the Civil Courts of Bihar he has been in practice as an Advocate for not less than 7 years in the Civil Courts of Bihar.

7. Disqualification for engagement—An Advocate or a senior Advocate shall be disqualified from being engaged or to continue as Law Officer under these Rules in the following circumstances:-

(1) a Law Officer who accepts brief from any private person in an criminal case in any Court;

(2) a law Officer may accepts a brief from any private person for a civil case in any court provided that such acceptance does not interfere with the discharge of his duties as a Law Officer and relates solely to dispute involving private parties and not involving the Government or its officials,

(3) an Officer shall not appear for or give Legal Advice to private person or matter in which the interest of the person are likely to be adverse to that of the Government or its Officials;

(4) a Law Officers shall not accept a brief from any person, whether a petitioner or Respondent, in proceedings initiated in an Election Petition in connection with an Election to a Local Authority or the State Legislature or the Parliament;

(5) a person, who is a member of the parliament or a Legislature of the State, a municipal Corporation, a Municipal Council, a Panchayat or any other Local Authority, shall not, as long as he hold that office, be eligible for engagement;

(6) a Law Officer shall not give legal advice to or accept a brief from or appear in any Court of Law on behalf of any instrumentality of the State, constituted by or under any statute or otherwise, including various Universities, Boards, Corporations, Authorities etc, where such advice, acceptance or appearance is in conflict with the interest of the Government or its Officials, either directly or indirectly;



(7) a Law Officer shall not continues to give legal advice to or to retain brief from or appear in any Court of Law on behalf of any person, body, association, company etc which effects the interest of the Government or its Officials, either directly or indirectly, after being engaged under these Rules;

(8) If the Law Officer ceases to be an Advocate or is convicted by a Court of Law for an offence involving moral turpitude.

8. Duties of Law Officers— It shall be duties of a Law Officer:-

(a) to give advice to the Government upon such matters, and to perform such other duties of a legal character, as may from time to time, be referred or assigned to him by the Government or the Advocate General;

(b) to appear without fail on behalf of the Government and its Officials and either prosecute or defend all proceedings, as that case may be, before the Patna High Court or the Supreme Court or any other High Court or any other Courts of Law as allotted or as directed by the Advocate General, in which the Government is concerned as a party or is otherwise interested;

(c) to discharge such other functions as are conferred on a Law Officer by or under the Constitution of India or any other Law for the time being in force.

9. Assistance to Law Officers—

(i) An Advocate on Record who have been in practice for not less than 3 years shall be engaged for the Patna High Court and the Supreme Court of India or for any other Courts of Law, in such number and on such fee, as may be decided by the Government on the recommendation of the Advocate General for being attached with the Law Officers, except Government Pleader, Assistant Government Pleader, Public Prosecutor and Additional Public Prosecutor, for assisting them in performing their duties as Law Officers under Rule 8 (b) of these Rules;

Provided that the Advocate General may, in his discretion in exceptional case, also recommend to the Government while making the above recommendation, to relax both or either of the above two requirements, for an Advocate who is found by him to be very competent and deserving to be engaged as Assisting Counsel.

(ii) Assisting Counsel engaged under Sub-Rule (i) above shall not appear or argue on behalf of the Government independently in any proceeding after completion of



pleadings or during course of final arguments therein before any of the Courts mentioned under the said Sub-rule(i).

10. Disengagement of Law Officers—The Law Officers engaged and holding the various categories of posts under these Rules or an Advocate engaged under these Rules at the pleasure of the Government shall be disengaged at any time by the Government in consultation with the Advocate General if found to be not eligible as under Rule 6 or having found to have incurred disqualification as under Rule 7 or on failure to perform the duties as under Rule 8 or on account of breach of Rule 9(ii) of these Rules. The Law Officer may disengage himself after giving one month notice to the Advocate General in this regard.

11. Review of performance—

(i) The works of the Law Officers, except those engaged under Rule 5(5) of these Rules, shall be assessed every year by the Advocate General and such assessment shall be sent to the Government for appraisal of their performance of duties and the Government shall disengage such Law Officers, in consultation with the Advocate General, whose performance has not been satisfactory on account of their failure to perform the duties as under Rule 8 or on account of breach of Rule 9(ii) of these Rules.

(ii) The work of the Law officers engaged under Rule 5(5) of these Rules shall be assessed every year by the District and Sessions Judge and the District Magistrate of the concerned District and such assessment shall be sent to the Government for appraisal of their performance of duties and the Government may disengage such Law Officers, in consultation of the Advocate General, whose performance has not been satisfactory on account of their failure to perform the duties as under Rule 8 of these Rules.

12. Retainer, Fee and other Allowances— For performance of the duties as mentioned in Rule 8 a Law Officer shall be paid fee including retainer fee, and such other allowances as may be determined by the Government from time to time.

13. Special Engagement— Notwithstanding anything contained in these Rules the Advocate General shall have the discretion to engage for the Patna High Court and the Supreme Court of India, on such terms and fee as may be fixed, in consultation with the Administrative Department and the Law Department, an Advocate for the Government as a special Public Prosecutor or a Special Counsel who is not a Law Officer under these Rules, in case(s) involving important issue(s) for the Government, specially revenue or in public interest.



14. Research Counsel—Notwithstanding anything contained in these Rules the Advocate General shall have the discretion to engage up to a maximum of five in numbers for not more than the period of three years and on such terms and consolidated fee per month as may be fixed in consultation with the Law Department, Advocates for carrying out a specialized nature of the legal work for the Government, such as legislative drafting, techno legal vetting, comprehensive research for case(s) involving important issues for the Government, specially constitutional, taxation, revenue and criminal.

15. Saving and overriding effect—

(i) These Rules shall be supplemental to the provisions contained in different statutes regarding engagement of Law Officers.

(ii) Anything contrary to these Rules made or issued by the Government in connection with the matters provided for herein prior to coming force of these Rules or anything contained in the Legal Remembrancer Rules, 1946 shall not have any effect and shall not stand saved from the date of coming in force of these Rules.”

Brijeshwar Singh Chahal's Case

22. The matter relating to appointment of Law Officers to conduct the cases on behalf of the Government of Punjab & Haryana came to be discussed recently in the judgment of the Hon'ble Supreme Court of India in the case of **Brijeshwar Singh Chahal** (supra), the Hon'ble Apex Court had occasion to consider the nature, obligations and duties of a Law Officer of the Government and while considering those aspects of the matter the Hon'ble Apex Court was called upon to examine as to whether appointment of Law Officers is just a professional engagement or that it has a public element attached to it. Taking note of various aspects of the matter, in the matter of appointment of the Law Officers, the Hon'ble Apex Court found that



no statutory procedure was existing in the States for a fair, reasonable, transparent, objective and credible selection, hence, the Hon'ble Apex Court framed the following questions for determination:-

“(I) Whether the States of Punjab and Haryana have made any realistic assessment of their requirement before making appointments of Law Officers.

(II) Whether the States of Punjab and Haryana have formulated any scheme, policy, norms or standards for appointing Law Officers.

(III) Whether appointment of Law Officers by the State Government need to be made on a fair, reasonable, non-discriminatory and objective basis and

(IV) If necessary to Questions (I), (II) and (III) are found in the negative, what is the way forward?”

23. The Hon'ble Apex Court went through the procedures being followed by the State Government for selecting practicing advocates for appointment as Law Officers for the State of Punjab and found that the Law Officers are being engaged on the recommendations of the Advocate General of the State, based *inter alia* on the assessment of individuals by the Advocate General as well as on the recommendations made by colleagues and peers and others. There was no Selection or Search Committee constituted for making such selections and the Government does not consult the High Court before finalizing the list of appointments, except in the case of Public



Prosecutors appointed under Section 24 of the Code of Criminal Procedure. It was found that this practice has continued over the years by convention and was being followed by other State Governments, in respect of the State of Haryana from the affidavits exchanged before the Hon'ble Court it was found that the procedure for selecting practicing advocates for appointment as Law Officers is the same. While answering the Question No. (II), rejecting the submissions advanced on behalf of the State of Punjab and Haryana, the Hon'ble Apex Court in Paragraph 17 of its judgment held *inter alia* observed as under:-

“It is, in our view, too late in the day for any public functionary or Government to advance such a contention leave alone expect this Court to accept the same. If a Government counsel discharges an important public function and if it is the primary duty of those running the affairs of the Government to act fairly, objectively and on a non- discriminatory basis, there is no option for them except to choose the best at the bar out of those who are willing and at times keen to work as State counsel. It is also their duty to ensure that the process by which the best are selected is transparent and credible. Abdicating that important function in favour of the Advocate General of the State who, in turn, has neither the assistance of norms or procedure to follow nor a mechanism for assessment of merit will be self-defeating. We regret to say that in the matter of appointment of State Counsel, the States of Punjab and Haryana have much to do to reform the prevalent system which reform is in our opinion long



overdue.”

24. Further while considering Question No. (III) the Hon’ble Apex Court held that not only the Government but all public bodies are trustees of the power vested in them and custodians of public interest, therefore, they are liable to discharge that trust in the best possible manner and that is their primary duty. The Hon’ble Apex Court then observed:-

“This necessarily implies that the nature that the nature of functions and duties including the power to engage, employee or recruit servants, agents, advisors and representatives must be exercised in a fair, reasonable, non-discriminatory and objective manner....”

25. Referring to a series of judgments of the Hon’ble Apex Court viz **S.G. Jaisinghani v. Union of India AIR 1967 SC 1427, E.P. Royappa v. State of T.N (1974) 4 SCC 3, Maneka Gandhi v. Union of India (1978) 1 SCC 248, Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489, D.S. Nakara v. Union of India (1983) 1 SCC 305, Dwarkadas Marfatia and Sons v. Port of Bombay (1989) 3 SCC 293, Som Raj v. State of Haryana (1990) 2 SCC 653, Neelima Misra v. Hariendra Kaur Paintal (1990) 2 SCC 746 and Sharma Transport v. State of A.P. (2002) 2 SCC 188**, the Hon’ble Apex Court pointed out that the settled legal position that absence of arbitrary powers is



the first essence of “Rule of Law” and this proposition has been approved in the context of varied fact situations.

26. On the question as to whether appointment of Lawyers by the State Government simply signifies professional engagement of those appointed or has any “public element” also and if such appointments have a “public element”, whether the making of the same can itself be the subject-matter of judicial review. The Hon’ble Apex Court gainfully referred the judgments of the Hon’ble Supreme Court in the case of **Shrilekha Vidyarthi v. State of U.P (1991) 1 SCC 212** which was the first decision in which the Hon’ble Apex Court had an occasion to examine whether the Government Counsel in the districts are holders of an “office or post” or such appointments are no more than professional engagements like the one between a private client and his lawyer. The Hon’ble Apex Court in the case of **Shrilekha Vidyarthi** (supra) held that the judicial review of State action is permissible even when the engagement of the Government Counsel may be contractual in nature and the State is obliged to fulfill the requirement of Article 14 of the Constitution of India. The Court held that **“It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever filed, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for**



examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters.....”

27. Applying the principles referred by the Hon’ble Apex Court in the case of **State of U.P. v. State of Law Officers’ Association (1994) 2 SCC 204** and **State of U.P. Vs. Johri Mal (2004) 4 SCC 714**, concluded that the nature of office of the Government Counsel is of great importance. They are not only officers of the court but also the representatives of the State and that the courts repose a great deal of confidence upon them. They are supposed to render independent, fearless and non partisan views before the courts irrespective of the result of the litigation which may ensue. So also the Public Prosecutors have great responsibility. They are required to perform statutory duties independently having regard to various provisions contained in the Code of Criminal Procedure.

28. The Hon’ble Apex Court took note of the statistics which shows that nearly 80% of litigation pending in the courts today has State or one of its instrumentalities as a party to it. The Hon’ble Apex Court, therefore, held that for a fair, quick and satisfactory adjudication of a cause the assistance which the court gets from the



Bar is extremely important and, therefore, a fair, reasonable or non-discriminatory process of appointment of State Counsel is not thus demanded only by the rule of law and its intolerance towards arbitrariness but also by reason of the compelling need for doing complete justice which the Courts are obliged to do in each and every case.

29. In Paragraph 40 of the judgment in the case of **Brijeshwar Singh Chahal** (supra) the Hon'ble Apex Court has observed that:-

“.....The States cannot in the discharge of their public duty and power to select and appoint State Counsel disregard either the guarantee contained in Article 14 against non-arbitrariness or the duty to protect public interest by picking up the best among those available and willing to work nor can the States by their action frustrate, delay or negate the judicial process of administration of justice which so heavily banks upon the assistance rendered by the members of the Bar.....”

30. In ultimate analysis while summing up the various propositions the Hon'ble Apex Court held that the appointment of Government Counsel at the district level and equally so at the High Court level is not just a professional engagement but such appointments have a “public element” attached to them. As such the Hon'ble Apex Court answered the Question No. (III) in affirmative.

31. The Hon'ble Apex Court proceeded to consider



Question No. (IV) as to what is the way forward. The Hon'ble Apex Court took note of the recommendations of the Law Commission in its 197th report and in Paragraph 46 of the judgment noted that consultation with the Sessions Judge for a Public Prosecutor in the district judiciary and with the High Court for one in the High Court is statutorily prescribed because the importance of the appointment and the significance of the opinion of the courts where the appointee has to work is to his or her capacity or professional ability. It was further found that the statute does not speak of an appointment in disregard to the requirement of consultation. Most importantly in Paragraph 47 the Hon'ble Apex Court held as under:-

“Taking a cue from the provisions of [Section 24](#), we are inclined to hold that what serves as a check on the power of the Government to appoint a Public Prosecutor can as well be a check on the appointment of the State Counsel also. That is because, while the Public Prosecutor's power under [the Code of Criminal Procedure Code](#) gives him a distinctive position, the office of a State Counsel, in matters other than criminal, are no less important. A State Counsel by whatever designation called, appears in important civil and constitutional matters, service and tax matters and every other matter where substantial stakes are involved or matters of grave and substantial importance at times touching public policy and security of State are involved. To treat such matters to be inconsequential or insignificant is to trivialise the role and position of a State Counsel at times described as additional and even Senior Additional Advocate General. What holds good for appointment of a Public Prosecutor as a



check on arbitrary exercise of power must, therefore, act as a check on the State's power to appoint a State Counsel as well especially in situations where the appointment is unregulated by any constitutional or statutory provision. Such a requirement is implicit in the appointing power of the State which power is in trust with the government or the public body to be exercised only to promote public interest. The power cannot be exercised arbitrarily, whimsically or in an un-canalised manner for any such exercise will fall foul of [Article 14](#) of the Constitution of India and resultantly Rule of law to which the country is committed."

32. Having said so, the Hon'ble Apex Court emphasized about the two major aspects to be kept in mind in the matter of appointment of Law Officers, firstly, the need for assessment and requirement of the State Governments having regard to the workload in different courts and, secondly, the process of selection and assessment of merit of the candidates by a credible process. The Hon'ble Apex Court held in Paragraph 49.2 of its judgment that this process can be primarily left to the State Government who can appoint a Committee of Officers to carry out the same. The Hon'ble Apex Court further opined that it will be useful if the Committee of Officers has the Secretary to the Government, Law Department, who is generally a Judicial Officer on deputation with the Government as its Member-Secretary. The Committee can even invite applications from eligible candidates for different positions. The conditions of eligibility for appointment can be left to the Government



or the Committee depending upon the nature and the extent of work which the appointees may be entrusted to handle. The Hon'ble Apex Court further observed that the process and selection of appointment would be fair and reasonable, transparent and credible if the Government or the Committee, as the case may be, also stipulates the norms for assessment of merit and suitability.

V.Vasanthakumar's Case.

33. While these applications were still pending consideration, the Hon'ble Madras High Court had occasion to consider a similar matter in the case of **V.Vasanthakumar, Advocate** (supra) wherein the Hon'ble Madras High Court took note of the judgment of the Hon'ble Supreme Court in the case of **Brijeshwar Singh Chahal** (supra) and directed the State to formulate and frame definite guidelines in the manner and criteria of selection of Law Officers to the post of Government Law Officers and, in particular, the mode of giving weightage to court appearances, advocacy, legal acumen, quality of drafting pleadings, reported and unreported judgments, academic background, integrity, behaviour, general reputation, etc., for all future appointments and as and when Government Law Officers are selected, applications should be invited from eligible advocates by putting up notices in the recognized Bar



Associations.

Consideration.

34. We have discussed in detail the judicial pronouncements of the Hon'ble Apex Court and then the judgment of the Hon'ble Madras High Court here-in-above. In the light of the directions of the Hon'ble Supreme Court in the case of **Brijeshwar Singh Chahal** (supra) when we consider the Rules, 2017 keeping in mind the rival submissions at the Bar, we find, at the outset, that the categories of Law Officers have been provided under Rule 3 whereunder the Public Prosecutor, the Additional Public Prosecutor and the Additional Public Prosecutor (Senior Panel) are also included. For the purpose of appointment as a Public Prosecutor in terms of the eligibility conditions he must be in practice for not less than 10 years in the Patna High Court or in the Civil Courts of Bihar respectively in the court for which the engagement is made. We find this provision is not in consonance with Proviso to sub-section (3) of Section 24 and sub-section (7) of Section 24 of the Code of Criminal Procedure. Section 24 of Code of Criminal Procedure is quoted hereunder for a ready reference:-

“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 conducting 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 Prosecutor, 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.

Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.

(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 or as an Additional Public Prosecutor or Assistant 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.”

35. With respect to the appointment of Public Prosecutors, Additional Public Prosecutors, the Government Pleaders and the Additional Government Pleaders proviso to sub-section (3) says that the Public Prosecutor or Additional Public Prosecutor appointed for one District may also be appointed as a Public



Prosecutor or an Additional Public Prosecutor for another district, therefore, in our considered opinion having provided in clause (iii) of sub-rule 5 of Rule 5 that the appointment of Public Prosecutor and Additional Public Prosecutor in the Patna High court and the Civil Courts of State shall be made as per the provisions contained in Section 24 (3) of the Code of Criminal Procedure, 1973, the embargo created under sub-rule (vi) of Rule 6 to the extent says that for a Public Prosecutor for the Patna High Court or the Civil Courts of Bihar the candidate must have been in practice for not less than 10 years in Patna High Court or in the Civil Courts of Bihar respectively for that Court for which the engagement is to be made is not just and proper and that seems to be violative of Proviso to Section 24(3) and sub-section (7) to Section 24 of the Code of Criminal Procedure. Similarly, when the statute provides the minimum eligibility for standing at the Bar for Public Prosecutor as 7 years only the Rules, 2017 cannot introduce minimum standing at Bar at 10 years of practice. It is further found that under clause (ii) of sub-rule (5) of Rule 5 the requirement of consultation with the District and Sessions Judge has been provided at the initial stage of search only for the purpose of preparing the list of names of Advocates to the Legal Remembrancer and Secretary, Law Department. This, according to us, needs to be made consistent with the provisions of Section 24(4) of



the Code of Criminal Procedure wherein it is the District Magistrate who 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 Prosecutor or Additional Public Prosecutors for the district. According to us, sub-section (4) of Section 24 of the Code of Criminal Procedure specifically confers powers for preparation of a panel on the District Magistrate in consultation with the Sessions Judge, the same power in the matter of statutory post of Public Prosecutors and Additional Public Prosecutors cannot be conferred on the Search Committee or the Selection Committee, as the case may be, constituted under the Rules, 2017 promulgated under Article 162 of the Constitution of India.

36. Even though it has been argued by Mr. Dinu Kumar that the presence of the Advocate General, Bihar, both in the Search Committee as well as the Selection Committee is not just and proper, we do not find any reason to accept such submission. The Advocate General being the Chief / Principal Law Officer of the State, we do not find anything wrong in his presence both in the Search Committee as well as the Selection Committee.

37. We hasten to add that following the mandate of the Hon'ble Supreme Court provided in Paragraph 49.2 of the judgment



in **Brijeshwar Singh Chahal** (supra) the Secretary, Department of Law, Govt. of Bihar should also be a Member of the Search Committee because his legal knowledge and acumen may be helpful in the matter of evolving the methods to be adopted to judge merit and suitability of a candidate.

38. In the matter of preparation of a panel of advocates based on the assessments of the requirements even though sub-rule (2) of Rule 4 talks of such appointments on the basis of merit and suitability apart from other factors, the Rules, 2017 has not provided any method to judge the merit and suitability of a candidate. All that is provided under the Rules, 2017 is the required standing at the Bar for being the Law Officers.

39. Following the judgment of the Hon'ble Apex Court in the case of **Brijeshwar Singh Chahal** (supra), we are in agreement with the opinion of the Hon'ble Madras High Court that "there should be the prescribed guidelines laying down the criteria and norms for selection or giving weightage to Court appearances, advocacy, drafting skills, legal acumen, reported and unreported judgments, behaviour, integrity, reputation and the like." We also agree with the view of the Hon'ble Madras High Court that no appointment should be made either for pursuing a political purpose or for giving some



undue advantage to any section.

40. We, therefore, direct the Search Committee to formulate its own procedures in terms of sub-rule (3) of Rule 4, the modes and method of inviting notices from the willing candidates and they should formulate definite guidelines as has been held by the Hon'ble Madras High court and we reiterate the same for the manner and/or criteria of selection of advocates, the methods of giving weightage to Court appearances, advocacy, drafting skills, legal acumen, reported and unreported judgments, behaviour, integrity, reputation etc., for all future appointments. The Search Committee should invite applications from eligible advocates by putting up notices in the recognized Bar Associations of the High Court and the Civil Courts in the State of Bihar. Such notices may also be published in the newspapers having wide circulation in the area.

41. While going through Rule 6 which prescribes eligibility in terms of the standing at the Bar, we find that for the engagement as an Additional Advocate General in the High Court, Advocates, who are not less than in practice for 20 years and/or a designated Senior Advocate, are only eligible. In order to consider this issue we refresh ourselves with Article 165 of the Constitution of India which reads as under:-



“165. Advocate-General for the State- (1) The Governor of each State shall appoint a person who is qualified to be appointed a Judge of a high court to be Advocate-General for the State.

(2) It shall be the duty of the Advocate-General to give advice to the Government of the State upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) The Advocate-General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine.

42. In terms of Article 217 (2) (b) of the Constitution of India an Advocate of a High Court, who has at least 10 years of practice, is eligible to be considered for appointment as a Judge of a High Court, therefore, in terms of Article 165 of the Constitution of India, an Advocate having 10 years of practice at the Bar will be qualified to be appointed as the Advocate General for the State but, according to the eligibility conditions prescribed under Rule 6, an Advocate, below 15 years of practice, cannot be considered for engagement as a Government Advocate and below 20 years of practice cannot be considered to be engaged as Additional Advocate General. This, according to us, is discriminatory and cannot sustain the test of reasonableness as the criteria laying down 20 years of



practice for Additional Advocate General and 15 years of practice for appointment as a Government Advocate is not based on any intelligible differentia. It amounts to debarring an advocate who is eligible otherwise for appointment as an Advocate General and a Judge of the High Court from participating in the selection process initiated for engagement as an Additional Advocate General, a Standing Counsel and a Government Advocate. We are, thus, unable to appreciate the number of years of standing prescribed under Rule 6 for appointment as an Additional Advocate General in the High Court, Senior Standing Counsel for the Supreme Court of India and for appointment as a Government Advocate for the Patna High Court and apparently those conditions are *ultra vires* to Article 14 and Article 165 of the Constitution of India.

43. As regards the challenge to clause (i) of Rule 9 which prescribes that an Advocate on Record, who has been in practice for not less than three years, shall be eligible for engagement in the Patna High Court and the Supreme Court of India or any other Courts of Law, we do not find any reason to accept the challenge as we understand that by prescribing that an Advocate on Record having not less than three years of practice in the High Court will be eligible for appointment as an Assisting Counsel, the attempt is only to raise the benchmark which will improve the quality of drafting of legal



documents and assistance in the Court proceedings. We are, however, unable to accept the proviso to sub-rule (i) of Rule 9 which prescribes that the Advocate General may in his discretion in exceptional case recommend to the Government to relax the conditions for engagement as an Assisting Counsel. Here we take note of the views expressed by the Hon'ble Apex Court in the case of **Brijeshwar Singh Chahal** (supra) where it has been cautioned that while adopting fair, objective and non-discriminatory approach towards choosing the best at the Bar it is the duty of the Government to ensure that the process by which the best are selected is transparent and credible and abdicating that important function in favour of the Advocate General of the State who, in turn, has neither the assistance of norms or procedure to follow nor a mechanism for assessment of merit will be self-defeating. Following these words of caution provided by the Hon'ble Supreme Court in Paragraph 17 of the judgment in the case of **Brijeshwar Singh Chahal** (supra), we are of the considered opinion that the powers to relax the criteria for appointment of Assisting Counsel to the Law Officers should be vested with the Search Committee itself. The Search Committee should clearly and in definite words lay down the criteria for judging the merit and suitability of Assisting Counsel to the Law Officers and the conditions which may be relaxed in a given circumstance. The Advocate General, being the Chairman of



the Search Committee, may always be in a position to place the name of the Advocate who seeks relaxation in the eligibility conditions for appointment as an Assisting Counsel to the Law Officers and thereupon the Search Committee may, for reason to be recorded, put the name of such candidate in the panel of Assisting Counsel which will be sent to the Selection Committee. Any dilution with the mode of engagement of Assisting Counsel without there being a definite criterion prescribed by the Search Committee, in our considered opinion, would be contrary to the views expressed by the Hon'ble Apex Court and, hence, cannot be sustained on the anvil of Article 14 of the Constitution of India. We, therefore, hold that the proviso to clause (i) of Rule 9 is *ultra vires* Article 14 of the Constitution of India.

44. Similarly, we are of the considered view that sub-rule (ii) of Rule 9 cannot be sustained by any stretch of imagination. Sub-rule (ii) provides that the Assisting Counsel engaged under sub-rule (i) shall not appear or argue on behalf of the Government independently in any proceeding after completion of pleadings or during course of final arguments therein before any of the Courts mentioned under the said sub-rule (i). A literal meaning of this provision is that after the pleadings are exchanged in a case pending before the various Courts in terms of sub-rule (i), the Assisting



Counsel will be of no use inasmuch as he will neither appear alone after completion of pleadings nor will he argue in course of final arguments. This will be a peculiar circumstance where the Assisting Counsel, in whose favour a Vakalatnama in case of engagement of a Government Law Officer who is a designated Senior Advocate has been executed or permission granted will not be in a position to appear in a case independently even though the circumstances in a particular case may warrant his presence and assistance to the court in disposal of cases. The Hon'ble Apex Court has taken note of the fact that in 80% of litigations pending in the Court the government or its instrumentalities are its parties. Everyday we find that in the Court proceedings a particular Law Officer is engaged in one case or another and it is the Assisting Counsel who comes prepared with the brief to the Court to extend assistance to the Court in disposal of the cases. We fail to understand as to how an Advocate on Record, who has been designated as an Advocate on Record after passing the examination conducted by the High court and then he has at least three years of experience in his hand after having been selected through the process under the Rules, 2017 may be debarred from independently appearing or arguing in any proceeding after completion of pleadings or during the course of final arguments if the circumstances so warrants. Permitting sub-rule (ii) to Rule 9 to exist



in the Rules, 2017 would amount to conferring a kind of permission to the Law Officers to withhold the court proceedings and delay the disposal of the case on the ground that an Assisting Counsel would not independently assist the Court in any circumstance.

45. We also find that under the Advocates Act, 1961 an Advocate whose name has been entered in the State roll shall be entitled and shall have all right to practice throughout the territories to which this Act extends in all Courts including the Supreme Court, before any tribunal or person legally authorized to take evidence, and before any other authority or person before whom such Advocate is by or under any law for the time being in force entitled to practice. Section 30 of the Advocates Act confers this status on right on the Advocates, therefore, once an Assisting Counsel has been appointed in terms sub-rule (i) of Rule 9 of the Rules, 2017, he cannot be debarred from independently putting appearance and argue the matter in which he is assisting the Law Officer concerned. In the interest of the State as well as in the interest of justice he is supposed to appear, argue and assist the Court in reaching to a just and proper conclusion. This provision is discriminatory also because it pre-supposes that an Assisting Counsel would not be efficient or meritorious enough to argue independently, hence this sub-rule (ii) is held to be *ultra vires* to Article 14 of the Constitution of India read with Section 30 of the



Advocates' Act, 1961.

46. Rule 13 of the Rules, 2017 confers a discretion on the Advocate General to engage for the Patna High court and the Supreme Court of India on such terms and fee as may be fixed, in consultation with the Administrative Department and the Law Department, an Advocate for the Government as a special Public Prosecutor who is not a Law Officer under these Rules, in case(s) involving important issues(s) for the Government, specially revenue or in public interest.

47. While considering Rule 13 of the Rules, 2017 in present form we find that under sub-section (8) of Section 24 of the Cr.P.C. the power to appoint a Special Public Prosecutor is vested with the Central Government or the State Government for purpose of any case or class of cases. Further sub-section (9) of Section 24 Cr.P.C. provides that for purpose of sub-section (7) and (8), the period during which a person has been in practice as a pleader or has rendered service as a Public Prosecutor, Additional Public Prosecutor, Assistant Public Prosecutor or other Prosecuting Officer shall be deemed to be the period during which such person has been in practice as an advocate.

48. Rule 13 of the Rules, 2017, in our considered opinion, has to be amended and brought in tune with sub-section (8)



& (9) of Section 24 of Cr.P.C. In present form Rule 13 does not talk of engagement of Special Public Prosecutor in a case or class of cases rather it talks of appointment of a Special Public Prosecutor in the High Court and the Hon'ble Supreme Court of India without specifically saying that the nature of engagement of a Special Public Prosecutor is an engagement on case to case basis or for a class of cases.

49. We understand that while incorporating sub-section (8) of Section 24 of the Cr.P.C. the legislature had in their mind that sometimes there may be a need of appointment or special engagement of lawyer in a particular case or class of cases, therefore, powers have been vested with the Central Government and the State Government accordingly. A careful reading of Section 24 Cr.P.C. would show that while appointment of a Public Prosecutor has been envisaged for a district and in every High Court the appointment of a Special Public Prosecutor is to be done alone on case to case basis and in a class of cases.

50. We can take note of the circumstances that sometimes there may be need of appointment or special engagement of lawyer in a particular case and, therefore, such engagement cannot wait for the decision of the Search Committee and the Selection



Committee and, in such cases, where a special kind of engagement is required in a particular case, the Advocate General being the Chief / Principal Law Officer of the State can certainly decide to engage a particular Lawyer for that case in consultation with the Administrative Department and the Law Department, to that extent, there cannot be any unreasonableness to the manner in which Rule 13 has been couched.

51. This Court has been informed that the Rules, 2017 is now going to be notified by the Government in exercise of it's power under Article 162 of the Constitution of India, it is expected that to avoid further round of litigations, prior to notifying the Rules, 2017, the Government / the concerned respondents shall take into consideration the aforementioned declarations, directions and observations of this Court.

52. Before we part with this judgment it is worth taking note of the submissions of Ms. Anju Mishra, learned advocate, that under the Rules, 2017 no provision has been made giving adequate representation to the women lawyers and the differently-abled candidates. Keeping legal issues opened at this stage, we would only draw the attention of the State respondents to consider the submissions advanced by the learned Advocate in accordance with



law while taking steps for notifying the Rules, 2017.

53. All these writ applications are disposed of with the
aforementioned observations and directions.

(Rajendra Menon, CJ)

(Rajeev Ranjan Prasad, J)

Arvind/R.R.Ojha

AFR/NAFR	AFR
CAV DATE	N/A
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