

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.06.2019

CORAM

THE HONOURABLE MR.JUSTICE N. ANAND VENKATESH

Cr1.O.P.No.14435 of 2019

A.Ponni

... Petitioner

.Vs.

1. The State rep.by
The Deputy Superintendent of Police,
Thiruvannamalai - 606 601.
2. M.Moorthy
3. The District Collector,
Thiruvannamalai,
Thiruvannamalai District. ... Respondents

PRAYER : Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to direct the District Collector, Thiruvannamalai District to appoint Mr.D.Kumar, Advocate as desired by the petitioner for conducting the prosecution case in S.C.No.136 of 2015, on the file of the District and Sessions Judge, Thiruvannamalai.

For Petitioner : Mr.S.Arokiamaniraj

For Respondent : Mr.C.Raghavan
Government Advocate

सत्यमेव जयते
O R D E R

This petition has been filed seeking for a direction to the 3rd respondent to appoint one Mr.D.Kumar, Advocate as a Special Public Prosecutor to conduct the case which is pending before the Special Court for an offence under Scheduled Castes and Scheduled Tribes [Prevention of Atrocities) Act, 1989 [hereinafter referred as "SC/ST (PA) Act".

2. It is seen from records that the petitioner is the victim and the de facto complainant in this case. Based on her complaint, the respondent Police registered an FIR in Cr.No.04/2010 for various offences including offence under the SC/ST (PA) Act. After the completion of the investigation, a

Final Report was also filed and same was taken on file in SC.No.136 of 2015.

3. When the matter was pending, the petitioner being the victim made a representation to the 3rd respondent to appoint one Mr.D.Kumar, Advocate as a Special Public Prosecutor to conduct the case. The said advocate had also given his consent to act as the Special Public Prosecutor by his letter dated 22.01.2019. In spite of the receipt of the representation since no action was taken, the present petition has been filed seeking for appropriate directions.

4. The learned counsel for the petitioner submitted that u/s 15 of the Act, besides the Public Prosecutor appointed under Section 24(7) of Cr.P.C., a Special Public Prosecutor can also be appointed to conduct the prosecution before the Special Court under the SC/ST (PA) Act. The learned counsel further submitted that pursuant to the rule making power provided under Section 23(1) of the Act, the Central Government has framed rules under Schedule Casts and Schedule Tribes [Prevention of Atrocities] rules 1995. Rule 4 (5) specifically gives a right to the victim to get a Special Public Prosecutor appointed for conducting the case of the prosecution.

5. It will be relevant to rely upon the judgment of this Court in Somalaiappan .Vs. Palanisamy and Others made in CrI.O.P.No.22043 of 2013 dated 26.09.2013. The relevant portions of the judgment is extracted hereunder:

22. Rule 4(5) was considered by a Division Bench of the Rajasthan High Court in SMT.SATKI DEVI & ANR ETC., Vs. TIKAM SINGH AND ORS. (2006 CRI.L.J 4721).

23. The Division Bench set aside the order of a learned Single Judge setting aside the appointment of an Advocate at the instance of a victim of atrocity under Rule 4(5). The Division Bench critically examined Rule 4(5) and observed as under:-

"16. Dwelling upon the scope of Rule 4 (5) of the Rules the learned Single Judge held that the rules does not relate to Section 15. It operates to achieve the objectives of various clauses of Section 21(2) of the Act in the matter of effective implementation of the Act. Under Rule 4(5), an eminent Senior Advocate can be 'engaged' by the District Magistrate or Sub Divisional Magistrate, such 'engaged' lawyer can only aid or assist the Special Public Prosecutor

"but in any case, he cannot prosecute". If sub-rule (5) is read as proviso to Section 15 of the Act, it would disturb the structure of the Act. If the rule goes beyond what the Act contemplates, it must yield to the Act. Vires of sub-rule (5) need not be challenged as it is relatable to Section 21 of the Act. A non-obstante clause can operate only to the extent it is intended to be, and from a bare reference to sub-rule(5) it is clear that rule intends to facilitate engagement of a counsel if consider necessary by the District Magistrate or Sub Divisional Magistrate or decide by the complainant alongside the Special Public Prosecutor. Such engagement is not intended to be (over and above) the power of the State Government to specify or appoint Special Public Prosecutor under Section 15 of the Act. If the non-obstante clause in sub-rule (5) is read as an independent provision over and above the enactment, the rule to that extent would be invalid and in operative. The prosecution being essentially by the State and Prosecutor being appointed by the State, an Executive Magistrate cannot have an independent power to appoint a prosecutor. sub-rule (5) does not refer to minimum length of practice as an Advocate unlike Section 15 of the Act or Section 24 of the Code for appointment as a Special Public Prosecutor. The omission regarding minimum length of service and the use of the term "engagement" in place of appointment cannot be ignored as insignificant. If the Advocate appointed under sub-rule(5) on the application of the victim is treated as prosecutor, it would lead to an anomalous position as it would permit the victim to become prosecutor. Advocate so appointed can conduct the case "to the extent his engagement would permit; but he cannot prosecute."

18. We are afraid, the learned single Judge over looked the fact that the Act is a special statute enacted among other things to provide for special Courts for trial of offences of atrocities against members of the Scheduled Caste and Scheduled Tribes. It is true that in terms of Section 4(2) of the Code, all offences under any law other than the Indian Penal Code including special law are to be investigated, inquired into, tried and other wise dealt with

according to the same provisions i.e, provisions contained in the Code, but that is subject to any special enactment for the time being in force regulating the manner of investigation, enquiry or trial. The provisions regarding appointment of Public Prosecutor are contained in Section 24 of the Code and those relating to trial by public prosecutor in the Court of Session and contained in Sections 225 and 301 of the Code. The provisions relating to appointment of special public prosecutor under Section 15 or engagement of an eminent senior advocate under Rule 4(5) are to be read as supplemental to the provisions of the Code. It is pertinent to mention here that appointment of public prosecutor or special public prosecutor - whether under Section 24 of the Code or Section 15 of the Act - is for "conducting" cases in the Court of Session or Special Court, as the case may be. Likewise, the engagement of eminent senior advocate under Rule 4(5) of the Rules is also for "conducting" cases in the special Court. We find no justification for taking the view that an advocate engaged under Rule 4(5) can only aid or assist special public prosecutor and submit written argument at the end of trial with permission of the Court, but he cannot prosecute.

19. On a conjoined reading of Section 15 of the Act and sub Rules (1) and (5) of Rule 4 of the Rules, it would appear that under Section 15, the State Government may specify the public prosecutor or make a fresh appointment of an advocate who has been practising as an advocate for not less than seven years as special public prosecutor. Under sub-rule 1 of rule 4 the State Government is required to prepare, on the recommendation of the District Magistrate, a panel of eminent senior advocates who have put in practice for not less than 7 years. Another panel of public prosecutors specified in consultation with the Director of Prosecution/in-charge of prosecution is also required to be prepared. These panels shall remain in force for a period of three years.

20. Before proceeding further, we may further analyse Rule 4(1). On a close reading, it would appear that while the first part contemplates empanelment of 'advocates' having

not less than 7 years practice, the second part refers to panel of 'public prosecutors'. Section 15, it is to be kept in mind, also refers to 'specifying' a public prosecutor and 'appointing' an advocate. The only difference is that while Rule 4(1) provides for 'empanelment'. Section 15 provides for specifying the particular public prosecutor or appointing a particular advocate [apparently from the panel prepared under Rule 4(1)] for the particular Special Court.

21. sub-rule (5) contains a non-obstante clause overriding the provisions of sub-rule(1). Thereunder, the District Magistrate or Sub Divisional Magistrate may on application of the victim of atrocity or on his own motion, if deemed necessary, engage an eminent senior advocate to conduct the case. While the panels contemplated in sub rule(1) of the Rule 4 and standing panels and the Advocates/Public Prosecutors borne on these panels have a tenure of three years subject to review of their performance and ability-as provided in sub rules (2), (3) and (4) of Rule 4, and they may appear in the case assigned to them. The engagement under sub rule (5) of Rule 4 is special appointment for the particular case. This is evident from the fact that such appointment is on payment of special fee as considered appropriate, which may be different from the fee payable to an advocate/public prosecutor appointed or specified under Section 15 of the Act.

22. Much emphasis was laid on the use of a different terminology viz., "engage" in Rule 4(5) as distinct from "appoint" or "specify" in Section 15. It was submitted that the trial can be conducted only by a special public prosecutor as provided in Section 15 of the Act. Sub rule(5) does not refer to conducting trial by a special public prosecutor. Conducting case by an 'eminent senior advocate' as provided in sub rule(5) therefore, would not tantamount to conducting case by a special public prosecutor.

23. It is true that sub rule (5) employs a different term viz., "engage" different from "appoint" or "specify" used in Section 15. But we do not think, the phraseology

has any bearing on the extent of one's brief. Whether he is appointed, specified or engaged - he would nonetheless be "conducting" the case in special Court. We are conscious of the fact that in the scheme of things provided in the Code, the trial in the Court of Session is conducted only by a Public Prosecutor or Special Public Prosecutor. Section 15 of the Act also provides for conducting cases in Special Court by a Special Public Prosecutor. No mention, on the other hand is made of Special Public Prosecutor in sub rule(5). The reason however, is not far to seek. Section 15 contemplates 'specifying' a Public Prosecutor whether appointed under Section 24 of the Code or empanelled under sub-rule (1) of Rule 4 - or "appointing" an advocate as Special Public Prosecutor for the purpose of conducting cases in the Special Court. These appointments apparently are made from panels of prosecutors and Advocates. It may so happen that the victim of atrocity in a particular case may not have faith in the prosecutors/advocate specified or appointed under Section 15. He may like to have the case conducted by an Advocate of his choice. It is in order to inspire confidence of the victim of atrocity in the administration of justice that a special provision has been made for engagement of an eminent senior advocate to conduct the case. That is why a different term 'engaged' has been used in Rule 4(5) in contradistinction to 'appoint' or 'specify' in Section 15. 'Engaged' means that he has been engaged for a particular case, unlike appointment/specifying of an advocate/prosecutor from the panel. It is to be kept in mind that sub rule (5) contains a non-obstante clause overriding the provisions of rule rule(1) which means that the appointment under Rule 4(5) can be made of a person who is not in the panel. The panels, as seen above, comprise of advocates/Public Prosecutors of the choice of the Government. It is also to be kept in mind that the Act is a special statute enacted to provide relief to the victims of atrocity in the matter of trial of offences covered by the Act and Rule 4(5) confers a right upon victim of atrocity to have his case conducted by an advocate of his choice - so as to ensure that he has faith in the trial.

28. The State no doubt is the prosecutor and the prosecution in all cases and trial in all cases is to be conducted in the Court of Session by Public Prosecutor or Special Public Prosecutor, as the case may be, appointed by the Government, but the SC & ST Act is a special statute which overrides any other law for the time being in force.

29. We do not find any conflict between sub rule (5) and Rule 4 and Section 15 of the Act. As indicated above whether the Public Prosecutor is specified or an advocate is appointed under Section 15 of the Act or an eminent senior advocate is engaged under Rule 4(5), these appointments or engagements are for the purpose of conducting cases in Special Courts. The observation of the learned Single Judge that sub rule (5) of Rule 4 is limited to implementing the Act framed in the context of Section 21(2) (iv) does not appear to be correct. We are conscious of the fact that sub rule (5) is part of the Rule captioned as single 'supervision of prosecution and submission of report' - referred to in clause (iv) of sub section (2) of Section 21. However on a combined reading of a rule, it is manifest that while sub rules(1) to (4) contain provisions regarding supervision of prosecutions through panel prepared under sub-rule(1) and review of the performance of the prosecutors borne on the panel, sub rule (5) is an independent provision with a non-obstante clause. Rules are always framed for effective implementation of the Act, but if sub rule(5) is given a restricted meaning and it is held that the authority of the advocate engaged by the District Magistrate to conduct case is limited to assisting the Public Prosecutor as a second fiddle, it would frustrate the object of sub rule (5) as it would deny the victim of atrocity the facility to have his case conducted by an advocate of his choice.

30. It is true that sub rule (5) does not laid down any qualification as to the minimum length of practice unlike Section 15 or sub rule (1) of Rule 4 but, apparently, framers of the Rule did not want to put any restriction and the choice of the victims of atrocity subject to the embargo that the person should be an 'eminent senior advocate' - a term used in

sub rule (1) of Rule 4 as well. Thus the advocate should be of choice of the victim of atrocity and also in the opinion of the District Magistrate/sub Divisional Magistrate, an eminent senior advocate."

24. Similarly, in DHAMAYANTHI .VS. MURUGANANTHAM AND OTHERS, [2011 (2) MLJ (Cr1) 22], a Single Judge of this Court referring to the said Rule 4(5) held as under:-

"As per the rule, the District Magistrate is the competent authority to engage an advocate for conducting the cases in Special Courts on payment of fee. Therefore it is just and appropriate to direct the District Magistrate viz., the Collector, Namakkal District to appoint an Advocate as desired by the victim for conducting the case pending before the Principal and District and Sessions Judge, Namakkal."

25. The language employed in Rule 4(5) is plain, simple and admit of any difficulty or ambiguity in understanding it. Unlike the General Penal Law of India or any other enactment providing prosecution, the SC/ST (PA) Act is a special Act intended to put an end to untouchability, degradation of human being merely on account of their birth. That is how, as per Section 18 of the Act, even grant of pre-arrest bail has been ruled out for those who commits the offences prescribed under the Act. Added to that Section 20 introduced a non-obstante clause and Section 21 imposed a duty on the Central Government to frame rules for effective implementation of the Act.

26. In such circumstances, the golden rule of literal interpretation has to be adopted. There shall not be any addition or subtraction to the language of the law employed in such plain rule.

27. In view of the foregoing, whether the prosecution is being conducted by a Senior Public Prosecutor or whether there was any allegation as against the Prosecutor, when the victim of the atrocity wishes that an eminent Senior Advocate shall be engaged to conduct the prosecution case then the District Magistrate has to engage such an Advocate to conduct the prosecution in the Special Court. The District

Collector cannot avoid such a request of the victim of the atrocity.

28. In the circumstances, in pursuance of the written representations of the petitioner dated 25.3.2103 and 2.8.2013, the District Magistrate/the District Collector, Tiruppur District, Tiruppur is directed to engage Mr. B. Mohan, Senior Advocate to conduct the prosecution in the special case in S.C No. 1 of 2013 pending before the Special Judge (Principal Sessions Judge) under SC/ST (PA) Act, Tiruppur within 10 days from the date of receipt of a copy of this order. Accordingly, the criminal original petition is disposed of. Consequently, connected M.P is closed.

6. In view of the above, it is beyond doubt that the victim of the atrocity who wishes to have an eminent advocate to be appointed as a Special Public Prosecutor can make a representation to the District Collector and the District Collector has to act upon the representation and appoint the Special Public Prosecutor. The law is now well settled in this regard.

7. In the circumstances, the 3rd respondent is directed to engage Mr.D.Kumar, Advocate to conduct the prosecution in the Special Case in S.C.No.136 of 2015, pending before the Principal District and Sessions Judge, Thiruvannamalai, within a period of two weeks from the date of receipt of a copy of the order.

In the result, this Criminal Original Petition is allowed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

KP

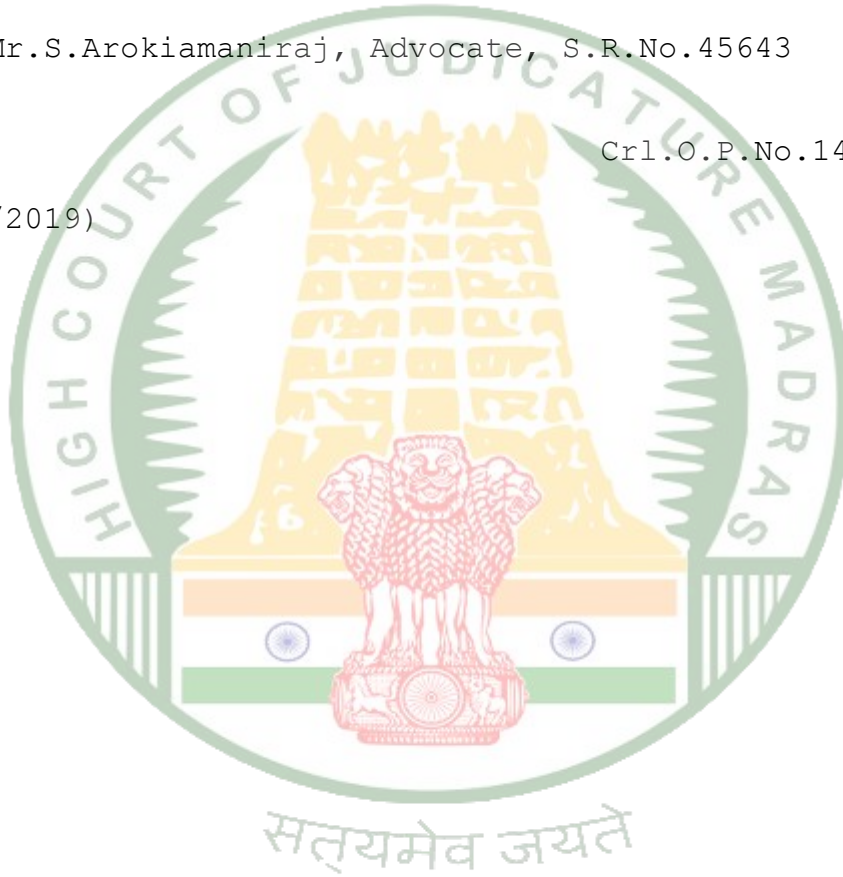
To

1. The Deputy Superintendent of Police,
Thiruvannamalai - 606 601.
2. The District Collector,
Thiruvannamalai,
Thiruvannamalai District.
3. The Public Prosecutor,
High Court, Madras.

+1 cc to Mr.S.Arokiamaniraj, Advocate, S.R.No.45643

Crl.O.P.No.14435 of 2019

RSI (CO)
SSM(28/06/2019)



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