

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.03.2019

CORAM

THE HONOURABLE MR. JUSTICE K.RAVICHANDRABAABU

W.P. No. 33561 of 2018
and
W.M.P. Nos. 38947 & 38948 of 2018

Bhoopathy

... Petitioner

Vs.

1.The Government of Tamil Nadu
Rep by the Additional Chief Secretary to the Government
Home (Courts-VIA) Department
Fort St. George, Chennai.

2.The District Collector
Office of the Collectorate
Salem District.

3.P.Dhanasekaran

... Respondents

Prayer :: Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records relating to the impugned order passed by the first respondent in G.O. (D) No. 1138 dated 28.09.2018 and quash the same and consequently, directing the first respondent to appoint a Special Public Prosecutor in accordance with Section 32(1) of POCSO Act.

For Petitioner : Mr.KA.Mariappan
For M/s.S.Conscious Illango

For Respondents : Mr.V.Jayaprakash Narayanan
Government Pleader
and Mr.R.Govindasamy
Special Government Pleader [For R1 & R2]
Mr.K.V.Dhanapalan [For R3]

O R D E R

This writ petition is filed challenging the order of the first respondent made in G.O. (D) No. 1138, Home (Courts-VIA) Department, dated 28.09.2018, wherein and whereby, the first respondent ratified the act of the second respondent-District

Collector, Salem in appointing the third respondent as Special Public Prosecutor to conduct trial in S.C. No. 1 of 2014 filed under the Protection of Children from Sexual Offences Act, 2012 before the Mahila Court, Salem. Consequently, the petitioner seeks for a direction to the first respondent to appoint a Special Public Prosecutor in accordance with Section 32(1) of POCSO Act.

2.The petitioner and four others were charge sheeted for the offences punishable under Sections 120 (B), 450, 450 read with 34, 363, 366, 376(D), 302 read with 34, 404, 404 read with 34, 201 read with 302 of IPC and 6 read with 5 (g) & (m) of the Protection of Children from Sexual Offences Act, 2012. The case was taken on file in S.C. No. 1 of 2014 by the Sessions Judge, Mahila Court, Salem.

3.The third respondent was appointed as Special Public Prosecutor to prosecute the above said case. The said appointment is challenged by the petitioner herein, on the ground that such appointment is not in accordance with Section 32 of POCSO Act, 2012, since only the State Government is empowered to appoint a Special Public Prosecutor and not the second respondent-District Collector, whose order had only been subsequently ratified by the First Respondent-State Government. It is also contended that a person to be appointed as a Special Public Prosecutor should have a practice for not less than 7 years as an advocate as contemplated under sub-clause 2 of Section 32 of POCSO Act, 2012.

4.A counter affidavit is filed by the second respondent, wherein, it is stated that it is learnt from the Deputy Superintendent of Police, Valapady and also from the Superintendent of Police, Salem that the trial in the Special Sessions Case No. 1 of 2014 has been delayed for more than 2 years thereby necessitating the second respondent to speed up the trial by suitably appointing a Special Public Prosecutor specifically for the present case to ensure speedy delivery of justice to the child victim's family. It is further contended that under Criminal Procedure Code, the second respondent is empowered to appoint a Special Public Prosecutor for a specific case. It is also stated that the consent of the Public Prosecutor was sought, who had also given his consent to act as per his letter dated 30.05.2018, where due to exigency of the

emergent situation the third respondent was appointed as the Special Public Prosecutor. The third respondent fulfilled all the criteria of being appointed as the Special Public Prosecutor both under the Code of Criminal Procedure, 1973 and also under the Protection of Children from Sexual Offences Act, 2012. It is further contended that the first respondent Government confirmed the said appointment of the third respondent through the impugned G.O.

5.The learned counsel for the petitioner, after heavily relying on Section 32 of the POCSO Act contended that the appointment of the third respondent by the second respondent cannot be sustained as legal, since only the State Government is empowered to make such appointment as provided under Section 32 (1) and not the District Collector. He further contended that the subsequent ratification by Government will not make such appointment legal. The learned counsel in support of his contention relied on 2003 (7) CTCOL 793 (Mad) and an order passed by Karnataka High Court in a case reported in 2005 ILR (Karnataka) 4780.

6.On the other hand, the learned Government Pleader appearing for the respondents 1 and 2 and the learned counsel for the third respondent contended that appointment of Special Public Prosecutor has been made for speeding up the trial and that the petitioner is no way prejudiced by such appointment and consequently, he has no say in the manner in which such appointment was made. It is also stated that the third respondent is already functioning as Public Prosecutor, who in turn was appointed as Special Public Prosecutor. Hence they contended that the third respondent is fully qualified for such appointment.

7.Heard both sides.

8.The petitioner is an accused facing the trial in S.C. No. 1 of 2014 before the Mahila Court, Salem for the offences alleged to have been committed under Sections 120 (B), 450, 450 read with 34, 363, 366, 376(D), 302 read with 34, 404, 404 read with 34, 201 read with 302 of IPC and 6 read with 5 (g) & (m) of the Protection of Children from Sexual Offences Act, 2012. For conducting the trial the third respondent was appointed as Special Public Prosecutor. It is seen that such appointment was made by the second respondent, after taking note of the fact that the trial is being delayed. It is further seen that the

said appointment has been ratified by the first respondent through the impugned G.O. The petitioner questioned the very appointment by contending that it is only the first respondent-State Government, which ought to have made the appointment and not the second respondent namely, District Collector.

9. First of all, I am not in a position to either accept the locustandi of the petitioner to question such appointment nor his contention against the manner in which such appointment was made, particularly, when it is apparent that the impugned G.O. has not prejudiced the interest of petitioner accused in any manner nor it affects his right for fair trial.

10. No doubt, Section 32(1) of the Protection of Children from Sexual Offences Act, 2012 states that it is the State Government, which has to make such appointment of the Special Public Prosecutor. Here, in this case, the first respondent-State Government has in fact ratified the appointment made by the second respondent through the impugned G.O. The second respondent in his counter affidavit has explained the circumstances under which such appointment was made i.e. the delay in conducting the trial. In other words, to speed up the trial, the second respondent had taken initiative and made such appointment and got it also ratified by the first respondent. Assuming such appointment was made by making certain procedural aberration, still this court is not convinced to interfere with such appointment at the instance of the petitioner, who is an accused in the said case, as he is not going to be prejudiced or affected in any manner by such appointment.

11. Can it be construed that appointing a Special Public Prosecutor in a given case, is denial of fair justice to the accused? Certainly the accused can not have a say in the matter of choosing and appointing the Prosecutor of the State, howsoever irregular such process of selection may be. At the best such appointment can be termed as irregular and certainly not illegal. It is well settled that the writ court's jurisdiction under Article 226 of Constitution of India is discretionary in nature and thus, even assuming that a case is made out for such exercise, it is for the writ court to consider and decide as to where and when to exercise such discretion, depending upon the facts and circumstances of each case.

12. Thus, I find that this is not a fit case to exercise the discretionary jurisdiction of this Court under Article 226 of the Constitution of India to set aside the appointment of the third respondent as Special Public Prosecutor. Even otherwise, the very prayer sought for in this writ petition would show that the petitioner is not wholly against the appointment of any Special Public Prosecutor and on the other hand, in his

consequential prayer he seeks for such appointment only in accordance with Section 32(1) of POCSO Act. When the very same State Government has already applied its mind and exercised its discretion to ratify that the appointment so made, I do not think that the petitioner can have any say or grievance against such appointment, as he himself sought for such appointment as a consequential prayer.

13.The learned counsel for the petitioner relied on 2003(7) CTCOL 793 (Mad), which is a matter arising under the offences committed under IPC. A careful perusal of the said decision would show that the question of locustandi of the accused to question the appointment of a Special Public Prosecutor was not at all raised or considered. Therefore, I find that the said decision, based upon the facts and circumstances of the present case, is not applicable. The other decision relied on by the petitioner's counsel reported in 2005 ILR (Karnataka) 4780, in fact supports the case of the respondents rather than supporting the case of the petitioner. In that case, the Special Public Prosecutor was appointed at the instance of M.L.A. who had nothing to do with the crime in question. Only under such circumstances the learned Judge pointed out that the appointment not made in accordance with law and made for extraneous considerations with malafide intentions, offends the concept of fair trial, a fundamental right guaranteed to the accused. Under such circumstances, the Karnataka High Court found that the accused therein is entitled to question, however also by observing that the accused has no say in the matter of appointment of the Special Public Prosecutor under the scheme of the Code. In fact, the Karnataka High Court has also pointed out that the Court is concerned only with the decision making process and not the decision itself.

14.Therefore, considering all these aspects I am not inclined to interfere with impugned order. Accordingly, this writ petition fails and the same is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

maya/sni

To

1.The Additional Chief Secretary to the Government
Home (Courts-VIA) Department
Fort St. George, Chennai.

2.The District Collector
Office of the Collectorate
Salem District.

3.The Judge,
Mahila Court, Salem.

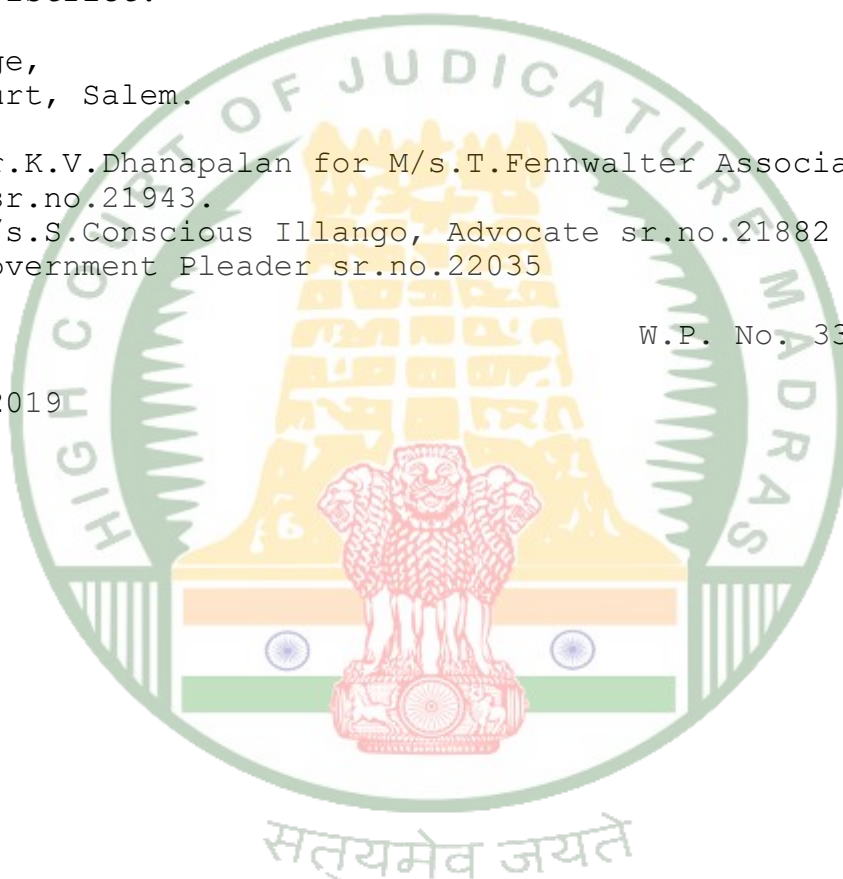
+lcc to Mr.K.V.Dhanapalan for M/s.T.Fennwalter Associates,
Advocate sr.no.21943.

+lcc to M/s.S.Conscious Illango, Advocate sr.no.21882

+lcc to Government Pleader sr.no.22035

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