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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 729/2018**

SUNIL GROVER

..... Petitioner

Through: Mr Asheesh Lal and Ms Rachna
Lal, Advocates.

versus

GOVERNMENT OF NCT OF DELHI

AND ORS

..... Respondents

Through: Mr Anupam Srivastava, ASC for
GNCTD with Ms Shreya Mehta,
Advocates for R-1 and R-2.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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23.01.2019

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, impugning the appointment of respondent no.3 (Sh Pankaj Kumar), as the Special Public Prosecutor for Special Court under the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereafter 'SC/ST Act'), in Sessions case 27462/2016.

2. The petitioner states that he is the landlord of the premises bearing No. 165, Dr Mukherjee Nagar, Delhi-110009. He states that in the year 2008, he had leased a part of his property to a lady (hereafter 'Ms K') who entered the premises as a tenant and started residing in the property along with her brothers and sisters. The petitioner claims that there was a

landlord-tenant dispute with regard to use of water, as the same was in short supply and this had led Ms K to file a false complaint against him at P.S. Mukherjee Nagar, on 03.05.2008.

3. On the complaint filed by Ms K, an FIR (being FIR No. 156 dated 03.05.2008) has been registered against the petitioner, *inter alia*, under the SC/ST Act. Thereafter, charges were framed against the petitioner and his family members on 08.07.2008, and the case is pending trial before the concerned court.

4. Initially, the petitioner and his family members were discharged by the learned Sessions Court, however, on a Criminal Revision petition preferred by the complainant, the order of discharge was set aside. Thereafter, the complainant (Ms K) filed a transfer petition seeking transfer of the case from the concerned Court, to another Court. The said transfer petitions were rejected by this Court on 29.08.2013. Aggrieved by the same, the complainant had preferred an appeal being criminal appeal No.222/2015 before the Supreme Court of India. The same was allowed by an order dated 04.02.2015, and the trial of the said case was transferred from the Rohini Sessions Division to the Tis Hazari Sessions Division.

5. The grievance of the petitioner in the present petition is that the complainant's counsel (respondent no.3) has been appointed as a Special Public Prosecutor to prosecute the case on behalf of the State against the petitioner. He has pointed out that respondent no.3 has been regularly appearing on behalf of the complainant in several cases and therefore

prays that the appointment of respondent no.3 as a special prosecutor to prosecute the case against the petitioner, be set aside. The petitioner further submits that the appointment of respondent no.3 is not in accordance with the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (hereafter the SC/STRules).

6. Respondent nos.1 and 2 have filed a counter affidavit indicating that respondent no.3 was appointed as a Special Public Prosecutor in view of the opinion dated 01.07.2016, received from the Department of Law.

7. A plain reading of the said opinion indicates that the Law Department had opined that it was not necessary for the respondents to decide the criteria for appointment of an eminent senior lawyer, as the same was not relevant because the alleged victim had specifically requested for appointment of respondent no.3 as an Advocate. Thus, according to the respondents, once the victim has indicated his or her choice of an advocate to act a special prosecutor, the concerned District Magistrate/Sub Divisional Magistrate is not required to apply his mind as to whether it is necessary to appoint a special prosecutor or whether the concerned advocate qualifies the criteria of an “eminent Senior Advocate”.

8. Mr Shrivastava, learned counsel appearing for the respondents contends that the SC/ST Act is a special act, and, in terms of Rule 4(5) of the SC/ST Rules, an advocate could be appointed at the choice of the victim. He further submits that the expression “eminent Senior

Advocate” as used in Sub-rule (5) of Rule 4 of the SC/ST Rules, should not be construed as a designated Senior Advocate. but as lawyers who have an experience exceeding seven years at the bar. He referred to the decision of the Division Bench of the High Court of Rajasthan in ***Smt Satki Devi and Anr. Etc. V. Tikam Singh and Ors.: 2006 Crl. Law Journal 4721*** in support of his contentions.

9. Before proceeding further it would be relevant to refer to Section 15 of the SC/ST Act which reads as under:-

“15. Special Public Prosecutor and Exclusive Public Prosecutor.—(1) For every Special Court, the State Government shall, by notification in the Official Gazette, specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a Special Public Prosecutor for the purpose of conducting cases in that Court.

(2) For every Exclusive Special Court, the State Government shall, by notification in the Official Gazette, specify an Exclusive Special Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as an Exclusive Special Public Prosecutor for the purpose of conducting cases in that Court.]”

10. It is apparent from the above that the State Government is required to, by a notification in the Official Gazette. appoint public prosecutors and advocates who have been in practice for not less than seven years as special public prosecutors for the purposes of conducting cases in the said Court.

11. Rule 4 of the said Rules provides Supervision of Prosecution and

Submission of report. Sub-rules (1), (1A) and (5) are relevant and are set out below:-

“4. Supervision of Prosecution and Submission of Report.—(1) The State Government, on the recommendation of the District Magistrate, shall prepare for each District a panel of such number of eminent senior advocates who have been in practice for not less than seven years, as it may deem necessary for conducting cases in the Special Courts and Exclusive Special Courts.

(1A) The State Government in consultation with the Director of Prosecution or in charge of the prosecution, shall also specify a panel of such number of Public Prosecutors and Exclusive Special Public Prosecutors, as it may deem necessary for conducting cases in the Special Courts and Exclusive Special Courts, as the case may be.

(2)xxxxxxxxxxxx

(3)xxxxxxxxxxxx

(4)xxxxxxxxxxxx

(5) Notwithstanding anything contained in sub-rule (1) the District Magistrate or the Sub-Divisional Magistrate may, if deem necessary or if so desired by the victims of atrocity engage an eminent Senior Advocate for conducting cases in the Special Courts or Exclusive Special Courts on such payment of fee as he may consider appropriate.”

12. It is clear from the plain reading of Sub-Rule (1) that State Governments are required to prepare a panel of “eminent senior advocates”, who have been practicing for not less than seven years, for conducting cases in special cases in exclusive special courts.

13. Sub-Rule (1A) of Rule 4 provides for specifying a panel for such

number of Public Prosecutors and Exclusive Special Public Prosecutors as the State Government may deem necessary, for conducting cases in Special Courts and Exclusive Special Courts.

14. Sub-Rule (5) of Rule 4 contains a *non obstante* provision, which enables the District Magistrate or the Sub-Divisional Magistrate to engage an “eminent Senior Advocate” provided that the District Magistrate or Sub-Division Magistrate deems it necessary to do so, or, if it is so desired by the victim of atrocity.

15. The contention that the District Magistrate or Sub-Divisional Magistrate is required to engage an advocate, if so desired by the victim of atrocity, is clearly not supported by the plain language of Sub-Rule (5) as there is a provision that mandates that an advocate of choice of the victim should be engaged by the concerned District Magistrate or the Sub-Divisional Magistrate.

16. It is also important to note that the Sub-Rule (5) provides for engagement of an “eminent Senior Advocate”, and not any advocate.

17. Admittedly respondent no. 3 has been appointed to conduct the case against the petitioner on the basis of a legal opinion from the Law Department. The relevant extract of the same is set out below:

“Second query is as to what is the criterion to decide about eminent senior lawyer is not relevant in this case as the victim has specifically requested to appoint Sh Pankaj Kumar, Advocate who has been appearing as her advocate in the Supreme Court. It may kept in mind that the special Act was enacted to provide relief to the victims of atrocities

and it empowers the victim of atrocity in the matter of trial of offences covered by the Act to have his case conducted by an eminent lawyer of his choice so as to ensure fair trial of his case.”

18. This Court is unable to concur with the aforesaid opinion. First of all, Sub-rule (5) of Rule 4 does not stipulate that the victim of atrocity can insist on engagement of a lawyer of his/her own choice. Undoubtedly, the victim can request that an eminent Senior Advocate be appointed for conducting the case, however, the decision in this regard would rest with the concerned District Magistrate/Sub-Divisional Magistrate. Appointment of Special Counsels to conduct cases on behalf of the State has monetary implication. In this case, respondent no.3 has been appointed at a fee of ₹25,000/- per appearance, subject to the condition that the total fees payable for a month shall not exceed ₹1,40,000/-. It is difficult to accept that the victim can insist that an advocate of his choice be appointed at the cost of the State Exchequer, without any application of mind on the part of the concerned District / Sub Divisional Magistrate. The language of Sub-rule (5) does not provide that the eminent Senior Advocate to be one of the victim's choice.

19. It is also relevant to note that Sub-rule (5) of Rule 4 of the said Rules contemplates engagement of an “eminent Senior Advocate”. In terms of Section 16 of the Advocates Act, 1961, there are only two classes of advocates, namely, Senior Advocates and Other Advocates. Thus, in terms of Sub-rule (5) of Rule 4 of the SC/ST Rules, only a Senior Advocate can be appointed for conducting a case. In the present

case, respondent no.3 is not designated as a Senior Advocate. The contention that the term “Senior Advocate” must be read as a senior lawyer is unpersuasive.

20. In terms of Section 15 of the SC/ST Act, the State Government is required to issue a notification, specifying the Public Prosecutor or appointing an advocate who has been in practice for not less than seven years as a Special Public Prosecutor for conducting cases in the Special Court. The SC/ST Rules have been made by the Central Government in exercise of powers conferred upon it under Section 23 of the SC/ST Act, which enables the Central Government to make Rules for carrying out the purposes of the Act. Sub-rule (1) of Rule 4 of the said Rules contains a provision for preparation of a panel of eminent Senior Advocates for conducting cases in Special Courts and Exclusive Special Courts. Sub-rule (1A) provides for constitution of a panel of Public prosecutors and Exclusive Special Public prosecutors for conducting cases in Special Courts and Exclusive Special Courts, as the case may be. In terms of Sub-rule (1B) of Rule 4, both the panels – panel of senior advocates and panel of public prosecutors and exclusive special public prosecutors – are required to be notified in the official gazette.

21. A conjoint reading of Sub-rule (1) and (1A) of Rule 4 of the said Rules clearly indicates that the Central Government has drawn a distinction between a panel of Senior Advocates and other public prosecutors. Sub-rule (5) of Rule 4 enables the District Magistrate and the Special Divisional Magistrate to engage an eminent Senior Advocate, where it is deemed necessary or if desired by the victim of atrocity. It is

relevant to note that Sub-rule (5) contains a *non obstante* clause and the Magistrate / Sub Divisional Magistrate is empowered to appoint a Senior Advocate, notwithstanding anything contained in Sub-rule (1) of Rule 4. In other words, the Magistrate/Sub Divisional Magistrate is entitled, where it is deemed necessary, to engage a Senior Advocate, notwithstanding that his name does not feature in the panel as notified under Sub-rule (1) of Rule 4 of the SC/ST Rules. However, the said provision cannot be read to mean that the Magistrate or Divisional Magistrate can appoint any advocate of the choice of the victim, without considering the criteria as set out in Sub-rule(5) of Rule 4. The power under Sub-rule (5) of Rule 4 of the SC/ST Rules must be exercised in cases where it is necessary and with due application of mind.

22. If the contention of Mr Srivastava that it is necessary for the Magistrate to appoint an advocate of the victim's choice whenever a request is so made, is accepted, it would serve little purpose to maintain a panel of eminent Senior Advocates or a Panel of Public Prosecutors or Special Public Prosecutors. This Court is of the view that such a interpretation militates against the scheme of Rule 4 of the SC/ST Rules.

23. The decision in the case of **Smt Satki Devi and Anr. Etc. V. Tikam Singh and Ors.** (*supra*) was rendered in the context of the controversy whether an advocate appointed in terms of Rule 4(5) of the SC/ST Rules could act as a Special Public Prosecutor. The respondent in the said case had contended that only a Special Public Prosecutor appointed under Section 15 could conduct a case. The issue whether a District Magistrate could appoint an advocate of the victim's choice,

without applying its mind to the criteria as specified in Sub-rule (5) of Rule 4 of the SC/ST Rules if requested by the victim, was not the controversy in that case. It is trite law that the judgment is an authority for what it decides. The said decision is not an authority for the proposition that, the District Magistrate is required to ignore the criteria as set out in Rule 4(5) of the SC/CT Rules if the Advocate appointed is the one chosen by the alleged victim.

24. Undoubtedly, a victim can suggest appointment of a lawyer, however, it would be necessary for the District Magistrate or Sub-Divisional Magistrate to satisfy themselves that it is necessary or appropriate to engage an eminent senior advocate and further that it is necessary that such an advocate be appointed to prosecute the case.

25. In view of the above, the present petition is allowed and the appointment of respondent no.3 as a Special Prosecutor in terms of Sub-rule (5) of Rule 4 of the SC/ST Rules is set aside. It is further clarified that this would not preclude the District Magistrate or the concerned Sub Divisional Magistrate to apply his mind to the criteria as specified in Sub-rule(5) of Rule 4 of the SC/CT Rules and appoint an eminent Senior Advocate, if he considers it necessary to do so.

26. The petition is accordingly disposed of.

VIBHU BAKHRU, J

JANUARY 23, 2019

PKV/RK