Kumari Shrilekha Vidyarthi

Vs

State of U.P. and others

W.P. No.706 of 1990

(J. V. Verma, R. M. Sahai JJ)

20.09.1990

JUDGMENT

VERMA J

1.This judgment disposes of a bunch of matters comprising of some writ petitions under Art. 32 of the Constitution of India and special leave petitions under Art. 136 of the Constitution of India, all of which involve for decision certain common questions. The special leave petitions are directed against a common judgment of the Allahabad High Court dismissing some writ petitions in which the same questions were raised. In view of the decision of the High Court rejecting those contentions, the writ petitions were filed in this Court directly for the same purpose.

2. By one stroke, seemingly resorting to the Spoils System alien to our constitutional scheme, the Government of State of Uttar Pradesh has terminated by a general order the appointments of all Government Counsel (Civil, Criminal, Revenue) in all the districts of the State of U.P. w.e.f. 28-2-1990 and directed preparation of fresh panels to make appointments in place of the existing incumbents. This has been done by Circular G.0, No.D-284-Seven-Law-Ministry dated 6-21990, terminating all the existing appointments w.e.f. 28-2-1990, irrespective of the fact whether the term of the incumbent had expired or was subsisting. The validity of this State action is challenged in these matters after the challenge has been rejected by the Allahabad High Court. They have all been heard together since the common question in all of them is the validity, of the Circular G.O. No. D-284-Seven-Law-Mi,nistry dated 6-21990 issued by the Government of State of Uttar Pradesh.

3. Leave is granted in the Special Leave Petitions and the appeals are also heard on merits along with the writ petitions.

4. Broadly, two questions arise for decision by us in this bunch of matters. These are: Is the impugned circular amenable to judicial review?; and if so, is it liable to be quashed as violative of Art. 14 of the Constitution of India, being arbitrary?

5. The challenge in all these matters is to validity of G. O. No. D-284-Seven-Law-Ministry dated 6th February, 1990, from Shri A. K. Singh, Joint Legal Remembrancer, Justice (Law Ministry) Section, Government of Uttar Pradesh, to all the District Magistrates of Uttar Pradesh with copy to all the District Judges of the State for information and necessary action. The main question for decision in these matters being the validity of this circular, it would be appropriate to quote the same in extenso. It reads as under:

"Subject : Renewal of Tenure of All the Existing Government Counsel, Calling of new Panels for New Appointment.

I have been directed to inform you on the subject mentioned above that the Administration has taken a decision to extend the tenure of all the Government Counsel, who are presently working, till 28th February, 1990 only and to immediately receive new panels from the District Magistrates for new appointments in their places.

2.1, therefore, have been directed to state that all the Government Counsel, presently engaged for the work of Civil/Revenue/ Criminal (including Anti-Dacoity) and Urban Ceiling may be permitted to work till 28-2-1990 only and for appointments in their place, Administration may send the new panels, after preparing the same in following manner:-

1. Separate single panel in each of the Civil side, Revenue side, Criminal side (including Anti-Dacoity) and Urban ceiling side fixed for 12 districts, and separate single panel in each of the courts, functioning at District and Tehsil Headquarters, may be prepared. it may be enlisted therein the names of the work zone, number of courts related to it, the number of sanctioned posts for Government Counsel and recommended names of the counsel in terms of their seniority.

2. It may be clearly mentioned in the panel which counsel belong to Scheduled Caste, Scheduled Tribes, Backward Caste and Minority group.

3. The panels prepared for civil, revenue and urban ceiling side may contain the recommendations of names only three times of the presently sanctioned posts.

4. In the criminal side, five times of the names of the present sanctioned posts may be recommended.

5. The attested copies of Bio-Data of the Counsel recommended, attested details of their work during last two years, certificate of registration as an Advocate, certificate of birth and the attested copies of certificates of educational qualifications may also be sent.

6. The names of any such counsel, who has practice-experience for less than 7 years, or who has more than 60 years of age as on l- 1 -1990, or the person who is already working at a salaried Government or non-Governmental posts, a full-time lecturer in a college, Notary, Marriage Officer, Executive Qazi or State, may not be included in the panels. However, on resignation from the present post, they can be included in the panel.

7. For preparation of new panel, a general notice which enlists the application, age, conditions of appointment and the last date for submission of Bio-Data, may be prepared. This notice may be put on the Notice Boards of the local Bar As-Associations, and in the offices of District Magistrate, District Judge, Zonal Commissioner, S.D.M. and Munsif Magistrate.

8. It will be a condition for appointment as a Government Counsel that he will not be permitted to do private practice. He will be entitled to plead, with permission from the Administration, only the cases of State Government and Central Government, State State Company Council, Local Bodies, Autonomous Institution and Authorities. He will be paid only the monthly remuneration fixed by the Administration and no fee will be paid according to the valuation of the case/ appeal. No extra

fee will also be paid for any other work/ consultation. It may also be clarified that appointment of a Government-it Counsel will be different from the Government employees and no facilities to Government employees will be applicable to them. The appointment of Government Counsel will be done in the form of business engagement and the State Government will be entitled to terminate engagement at any time,, without giving reasons for it.

3. The Bio-Data and other desired papers, if received from the counsel within the prescribed date, may be examined minutely, as a special drive and after getting approval from the District Judge/ Munsif/ Magistrate/ SDM, as the case may be, the names may be recommended in the panel as per seniority position. The details of last two years ' work, along with the attested copies of the certificates and information desired in the enclosed format, 'Ka' and 'Kha' may be sent to the Administration along with the panel.

4. I have also been directed to state that the appointments made on or after January, 1990, shall not be affected by the above mentioned policy decision and the same shall continue for the prescribed period.

5. I have also been directed to clarify that the panels received prior to release of this Government Order, on the basis of which, no appointments or renewal has been made or which are still pending, may ne understood as cancelled.

6. I have also been directed to request you that the new panels may be prepared in accordance with the above direction on top priority basis, and the same may be ensured to be sent to the undersigned in a confidential envelope through a special messenger by 25th February, 1990.

Sd/-

(A. K. Singh)

Joint Legal Rememberancer"

6. By the above-quoted circular letter dated 6-2-1990, the decision of the State Government to terminate the engagement of all the Government Counsel engaged through out the State of U.P. for civil-revenue/ criminal (Including anti-dacoity) and urban ceiling work on and from 28-2-1990 and to make appointments in their place on the basis of new panel prepared for the purpose was communicated to all the District Magistrates in the State. Admittedly, this circular was made applicable to all the Government Counsel throughout the State at the district level, howsoever designated such as District Government Counsel, Additional District Government Counsel, etc. There is no dispute that the circular related to and applied equally to all the Government Counsel throughout the State irrespective of their tenure whose appointments were terminated w.e.f. 28-21990 for being replaced by new appointees. The circular applied equally to not only those Government Counsel whose tenure had already expired or whose tenure was to expire before 28-2-1990, but also to those whose tenure, as a result of their earlier appointment, was to extend beyond 28-2-1990, as well as those who were entitled to be considered for renewal of the tenure on expiry of their earlier tenure. The challenge in these matters is not only by some individuals who were adversely affected by the said circular but also by Association of District Government Counsel. Since the impact of the circular is on all Government Counsel engaged at the district level throughout the State, the challenge is really in representative capacity on behalf of all of them and this is how the challenge has been met on behalf of the State of U. P. in reply. It is common ground

that the decision of these matters will govern the appointment of all Government Counsel throughout the State of U.P. at the district level, in all branches, irrespective of the name or designation given to the appointment such as District Government Counsel, Additional District Government Counsel, etc.

7. Several arguments were advanced by the learned counsel on both sides relating to the nature of these appointments about which there is a serious contest between the parties. In the present case it is not necessary for us to consider at length the exact nature of these appointments which is material only for indicating the extent of security of tenure of the appointee to these offices since in our opinion the main attack to the impugned circular on the ground of arbitrariness can be upheld even assuming the security of tenure of the appointees to be minimal as claimed for and on behalf of the State Of U.P. We shall, therefore, only refer to the rival contentions regarding the nature of appointments and then proceed on the has s of the minimum status attaching to these appointments to examine whether the ground of arbitrariness is available and vitiates the circular.

8. According to the learned Additional Advocate General of the State of U.P., the relationship of the appointees to these offices of Government Counsel in the districts is purely contractual depending on the terms of the contract and is in the nature of an engagement of a Counsel by a private party who can be changed at any time at the will of the litigant, with there obeing no right in the Counsel to insist on continuance of the engagement. The learned Additional Advocate General contended that for this reason, the relationship being purely contractual, which cannot be continued against the will of either party, there is no scope for the argument that the State does not have the right to change the Government Counsel at its will. It is common ground that the appointment, termination and renewal of tenure of all Government Counsel in the districts is governed by certain provisions contained in the Legal Remembrancer's Manual, in addition to S. 24 of the Code of Criminal Procedure, 1973, applicable in the case of public prosecutors. The learned Additional Advocate General did not dispute that if Art. 14 of the Constitution of India is attracted to this case like all State actions, the impugned circular would be liable to be quashed if it suffers from the vice of arbitrariness. However, his argument is that there is no such vice. In the ultimate analysis, it is the challenge of arbitrariness which the circular must withstand in order to survive. This really is the main point involved for decision by us in the present case.

9. The nature of appointment of the Government Counsel in the districts on the civil, criminal and revenue sides was hotly debated during the hearing. It was urged on behalf of the petitioners/ appellants that the relationship of the Government Counsel with the Government is not merely one of client and counsel as in the case of a private client, but one of status in the nature of public emloyment or appointment to a public office' so that termination of the appointment of a Government Counsel cannot be equated with the termination by a private litigant of his Counsel's engagement, which is purely contractual, without any public element attaching to it. It was urged that appointment of public prosecutors has a statutory status also in view of such appointments being required to be made in accordance with S. 24 of the Code of Criminal Procedure, 1983. Reliance was also placed on certain provisions of the Legal Remembrancer's Manual, which admittedly govern and regulate the appointment of all Government Counsel in the districts as well as the termination of their appointment and renewal of their tenures. It was contended that the relationship between the Government and the Government Counsel is, therefore, not purely contractual in nature as in the case of a private litigant and his counsel. An attempt was also made to urge that the appointment of Government Counsel is in the nature of a public employment with the attendant security of tenure of office and the necessary concomitants attaching to it. On the other hand, the learned Additional Advocate General appearing for the State of U.P. contended that the

relationship between the Government and the Government Counsel is purely contractual like that of a private litigant and his counsel which enables the Government to change its counsel at any time as may be done by a private litigant in the event of loss of confidence between them. He contended that there is no element of public employment in such appointments and the provisions in the Legal Rememberancer's Manual and S. 24 of the Code of Criminal Procedure are merely to provide for making a suitable choice. We shall briefly refer to some provisions which admittedly regulate and govern such appointments, termination and renewal of tenure of the appointees.

10. Chapter 1 of the Legal Remembrancer's Manual, 1975 Ed., contains the interpretations and Para 1.01 says that the L.R. Manual is the authoritative compilation of the Government orders and instructions for the conduct of legal affairs of the State Government. Para 1.06 enumerates the Law Officers of the Government which includes the District Government Counsel (Civil, Revenue, Criminal) along with many others such as Judicial Secretary and Legislative Secretary. It is obvious that all of them including D.C.Cs. are described as holders of some 'office' of the State Govt. Chapter VII contains the necessary provisions relating to District Government Counsel. Part A therein deals with appointment and conditions of engagement of the District Government Counsel. Para 7.02 deals with the power of Government to appoint Government Counsel in the districts which requires the Government to appoint District Government Counsel (Civil, Revenue, Criminal) and also, wherever necessary, in the interest of efficient and expeditious disposal of business, to appoint Additional or/ and Assistant District Government Counsel to assist the District Government Counsel (Criminal) or (Civil) in discharge of his duties; Subordinate District Government Counsel for the conduct of civil cases in outlying towns of a district; and Assistant District Government Counsel in outlying towns of the district for the conduct of criminal or civil cases or both. Para 7.03 provides for applications and qualifications for appointment to these offices or posts. The District Officer is required to consider all the applications received in consultation with the District Judge, giving due weight to the claim of the existing incumbents, if any, and to submit in order of preference the names of legal practitioners, together with the opinion of the District Judge on the suitability and merits of each candidate. The process of selection expressly involves the District Judge and gives due weight to his opinion for the obvious reason that the District Judge is expected to know best the comparative merits of the candidates for such appointments. Para 7.04 requires the Legal Remembrancer to submit the recommendations of the District Officer along with his own opinion for the orders of the Government. Para 7.06 provides for appointment and renewal, para 7.08 for renewal of term and para 7.09 for maintenance of character roll of the appointees. Para 7.07 forbids the D.G.C. so long as he holds the 'post from participating in political activity like all other Government officers and unlike a lawyer engaged by a private party. These provisions read as under:

> "7.06. Appointment and renewal - (1) The legal practitioner finally selected by the Government may be appointed District Government Counsel for one year from the date of his taking over charge.
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> (2) At the end of the aforesaid period, the District Officer after consulting the District Judge shall submit a report on his work and conduct to the Legal Remembrancer together with the statement of work done in Form No. 9. Should his work or conduct be found to be unsatisfactory the matter shall be reported to the Government for orders. If the report in respect of his work and conduct is satisfactory, he may be furnished with a deed of engagement in Form No. 1 for a term not exceeding three years. On his first engagement a copy of Form No. 2 shall be supplied to him and he shall complete and return it to the Legal Remembrancer for record.

(3) The appointment of any legal practitioner as a District Government Counsel is only professional engagement terminable at will on either side and is not appointment to a post under the Government. Accordingly the Government reserves the power to terminate the appointment of any District Government Counsel at any time without assigning any cause.

7.07. Political Activity The District Government Counsel shall not participate in political activities so long they work as such; otherwise they shall incur a disqualification to hold the post.

7.08. Renewal of term - (1) at least three months before the expiry of the term of a District Government Counsel, the District Officer shall after consulting the District Judge and considering his past record of work, conduct and age, report to the Legal Remembrancer, together with the statement of work done by him in Form No. 9 whether in his opinion the term of appointment of such counsel should be renewed or not. A copy of the opinion of the District Judge should also be sent along with the recommendations of the District Officer.

(2) Where recommendation for the extension of the term of a District Government Counsel is made for a specified period only, the reasons therefore shall also be stated by the District Officer.

(3) While forwarding his recommendation for renewal of the term of a District Government Counsel -

(i) the District Judge shall give an estimate of the quality of the Counsel's work from the Judicial standpoint, keeping in view the different aspects of a lawyer's capacity as it is manifested before him in conducting State cases, and specially his professional conduct;

(ii) the District Officer shall give his report about the suitability of the District Government Counsel from the administrative point of view, his public reputation in general, his character, integrity and professional conduct.

(4) If the Government agrees, with the recommendations of the District Officer for the renewal of the term of the Government Counsel, it may pass orders for re-appointing him for a period not exceeding three years.

(5) If the Government decides not to reappoint a Government Counsel, the Legal Remembrancer may call upon the District Officer to forward fresh recommendations in the manner laid down in para 7.03.

(6) The procedure prescribed in this para shall be followed on the expiry of every successive period of renewed appointment of a District Government Counsel.

Note - The renewal beyond 60 years of age shall depend upon continuous good work ' sound integrity and physical fitness of the Counsel.

7.09. Character roll- (1) The District Officer and the District Judge shall, before the end of every year and also while leaving the district on transfer, place on record his

opinion on the capacity and work of the District Government Counsel. The District Judge shall before recording such opinion obtain a report about the work and conduct of the District Government Counsel from the presiding officers of the courts, where they are generally required to practise. Similarly, the District Officer shall before recording such opinion obtain a report from the Superintendent of Police regarding the counsel's capacity for prosecution of cases and assistance rendered to the investigating agency. The record, which shall be confidential, shall be maintained by the District Officer. Every adverse entry shall be communicated to the District Government Counsel concerned by the District Officer, with the prior approval of the Government.

(2) The character roll of every District Government Counsel shall also be maintained by the Government in Judicial (Legal Advice) Section. For this purpose, the District Officer shall forward to the Legal Remembrancer a copy of all the confidential reports, recorded by him and the District Judge on the work and conduct of the District Government Counsel by the first week of May every year for being incorporated in the character roll, maintained by the Government.

(3) The District Officer shall forward a copy of all the confidential reports, referred to in para 7.09(2) in respect of District Government Counsel (Criminal) to Home (Police) Section of Secretariat also for information.

(4) Any shortcomings on the part of the District Government Counsel shall at once be brought to t the notice of the Legal Remembrancer."

11. These provisions show that the initial appointment is for a period of one year during which the work and conduct of the appointee is watched to adjudge his suitability and a report is required to be submitted at the end thereof by the District Officer after consulting the District Judge and on the same being found satisfactory, his engagement is made for a term not exceeding three years. Before expiry of the term of three years, the case of the incumbent is to be considered on the basis of his work, conduct and age for renewal and the Government is required to decide the question of his reappointment for a period not exceeding three years on the basis of the report of the District Officer and the opinion of the District Judge. If the Government agrees with their 'recommendations, the term of the existing incumbent is renewed for a period not exceeding three years. It is only lf the Government decides not to reappoint a Government Counsel' that the Legal Remembrancer may call upon the District Officer to forward fresh recommendations in the manner laid down in para 7.03. This procedure is to be followed on the expiry of every successive period of renewed appointment of District Government Counsel. The age factor mentioned in para 7.08 has to be read with the footnote to it, which says that 'the renewal beyond 60 years of age shall depend upon continuous good work, sound integrity and physical fitness of the Counsel'. Para 7.09 provides for maintenance of the character roll in which the District Officer and the District Judge are required to record their opinion on the capacity and work of the District Government Counsel. Cl. 3 of para 7.06, regarding termination of the appointment, would be considered later while dealing with an other argument of the learned Additional Advocate-General. Para B of Chapter VII lays down 'Duties' of D.G.Cs.

12. The above provisions in the L.R. Manual clearly show that the Government Counsel in the districts are treated as Law Officers of the State who are holders of an 'office's or 'post'. The aforesaid provisions in Chapter VII relating to appointment and conditions of engagement of District Government Counsel show that the appointments are to be made and ordinarily renewed on

objective assessment of suitability of the person based on the opinion of the District Officer and the District Judge; and character roll is maintained for keeping a record of the suitability of the appointee to enable an objective assessment for the purpose of his continuance as a Law Officer in the district. There are provisions to bar private practice and participation in political activity by D.G.Cs. Apart from cl. 3 of para 7.06 to which we shall advert a little later, these provisions clearly indicate that the appointment and engagement of District Government Counsel is not the same as that by a private litigant of his counsel and there is obviously an element of continuity of the appointment unless the appointee is found to be unsuitable either by his own work, conduct or age or in comparison to any more suitable candidate available at the place of appointment. Suitability of the appointee being the prime criterion for any such appointment, it is obvious that appointment of the best amongst those available, is the object sought to be achieved by these provisions, which, even otherwise, should be the paramount consideration in discharge of this governmental function aimed at promoting public interest. All Govt. Counsel are paid remuneration out of the public exchequer and there is a clear public element attaching to the 'office' or 'post'.

13. The learned Additional Advocate General contended that clause 3 of para 7.06 says that the appointment of a District Government Counsel is only professional engagement terminable at will on either side and not appointment to a post under the Government; and the Government has the power to terminate the appointment at any time 'without assigning any cause'. He contended that this power to terminate the appointment at any time without assigning any cause and the clear statement that the appointment is only professional engagement terminable at will on either side is sufficient to indicate that the relationship is the same as that of a private client and his counsel. In our opinion, this provision has to be read not in isolation, but in the context in which it appears and along with the connected provisions, already referred. The expression 'professional engagement' is used therein to distinguish it from 'appointment to a post under the Government' in the strict sense. This,' however, does not necessarily mean that a person who is not a Government servant holding a post under the Government does not hold any public office and the engagement is purely private with no public element attaching to it. This part of cl. 3 of Para 7.06 means only this and no more. The other part of cl. 3 which enables the Government to terminate the appointment 'at any time without assigning any cause' can also not be considered in the manner, suggested by the learned Additional Advocate General. The expression at any time merely means that the termination may be made even during the subsistence of the term of appointment and 'without assigning any cause means without communicating any cause to the appointee whose appointment is terminated. However, without any cause is not to be equated with without existence of any cause'. It merely means that the reason for which the termination is made need not to be assigned or communicated to the appointee. It was held in Liberty Oil Mills v. Union of India (1984) 3 SCC 465 : (AIR 1984 SC 1271) that the expression 'without assigning any reason' implies that the decision has to be communicated, but reasons for the decision have not to be stated; but the reasons must exist, otherwise, the decision would be arbitrary. The non-assigning of reasons or the non-communication thereof may be based on public policy, but termination of an appointment without the existence of any cogent reason in furtherance of the object for which the power is given would be arbitrary and, therefore, against public policy. Cl. 3 of para 7.06 must, therefore, be understood to mean that the appointment of a District Government Counsel is not to be equated with appointment to a post under the Government in the strict sense, which does not necessarily mean that it results in denuding the office of its public character; and that the appointment may be terminated even during currency of the term by only , communicating the decision of termination without communicating the reasons which led to the termination. It does not mean that the appointment is at the sweet will of, the Government which can be terminated at any time, even without the existence of any cogent reason

during the subsistence of the term. The construction, suggested on behalf of the State of U.P. of this provision, if accepted, would amount to conceding arbitrary power of termination to the Government, which by itself is sufficient to reject the contention and thereby save it from any attack to its validity.

14. We may now refer to some provisions of the Code of Criminal Procedure, 1973, relating to Public Prosecutors. Section 24 provides for appointment of Public Prosecutors in the High Courts and the districts by the Central Government or the State Government. We are here concerned only with the appointment of Public Prosecutors by the State Government in the districts. Sub-see' (3) of S. 24 says that for every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district. Sub-sec. (4) requires the District Magistrate to prepare a panel of names of persons considered fit for such appointments, in consultation with the Sessions Judge. Sub-sec. (5) contains an embargo against appointment - of any person as the Public Prosecutor or Additional Public Prosecutor for the district by the State Government unless his name appears in the panel prepared under sub7sec. (4). Subsec. (6) provides for such appointments, where in a State there exists a regular Cadre of Prosecuting Officers but if no suitable person is available in such cadre, then the appointment has to be made from the panel prepared under sub.-see. (4). Sub-sec. (7) says that a person shall be eligible for such appointment only after lid has been in practice as an advocate for not less than seven years. S. 25 deals with the appointment of Assistant Public Prosecutors in the district for conducting prosecution in the Courts of Magistrate. In the case of Public Prosecutors also known as District Government Counsel (Criminal), there can be no doubt about the statutory element attaching to such appointments by virtue of these provisions in the Code of Criminal Procedure, 1973. In this context, S. 321 of the Code of Criminal Procedure, 1973, is also significant. S. 321 permits withdrawal from prosecution by the Public Prosecutor or Assistant Public Prosecutor in charge of a case, with the consent of the Court, at any time before the judgment is pronounced. This power of the Public Prosecutor in charge of the case is derived from statute and the guiding consideration for it, must be the interest of administration of justice. There can be no doubt that this function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of so acting only in the interest of administration of justice. In the case of Public Prosecutors, this additional public element flowing from statutory provisions in the Code of Criminal Procedure, undoubtedly, invest the Public Prosecutors with the attribute of holder of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it.

15. A brief reference to some decisions of this Court, in which the character of engagement of a Government Counsel was considered, may be made. In Mahadeo v. Shantibhai (1969) 2 SCR 422, it was held that a 1awyer engaged by the Railway Administration during the continuance of the engagement was holding an 'office of profit'. The engagement of the Railway Counsel was similar to that -of the Government Counsel in the present case. It was pointed out that by 'office' is meant the right and duty to exercise an employment or a position of authority and trust to which certain duties are attached; and such an engagement satisfied that test. Even though the decision was rendered in the context of disqualification under the Election Law by holding an 'office of profit', yet it is useful for appreciating the nature of such an engagement or appointment of a counsel by the Government. In Mundrika Prasad Sinha v. State of Bihar (1980) 1 SCR 759 : (AIR 1979 SC 1871), the nature of appointment of Government Pleaders came up for consideration and it was said that the office of a Government Pleader, as defined in S. 2(7) of the Code of Civil Procedure, 1908, is a public office. Krishna lyer, J., in that decision, also pointed out that the 'Government under our Constitution shall not play with law offices on political or other impertinent consideration as it may

affect the legality of the action and subvert the rule of law itself'. In that decision, an earlier Madras decision was quoted with approval, wherein, it was clearly held that the duties of the Government Pleader are of a public nature and that the office of a Government Pleader is a public office. The relevant extract is as under (at pp. 1874-75 of AIR):-

> "..... A Government pleader is more than an advocate for a litigant. He holds a public office. We recall with approval the observations a Division Bench of the Madras High Court made in Ramachandran v. Alagiriswami, AIR 1961 Madras 450 and regard the view there, expressed about a Government Pleader's office, as broadly correct even in the Bihar set-up.
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> "..... the duties of the Government Pleader, Madras are duties of a public nature. Besides, as already explained the public are genuinely concerned with the manner in which Government Pleader discharges his duties because, if he handles his cases badly, they have ultimately to foot the bill��"
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> "I consider that the most useful test to be applied to determine the question is that laid down by Erle, J. in (1951) 17 QB 149. The three criteria are, source of the office, the tenure and the duties. I have applied that test and I am of opinion that the conclusion that, the office is a public office is irresistible."
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> Similarly, in Mukul Dalal v. Union of India (1988) 3 SCC 144, it was held that the 'office of the Public Prosecutor is a public one and 'the primacy given to the Public Prosecutor under the Scheme of the Code (Cr. P. C.) has a social purpose'.

16. It is useful in this context to refer to the decision in Malloch v. Aberdeen Corporation (1971) 2 All ER 1278. That was a case of dismissal of an employee of a public authority whose appointment was during the authority's pleasure. Examining the scope of judicial review, Lord Wilberforce said:-

> "The appellant's challenge to the action taken by the respondents raises a question in my opinion, of administrative law. The respondents are a public authority, the appellant holds a public position fortified by statute. The considerations which determine whether he has been validly removed from that position go beyond the mere contract of employment, though no doubt including it. They are, in my opinion, to be tested broadly on arguments of public policy and not to be resolved on narrow verbal distinctions. The appellant is entitled to complain if, whether in procedure or in substance, essential requirements, appropriate to his situation in the public service under the respondents, have not been observed and, in case of nonobservance, to come to the courts for redress.
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> .....So, while the courts will necessarily respect the right, for good reasons of public policy, to dismiss without assigned reasons, this should not, in my opinion, prevent them from examining the framework and context of the employment to see whether elementary rights are conferred on him expressly or by necessary implication, and how far these extend

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

18. The scope of judicial review permissible in the present case, does not require any elaborate consideration since even the minimum permitted scope of judicial review on the ground of arbitrariness or unreasonableness or irrationality, once Art. 14 is attracted, is sufficient to invalidate the impugned circular as indicated later. We need not, therefore, deal at length with the scope of judicial review permissible in such cases since several nuances of that ticklish question do not arise for consideration in the present case.

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

20. Even apart from the premise that the office' or 'post' of D.G.Cs. has a public element which alone is sufficient to attract the power o 'judicial review for testing validity of the impugned circular on the anvil of Art. 14, we are also clearly of the view that this power is available even without that element on the premise that after the initial appointment, the matter is purely contractual. Applicability of Art. 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, can it be said that the State can thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more? We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after the contractual rights accrue to the other C party in addition. It is not as if the requirements of Art. 14 and contractual obligations are alien concepts, which cannot co-exist.

21. The Preamble of the Constitution of India resolves to secure to all its citizens Justice, social, economic and political; and equality of status and opportunity. Every State action must be aimed at achieving this goal. Part IV of the Constitution contains 'Directive Principles of State Policy' which are fundamental in the governance of the country and are aimed at securing social and economic freedoms by appropriate State action which is complementary to individual fundamental rights guaranteed in Part III for protection against excesses of State action, to realise the vision in the Preamble. This being the philosophy of the Constitution, can it be said that it contemplates exclusion of Art, 14 - non-arbitrariness which is basic to rule of law - from State actions in contractual field when all actions of the State are meant for public good and expected to be fair and just? We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. In our opinion, it would be alien to the Constitutional Scheme to accept the argument of exclusion of Art. 14 in contractual matters. The scope and permissible grounds of judicial review in

such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Art. 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Art. 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Art. 14 of non-arbitrariness at the hands of the State in any of its actions.

23. Thus, in a case like the present, if it is shown that the impugned State action is arbitrary and, therefore, violative of Art. 14 of the Constitution, there can be no impediment in striking down the impugned act irrespective of the question whether an additional right, contractual or statutory, if any, is also available to the aggrieved persons.

24. The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Art. 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, 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 Art. 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. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

25. In Wade's Administrative Law, 6th Ed., after indicating that the powers of public authorities are essentially different from those of private persons', it has been succinctly stated at pp. 400-401 as under:-

> ".....The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public

good.

> There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law : it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities : it applies no less to ministers of the Crown. Nor is it confined to the sphere of administration : it operates wherever discretion is given for some, public purpose, for example, where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.
>
> For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere."
> (Emphasis supplied)
>
> The view, we are taking, is, therefore, in consonance with the current thought in this field. We have no doubt that the scope of judicial review may vary with reference to the type of matter involved, but the fact that the action is reviewable, irrespective of the sphere in which it is exercised, cannot be doubted.

26. A useful treatment of the subject is to be found in (1990) 106 LQR at pages 277 to 292 in an article 'Judicial Review and Contractual Powers of Public Authorities'. The conclusion drawn in the article on the basis of recent English decisions is that 'public law principles designed to protect the citizens should apply because of the public nature of the body, and they may have some role in protecting the public interest'. The trend now is towards judicial review of contractual powers and the other activities of the Government. Reference is made also to the recent decision of the Court of Appeal in Jones v. Swansea City Council, (1990) 1 WLR 54, where the Court's clear inclination to the view that contractual powers should generally be reviewable is indicated, even though the Court of Appeal faltered at the last step and refrained from saying so. It is significant to note that emphasis now is on reviewability of every State action because it stems not from the nature of function, but from the public nature of the body exercising that function; and all powers possessed by a public authority, howsoever conferred, are possessed solely in order that it may use them for the public good'. The only exception limiting the same is to be found in specific cases where such exclusion may be desirable for strong reasons of public policy. This, however, does not justify exclusion of reviewability in the contractual field involving the State since it is no longer a mere private activity to be excluded from public view or scrutiny.

27. Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a

public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide-ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14.

28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Art. 14 and permit judicial review, we have no hesitation in saving that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Art. 14.

29. It can no longer be doubted at this point of time that Art. 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. (See Ramana Dayaram, Shetty v. The International Airport Authority of India (1979) 3 SCR 1014: (AIR 1979 SC 1628) and Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir (1980) 3 SCR 1338: (AIR 1980 SC 1992)). In Col. A. S. Sangwan v. Union of India, 1980 (Supp) SCC 559: (AIR 1981 SC 1545), while the discretion to change the policy in exercise of the executive power, when not trammelled by the statute or rule, was held to be wide, it was emphasised as imperative and implicit in Art. 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Art. 14 and the requirement of every State action qualifying for its validity on this touch-stone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose.

30. In Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay (1989) 3 SCC 293 : (AIR 1989 SC 1642), the matter was re-examined in relation to an instrumentality of the State for applicability of Art. 14 to all its actions. Referring to the earlier decisions of this Court and examining the argument for applicability of Art. 14, even in contractual matters, Sabyasachi Mukharji, J. (as the learned Chief Justice then was) ' speaking for himself and Kania, J., reiterated that every action of the State or an instrumentality of the State must be informed by reason..... actions uninformed by reason may be questioned as arbitrary in proceedings under Art. 226 or Art. 32 of the Constitution. Ranganathan, J. did not express any opinion on this point but agreed with the conclusion of the other learned Judges on the facts of the case. It is obvious that the conclusion on the facts of the case could not be reached by Ranganathan, J. without examining them and this could be done only on the basis that it was permissible to make the judicial review. Thus, Ranganathan, J. also applied that principle without saying so. In view of the wide-ranging and, in essence, all pervading sphere of State activity in discharge of its welfare functions, the question assumes considerable importance and cannot be shelved. The basic requirement of Art. 14 is fairness in action by the State and we find it difficult to accept that the State can be permitted to act otherwise in any field of its activity, irrespective of the nature of its function, when it has the uppermost duty to be governed by the rule of law. Non-arbitrariness, in substance, is only fair play in action. We have no doubt that this obvious requirement must be satisfied by every action of the State or its instrumentality in order to satisfy the test of validity.

31. It is this aspect which has been considered at length by Sabyasachi Mukharji, J. (as the learned Chief Justice then was) in Dwarkadas Marfatia's case (AIR 1989 SC 1642) (supra) even though, that was a case of statutory exemption granted under the Rent Act to an instrumentality of the State and it was in that context that the exercise of power to terminate the contractual tenancy was examined. All the same, without going into the question whether the obligation of the instrumentality to act in pursuance of public purpose, was a public law purpose or private law purpose, it was held that the obligation to act in pursuance of public purpose was alone sufficient to attract Art. 14. It was held that there was an implied obligation in respect of the dealings with the tenants/ occupants of the authority to act in public interest/ purpose. It as emphasised that every State action has to be for a public purpose and must promote public benefit. Referring to some earlier decisions, it was reiterated that all State actions 'whatever their mien are amenable to constitutional limitations, the alternative being to permit them 'to flourish as an imperium in imperio'. It was pointed out that governmental policy would be invalid as lacking in public interest, unreasonable or contrary to the professed standards', if it suffers from this vice. It was stated that every State action must be reasonable and in public interest and an infraction of that duty is amenable to judicial review. The extent of permissible judicial review was indicated by saying that 'actions are amenable to judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. It is sufficient to quote from the judgment of Mukharji, J. (as the learned Chief Justice then was) the following extract (at p. 1648 of AIR):

> "..... Where there is arbitrariness in State action, Art. 14 springs in and judicial review strikes such an action down. Every action of the executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Art. 14....."

(Emphasis supplied)

> This decision clearly shows that no doubt was entertained about the applicability of Art. 14 of the Constitution to an action of the State or its instrumentality, even where the action was taken under the terms of a contract of tenancy which alone applied by virtue of the exemption granted under the Rent Act excluding the applicability of the provisions thereof.

32. In another recent decision in Mahabir Auto Stores v. Indian Oil Corporation (1990) 1 JT 363 : (AIR 1990 SC 1031), it was held that Art. 14 was attracted even where the aggrieved person did not have the benefit of either a contractual or a statutory right. The grievance in that case was made by a person who was not a dealer of the Indian Oil Corporation but merely claimed to have been treated as one by a long course of conduct. It was held by the learned Chief Justice that the impugned act of the Indian Oil Corporation was an administrative decision land could be impeached on the ground that it was arbitrary or violative of Art. 14 of the Constitution. It was emphasised that the Indian Oil Corporation being an instrumentality of the State was bound to act fairly; and that fairness in such actions should be perceptible, if not transparent'. If Art. 14 was applied even without the benefit of a contract of dealership, the position cannot be worse with the added benefit of a contract. With respect, we concur with the view about the impact of Art. 14 of the Constitution on every State action as indicated by the learned Chief Justice in these two recent decisions.

33. No doubt, it is true, as indicated by us earlier, that there is a presumption of validity of the State action and the burden is on the person who alleges violation of Art. 14 to prove the assertion. However, where no plausible reason or principle is indicated nor is it discernible and the impugned

State action, therefore, appears to be ex facie arbitrary, the initial burden to prove the arbitrariness is discharged shifting onus on the State to justify its action as fair and reasonable. If the State is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged. The scope of judicial review is limited as indicated in Dwarkadas Marfatia's case (AIR 1989 SC 1642) (supra) to oversee the State action for the purpose of satisfying that it is not vitiated by the vice of arbitrariness and no more. The wisdom of the policy or the lack of it or the desirability of a better alternative is not within the permissible scope of judicial review in such cases. It is not for the Courts to recast the policy or to substitute it with another which is considered to be more appropriate, once the attack on the ground of arbitrariness is successfully repelled by showing that the act which was done, was fair and reasonable in the facts and circumstances of the case. As indicated by Diplock, LJ, in Council of Civil Service Unions v. Minister for the Civil Service (1984) 3 All ER 935, the power of judicial review is limited to the grounds of illegality, irrationality and procedural impropriety. In the case of arbitrariness, the defect of irrationality is obvious.

34. In our opinion, the wide sweep of Art. 14 undoubtedly takes within its fold the impugned circular issued by the State of U. P. in exercise of its executive power, irrespective of the precise nature of appointment of the Government counsel in the districts and the other rights, contractual or statutory, which the appointees may have. It is for this reason that we base our decision on the ground that independent of any statutory right, available to the appointees, and assuming for the purpose of this case that the rights flow only from the contract of appointment, the impugned circular, issued in exercise of the executive power of the State, must satisfy Art. 14 of the Constitution and if it is shown to be arbitrary, it must be struck down. However, we have referred to certain provisions relating to initial appointment, termination or renewal of tenure to indicate that the action is controlled at least by settled guidelines, followed by the State of U. P., for a long time. This too is relevant for deciding the question of arbitrariness alleged in the present case.

35. It is now too well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Art. 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual on the field of contract has to be borne in the mind.

36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you'. This is what men in power must remember, always.

37. Almost a quarter century back, this Court in S. G. Jaisinghani v. Union of India (1967) 2 SCR 703, at pp. 718-19 : (AIR 1967 SC 1427 at p. 1434), indicated the test of arbitrariness and the pitfalls to be avoided in all State actions to prevent that vice, in a passage as under:

> "In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey -"Law of the Constitution" - Tenth Edn., Introduction cx). "Law has reached its finest, moments", stated Douglas, J. in United States v. Wunderlick (1951-342 US 98 : 96 Law Ed 113), "When it has freed man from the unlimited discretion of some ruler..... Where discretion is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes (1 77098 ER 327), "means sound discretion guided by law. It must be governed by rule, not humour: it must not be arbitrary, vague and fanciful."

38. After Jaisinghani's case (AIR 1967S C 1427) (supra), long strides have been taken in several well known decisions of this Court expanding the scope of judicial review in such matters. It has been emphasised time and again that arbitrariness is anathema to State action in every sphere and wherever the vice percolates, this Court would not be impeded by technicalities to trace it and strike it down. This is the surest way to ensure the majesty of rule of law guaranteed by the Constitution of India. It is, therefore, obvious that irrespective of the nature of appointment of the Government Counsel in the districts in the State of U.P. and the security of tenure being even minimal as claimed by the State, the impugned circular, in order to survive, must withstand the attack of arbitrariness and be supported as an informed decision which is reasonable.

39. No doubt, it is for the person alleging arbitrariness who has to prove it. This can be done by showing in the first instance that the impugned State action is uninformed by reason inasmuch as there is no discernible principle on which it is based or it is contrary to the prescribed mode of exercise of the power or is unreasonable. If this is shown, then the burden is shifted to the State to repeal the attack by disclosing the material and reasons which led to the action being taken in order to show that it was an informed decision which was reasonable. If after a prima facie case of arbitrariness is made out, the State is unable to show that the decision is an informed action which is reasonable, the State action must perish as arbitrary.

40. In the present case, the initial burden on the petitioners/appellants has been discharged by showing that there is no discernible principle for the impugned action at the district level throughout the State of U. P. since there is nothing in the circular to indicate that such a sweeping action for all districts throughout the State was necessary which made it reasonable to change all Government counsel in the districts throughout the State, even those whose tenure in office had not expired. Such a drastic action could be justified only on the basis of some extraordinary ground equally applicable to all Government counsel in the districts throughout the State which is reasonable. No such reason appears in the circular.

41. The impugned circular itself does not indicate the compelling reason, if any, for the drastic step of replacing all the Government Counsel in every branch at the district level throughout the State of U. P., irrespective of the fact whether the tenure of the incumbent had expired or not. The learned

Additional Advocate General stated that the circular was issued because the existing panels were made in 1985, 1986 and 1987 and were considered to be not too proximate in point of time in the year 1990 for being continued. The reason, if any, for considering such en bloc change necessary has not been disclosed either in the circular or at the hearing in addition to what is said in para 29 of the counter-affidavit of A. K. Singh, which is referred later. On behalf of the petitioners/ appellants, it was alleged that the en masse change at the district level throughout the State of U. P. was made only for political reasons on account of the recent change in the State Government. We deem it unnecessary to go into this question for want of any specific material either way. Moreover, the arbitrariness, if any, of such an act, would be equally applicable irrespective of the change in the Government, which, if at all, would only strengthen the argument in case arbitrariness is proved otherwise. The only reason given in the counter-affidavit of A. K. Singh, Joint Secretary and Joint Legal Remembrancer, Government of U. P., is in para 29 of thereof which reads as under:

> "That the contents of para 38 of the writ petition are not admitted. It is denied that the Government took the present decision with a political motive and in an arbitrary manner. It is also submitted that the decision to terminate the professional engagement has been taken in order to streamline the conduct of the government cases and effective prosecution thereof."

42. It is difficult to appreciate this as a reasonable basis for the drastic and sweeping action throughout . the State, particularly when the provisions in the Legal Remembrancer's Manual referred earlier provide ordinarily for renewal of the tenure of the appointees. To say the least, the contents of para 29 of this counter-affidavit which alone are relied on to disclose the reasons for the circular are beautifully vague and convey nothing of substance and cannot furnish any tangible support to the impugned circular. It was stated by the learned Additional Advocate-General that many of the old incumbents were to be reappointed even after this exercise and, therefore, a wholesale change was not to be made. If at all, this submission discloses a further infirmity in the impugned circular. If it be true that many of the existing appointees were to be continued by giving them fresh appointments, the action of first terminating their appointment and then giving them fresh appointment is, to say the least, uninformed by reason and does not even fall within the scope of the disclosed reason 'to streamline the conduct of government cases and effective prosecution thereof. It is obvious that at least in respect of all such appointees who are to be continued by giving them fresh appointments, the act of terminating their appointment in one stroke, was without application of mind by anyone to the question whether a change was at all needed in their case. It would be too much to assume that every Government counsel in . all the districts of the State of U. P. was required to be replaced in order to streamline the conduct of Government cases and indeed, that is not even the case of the State which itself says that many of them were to be reappointed.

43. Non-application of mind to individual cases before issuing a general circular terminating all such appointments throughout the State of U. P. is itself eloquent of the arbitrariness writ large on the face of the circular. It is obvious that issuance of the impugned circular was not governed by any rule but by the whim or fancy of someone totally unaware of the requirements of rule of law, neatly spelled out in the case of John Wilkes (1770) 4 Burr 2528 more than two centuries back and quoted with approval by this Court almost a quarter century earlier in Jaisinghani's case (AIR 1967 SC 1427) (supra). We have considered it necessary to re-emphasise this aspect and reiterate what has been said so often by this Court only because we find that some persons entrusted with the task of governance appear to be unaware of the fact that the exercise of discretion they have must be governed by rule, not by humour, whim, caprice or fancy or personal predilections. It also disturbs us to find that the Legal Remembrancer's Department of the State of U. P. which has the duty to

correctly advise the State Government in such matters, overlooked the obvious and failed to discharge its bounden duty of correctly advising the State Government in matters of law. We would like to believe that the impugned circular was issued for want of proper legal advice in this behalf instead of any ulterior motive suggested by the petitioners/ appellants.

44. Conferment of the power together with the discretion which goes with it to enable proper exercise of the power is coupled with the duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred, which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. All persons entrusted with any such power have to bear in mind its necessary concomitant which alone justifies conferment of power under the rule of law. This was apparently lost sight of in the present case while issuing the impugned circular.

45. Arbitrariness is writ large in the impugned circular dated 6-2-1990 issued by the State of Uttar Pradesh. It gives the impression that this action was taken under the mistaken belief of applicability of "spoils system" under our Constitution and the cavalier fashion in which the action has been taken gives it the colour of treating the posts of D.G.Cs. as bounty to be distributed by the appointing authority at its sweet will. Such a change even by a private party is made keeping in view his own interest when he finds that the existing lawyer is not suitable for the assignment and, therefore, without making the change he incurs the risk of some loss. In the case of the State it is the public interest which should be the prime guiding consideration to judge the suitability of the appointee but it appears that the impugned State action was taken in the present case with only one object in view, that is, to terminate all existing appointments irrespective of the subsistence or expiry of the tenure or suitability of the existing incumbents.

46. Viewed in any manner, the impugned circular dated 6-2-90 is arbitrary. It terminates all the appointments of Government Counsel in the districts of the State of Uttar Pradesh by an omnibus order, even though, these appointments were all individual. No common reason applicable to all of them justifying their termination in one stroke on a reasonable ground has been shown. The 'submission on behalf of the State of Uttar Pradesh at the hearing that many of them were likely, to be reappointed is by itself ample proof of the fact that there was total nonapplication of mind to the individual cases before issuing the general order terminating all the appointments. This was done in spite of the clear provisions in the L. R. Manual laying down detailed procedure for appointment, termination and renewal of tenure and the requirement to first consider the existing incumbent for renewal of his tenure and to take steps for a fresh appointment in his place only if the existing incumbent is not found suitable in comparison to more suitable persons available for appointment at the time of renewal. In the case of existing appointees, a decision has to be first reached about their non-suitability for renewal before deciding to take steps for making fresh appointments to replace them. None of these steps were taken and no material has been produced to show that any existing incumbent was found unsuitable for the office on objective assessment before the decision to replace all by fresh appointees was taken. The prescribed procedure laid down in the L.R. Manual which has to regulate exercise of this power was totally ignored. In short, nothing worthwhile has been shown on behalf of the State of U. P. to support the impugned action as reasonable and non-arbitrary. The impugned circular must, therefore, perish on the ground of arbitrariness which is an available ground for judicial review in such a situation.

47. In view of the above conclusion, all the existing appointees to the posts of Government Counsel in the districts throughout the State of U. P., by whatever name called, governed by the impugned circular dated 6-2-1990, who were in position at the time of issuance of the circular, must continue in office and be dealt with in accordance with the procedure laid own in the L.R. Manual. Those

Government Counsel, whose term had then expired or was to expire thereafter, would be considered for renewal of their tenure in the manner prescribed and steps for preparation of a fresh panel to replace them would be taken only if they are found unsuitable for renewal of their terms as a result of an informed decision in the manner prescribed. The power of termination of any appointment during the subsistence of the term available to the State Government shall also be available for exercise only in the manner indicated, wherever considered necessary. In short, the status quo ante as on 28-2-1990, on which date the impugned circular dated 6-2-1990 was made effective, will be restored and be maintained till change in any appointment is found necessary and is made in the manner prescribed. The fresh appointments, if any, made by the State Government in implementation of the impugned circular dated 6-2-1990, being subject to the validity of the circular and the result of these matters, would stand superseded in this manner. The State Government will implement this discretion within two weeks of the date of this order.

48. In our view, bringing the State activity in contractual matters also within the purview of judicial review is inevitable and is a logical corollary to the stage already reached in the decisions of this Court so far. Having fortunately reached this point, we should not now turn back or take a turn in a different direction or merely stop there. In our opinion, two recent decisions in M/s. Dwarkadas Marfatia and Sons (AIR 1989 SC 1642) (supra) and Mahabir Auto Stores (AIR 1990 SC 1031) (supra) also lead in the same . Direction without saying so in clear terms. This appears to be also the trend of the recent English decisions. It is in consonance with our commitment to openness which implies scrutiny of every State action to provide an effective check against arbitrariness and abuse of power. We would much rather be wrong in saying so rather than be wrong in not saying so. Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary, in whatever sphere, must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all power must be for public good instead of being an abuse of the power.

49. In view of the conclusion reached by us and the above direction restoring status quo ante as on 28-2-1990, we have not gone into individual matters brought before us. Some argument was advanced from both sides in W. P. No. 706 of 1990 (Km. Shrilekha Vidyarthi v. State of U. P.) wherein the fact of renewal of petitioner's tenure is disputed. It is unnecessary for us to go into that question also since the order, we are making, governs the case of all Government counsel in the districts throughout the State of U. P. including that of the petitioner in this writ petition. The subsequent rights of this petitioner also would be governed in the manner indicated above. If and when such a situation arises, it would be open to the parties to have the dispute, if any, adjudicated wherein the question of renewal of tenure, claimed by the petitioner, can also be gone Into.

50. Consequently, these appeals and writ petitions are allowed. The impugned circular G.O. No. D-284-Seven-Law-ministry dated 6-2-1990, issued by the Government of State of U. P., is quashed resulting in restoration of status quo ante as on 28-2-1990, the date from which this circular was made effective. No costs.

Order accordingly.

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