SUPREME COURT OF INDIA

State of U.P.

Vs.

Johri Mal

C. A. Nos. 963-64 of 2000

(V. N. Khare, C.J.I., Brijesh Kumar and S. B. Sinha, JJ.)

21.04.2004

JUDGEMENT

S. B. SINHA, J.:-

INTRODUCTION:

1. A short but interesting question as regard interpretation of Section 24 of the Code of Criminal Procedure and the relevant provisions of Legal Remembrancer's Manual relating to appointment and renewal of term of the District Government Counsel is in question in this batch of appeals which arise out of various judgments and orders passed by the Allahabad High Court in C.M.W.P. Nos. 34064, 19513, 34074, 26613, 40945, 41178, 5665, 41180, 5667 of 1998, 9809 of 1992, 9203 of 1998, 3100, 3102 of 1999 and 6754 of 1998.

FACTUAL BACKDROP:

2. The State of Uttar Pradesh appoints District Government Counsel (DGC) for civil, criminal and revenue Courts in terms of the Legal Remembrancer Manual.

3. Appointment of Public Prosecutor is governed by the Code of Criminal Procedure, 1973. The State of Uttar Pradesh, however, amended Section 24 of the Code of Criminal Procedure in terms whereof the requirements to consult the High Court for appointment of Public Prosecutors for the High Court as contained in sub-section (1) of Section 24 as also sub-sections (4), (5) and (6) thereof were deleted, Renewal of terms of the District Government Counsel, are, however, governed by Legal Remembrancer Manual.

4. The first respondent herein was appointed as District Government Counsel (DGC) (Criminal) at Meerut on or about 7-1-1983. The said post is deemed to be that of Public Prosecutor within the meaning of Section 24 of the Code of Criminal Procedure. His term was renewed by an order dated 12-3-1996. He was again appointed in the same capacity by an order dated 17-9-1997 for a period of one year. Before expiry of the said period, the respondent applied for renewal of his tenure. Allegedly, the District Judge and the District Magistrate did not recommend therefor. The State Government decided not to renew the term of the respondent as DGC (Criminal) and by an order dated 18-9-1998 he was relieved from the charge of the said post. By a notification dated 17-9-1998, the vacancy was advertised whereafter the respondent filed a writ petition before the Allahabad High Court inter alia praying for quashing the said order dated 18-9-1998. In the said writ petition, the contention of the respondent was that as the District Magistrate as also the District Judge had recommended for renewal of his tenure as DGC (Criminal) having found his conduct and work satisfactory, the renewal ought to have been granted as a matter of course.

5. Despite opportunities granted in that behalf, the appellants, however, did not file any return.

6. By reason of judgment, dated 11-12-1998, a Division Bench of the Allahabad High Court allowed the said writ application holding :

"In the present case the District Judge has recommended in favour of the petitioner and no good or cogent reason has been assigned for rejecting the recommendation of the District Judge. Hence we direct the petitioner's term as DGC (Criminal) to be renewed forthwith by the State Government."

7. The learned Judges further opined :

"The Supreme Court has observed in Special Reference No. 1 of 1998 that the Chief Justice of India means not the Chief Justice of India alone but in consultation with his four senior-most colleagues. No doubt this judgment was given in the context of appointments of Judges in the Supreme Court and High Courts, but in our opinion the spirit of the judgment is applicable to the present case also since the intention was to keep the administration of justice away from political considerations. Hence in our opinion the District Judge should not make the recommendation alone but in consultation with the two senior-most Judicial Officers in the District Court and also the CJM in the case of recommendations for appointments in the Criminal side, and the senior-most Civil Judge for appointments on the Civil side, and also the District Magistrate. In other words the recommendation shall be by a collegium headed by the District Judge and consisting of the above mentioned five members (consisting of four judicial officers and the District Magistrate). If two members disapprove the name no recommendation will be made. No name will be recommended if the District Judge disapproves. This, in our opinion, will be in accordance with the norms laid down in the L.R. Manual. Such a recommendation will ordinarily be treated as binding on the Government unless for some strong, cogent reasons to be recorded in writing if the Government disagrees. We again make it clear that the recommendation must be made purely on merit and competence ignoring caste, creed, religion or political affiliation." AIR 1999 SC 1 : 1998 AIR SCW 3400

8. Contending that the said judgment contains an error of record as the case of the first respondent had not been recommended by the District Judge or the District Magistrate concerned, an application for recalling of the judgment was filed by the appellant herein but the same was disposed of directing that the question regarding renewal of the respondent's term as DGC (Criminal) shall be considered afresh by the collegium headed by the District Judge constituted in the said judgment and the State Government shall act on the recommendations thereof.

SUBMISSIONS:

9. Mr. Ashok Kumar Srivastava, learned counsel appearing on behalf of the appellant would urge that the High Court proceeded on a wrong premise that the recommendations for renewal of terms of D.G.C. (Crl.) had been made by the District Magistrate in favour of the first respondent. Our attention in this behalf has been drawn to the opinion of the District Judge dated 11th September, 1998 as also the letter of the District Magistrate, Meerut addressed to the Principal Secretary, Justice and Legal Remembrancer, Government of Uttar Pradesh, Lucknow dated 12-9-1998.

10. The learned counsel would submit that as the appointment of public prosecutor is governed by the provisions of the Code of Criminal Procedure and renewal thereof by the Uttar Pradesh Legal Remembrancer, the High Court committed a manifest error in directing constitution of a collegium headed by a member of judiciary.

11. Mr. Srivastava would argue that having regard to the fact that professional engagement of a lawyer cannot be equated with appointment on a civil post as there exists a relationship of client and the lawyer between the State and the public prosecutor, the High Court was not correct in issuing the impugned directions. Reliance in this behalf has been placed on Harpal Singh Chauhan and others v. State of U.P. ((1993) 3 SCC 552), State of U.P. and others v. U.P. State Law Officers Association and others ((1994) 2 SCC 204) and State of U.P. v. Ramesh Chandra Sharma and others ((1995) 6 SCC 527). AIR 1993 SC 2436 : 1993 AIR SCW 2843 : 1993 Cri LJ 3140 : 1993 All LJ 1255, AIR 1994 SC 1654 : 1994 AIR SCW 1389, AIR 1996 SC 864 : 1996 AIR SCW 247 : 1996 All LJ 407

12. Mr. Ranjit Kumar, learned senior counsel appearing on behalf of the respondent, on the other hand, would submit that the High Court felt the need to constitute a collegium keeping in view of the fact that the action on the part of the State in appointment and/or renewal of the DGCs was found to be arbitrary.

13. The learned counsel would submit that the public prosecutors look after the prosecution works and, thus, the nature of office would be a public in nature having regard to the fact that they discharge public functions.

STATUTORY PROVISIONS:

Sub-sections (2) to (6) of Section 24 of Code of Criminal Procedure read thus :

"(2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case or class of cases in any district, or local area.

(3) For every district, the State Govt. shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district.

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Pubic Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names

of persons, who are, in his opinion fit to be appointed as Public Prosecutor or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).

(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre.

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4)."

14. However, the State of U.P. by Act No. 18 of 1991 with effect from 16-2-1991 amended sub-section (1) of Section 24 of the Code of Criminal Procedure in the following terms :

"in sub-section (1), the words "after consultation with the High Courts" shall be omitted;"

15. By reason of the said Act, sub-sections (4) (5) and (6) of Section 24 have also been omitted.

16. Para 7.01 of Legal Remembrancer's Manual defines the District Government Counsel to mean legal practitioners appointed by the State Government to conduct in any Court such civil, criminal or revenue cases, as may be assigned to them either generally, or specially by the Government. The legal practitioner appointed to conduct civil, criminal or revenue cases shall be known as District Government Counsel (Civil), (Criminal) or (Revenue), as the case may be.

17. Para 7.02 of the Manual lays down the power of the Government to appoint Government Counsel for each district in the State. Para 7.03 provides that whenever a post of any Government Counsel is likely to fall vacant within the next three months or when a new post is created, the District Magistrate shall notify the vacancies to the members of the Bar, the qualification wherefor would be practice of 10 years in case of District Government Counsel, 7 years in case of Assistant

District Government Counsel and 5 years in case of Sub-District Government Counsel. Clause (3) of Para 7.03 reads thus :

"(3) The names so received shall be considered by the District Officer in consultation with the District Judge. The District Officer shall give due weight to the claim of the existing incumbents (Additional/Assistant District Government Counsel), if any, and shall submit confidentially in order of preference the names of the legal practitioners for each post to the Legal Remembrancer giving his own opinion particularly about his character, professional conduct and integrity and the opinion of the District Judge on the suitability and merits, of each candidate. While forwarding his recommendations to the Legal Remembrancer the District Officer shall also send to him the bio-data submitted by other incumbents with such comments as he and the District Judge may like to make. In making the recommendations, the proficiency of the candidate in civil or criminal or revenue law, as the case may be, as well as in Hindi shall particularly be taken into consideration:

Provided that it will also be open to the District Officer to recommend the name of any person, who may be considered fit, even though he may not have formally supplied his bio-data for being considered for appointment. The willingness of such a person to accept the appointment if made shall, however, be obtained before his name is recommended."

18. Para 7.04 of the said Manual provides that on receipt of the recommendations of the District Officer, the Legal Remembrancer may make further enquiry and submit the recommendations as also for orders of the State Government. The decision of the State Government would be final. Para 7.05 prohibits canvassing by or on the part of a candidate which would entail disqualification.

19. Paras 7.06, 7.07 and 7.08 read thus :

"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.

(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.

Note: The term political activity includes membership of any political party or local body as also press reporting work.

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 therefor 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 stand point, 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 reappointing 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."

20. A supplementary provision has been made in Chapter XXI of the said Manual for appointment and renewal of the post of public prosecutors. It inter alia contains the guidelines and clarifies that the appointment of DGC (Criminal), the change of designation of the public prosecutors could not effect the basic nature of their professional engagement. It further provides that such professional engagement is terminated on either side without notice and without assigning any reason. It is stated that the appointment of public prosecutor and Addl. Prosecutor both for the High Court and District shall be made in accordance with Section 24 of the new Code. Para 21.04 provides for constitution of a panel of five years against each vacancy. It mandates that the State Government shall appoint an Additional Public Prosecutor out of the names appeared in the panel. Paras 21.07 and 21.08 of the said Manual read as under :

"21.07. The appointment of Public Prosecutor, or Additional Public Prosecutor shall be made for the period of three years, but the State Government can terminate such appointment at any time without notice and without assigning any reason. The State Government may extend the period of such appointment from time to time and such extension of such term shall not be treated as new appointment.

21.08. The District Magistrate shall after consultation with the Sessions Judge submit a confidential report in respect of the Public Prosecutor and Additional Public Prosecutors giving details about the percentage of success of cases conducted by them and the general reputation which they enjoy. Where the percentage of success is low the reasons given by the Public Prosecutor or Additional Public Prosecutor for the same should also be commented on. After every three years he shall make a special assessment of each such Public Prosecutor or Additional Public Prosecutor and recommend whether the person concerned should be granted extension for a further term of three years or for a shorter term only."

21. The provisions of the Code of Criminal Procedure which are statutory in nature govern the field. The State of Uttar Pradesh, however, for reasons best known to it amended sub-section (1) of Section 24 of the Code of Criminal Procedure as a result whereof, the State is not required to consult the High Court before appointing a Public Prosecutor for the High Court. Similarly, sub-sections (4), (5) and (6) of Section 24 have also been deleted purported to be on the ground that similar provisions exist in the Legal Remembrancer Manual. The Legal Remembrancer Manual is merely a compilation of executive orders and is not a 'law' within the meaning of Article 13 of the

Constitution of India.

JUDICIAL REVIEW:

22. The power of judicial review is now well-defined in a series of decisions of this Court. It is trite that the Court will have no jurisdiction to entertain a writ application 1993 AIR SCW 1425, 1994 AIR SCW 2584, 1994 AIR SCW 2616, AIR 2003 SC 3823 : 2003 AIR SCW 4381 in a matter governed by contract qua contract (assuming such professional engagement to be one), as therein public law element would not be involved. See Life Insurance Corporation v. Escorts Ltd. and others (AIR 1986 SC 1370), F.C.I. and others v. Jagannath Dutta and others (AIR 1993 SC 1494), State of Gujarat and others v. Meghji Pethraj Shah Charitable Trust and others, ((1994) 3 SCC 552) , Assistant Excise Commissioner and others v. Issac Peter and others, (1994) 4 SCC 104, National Highway Authority of India v. M/s. Ganga Enterprises and another, (2003 (7) SCALE 171).

23. In any event, the modern trend also points to judicial restraint in administration action as has been held in Tata Cellular v. Union of India ((1994) 6 SCC 651). See also Monarch Infrastructure (P.) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and others ((2000) 5 SCC 287) and W. B. State Electricity Board v. Patel Engineering Co. Ltd. and others ((2001) 2 SCC 451) and L.I.C. and another v. Consumer Education and Research Centre and others (AIR 1995 SC 1811). AIR 1996 SC 11 : 1994 AIR SCW 3344, AIR 2000 SC 2272 : 2000 AIR SCW 2050, AIR 2001 SC 682 : 2001 AIR SCW 322, 1995 AIR SCW 2834

24. The legal right of an individual may be founded upon a contract or a statute or an instrument having the force of law. For a public law remedy enforceable under Article 226 of the Constitution, the actions of the authority need to fall in the realm of public law be it a legislative act of the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element. The question is required to be determined in each case having regard to the nature of and extent of authority vested in the State. However, it may not be possible to generalize the nature of the action which would come either under public law remedy or private law field nor is it desirable to give exhaustive list of such actions.

25. In Council of Civil Services Unions v. Minister for the Civil Service ((1985) AC 374) while extending the scope of judicial review the House of Lords decided that judicial review should not be available if the particular decision under challenge was not justiciable. However, in granting relief the Court shall take into consideration the factors like national security issue. In Constitution Reform in the UK by Dawn Oliver, it is stated at page 210:

"In the CCSU case the House of Lords decided that judicial review should not available if the

particular decision under challenge was not justiciable. In effect they respected the political Constitution and deferred to Government in some sensitive areas. In this case the Government was alleging that for them to have consulted the unions before the decision was taken would have provoked industrial action at GCHQ, which would in turn have been damaging to national security. In the view of the House of Lords this made an otherwise reviewable decision not suitable for judicial review - not justiciable. Other decisions taken under the royal prerogative, which the Court indicated would be non-justiciable, included treaty making and foreign affairs. Despite the outcome of the CCSU that the prerogative is in principle reviewable and that were it not for the national security issue the Government should have consulted the unions before imposing these changes was a major step forward in the judicialization of Government action, including the actual conduct of Government, and a step away from the political Constitution."

26. However, we may notice that judicial review was held to be available when justiciability of foreign relations came to be considered in R. (Abbasi) v. Secretary of State for the Foreign and Commonwealth Office and Secretary of State for the Home Department, (2002) EWCA Civ., 6 November 2002 stating:

"Although the statutory context in which Adan was decided was highly material, the passage from Lord Cross' speech in Cattermole supports the view that, albeit that caution must be exercised by this Court when faced with an allegation that a foreign State is in breach of its international obligations, this Court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of its international obligations, this Court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights."

27. In Council of Civil Services Unions v. Minister of Civil Service the power of judicial review was restricted ordinarily to illegality, irrationality and impropriety stating:

"If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated."

28. The scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi judicial or administrative. The power of judicial review is not intended to assume a supervisory role or done the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the Courts step into the areas exclusively reserved by the supreme lex to the other organs of the State. Decisions and

actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review Court. The limited scope of judicial review succinctly put are :

(i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies.

(ii) A petition for a judicial review would lie only on certain well-defined grounds.

(iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.

(iv) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a Court is limited to seeing that Tribunal functions within the limits of its authority and that its decisions do not occasions miscarriage of justice.

(v) The Courts cannot be called upon to undertake the Government duties and functions. The Court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a Judge should not be invoked as a substitute for the judgment of the legislative bodies. (See Ira Munn v. State of Ellinois, 1876 (94) US (Supreme Reports) 113).

29. In Wade's Administrative Law, 8th edition at pages 33-35, it is stated:

"Review, legality and discretion:

The system of judicial review is radically different from the system of appeals. When hearing an appeal the Court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the Court is concerned with its legality; is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?'

Rights of appeal are always statutory. Judicial review, on the other hand, is the exercise of the Court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary; the Court is simply performing its ordinary functions in

order to enforce the law. The basis of judicial review, therefore, is common law. This is none-the-less true because nearly all cases in administrative law arise under some Act of Parliament. Where the Court quashes an order made by a minister under some Act, it typically uses its common law power to declare that the Act did not entitle the ministers to do what he did and that he was in some way exceeding or abusing his powers.

Judicial review thus is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the Court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not. If the Home Secretary revokes a television licence unlawfully, the Court, may simply declare that the revocation is null and void. Should the case be one involving breach of duty rather than excess of power, the question will be whether the public authority should be ordered to make good a default. Refusal to issue a television licence to someone entitled to have one would be remedied by an order of the Court requiring the issue of the licence. If administrative action is in excess of power (ultra vires), the Court has only to quash it or declare it unlawful (these are in effect the same thing) and then no one need pay any attention to it. The minister or tribunal or other authority has in law done nothing, and must make a fresh decision."

30. It is well-settled that while exercising the power of judicial review the Court is more concerned with the decision making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the Court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision maker's opinion on facts is final. But while examining and scrutinizing the decision making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the Court of judicial review can reappreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touch-stone of the tests laid down by the Court with special reference to a given case. This position is well settled in Indian Administrative Law. Therefore, to a limited extent of scrutinizing the decision making process, it is always open to the Court to review the evaluation of facts by the decision maker.

31. In Chief Constable of the North Wales Police v. Evans (1982 (3) All ER 141), the law is stated in the following terms:

". . . . .The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is

authorized or enjoined by law to decide for itself a conclusion which is correct in the eyes of the Court."

32. Prof. Bernard Schwartz in his celebrated book (Administrative Law, III Edn. Little Brown Company 1991) dealing with the present status of judicial review in American context, summarized as under :

"If the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the Courts. That would destroy the values of agencies, created to secure the benefit of special knowledge acquired through continuous administration in the complicated fields. At the same time, Court should not rubber-stamp agencies; the scope of judicial enquiry must not be so restricted that it prevents full enquiry into the action of legality. If that question cannot be properly explored by the Judge, the right to review becomes meaningless . . . .in the final analysis, the scope of review depends on the individual Judges estimate of the justice of the case."

33. Prof. Clive Lewis in his book (Judicial Remedies in Public Law, 1992 Edn. At Pp. 294-295).

"The Courts now recognise that the impact on the administration is relevant in the exercise of their remedial jurisdiction. . . . ..Earlier cases took a robust line that the law has to be observed and the decision invalidated, what, ever the administrative inconvenience caused. The Courts now-a-days recognise that such an approach is not always appropriate and may not be in the wider public interest. The effect on the administrative process is relevant to the Court's remedial discretion may prove decisive. . . . They may also be influenced to the extent to which the illegality arises from the conduct of the administrative body itself, and their view of that conduct."

34. Grahme Aldous and John Alder in "Applications for Judicial Review, Law and Practice" stated thus :

"There is a general presumption against ousting the jurisdiction of the Courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the Courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the royal prerogative are inherently unreviewable but since the speeches of the House of Lords in Council of Civil Service Unions v. Minister of the Civil Service this is doubtful. Lords Diplock, Scaman and Roskili appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject-matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle,

including where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest."

35. In Wade's Administrative Law, 8th Edition at pages 551-552, the author states:

"Rights and Remedies : Rights depend upon remedies. Legal history is rich in examples of rules of law which have been distilled from the system of remedies, as the remedies have been extended and adapted from one class of case to another. There is no better example than habeas corpus. This remedy, since the sixteenth century the chief cornerstone of personal liberty, grew out of a medieval writ which at first played an inconspicuous part in the law of procedure; it was used to secure the appearance of a party, in particular where he was in detention by some inferior Court. It was later invoked to challenge detention by the king and by the Council; and finally it became the standard procedure by which the legality of any imprisonment could be tested. The right to personal freedom was almost a by-product of the procedural rules.

This tendency has both good and bad effects. It is good in that the emphasis falls on the practical methods of enforcing any right. Efficient remedies are of the utmost importance, and the remedies provided by English administrative law are notably efficient. But sometimes the remedy comes to be looked upon as a thing in itself, divorced from the legal policy to which it ought to give expression. In the past this has led to gaps and anomalies, and to a confusion of doctrine to which the Courts have sometimes seemed strangely indifferent."

36. A writ of or in the nature of mandamus, it is trite, is ordinarily issued where the petitioner establishes a legal right in himself and a corresponding legal duty in the public authorities.

37. The Legal Remembrancer Manual clearly states that appointment of a public prosecutor or a district counsel would be professional in nature. It is beyond any cavil and rightly conceded at the Bar that the holder of an office of the public prosecutor does not hold a civil post. By holding a post of district counsel or the public prosecutor, neither a status is conferred on the incumbent.

38. A distinction is to be borne in mind between appointment of a Public Prosecutor or Additional Public Prosecutor, on the one hand, and Assistant Public Prosecutor, on the other. So far as Assistant Public Prosecutors are concerned, they are employees of the State. They hold Civil Posts. They are answerable for their conduct to higher statutory authority. Their appointment is governed by the service rules framed by the respective State Government. See Samarendra Das, Advocate v. The State of West Bengal and others (2004 (2) JT (SC) 413). 2004 AIR SCW 488 : 2004 Lab IC 565

39. The appointment of public prosecutors, on the other hand, are governed by the Code of Criminal Procedure and/or the executive instructions framed by the State governing the terms of their appointment. Proviso appended to Article 309 of the Constitution of India is not applicable in their case. Their appointment is a tenure appointment. Public prosecutors, furthermore, retain the character of legal practitioners for all intent and purport. They, of course, discharge public functions and certain statutory powers are also conferred upon them. Their duties and functions are onerous but the same would not mean that their conditions of appointment are governed by any statute or statutory rule.

40. So long as in appointing a counsel the procedures laid down under the Code of Criminal Procedure are followed and a reasonable or fair procedure is adopted, the Court will normally not interfere with the decision. The nature of the office held by a lawyer vis-a-vis the State being in the nature of professional engagements, the Courts are normally charry to over-turn any decision unless an exceptional case is made out. The question as to whether the State is satisfied with the performance of its counsel or not is primarily a matter between it and the counsel. The Code of Criminal Procedure does not speak of renewal or extension of tenure. The extension of tenure of public prosecutor or the district counsel should not be compared with the right of renewal under a licence or permit granted under a statute. The incumbent has no legal enforceable right as such. The action of the State in not renewing the tenure can be subjected to judicial scrutiny inter alia on the ground that the same is arbitrary. The Courts normally would not delve into the records with a view to ascertain as to what impelled the State not to renew the tenure of a public prosecutor or a district counsel. The jurisdiction of the Courts in a case of this nature would be to invoke the doctrine of 'Wednesbury Unreasonableness' as developed in Associated Picture House v. Wednesbury Corporation, (1947) 2 All ER 640).

41. In Om Kumar and others v. Union of India ((2001) 2 SCC 386), it was held that where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the constitutional Courts as primary reviewing Courts to consider the correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. For judging the arbitrariness of the order, the test of unreasonableness may be applied. The action of the State, thus, must be judged with extreme care and circumspection. It must be borne in mind that the right of the public prosecutor or the district counsel do not flow under a statute. Although, discretionary powers are not beyond pale of judicial review, the Courts, it is trite, allow the public authorities sufficient elbow space/play in the joints for a proper exercise of discretion. AIR 2000 SC 3689 : 2000 AIR SCW 4361 : 2001 Lab IC 304

42. It may be true that the Legal Remembrancer Manual provides for renewal but it contains executive instructions which even do not meet the requirements of clause (3) of Article 166 of the Constitution. Legal Remembrancer Manual is not a law within the meaning of Article 13 of the Constitution of India. See Union of India v. Naveen Jindal and another, (2004 (2) JT (SC) 1. AIR

43. The State, however, while appointing a counsel must take into account the following fundamental principles which are required to be observed that good and competent lawyers are required to be appointed for (i) good administration of justice; (ii) to fulfil its duty to uphold the rule of law; (iii) its accountability to the public; and (iv) expenditure from the tax payers' money.

44. Only when good and competent counsel are appointed by the State, the public interest would be safeguarded. The State while appointing the public prosecutors must bear in mind that for the purpose of upholding the rule of law, good administration of justice is imperative which in turn would have a direct impact on sustenance of democracy. No appointment of public prosecutors or district counsel should, thus, be made either for pursuing a political purpose or for giving some undue advantage to a section of people. Retention of its counsel by the State must be weighed on the scale of public interest. The State should replace an efficient, honest and competent lawyer, inter alia, when it is in a position to appoint a more competent lawyer. In such an event, even a good performance by a lawyer may not be of much importance.

45. However, malice in law can also be a ground for judicial review.

46. The Code of Criminal Procedure does not provide for renewal or extension of a term. Evidently, the Legislature thought it fit to leave such matters at the discretion of the State. It is no doubt true that even in the matter of extension or renewal of the term of Public Prosecutors, the State is required to act fairly and reasonably. The State normally would be bound to follow the principles laid down in the Legal Remembrancer Manual.

CORRECTNESS OF THE HIGH COURT JUDGMENT:

47. It appears that Shri K. S. Rakhra, District Judge, Meerut by his letter dated 11th September, 1998 addressed to the District Magistrate, Meerut although observed that the work and conduct of the respondent was satisfactory and he had not received any complaint in regard to his integrity, but it was stated:

"I, however, agree with your view that the work of the D.G.C. (Cri.) also requires effective control over his team and proper analysis of the result of the trial and follow up action including remedial steps to improve the efficiency of the prosecution as a whole.

Your letter suggests that in your monthly meetings you have found that Shri Johri Mal does not exercise effective control over the Additional D.G.C. (Cri.) and Asstt. D.G.C. (Cri.) and that he has not been following the instructions given in your monthly meetings with regard to serious criminal matters.

You have also found him failing to furnish complete relevant information in the meetings and that he does not have proper co-ordination with the S.P.O. office and that it is giving rise to administrative problems.

The work of D.G.C. (Cri.) also requires administrative skill and above average judicial knowledge.

I have no objection if Shri Johri Mal is replaced by some better and experienced person having good experience of conducting Sessions Trials and also having sufficient administrative skill."

48. Acting pursuant to or in furtherance of the aforementioned recommendations of the District Judge, the District Magistrate in terms of his letter dated 12-9-1998 addressed to the Principal Secretary, Justice and Legal Remembrancer, Government of Uttar Pradesh, Lucknow stated, thus :

"It is submitted in aforesaid matter that Sri Johri Mal, Advocate, was engaged on the post of District Government Counsel (Criminal), Meerut for the term up to 14-9-98 as per the order No. D 1880 (1) Seven-Judicial 3(42)/90 dated 17-9-97. After the term of Sri Johri Mal comes to an end, the post of District Government Counsel (Criminal) shall fall vacant w.e.f. 15-9-98. On analysis of work of Sri Johri Mal in a year, I felt that it shall not be proper to extend the period of Sri Johri Mal as District Government Counsel (Criminal) in a district like Meerut. He has no effective control over other ADGC for doing 'pairvi' (taking steps). Even necessary particulars are not collected for doing 'pairvi'. In order to make prosecution more effective it was decided that three important cases be determined, regular dates be fixed and same be got decided at the earliest, but such action could not be done effectively due to lack of co-ordination with the judicial officers. In toto his term as the District Government Counsel cannot be held as proper and satisfactory, District Judge has also consented to engage other appropriate D.G.C. at the place of Johri Mal and letter of opinion of the District Judge is enclosed."

49. We may notice that one Shri Narendra Deo Chaubey, Under Secretary, Law Department, Government of Uttar Pradesh, Lucknow affirmed an affidavit in support of its application for recalling of the Order dated 11th December, 1998 wherein it was categorically stated:

"That in para 22 of the writ petition the petitioner has made a false statement that on the renewal application of the petitioner the District Judge, Meerut and respondent No. 2 made favourable reports and the renewal of the petitioner was recommended."

50. The very premise whereupon the High Court has based its decisions, therefore, was incorrect. The impugned judgment, thus, cannot be sustained as it suffers from misdirection in law.

51. A Public Prosecutor is not only required to show his professional competence but is also required to discharge certain administrative functions. The District Officer was of the opinion that in a district like Meerut the term of the appointment should not be extended as he has no effective control over the other ADGs for 'taking steps'. The approach of the District Officer cannot be said to be wholly irrational. As noticed hereinbefore, the District Judge, Meerut has also agreed thereto. The action on the part of the State, therefore, cannot be said to be wholly without jurisdiction requiring interference by the High Court in exercise of its power of judicial review.

COLLEGIUM:

52. Whether the High Court was right in its direction in the light of Special Reference No. 1 of 1998 that a collegium should be constituted? AIR 1999 SC 1 : 1998 AIR SCW 3400

53. This Court in Supreme Court AIR 1964 SC 268 : 1993 AIR SCW 4101 Advocates-on-Record Associations and others v. Union of India ((1993) 4 SCC 441) held that the word 'consultation' is capable of giving different meaning in different context. The word 'consultation' occurring in Article 124 of the Constitution of India was given a particular construction having regard to the relevant significant context in which the same was used. Having regard to the provisions of the Constitution, the Court felt that the meaning of the word 'consultation' cannot be confined to its lexical definition.

54. In Special Reference No. 1 of 1998, Re: ((1998) 7 SCC 739) this Court stated: AIR 1999 SC 1 : 1998 AIR SCW 3400 (Para 10)

"12. The majority view in the Second Judges case ((1993) 4 SCC 441) is that in the matter of appointments to the Supreme Court and the High Courts, the opinion of the Chief Justice of India has primacy. The opinion of the Chief Justice of India is "reflective of the opinion of the judiciary,

which means that it must necessarily have the element of plurality in its formation". It is to be formed "after taking into account the view of some other Judges who are traditionally associated with this function". The opinion of the Chief Justice of India "so given has primacy in the matter of all appointments". For an appointment to be made, it has to be "in conformity with the final opinion of the Chief Justice of India formed in the manner indicated". It must follow that an opinion formed by the Chief Justice of India in any manner other than that indicated has no primacy in the matter of appointments to the Supreme Court and the High Courts and the Government is not obliged to act thereon." AIR 1994 SC 268 : 1993 AIR SCW 4101

55. Appointment of the District Government Counsel cannot be equated with the appointments of the High Court and the Supreme Court Judges. A distinction must be made between professional engagement and a holder of high public office. Various doctrines and the provisions of the Constitution which impelled this Court to give meaning of 'consultation' as 'concurrence' and wherein the Chief Justice of India will have a primacy, cannot be held to be applicable in the matter of consultation between the District Magistrate and the District Judge for the purpose of preparation of a panel of the District Government Counsel.

56. We would, however, like to lay stress on the fact that the consultation with the District Judge must be an effective one. The District Judge in turn would be well advised to take his colleagues into confidence so that only meritorious and competent persons who can maintain the standard of public office can be found out.

57. The High Court failed to consider that the power under Article 226 of the Constitution of India is not at par with the constitutional jurisdiction conferred upon this Court under Article 142 of the Constitution of India. The High Court has no jurisdiction to direct formulation of a new legal principle or a new procedure which would be contrary to and inconsistent with a statutory provision like Code of Criminal Procedure. See State of Himachal Pradesh v. A Parent of a Student of Medical College, Simla and others ((1985) 3 SCC 169) and Asif Hameed and others v. State of Jammu and Kashmir and others (1989 Supp (2) SCC 364))., AIR 1985 SC 910, AIR 1989 SC 1899

58. In Guruvayoor Devaswom Managing Committee and another v. C. K. Rajan and others ((2003 (7) SCC 548) this Court held: 2003 AIR SCW 6039

"50. . . . . .(x) The Court would ordinarily not step out of the known areas of judicial review. The High Courts although may pass an order for doing complete justice to the parties, they do not have a power akin to Article 142 of the Constitution of India."

DECISIONS OF THIS COURT:

59. This Court in Kumari Shrilekha Vidyarthi and others v. State of U. P. and others ((1991) (1) SCC 212) opined that the appointment made in the post of District Government Counsel is not contractual in nature. It was held that the Government Law Officers including the Public Prosecutors are holders of public offices. It was further opined that even in a case of contract the State cannot act arbitrarily and such arbitrary action is liable to be set aside as violative of Article 14 of the Constitution of India. AIR 1991 SC 537 : 1993 AIR SCW 77 : 1993 All LJ 4

60. In Kumari Shrilekha Vidyarthi (supra), the Court sought to draw a distinction between the powers of public authorities vis-a-vis the private authorities referring to Wade's Administrative Law, 6th Edition, page 401 to the following effect and stating:

"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."

61. We have our own reservations about the aforementioned principles of law, but for the purpose of this case, it is not necessary to advert thereto.

62. The Article by Sue Arrow Smith on Judicial Review and Contractual Powers of Authorities published in (1990) 106 Law Quarterly Review, Pages 277-292 which has been referred to in Shreelekha Vidyarthi (supra) took into consideration several areas of English Law relating to (a) Licensing of market traders, (b) Dismissal of public servants, (c) Public body's powers as landlord and (d) Judicial review of Government procurement. The learned author, inter alia, observed that the possibility of review of the exercise of contractual rights in the said area which have been recognised by Canadian Courts should also be adopted by the English Courts. The learned author observes. AIR 1991 SC 537 : 1993 AIR SCW 787 : 1993 All LJ 4

"In other words, they should accept that these powers are reviewable as a matter of principle but that review may be negated of limited by specific policy factors, rather than continue searching for some "public law" element to the decision as a justification for applying public law doctrines to the case before them. Support for this approach is found in the judgments of the Court of Appeal in Brown, Kelly and Emmett and also, implicitly, in the recent cases on review of procurement and it is a pity that the Court of Appeal did not take the opportunity presented recently in Jones v. Swanesea City Council to endorse such an approach, since this clearly commended itself to the Court."

63. The said Article is althought though provoking we are bound by the decisions of this Court and a distinction between a public law element and private law element although may be thin, has to be kept in view and taken into consideration while entertaining a writ application.

64. In Mukul Dalal and others v. Union of India and others, ((1988) 3 SCC 144), this Court held that office of the Public Prosecutor is a public one and nobody should be appointed as a special public prosecutor at the instance of a complainant stating :

"10. ..... To leave the private complainant to pay to the Special Public Prosecutor would indeed not be appropriate. We would make it clear that we do not support the conclusion of the High Court that as a rule whenever there is request of appointment of a Special Public Prosecutor or an Assistant Public Prosecutor, the same should be accepted. The Remembrancer of Legal Affairs should scrutinise every request, keeping a prescribed guidelines in view and decide in which cases such request should be accepted, keeping the facts of such cases in view. Ordinarily the special Public Prosecutor should be paid out of the State funds even when he appears in support of a private complainant but there may be some special case where the Special Public Prosecutors' remuneration may be collected from the private source. In such cases the fees should either be deposited in advance or paid to a prescribed State agency from where the Special Public Prosecutor could collect the same. In view of these conclusions and our disagreeing with the view of the High Court , the appeals should stand allowed. Rule 22 of the Maharashtra Rules, referred to above, in our view is bad and the State Government should properly modify the same keeping our conclusions in view. The Remembrancer of Legal Affairs of the Maharashtra Government will now decide as to whether in the three cases referred to here, the services of a Special Public Prosecutor, a Public Prosecutor or an Assistant Public Prosecutor should be provided and in case he comes to the conclusion that such provision should be made, he should decide as to whether the State administration should pay for such Public Prosecutor or the private complainant should bear the same. There would be no order as to costs.

65. In Mundrika Prasad Singh v. State of Bihar ((1979) 4 SCC 701) this Court held that a Government Pleader holds a public office but he is more than an advocate for litigant. This Court observed : AIR 1979 SC 1871

"14. It is heartening to notice that the Bihar Government appoints these lawyers after consultation with the District Judge. It is in the best interest of the State that it should engage competent lawyers without hunting for political partisans regardless of capability. Public offices - and Government Pleadership is one - shall not succumb to Tammany Hall or subtle spoils system, if purity in public office is a desideratum. After all, the State is expected to fight, and win its cases and sheer patronage is misuse of power. One effective method of achieving this object is to act on the advice of the District Judge regarding the choice of Goverment Pleaders. When there were several thousand cases in the Patna Courts and hundreds of cases before a plurality of tribunals, it was but

right that Government did not scarifice the speedy conduct of cases by not appointing a number of pleaders on its behalf for the sake of the lucrative practice of a single Government Pleader. It is inconceivable how he would have discharged his duties to the Court and to his client if, this crowd of land acquisition cases were posted in several Courts more or less at the same time. Adjournment to suit advocates' convenience becomes a bane when it is used only for augmentation of counsel's income resisting democratisation and distributive justice within the profession. These principles make poor appeal to those who count, which he is a pity."

66. This Court lamented :

"17. We dismiss the special leave petition but with a sad tag, which is the message of this martyrdom. Professions shall not be concealed conspiracies with 'effects, aristocratic, protective coloration', which at the same time enables one to make a considerable sum of money without sullying his hands with a "job" or "trade". The remarks of Tabachnik, in 'Professions For the People,' about English professions of the eighteenth century smell fresh :

One could carry on commerce by sleight of hand while donning the vestments of professional altruism. To boot one could also work without appearing to derive income directly from it. As Reader explains :

"The whole subject of payment ..... seems to have caused professional man acute embarrassment, making them take refuge in elaborate concealment, fiction and artifice. The root of the matter appears to lie in the feeling that it was not fitting for one gentleman to pay another for services rendered particularly if the money passed directly. Hence, the devices of paying a barrister's fee to the attorney, not to the barrister himself. Hence, also the convention that in many professional dealings the matter of the fee was never openly talked about, which could be very convenient, since it precluded the client or patient, from arguing about whatever sum his advisor might eventually indicate as a fitting honorarium." (1966 p. 37)

The established professions - the law, medicine, and the clergy - held (or continued to hold) estate - like positions:

"The three 'liberal professions' of the eighteenth century were the nucleus about which the professional class of the nineteenth century was to form. We have seen that they were united by the bond of classical education that their broad and ill defined functions covered much that later would crystallise out into new, specialised, occupations, that each, ultimately, derived much of its standing with the established order in the States." (1966 p. 23)

18. The time has come to examine the quality of the product or service, control the price, floor to ceiling, enforce commitment to the people who are the third world clients, and practice internal distributive justice oriented on basic social justice so that the profession may flourish without wholly hitching the calling to the star of material assessment immunised by law from the liabilities of other occupations. We do not suggest that lawyering in India needs a National Commission right now as in England and elsewhere, nor do we subscribe to the U.S. situation on which the President and the Chief Justice have pronounced. We quote:

We are over lawyered ..... Lawyers of great influence and prestige led the fight against civil rights and economic justice ..... They have fought innovation even in their own profession ..... Lawyers as a profession have resisted both social change and economic reform.

(President Carter, May, 1978)

We may well be on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of justices in numbers, never before contemplated.

(U.S. Chief Justice Burger)

19. Law Reform includes Lawyer Reform, an issue which the petitioner has unwittingly laid bare. After all, as Prof. Connel states.

Criticism of relatively conservative institutions in times of social questioning is hardly a new phenomenon.

(Australian Law Journal, Vol. 51, p. 351)"

67. In State of U.P. v. Ramesh Chandra Sharma and others , (1995) 6 SCC 527, Verma, C.J. speaking for the Bench opined : AIR 1996 SC 864 : 1996 AIR SCW 247 : 1996 All LJ 407 (para 5)

"In view of the clear provision in clause (3) of para 7.06 that the "appointment of any legal practitioner as a District Government Counsel is only professional engagement," it is difficult to

appreciate the submission for which sustenance is sought from the provisions contained in the same manual. The appointment being for a fixed term and requiring express renewal in the manner provided in the Manual, there is no basis to contend that it is not a professional engagement of a legal practitioner but appointment of post in Government service which continues till attaining the age of superannuation. In the earlier decisions of this Court including Shrilekha Vidyarthi, the appointment of District Government Counsel under the Manual has been understood only as a professional engagement of a legal practitioner. This contention is, therefore, rejected.

68. Another Bench of this Court in Harpal Singh Chauhan and others etc. v. State of U.P., ((1993) 3 SCC 552) upon a detailed discussion of the relevant provisions of the Legal Remembrancer Manual as also sub-sections (4), (5) and (6) of the Code of Criminal Procedure opined : AIR 1993 SC 2436 : 1993 AIR SCW 2843 : 1993 Cri LJ 3140 : 1993 All LJ 1255

"16. As already mentioned above, Section 24 of the Code does not speak about the extension or renewal of the term of the Public Prosecutor or Additional Public Prosecutor. But after the expiry of the term of the appointment of persons concerned it requires the same statutory exercise, in which either new persons are appointed or those who have been working as Public Prosecutor or Additional Public Prosecutor, are again appointed by the State Government, for a fresh term. The procedure prescribed in the Manual - to the extent it is not in conflict with the provisions of Section 24 - shall be deemed to be supplementing the statutory provisions. But merely because there is a provision for extension or renewal of the term, the same cannot be claimed as a matter of rights."

17. It is true that none of the appellants can claim, as a matter of right, that their terms should have been extended or that they should be appointed against the existing vacancies, but, certainly, they can make a grievance that either they have not received the fair treatment by the appointing authority or that the procedure prescribed in the Code and in the Manual aforesaid, have not been followed. While exercising the power of judicial review even in respect of appointment of members of the legal profession as District Government Counsel, the Court can examine whether there was any infirmity in the "decision making process". Of course, while doing so, the Court cannot substitute its own judgment over the final decision taken in respect of selection of persons for those posts."

69. The Court emphasized that the members of the legal profession are required to maintain high standard of legal ethics and dignity of profession and further they are not supposed to solicit work or seek mandamus from Courts in matters of professional engagements.

70. Despite the same to a limited extent in some cases the orders of non renewal of the term of the District Government Counsel were interfered with on the ground that the District Magistrate had not performed his duty as enjoined by law :

71. In relation to appointment of the standing counsel, for the High Court, this Court, however, in State of U.P. and others etc. v. U.P. State Law Officers Association AIR 1994 SC 1654 : 1994 AIR SCW 1389, AIR 1991 SC 537 : 1993 AIR SCW 77 : 1993 All LJ 4 and others etc. ((1994) 2 SCC 204) while distinguishing Shri-lekha Vidyarthi (supra), observed that legal profession is essentially a service oriental profession. Noticing the changing scenario as also growth of litigation, this Court emphasised the obligation on the part of the Government or the public body to engage the most competent lawyer for conducting their affairs stating that relationship between the lawyer and his client is one of the trust and confidence. The client engages a lawyer for personal reasons and would be at liberty to leave him also for the same reasons. It was observed:

"18. The mode of appointment of lawyers for the public bodies, therefore, has to be in conformity with the obligation cast on them to select the most meritorious. An open invitation to the lawyers to compete for the posts is by far the best mode of such selection. But sometimes the best may not compete or competent candidates may not be available from among the competitors. In such circumstances, the public bodies may resort to other methods such as inviting and appointing the best available although he may not have applied for the post. Whatever the method adopted, it must be shown that the search for the meritorious was undertaken and the appointments were made only on the basis of the merit and not for any other consideration."

NATURE OF OFFICE:

72. The District Government counsel appointed for conducting civil as also criminal cases hold offices of great importance. They are not only officers of the Court but also the representative of the State. The Court reposes a great deal of confidence in them. Their opinion in a matter carries great weight. They are supposed to render independent, fearless and non partisan views before the Court irrespective of the result of litigation which may ensue.

73. The Public Prosecutors have greater responsibility. They are required to perform statutory duties independently having regard to various provisions contained in the Code of Criminal Procedure and in particular Section 320 thereof.

74. The public prosecutor and the Government counsel play an important role in administration of justice. Efforts are required to be made to improve the management of prosecution in order to increase the certainty of conviction and punishment for most serious offenders and repeaters. The prosecutors should not be over burdened with too many cases of widely varying degree of seriousness with too few assistants and inadequate financial resources. The prosecutors are required to play a significant role in the administration of justice by prosecuting only those who should be prosecuted and releasing or directing the use of non punitive methods of treatment of those whose

cases would best be processed.

75. The District Government Counsel represent the States. They, thus, represent the interest of general public before a court of law. The Public Prosecutors while presenting the prosecution case have a duty to see that innocent persons may not be convicted as well as an accused guilty of commission of crimes does not go unpunished. Maintenance of law and order in the society and, thus, to some extent maintenance of rule of law which is the basic fibre for upholding the rule of democracy lies in their hands. The Government counsel, thus must have character, competence, sufficient experience as also standing at the Bar. The need for employing meritorious and competent persons to keep the standard of the high offices cannot be minimised. The holders of the post have a public duty to perform. Public element is, thus, involved therein.

76. In the matter of engagement of a District Government Counsel, however, a concept of public office does not come into play. However, it is true that in the matter of Counsel, the choice is that of the Government and none can claim a right to be appointed. That must necessarily be so because it is a position of great trust and confidence.The provision of Art. 14, however, will be attracted to a limited extent as the functionaries named in the Code of Criminal Procedure are public functionaries. They also have a public duty to perform. If the State fails to discharge its public duty or act in defiance, deviation and departure of the principles of law, the Court may interfere. The Court may also interfere when the legal policy laid down by the Government for the purpose of such appointments is departed from or mandatory provisions of law are not complied with. Judicial review can also be resorted to, if a holder of a public office is sought to be removed for reason dehors the statute.

77. The appointment in such a post must not be political one. The Manual states that a political activity by the District Government Counsel shall be a disqualification to hold the post.

78. We cannot but express our anguish over the fact that in certain cases recommendations are made by the District Magistrate having regard to the political affinity of the lawyers to the party in power. Those who do not have such political affinity although competent are not appointed. Legal Remembrancers Manual clearly forbids appointment of such a lawyer and/or if appointed, removal from his office. The District Judge and the District Magistrate, therefore, are duty bound to see that before any recommendation is not made , or any political affinity. They must also bear in mind that the Manual postulates that any lawyer who is guilty of approaching the authorities would not be entitled to be considered for such appointment.

79. The State, therefore, is not expected to rescind the appointments with the change in the Government. The existing panel of the District Government Counsel may not be disturbed and a fresh panel come into being, only because a new party has taken over change of the Government.

SUBMISSIONS OF BIO-DATA:

80. During hearing of the matter, a question arose as to whether submission of bio-data pursuant to issuance of a notice therefor by the District Magistrate or the District Judge would amount to soliciting briefs within the meaning of Rule 36 of the Bar Council of India Rules or not.

81. The question came up for consideration before a Full Bench of the Andhra Pradesh High Court in B. Rajeswar Reddy and others v. K. Narasimhachari and others, (2001 (6) ALT 104). The Court noticed : 2002 Cri LJ 1

"15. It may not always be possible for the District and Sessions Judge to have enough time to know all the advocates who are fit to be appointed as Public Prosecutors. He, therefore, may be entitled to consult his colleagues particularly when Additional Public Prosecutors are required to be appointed in their Courts also.

16. Before such recommendations are made the District and Sessions Judge and his colleagues, appear to have called for applications for making the things more transparent. It is true the post of the Public Prosecutor occupies a high position in the scheme of a criminal justice delivery system. His honesty, impartiality, firmness and other qualities will have to be taken into consideration.

82. Referring to the judgment of this Court in Harpal Singh Chauhan (supra), the High Court held that filing of such application on the part of the advocate would not attract the vice of Rule 36 as the advocates would not file any application on their own. AIR 1993 SC 2436 : 1993 AIR SCW 2843 : 1993 Cri LJ 3140 : 1993 All LJ 1255

PROVISO TO PARA 7.03(3):

83. We may also notice that according to Mr. Ranjit Kumar, learned senior counsel, the proviso appended to clause (3) of para 7.03 is being misused.

84. The proviso evidently was inserted with a noble purpose. Such a provision was evidently made having regard to the fact that an advocate having a deep sense of self respect may not file any application for his appointment as a District Government Counsel despite calling for applications by

the District Magistrate in this behalf. The District Magistrate, in a given situation may have to persuade very competent persons to take the offer in public interest as also in the interest of the State. But recourse to the said provision cannot be resorted to for general appointments. The said proviso must be taken recourse to only in very very exceptional cases. Even in relation thereto, consultation with the District Judge should be held to be imperative.

CONSULTATION:

85. Keeping in mind the aforementioned legal principles the question which arises for consideration in these appeals is : the nature and extent of consultation a Collector is required to make with the District Judge.

86. The age old tradition on the part of the States in appointing the District Government counsel on the basis of the recommendations of the District Collector in consultation with the District Judge is based on certain principles. Whereas the District Judge is supposed to know the merit, competence and capability of the concerned lawyers for discharging their duties, the District Magistrate is supposed to know their conduct outside the Court vis-a-vis the victims of offences, public officers, witnesses etc. The District Magistrate is also supposed to know about the conduct of the Government counsel as also their integrity.

87. We are also pained to see that the State of Uttar Pradesh alone had amended sub-section (1) of Section 24 and deleted sub-sections (3), (4) and (5) of Section 24 of the Code of Criminal Procedure. Evidently, the said legislative step had been taken to overcome the decision of this Court in Kumari Shrilekha Vidyarthi (supra). We do not see any rationale in the said action. The learned counsel appearing for the State, when questioned, submitted that such a step had been taken having regard to the fact that exhaustive provisions are laid down in Legal Remembrancer Manual which is a complete code in itself. We see no force in the said submission as a law cannot be substituted by executive instructions which may be subjected to administrative vagaries. The executive instructions can be amended, altered or withdrawn at the whims and caprice of the executive for the party in power. Executive instructions, it is beyond any cavil do not carry the same status as of a statute. AIR 1991 SC 537 : 1993 AIR SCW 77 : 1993 All LJ 4

88. The State should bear in mind the dicta of this Court in Mundrika Prasad Singh (supra), as regard the necessity to consult the District Judge. While making appointments of District Government Counsel, therefore, the States should give primacy to the opinion of the District Judge. Such a course of action would demonstrate fairness and reasonableness of action and, furthermore, to a large extent the action of the State would not be dubbed as politically motivated or otherwise arbitrary. As noticed hereinabove, there also does not exist any rationale behind deletion of the provision relating to consultation with the High Court in the matter of appointment of the Public Prosecutors in the High Court. The said provision being a salutary one it is expected that the State of

U.P. either would suitably amend the same or despite deletion shall consult the High Court with a view to ensure fairness in action. AIR 1979 SC 1871

CONCLUSION:

89. For the aforementioned reasons, we are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed but in the facts and circumstances of the case there shall be no order as to costs.

Appeal allowed.