

SUPREME COURT OF INDIA

Center for PIL

Vs.

Union of India (UOI)

C.A.No.10660 of 2010

(G. S. Singhvi and Asok Kumar Ganguly JJ.)

11.04.2011

ORDER

1. Heard Ms. Indira Jaising, Additional Solicitor General, Mr. K.K. Venugopal, learned senior counsel for the Central Bureau of Investigation (CBI), Mr. Harin Raval, Additional Solicitor General appearing for the Enforcement Directorate (ED) and also Mr. Pranav Sachdeva, the learned Counsel assisting Mr. Prashant Bhushan.

2. The question which this Court is now considering is the appointment of a Special Public Prosecutor, to conduct the prosecution on behalf of the CBI and the ED in the 2G Spectrum case, in which charge-sheet has been filed on April 2, 2011 and this Court has been told that a further charge-sheet is likely to be filed very soon.

3. From the various orders passed in this case on different dates, it is clear that this Court has not only directed CBI investigation in the matter, this Court has been monitoring the said investigation at various stages. This monitoring has been undertaken by this Court in view of the prayers made by the Appellant and also in view of the very fair stand taken by the prosecuting agency, as also the Government of India, virtually inviting this Court's intervention in the matter of monitoring of the investigation. Having regard to the larger issues of public interest involved in proper investigation of the case and the ultimate unearthing of the crime, this Court has accepted such prayers of the parties.

4. Acting on such basis, this Court has given direction for establishing a separate Special Court to try this case and pursuant to such direction, a Special Court has

been constituted after following the due procedure. All this will appear from various orders passed by this Court from time to time.

5. It may be noted that while monitoring this investigation, this Court, on the prayer made by the counsel for the parties, has also directed the CBI to take over the investigation in respect of the alleged suicide of one Mr. Sadik Batcha and pursuant to that direction, the CBI has expressed its willingness to take over the said investigation and in fact such investigation has been taken over by the CBI, as would appear from the communication dated April 7, 2011 issued by the Government of India, Ministry of Personnel, PG and Pension, Department of Personnel and Training to Ms. Indira Jaising, ASG. The requisite notification under Section 5(1) of DSPE Act, 1946 has been issued.

6. From the aforesaid trend of events, it is clear that in larger public interest, this Court, in exercise of its power under Article 136 of the Constitution has been monitoring the investigation in a most comprehensive manner.

7. In view of those peculiar facts of this case, and various orders passed by it from time to time, this Court is of the opinion that in the matter of appointment of the Special Public Prosecutor, utmost fairness and objectivity should be observed. It is beyond dispute that for a successful prosecution, the appointment of a very competent Special Public Prosecutor is of the essence. This Court is aware of the fact that normally, in matter of appointment of a Special Public Prosecutor, the Central Government or State Government, as the case may be, make such appointments. Since the Court is monitoring the case and it is of the view that a competent prosecution is of utmost importance, having regard to the demands of public interest, this Court requested Mr. K.K. Venugopal, learned senior counsel for CBI and ED, to suggest certain names of learned advocates who can undertake the responsibility of conducting the prosecution as a Special Public Prosecutor in the case.

8. On such request being made, Mr. K.K. Venugopal took some time and after considering several names suggested the name of Mr. U.U. Lalit, a senior advocate of this Court for being considered for appointment as Special Public Prosecutor.

9. There is unanimity among the learned Counsel appearing for the parties, that Mr. Lalit is a lawyer of unimpeachable integrity, possessing unquestionable competence and independence to conduct the prosecution in this case. This Court has also been informed by Mr. K.K. Venugopal, that Mr. Lalit has agreed to accept this responsibility if it is conferred on him. This Court has been informed that Mr.

Lalit was on the panel of State of Maharashtra for more than 10 years and also conducted prosecution in some important cases involving public interest. About Mr. Lalit's ability, acumen and independence, nobody has expressed any doubt.

10. But, learned Attorney-General, on 5.4.2011. by referring to provision of Section 46(2) of the Prevention of Money Laundering Act. 2002 (hereinafter the said Act) urged that the said provision may be considered by this Court before passing any order suggesting the appointment of Mr. Lalit as Special Public Prosecutor.

11. The matter was thereafter taken up on April 8, 2011. On that date, the learned Additional Solicitor General Ms. Indira Jaising, representing Union of India, on instruction, made the following written submissions:

1. The Union of India, after an in depth consideration of the entire matter, and in discharge of its obligations under the statutory provisions will make the necessary appointment of a SPP in respect of both the CBI matter as well as the money laundering matter within one week from today.

2. In view of this statement, it is not appropriate or necessary to make any submissions with regard to the scope of Section 46(2) of the Money Laundering Act at this stage.

3. It is therefore requested that the matter may be suitably adjourned to enable the Union of India to report the progress made in this matter to this Hon'ble Court.

12. Mr. Harin Raval, ASG appearing for ED, who is normally led by Mr. K.K. Venugopal, learned senior counsel argued by placing reliance on a decision of this Court in the case of Rajiv Ranjan Singh 'Lalan' (VIII) and Anr. v. Union of India and Ors. reported in: (2006) 6 SCC 613, especially paragraphs 50 and 51 of the said decision, those paragraphs are set out below:

50. The appointment of lawyers is the prerogative of the Government and the prosecuting agency. The Petitioners are trying to find fault with every attempt with every step taken. In cases like this the delay is inevitable.

51. It is also settled law that appointment of advocates, Public Prosecutors, etc. is the prerogative of the Government in power and the court has no role to play.

13. Relying on the aforesaid paragraphs, Mr. Raval submitted that the appointment of lawyers in connection with the present case is the prerogative of the government.

14. In so far as the ratio in the case of Rajiv Ranjan Singh (supra) is concerned, it was rendered in a totally different fact situation. In the said case, a PIL was filed under Article 32 of the Constitution at a time when the prosecution evidence was almost over and the trial had reached its final stage. At that stage, a prayer was made for change of public prosecutor at the instance of the Petitioners who were total strangers to the case. On these grounds, the petition was dismissed. In this connection, in the concurring judgment of Justice A.R. Lakshmanan the aforesaid observation about government's prerogative to appoint lawyers for the prosecuting agency was recorded.

15. We are of the view that the expression "prerogative" cannot be used in the context of a statutory provision. Under our Constitutional and statutory framework, there is nothing known as prerogative. In this connection, we may usefully recall what was said by the eminent jurist N.A. Palkhivala in his treatise "Our Constitution: Defaced and Defiled" (Macmillan: December 1974). The relevant portion reads as follows:

Our Constitution recognizes no prerogative whatsoever; it recognizes merely rights, duties and discretions. The difference between "prerogative" and "discretion" is clear. A person who has a prerogative can act arbitrarily or irrationally and yet his decision must be treated as legal and valid. On the other hand, if a person has the discretion, and not the prerogative, to make a decision, the discretion can only be exercised fairly and reasonably; otherwise his act is void on the ground that there was no valid exercise of discretion in the eyes of law. (page 103)

16. We are in respectful agreement with this view. In this case, the Court is not changing any public prosecutor who has already been appointed. The question in the present case was never in issue in Rajiv Ranjan Singh (supra).

17. Therefore, the decision in Rajiv Ranjan Singh (supra) is not of much relevance here.

18. We have taken note of the submission by Ms. Indira Jaising and Mr. Raval. But in the peculiar facts of the case and having regard to the larger issues of public

interest of transparent governance, this Court has been passing various orders for monitoring of the investigation and also by giving direction for setting up separate Special Courts. These steps are taken by this Court in exercise of its jurisdiction under Article 136 read with Article 142. Consistent with those orders and since this Court is of the opinion that for conducting a proper prosecution, an appointment of a competent Special Public Prosecutor is of the essence, the court requested Mr. K.K. Venugopal to suggest a name of a very able and competent lawyer so that such name can be suggested for appointment as Special Public Prosecutor. The court has already noted about the undoubted ability and acumen of Mr. Lalit to become a Special Public Prosecutor to conduct the prosecution in this case.

19. In the background of these facts, the court now proposes to examine the aforesaid contentions of the learned Attorney-General and also by Ms. Indira Jaising and Mr. Harin Raval, both Additional Solicitor Generals.

20. In this connection, Section 46 of the said Act is set out below:

46. Application of the Code of Criminal Procedure, 1973 to proceedings before Special Court.-(1) Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bails or bonds), shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the persons conducting the prosecution before the Special Court, shall be deemed to be a Public Prosecutor:

Provided that the Central Government may also appoint for any case or class or group of cases a Special Public Prosecutor.

(2) A person shall not be qualified to be appointed as a Public Prosecutor or a Special Public Prosecutor under this section unless he has been in practice as an Advocate for not less than seven years, under the Union or a State, requiring special knowledge of law.

(3) Every person appointed as a Public Prosecutor or a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of Clause (u) of Section 2 of the Code of Criminal Procedure, 1973 (2 of 1974) and the provisions of that Code shall have effect accordingly.

21. The provision of Section 2(u) of the Code of Criminal Procedure is also set out:

2(u) "Public Prosecutor" means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor;

22. Section 24 of the Code of Criminal Procedure is also set out:

24. Public Prosecutors.

(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(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 Government 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 Public 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 Prosecutors 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).

[Explanation.-For the purpose of this Sub-section,-(a) regular Cadre of Prosecuting Officers" means a Cadre of Prosecuting Officers which includes therein the post, of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors, by whatever name called, to that post; (b) "Prosecuting Officer" means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public Prosecutor under this Code.] (7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under Sub-section (1) or Sub-section (2) or Sub-section (3) or Sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a p(sic) who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

[Provide (sic) the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this Sub-section.]

(9) For the purposes of Sub-section (7) and Sub-section (8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.

23. From a perusal of the Section 46(1) of the said Act, it appears that every person conducting prosecution is deemed to be a public prosecutor. At the same time, Section 2(u) of the Code of Criminal Procedure. makes it clear that any person who is appointed under Section 24 of Code of Criminal Procedure is a public

prosecutor. Therefore, on a conjoint and harmonious reading of Section 46 along with Section 24 of the Code of Criminal Procedure it appears that the expression "person conducting the prosecution before the Special Court" in Sub-section (1) of Section 46 of the said Act, would mean that such a person must either be appointed by the Central or the State Government after following the procedure" prescribed in Sub-section (4), (5) along with Sub-section (7) of Section 24 of Code of Criminal Procedure or in the alternative after following the procedure in Sub-section (6) read with Sub-section (7) of Section 24 of Code of Criminal Procedure We are of the view that both the provisions, namely, the provisions of Section 46 of the said Act and Section 24 of Code of Criminal Procedure must be read together, since Section 46 of the said Act, being a later Act, makes an express reference to the provision of the pre-existing Central law. namely the provisions of Section 24 of Code of Criminal Procedure

24. The expression "under" occurring in Section 46(2) must be reasonably construed in a manner which is consistent with the dignity of the office of Public Prosecutor. A Public Prosecutor cannot be equated with a person who is holding an office under the State. He cannot be treated as a government employee. It may be that he should be a lawyer on the government panel. However, the independence of the Public Prosecutor from any governmental control is the hall mark of this high office.

25. Reference in this connection may be made to the decision of this Court in the case of Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. and Ors. reported in : AIR 1991 SC 537 at 547, wherein the following observations have been made:

The function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of acting only in the interest of administration of justice. In the case of public prosecutors, this additional public element flowing from statutory provisions in 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.

26. The role of a public prosecutor in a criminal justice system has been very aptly put in the following words:

The Prosecutor has a duty to the State, to the accused and to the court. The Prosecutor is at all times a minister of justice, though seldom so described. It is not the duty of the prosecuting counsel to secure a conviction, nor should any prosecutor even feel pride or satisfaction in the mere fact of success. [Christmas Humphreys: 1955 CLR 739]

27. A public prosecutor is really a minister of justice and his job is none other than assisting the State in the administration of justice and in fact he is not a representative of any party. (See Babu v. State of Kerala 1984 Cri.L.J. 499)

28. The same has also been expressed in R. v. Banks reported in (1916) 2 KB 621, wherein it has been said that the Public Prosecutor:

throughout a case ought not to struggle for the verdict against the prisoner but... ought to bear themselves rather in the character of minister of justice assisting the administration of justice.

29. This Court has also expressed the same opinion in Sidhartha Vashisht alias Manu Sharma v. State (NCT Of Delhi) reported in : (2010) 6 SCC 1, where this Court held that public prosecutor must observe a wider set of duties than to merely ensure that the accused is punished. His job is to ensure fair play in all proceedings. (Para 185-188).

30. In the Constitution Bench decision of this Court in Sheonandan Paswan v. State of Bihar and Ors. reported in : (1987) 1 SCC 288, this Court held that a public prosecutor is not a representative of any ordinary party to a controversy but of the sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.

31. Therefore, there is a public element in such an appointment.

32. In the appointment of Public Prosecutor, the principle of master-servant does not apply. Such an appointment is not an appointment to a civil post. (See State of U.P. and Anr. v. Johri Mal,: (2004) 4 SCC 714)

33. In view of the aforesaid well-settled principles, we cannot hold that the expression 'under' in Section 46(2) of the said Act can be construed to mean that the Public Prosecutor will be holding an employment under the State. All that it would mean is that the Special Public Prosecutor should be a lawyer on the panel of either the State or Central government. Mr. U.U. Lalit satisfies the said requirement quite adequately.

34. Therefore, we are unable to accept the contention of the Union of India and we hold that in the interest of a fair prosecution of the case, appointment of Mr. U.U. Lalit is eminently suitable.

35. We, therefore, order that Mr. U.U. Lalit shall be appointed Special Public Prosecutor by the government to conduct the prosecution in this case, on behalf of CBI and ED. On such appointment, Mr. U.U. Lalit may choose the other advocates who are already on the panel of CBI to assist him. Considering the magnitude of the case, we are of the view that Mr. Lalit may choose two persons from the said panel.

36. We also make it clear that any objection about appointment of Special Public Prosecutor or his assistant advocates or any prayer for staying or impeding the progress of the Trial can be made only before this Court and no other court shall entertain the same. The trial must proceed on a day-to-day basis.

37. All these directions are given by this Court in exercise of its power under Article 136 read with Article 142 of the Constitution and in the interest of holding a fair prosecution of the case.