

RAJASTHAN HIGH COURT

Om Prakash Joshi, Advocate

Vs.

State Of Rajasthan

S.B. Civil Writ petition No. 4548 of 1998
(Dr. Ar. Lakshmanan, C.J. and Bhagwati Parsad, J.)

06.07.2001

JUDGMENT

Lakshmanan, C.J.

1. The petitioners in the instant writ petition are the practicing advocates at Jodhpur. They filed the writ petition with the following prayers:-

"It is, therefore, prayed that a writ, direction or order or in the nature of mandamus be issued and respondents be directed to advertise the post and appointments of Advocate General, Additional Advocate General, Government Advocates, Panel lawyers etc. to deal with cases of State of Rajasthan in High Court and various other courts in Rajasthan and selections be made. That all persons holding these posts at present be held ab initio void".

2. According to the writ petitioners, the appointments to the post of Advocate General, Government Advocates, Public Prosecutors and Panel lawyers are made in a very arbitrary manner simply on likes and dislikes theory and that few lawyers got monopoly in representing the State. According to the petitioners, India being a Sovereign Socialist Secular Democratic Republic, there must be equal distribution of work and equal opportunity to seek work and compete. It is also their case that at present there is no policy guide lines for distributing the work of State litigation and to provide the State with the legal opinion and that the present policy of the Government of appointments of Advocate General, Government Advocates and Public Prosecutors etc. is wholly illegal and void since these appointments are made on the recommendation of various political workers, office bearers and on the desire of Chief Minister, Law Minister and local M.L. As. etc. which is totally illegal. According to

the petitioners that every post/appointment right from the President of India to Constable is public property and every eligible has right to apply and seek these posts and the only method is to advertise the post and appointments be made after due selection based on uniform rules and if these posts are not advertised and eligible persons are not allowed to apply, it is stated that the petitioners will be deprived of their right to apply and seek these posts.

3. The writ petition was resisted by the respondent No. 1, the State of Rajasthan by filing a reply. The following are the contentions raised and submissions made on behalf of the respondent No. 1, State of Rajasthan.

(a) The post of Advocate General and Additional Advocate General are concerned, these are constitutional posts and appointments are made in accordance with the provisions contained in the Constitution of India.

(b) So far as the posts of Government Advocates and Public Prosecutors are concerned, these posts are filled up in accordance with the Rajasthan Law & Legal Affairs Department Manual (1999 read with Section 24 of the Code of Criminal Procedure, 1973.

(c) The petitioners have not stated a single example of arbitrariness in the appointments and mere leveling of an allegation is not sufficient.

(d) It is for the State to select its own advocates to conduct the cases on behalf of the State in the High Court and the Courts subordinate to it and change of Ministry and Political party has nothing to do in the matter because it is the State Government who makes appointments/termination etc.

(e) in the matter of engaging lawyers by the State Government, it is always open to it to engage the advocates of its choice and confidence.

(f) The Constitution of India nowhere provides that there must be equal distribution of works and equal opportunity to seek work and compete, for the persons like the petitioners i.e. advocates.

(g) So far as the appointments of Government Advocates and Public Prosecutors are concerned, the same are made under the Judicial Manual after following the procedure prescribed thereunder and also under Section 24 of the Code of Criminal Procedure. Therefore, it is wholly wrong to state that there is no policy for appointment of Advocate General, Government Advocates and Public Prosecutors in the High Court and the trial courts.

(h) There is no requirement of law to advertise the posts in question because

they are not the posts falling within the definition "Government Service" nor under the Judicial Manual or under the Constitution. Hence, there is no provision for advertising these posts.

4. A rejoinder was filed by the petitioners to the reply filed by the State of Rajasthan reiterating the contentions raised in the main writ petition.

5. Written arguments were also submitted by the parties and various authorities and rulings were cited by both of them. Though various authorities were cited by the petitioners and the respondents, we are not referring to all the authorities cited except the judgments which are relevant and germane for the present purpose. We, therefore, proceed accordingly.

6. We have heard the arguments of Shri Dalpat Raj Bhandari for the petitioners and Sri Sagar Mal Mehta, learned Advocate General and Sri Dinesh Maheshwari for the respondents.

7. Before proceeding further to consider the rival claims, it would be useful to quote certain provisions of the Judicial Manual regarding the definition of "Government Advocate", "Public Prosecutor" and their categorization, duties of Advocate General, which are also to be performed by the Government Advocates and appointments of the Government Advocates. The relevant sections are extracted herein under:-

"2. Definition: in this manual, unless there is anything repugnant in the subject or context,-

"Government advocate" means a person appointed as such by the Government and includes an Additional Government Advocate, Deputy Government Advocate and Assistant Government Advocate appointed by the Government.

ix. "Public Prosecutor" includes Additional Public Prosecutor and in relation to civil litigation in subordinate Courts this term means Government Pleader, and in relation to Civil Litigation in High Court, the Government Advocate or any other Law Officer who may be engaged to represent the Government in such matters;

4. Law Officers:- The Law Officers of Government are-

(A) Government Law Officers:

(1) Advocate General;

(2) One or more Additional Advocate General;

(3) Senior Standing Counsel in the Supreme Court;

- (4) Advocate on record in the Supreme Court;
- (5) Government Advocates;
- (6) Public Prosecutors as also Additional Public Prosecutors and Special Public Prosecutors engaged on retainer ship;
- (7) Standing Counsel for Rajasthan Civil Services Appellate Tribunal.
- (B) Law Officers of the Law and Affairs Department-
 - (1) Secretary to Government, Law and Legal Affairs;
 - (2) Director, State Litigation-cum-Joint Legal Remembrance;
 - (3) Additional Director, State Litigation-cum-Joint Legal Remembrancer.
 - (4) Joint Legal Remembrancer;
 - (5) Controller of Litigation, Jaipur;
 - (6) Controller of Litigation, Jodhpur;
 - (7) Deputy Secretary to the Government;
 - (8) Deputy Legal Remembrancer;
 - (9) Deputy Director, Litigation;
 - (10) Assistant Legal Remembrancer;
 - (11) Assistant Legal Draftsman;
 - (12) Head Legal Assistant.

8. Duties. (1) The Advocate General is appointed under Section 24 of the Code of Criminal Procedure, 1973 (11 of 1974) to be Public Prosecutor for all cases before the High Court.

(2) Under Clause (2) of Article 165 of the Constitution, the Governor has assigned, in addition to the duties arising under sub-rule (1), the following duties to the Advocate General, namely:-

- (a) to represent.....
- (b) to represent.....
- (c) to represent Government in suits, appeals, revisions, references and other proceedings of Civil nature in which Government is party in the High Court if his services are requisitioned by the Government.
- (d) to represent Government in any Civil, Criminal or quasi criminal proceedings of special importance in the High Court, or in any Court or before any authority in the State, if his services are requisitioned by the Government;
- (i) to advise Government on nay legal matter which may be referred to him for opinion.
- (j) To scrutinise such draft Bills as may be referred to him for scrutiny by the

Law and Legal Affairs Department and to advise generally upon the proposed measures;

(1) to attend, speak in or otherwise take part in the proceedings of the State Legislative Assembly, when required to so by the Government.

11. Appointment (1) An Additional Advocate General may be appointed by the State Government on such terms and conditions as may be determined by the Government and he shall be liable to be removed by the State Government at any time

(2) An Additional Advocate General may resign the appointment by giving one month's notice in writing.

(3) He shall receive such remuneration as may be determined by the Government.

12. Duties and Disabilities - He will perform such duties as may be assigned to him by the State Government from time to time. The provisions of Rules 9 & 10 shall also apply to him.

14. Appointment and conditions of service (1) The Government advocate or Advocates shall be appointed by the Government. They shall be liable to perform the duties of the Advocate-General Specified in Rule 8 except those specified column (L) of sub-rule (2) thereof and shall perform such other duties as the Government may assign to them.

(2) The terms and conditions of appointment of the Government Advocate shall be such as the State Government may determine in each case. A Government Advocate or any other Advocate appointed under this rule may resign the appointment by giving one month's notice in writing.

(3) A Government advocate and other Advocate appointed under this Rule shall receive such retainerhip as the State Government may determine from time to time.

(4) The provisions of Rule 6 & 9 shall apply to the Government Advocate and other advocates appointed under this Rule.

(5) The State Government may appointed as many as Additional Government Advocate, Deputy Government Advocate or Assistant Government Advocate as may be deemed necessary on such term and conditions as may be determined by the Government.

PUBLIC PROSECUTORS

15. Appointment-(1) The State Government shall, after consultation with High Court, appoint a Public Prosecutor and may also appoint one or more additional Public Prosecutor for conducting any prosecution, appeal or other proceedings on behalf of the State Government before the High Court.

(2) All appointments of Public Prosecutor's for Courts other than the High Court shall be made by the Government from a panel prepared by the District Magistrate in consultation with the Sessions Judge in accordance, with the provisions of sub-section (4) of Section 24 of the Criminal Procedure Code, 1973;

(3) A person shall be eligible to be appointed as Public Prosecutor or as an Additional Public Prosecutor under sub-rule (1) or sub-rule (2) only if he has been in practice as an Advocate for not less than 7 years.

18. Term of Office:- A Public Prosecutor shall be appointed for a term not exceeding three years at a time, as the Government may determine in each case. Ordinarily no person will be appointed a Public Prosecutor after he attains the age of 62 years or continued in that office after he attains that age. Notwithstanding the expiry of the period of his term of appointment, a Public Prosecutor shall continue as such until his successor is appointed.

19. Terminating of term:- (1) Government may, at any time and without assigning any reason, dispense with the services of a Public Prosecutor after giving him one month's notice or one month's remuneration in lieu thereof;

Provided that where the term of appointment has expired or where term is extended till further orders, in such case no notice shall be necessary.

(2) A Public Prosecutor may resign his appointment after giving one month's notice.

8. A bare reading of the aforesaid clauses would reveal that the term "Government Advocate" includes Deputy Government Advocate, Additional Government Advocate, Assistant Government Advocate and the term of "Public Prosecutor" includes Government Advocate. Further, as per Clause 10(1) - a Government Advocate is required to perform duties of the Advocate General as specified in Rule 7 which includes certain duties of the Public Prosecutor but no specific procedure has been prescribed for appointment of Government Advocate. However, since the Government Advocates are discharging the duties of the Public Prosecutor, therefore, consultation with the High Court, as required under Section 24(1) Criminal Procedure Code is also necessary. Section 24(1) of Criminal Procedure Code is as under:-

"24(1). 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."

9. The said consultation is also a check on any arbitrary action in the matter of appointment of a Government Advocate.

10. In the instant writ petition, the first and main relief sought for by the petitioners is with reference to issuance of a direction for advertisement of the post and appointment of Advocate General, Additional Advocate General, Government Advocates, Panel Lawyers etc. In the High Court and various other courts, is based on the ground that every eligible advocate who wants to serve, is entitled for an opportunity to apply and his right cannot be denied by making the appointment without advertisement and selection in an arbitrary manner which is violative of Article 14 and 16 of the Constitution of India.

11. Another relief sought by the petitioner is that all persons holding these posts at present be held ab-initio-void. However, the petitioners have not prayed that the appointments of any incumbent concerned be declared void. None of the incumbent has been made party to the writ petition, except the Advocate General, by official designation, therefore, the second relief, in our opinion, deserves to be denied only on the ground of non-joinder of necessary parties. The Advocate General has also not been impleaded as a party by name. In this connection, we may usefully refer the decision of the Division Bench in the case of *Dalpat Raj Bhandari vs. The President of India and Others* ¹ The Division Bench in para 13 of the judgment has observed as follows:-

"It is trite law that nobody can be condemned unheard and no decision can be given by a competent court of law, which may affect the rights of persons being their back."

12. In our opinion, the question raised by the petitioners cannot be decided in this writ

petition because, the persons concerned have not been made parties to these proceedings and, therefore, no decision can be given in their absence without affording them an opportunity of hearing. This disposes off the second relief claimed by the petitioners in this writ petition.

13. We have already referred to the reply filed by the respondent No. 1. It is stated in the reply categorically that the office of the Advocate General, Additional Advocate General is constitutional office and the appointment on the said posts have been made/are made in accordance with Article 165 of the Constitution of India by His Excellency, the Governor. Article 165 of the Constitution of India is reproduced hereunder:-

The Advocate - General for the State Article 165(1) The Governor of each State shall appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate-General for the State.

(2). It shall be the duty of the Advocate General to give advice to the Government of the State upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) The Advocate-General shall hold the office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine.

14. In view of clause (1) of the Article 165 of the Constitution, the Governor is not answerable to a Court for his order, appointing a person as Advocate General purporting to be made under Article 165 by reasons of Article 361(1) of the Constitution. Article 217(2) of the Constitution prescribes the qualifications for appointment as a Judge of the High Court and clause (1) of Article 217 says that every Judge of a High Court shall hold office until he attains the age of sixty-two years. It has been held that the provisions in clause (1) of Article 217 does not prescribe the qualifications for appointment as a Judge of the High Court but prescribes the duration of the office of a High Court Judge, and, therefore, while clause (2) of Article 217 applies to the appointment of an Advocate General, clause (1) does not, since the specific provision in Article 165(3) says that an Advocate General shall hold office during the pleasure of the Governor without any age limit. Hence, there is no bar to a person being appointed Advocate General after the age of sixty years or to his

continuing in that officer after attaining the age of sixty-two years. Under Article 165 of the Constitution, the Governor may also appoint an Additional Advocate General. Thus, it is seen that the qualification for the Advocate General is the qualification of appointment of the Judge of High Court and His Excellency the Governor exercises the said power with the aid and advice of the Council of the Ministers as required under Article 163 of the Constitution. However, since the Advocate General is a Public Prosecutor also, therefore, the consultation with the High Court is mandatory as required under Section 24(1) of the Criminal Procedure Code. The provisions of Article Hand 16 are applicable in case of equality before law and the term "law" as required under Article 13 does not include the Constitution of India. Articles 13 and 14 of the Constitution of India are as under:-

Article 13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provision of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(4) in this Article, unless the context otherwise requires:-

(a) "law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this Article shall apply to any amendment of this Constitution made under Article 368.

Article 14. The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.

Article 16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen.....

(3) Nothing.....

(4) Nothing.....

(4A) Nothing.....

(4B) Nothing.....

(5) Nothing.....

15. Clause (1) and (2) of this Article guarantee equality of opportunity to all citizens in the matter of appointment to any office or of any other employment, under the State. Clauses (3) and (5), however, lay down several exceptions to the above rule of equal opportunity.

16. Article 16 is applicable only in case of employment or appointment to any Officer under the State. The office of the Advocate General is an independent constitution and provisions of Articles 14 and 16 have no applicability.

17. Their Lordships of the Supreme Court in the case of *Hargovind Pant vs. Dr. Raghukul Tilak and Others*² was considering the case of appointment to the office of the Governor of a State and held that the office of the Governor of a State is not an employment under the Government of India and it does not, therefore, come within the prohibition of clause (d) of Article 319 of the Constitution. The Supreme Court affirmed the decision reported in AIR 1978 Rajasthan 72 (3), by rejecting the special leave petition and confirmed the order passed by a Full Bench of the Rajasthan High Court. In the above case, the Hon'ble Supreme Court while dealing with the question whether the appointment of the Governor is an employment under the Government of India laid down two tests of insubordination and control and has held that both the elements are missing in case of appointment of the Governor and, therefore, the same cannot be said to be an employment under the Government of India. The relevant extract of para 5 of the Hargovind's case (supra) is as under:-

".....It will, therefore, be seen that the employment can be said to be under the Government of India if the holder or incumbent of the employment is under the control of the Government of India vis-a-vis such employment. Now, if one applies this test to the office of Governor, it is impossible to hold that the Governor is under the control of the Government of India. His office is not-subordinate or subservient to the Government of India, He is not amenable to, the directions of the Government of India, nor is he accountable to them for the manner in which he carries out his functions and duties. His is an independent constitutional office which is not subject to the control of the Government of India, He is constitutionally the head of the State in whom is vested the executive power of the State and without whose assent there can be no

legislation in exercise of the legislative power of the State. There can, therefore, be no doubt that the office of Governor is not an employment under the Government of India and it does not come within the prohibition of clause (d) of Article 319."

18. In Dalpat Raj Bhandari's case (supra), the Division Bench of this Court regarding constitutional office of the High Court Judge, has held that the provisions of Articles 14 and 16 are not applicable as the High Court Judges are not ordinary civil functionary to the work under the Union Government or State Government, They are constitutional functionaries. The relevant extract of para 25 and para 26 of Dalpat Raj Bhandari's case (supra) are under:-

"Thus, it is clear that the Judges/Chief Justices of the Supreme Court and High Courts are not ordinary civil functionaries, who work under the Union Govt. or the State Governments. These Constitutional functionaries are appointed by the President of India, which means President acting under the advice of the Union Govt. and its Ministers and they cannot be removed by the President at his pleasure. In order to ensure their independent action, the Judges and Chief Justices of the High Courts and Supreme Court have been provided with their secured tenure of service so that the Executive wing of the Govt. may not Influence them otherwise. The Executive wing of the Govt. may have a say in the matter of appointments of Judges/Chief Justices of the High Courts and Supreme Court, as held by their Lordships of the Supreme Court in *S.P. Gupta vs. President of India*,³ As stated above, once a Judge of the High Court/Supreme Court is appointed/elevated, his tenure is not dependent on the will of the Executive. It is futile to contend that from the post of President of India to that of a peon, the provisions of Article 14 and 16 of the Constitution are applicable. There is a lot of difference between selection and election. In matters of election, selection results in election and in matters of selection, election results in selection. For the posts of President, Vice-president and Prime Minister, the party which possesses majority in the Parliament elects their own winning candidates and then they are put or set them up for these posts and thereafter, the electoral college elects them. Thus, for the posts of President, Vice President and Prime Minister selection results in election. However, so far as civil employment is concerned, number of posts are advertised and a candidate may elect for a particular post to which he wants to apply and after

that election, he applies and then the selection process starts. After his selection, he is appointed. Appointments to the civil posts in the country under the Union Govt. or the State Govts. are regulated according to the Conditions or Service Rules framed by the Union Govt. or the State Govts. Though a legislation and these appointments are terms as public services. Article 16(1) of the Constitution provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The provisions of this Article applies to those appointments which are made under the State i.e. Union Govt. or the State Governments. The Judges and Chief Justices of the Supreme Court and High Courts are not appointed under the State. They are constitutional functionaries.

26. Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 13(3) of the Constitution defines the 'law' and it says that the law includes any Ordinance, Order, bye law, rule, regulation, notification, custom or usage having in the territory of India the force of law. These constitutional provision are beyond the pale of law as defined in Article 13(3) of the Constitution. All laws must abide by the Constitution. If the contention of Mr. Bhandari is accepted then certain provisions of the Constitution itself are to be declared as unconstitutional. This has never been the intention of the Framers of the Constitution that the provisions of the Constitution as it stands has to declare *extra virus*. Courts have no liberty to violate the Constitution. They can only judge the virus of a particular law or its provision and declare whether it is *intra virus* of the Constitution or it is *ultra virus* of the Constitution. They have no right to declare the constitutional provisions to be *ultra virus* of the Constitution. It is another thing when the Courts are called upon to decide how far the Parliament can change the Constitution and whether they have power to violate the basic structure of the Constitution or not i.e. how far they can so to change the Constitution but the Courts cannot decide what should be the Constitution of the Country. They can only interpret its spirit, they cannot furnish *caussus omissus*. It is beyond their domain to transgress on a field of activity which legitimately belongs to the Parliament."

19. A Division Bench comprising of the Chief Justice, Dr. AR. Lakshmanan and Justice Rajesh Balia, in *Dalpat Raj Bhandari vs. President of India and others*.⁴ has held as under:-

"Thus, it is seen that the Judges of the Supreme Court of India and High Courts are constitutional functionaries and are discharging sovereign functions of administration of justice and none of them is in public employment. It has been held in the case of *All India Judges Association and others vs. Union of India*⁵ that the judicial service is not service in the sense of employment and that the Judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public office in the same way as the members of the Legislature and that there cannot be a link between the service conditions of the Judges and those of members of the other services. The appellant has contended that Article 16 of the Constitution is attracted in the case of appointment of Judges. Such contention, in our opinion, is fallacious. Article 16(1) reads that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The appointment of a Judge of the Supreme Court or High Court is neither an employment nor an appointment of any office under the State but it is an independent constitutional function discharged by the persons so appointed and it is certainly not an appointment to in office under the State. Clauses (1) and (2) of Article 16 guarantee equality of opportunity to all citizens in the matter of appointment to any office or of any other employment under the State. Clauses (3) to (5) however, lay down exceptions to the above rule of equal opportunity.

Thus, in our opinion the application of Article 16 in the case of appointment of Judges does not arise.

Since doubts have arisen about the interpretation of law laid down by the Supreme Court in regard to the principles and prescribed procedural norms regarding appointment of the Judges of the Supreme Court under Article 124(2) and Chief Justice and Judges of the High Courts under Article 217(1), and transfer of Judges from one High Court to another under Article 222(1), in the case of *Supreme Court Advocates on-Record Association (supra)*, the H.E. President of India referred the 9 questions to the Supreme Court of India for consideration and to report its opinion on the questions referred. A 9 Judges Bench of the Supreme Court after considering the earlier judgments and after analyzing the Articles 124, 216, 217 and 222 of the Constitution of India, answered the questions posed by the reference and emphasized that the answers should be read in conjunction with the body of this opinion, in the case reported

in (JT 1998 (7) 304)."

20. Similar is the position with regard to the Constitutional Office of the Advocate General. A Division Bench of this Court in the case of *Regional Transport Authority Jodhpur vs. Sita Ram* ⁶ while placing reliance on the judgment of the Kerala High Court reported in 1975 Kerala Law Times 678 (6), has held as under:-

"In the instant case, it is not in dispute that Sri J.P. Joshi was then the Additional Advocate General of the Government of Rajasthan. He was Government Pleader within the meaning of Section 2(7) Civil Procedure Code. Under Order, 3, Rule 4(6) Civil Procedure Code, he was not required to present any document empowering him to act. It has been held in *K.J. Antony vs. State of Kerala* ⁷ that it is not possible to make Inference that Article 165 of the Constitution does not contemplate appointment of a second person as Additional Advocate general or Associate Advocate General as such. Merely because the singular is used in Article 165 it may not be positively held in view of Section 13 of the General Clauses Act that any second person could not be appointed as Additional Advocate General. Article 367 of the Constitution of India has made applicable the provisions of General Clauses Act for interpreting the provisions of the Constitution of India. Article 165(2), Constitution of India states that it shall be the duty of the Advocate General to perform such other duties of a legal character as may from time to lime referred or assigned to him by the Governor and to discharge the functions conferred on him by any other law for the time being in force. The Rajasthan Law and Judicial Department Manual contains executive Instructions issued by the Government of Rajasthan from time to time under Article 162 of the Constitution of India in respect to Government litigation. Rule 7 of this Manual contains the duties of the Advocate General. It includes the duty to represent the Government in the High Court in appeals against the judgment of any Judge of the Court exercising jurisdiction on the original side."

21. Therefore, the appointment of the Additional Advocate General is also governed by Article 165 read with Section 24 Sub Clause (1) of Criminal Procedure Code and the same is not an employment under the State.

22. The Division Bench of the Gauhati High Court in the case of *Bhadreshwar Tanti*

vs. S.N. Chaudhary and another ⁸ has held that the word singular for appointment of Additional Advocate General must include the plural by virtue of Section 13 of the General Clause Act, 1897 and H.E. the Governor has power to appoint an Additional Advocate General also. The relevant para - 9 of the said judgment is as under:

"The other contention that the State Government could not appoint an Additional Advocate General is also meritless. The Governor of a State has, under the Constitution, to appoint an Advocate General. That power includes the power to appoint an Additional Advocate General as well. Article 367 of the Constitution provides that unless the context otherwise requires, the General Clauses Act, 1897, shall apply for the Interpretation of the Constitution. There is nothing repugnant in the subject or context which would exclude the applicability of the General Clauses Act. The provisions of General Clauses Act shall therefore be pressed into service while interpreting Article 165. Now on the language of Section 13, General Clauses Act, the provision in the singular for appointment of Advocate General must include the plural. The Governor has, therefore, the power to appoint an Additional Advocate General also. In the view we have taken we find support from a decision of the Kerala High Court in *M.K. Padmanabhan vs. State of Kerala* ⁹ "

23. We are of the firm view the as regards Advocate General and Additional Advocate General, the above mentioned constitutional provisions and Criminal Procedure Code will apply and no Articles 14 and .16 for the reasons mentioned supra.

24. As regards the Government Advocates, Additional Government Advocates, Deputy Government Advocates, Assistant Government Advocates etc. are concerned, the contention of the respondent No. 1 is that their appointment is governed by the Rajasthan Law and Judicial Department Manual. We have already reproduced the relevant sections in paragraphs supra.

25. The Supreme Court in *State of U.P. and Others vs. U.P. State Law Officers Association and others* ¹⁰ while dealing with the non-renewal/termination of the appointment of UP Law Officer, has also dealt with the mode of appointment and has observed that in the absence of guidelines, the appointments may be made purely on personal or political consideration and be arbitrary. In the instant case, the petitioner has not produced any material regarding irregularity in appointment, and therefore, we

are not inclined to enter upon the said controversy for want of the specific material. In our opinion, the consultation in the case of Additional Advocate, Dy. Government Advocate, Assistant Government Advocate who have to discharge the duties of the Public Prosecutor also necessary as per the requirement of Section 24(1) of Criminal Procedure Code. The Supreme Court has further held that the case of *Srilekha Vidhyarthi vs. State of U.P.*¹¹, was a case of enblock termination of the District Government Counsel and Additional/Assistant District Government counsel appointed by the State Government to conduct civil, criminal and revenue cases and the same was not the appointment of Government Advocate in High Court and therefore, the same is not applicable. The Supreme Court has also refused to interfere with the termination as being arbitrary on the ground that their appointments were equally arbitrary for want of any guidelines in the manual but since in the instant case, the procedure of appointment is under challenge on the ground of non-advertisement. A bare perusal of Clause 10 of the Manual for the appointment of Government Advocate would reveal that no procedure is prescribed nor any guidelines have been issued. We are of the opinion that the consultation with the Advocate General at the time of preparing the initial panel and final consultation with the High Court before appointment would be check on the arbitrariness, if any, but no interference is called for in the matter of present appointment for want of specific material against any specific incumbent and further the person concerned has also not jointed as a party. It is useful to extract para-6 of the case *State of U.P. vs. U.P. State Law Officers Association AIR 1994 Supreme Court 1654* (supra), which reads thus:

"Where the appointment order of the Law Officers engaged by the State Government to conduct cases on its behalf in High Court itself stipulated that their appointments were terminable without assigning any reasons, the termination of their appointments without any reasons was not arbitrary when the Manual provided no guidelines for such appointments. It would be evident from Chapter V of the said Manual that to appoint the Chief Standing counsel, the Standing Counsel and the Government Advocate, Additional Government Advocate, Deputy Government Advocate and Assistant Government Advocate, the State Government is under no obligation to consult even its Advocate General muchless the Chief Justice or any Judges of the High Court or to take into consideration, the views of any committee that "may" be constituted for the purpose. The State Government has a discretion. It may or may not ascertain the views of any of them while making the said appointments. Even where it

chooses to consult thorn, their views are not binding on it. The appointments may, therefore, be made on considerations other than merit and there exists no provision to prevent such appointments. The method of appointment is indeed not calculated to ensure that the meritorious alone will always be appointed or that the appointment made will not be on considerations other than merit. In the absence of guidelines, the appointments may be made purely on personal or political considerations, and be arbitrary. This being so, those who come to be appointed by such arbitrary procedure, can hardly complain if the termination of their appointment is equally arbitrary. Such appointments are made, accepted and understood by both sides to be purely professional engagements till they last. The fact that they are made by public bodies cannot vest them with additional sanctity. Every appointment made to a public office, howsoever made, is not necessarily vested with public sanctity. There is, therefore, no public interest involved in saving all appointments irrespective of their mode. From the inception some engagements and contracts may be the product of the operation of the spoils system. There need be no legal anxiety to save them. It was more so when in the instant case, such law officers had no right to hold the office on the date of their removal as their period of contract was over."

26. The Supreme Court, in the above case, has also distinguished the judgment of Kumari Srilekha Vidhyarthi (supra), relied on by the respondents therein, on the ground that the said decision has no application for the obvious reasons that the decision relates to appointment of District Government Counsel, Additional/Deputy/Assistant District Government counsel who are Law Officers appointed by the State Government to conduct criminal, civil and revenue cases in any Court other than the High Court.

27. In the case of subordinate courts, panel is to be sent by the District Magistrates after consultation with the District & Sessions Judge and in case of the Government Advocates, the consultation with the High Court, as required under Section 24(i) of Criminal Procedure Code is necessary as the said procedure is a reasonable and fair procedure and, therefore, the same in our opinion, cannot be termed as arbitrary. The Government Advocate is also cannot be said to be in employment under the State. However, since the public element is attached to it, the Government Advocate can be said to be a holder of the public office. In our opinion, there is no master and -servant relationship between the Government Advocate and Government/State as the element

of insubordination and control is missing. It is only a professional engagement between the Government as a client and the Government Advocate as an Advocate, but because of the certain powers given to the Government Advocates, Public Prosecutor regarding withdrawal of prosecution u/Section 321 of Criminal Procedure Code, it cannot be said that it is purely contractual. Even after the Government Advocate is appointed then also he is bound by the provisions of the Advocates Act and the rules made by the Bar Council of India and State Bar Council and is further subject to the disciplinary control of the respective Bar Council. As per Section 35 and Rule 36 of the Rules made by the Bar Council of India, more particularly, for standards of professional conduct and etiquettes made him privileged member of the community and the Advocate is further restricted to solicit work or advertise either directly or indirectly as per Rule 36. The preamble of Chapter-11 of Standard of Professional Conduct and etiquettes of the Bar Council of India Rules along with Rule 36 is reproduced hereunder;

Preamble;

"An Advocate shall, at all times, comfort himself in a manner befitting his status as an officer of the Court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non- professional capacity may still be improper for an Advocate. Without prejudice to the generality of the foregoing obligation, an Advocate shall fearlessly uphold the interests of his client, and in his conduct conform to the rules hereinafter mentioned both in letter and in spirit. The rules hereinafter mentioned contain canons of conduct and etiquette adopted as general guides; yet the specific mention thereof shall not be construed as a denial of the existences of others equally imperative though not specifically mentioned."

Rule 36:

"An Advocate shall not solicit work or advertise, either directly or indirectly, whether by circulars, advertisements, touts, personal communications, interview not warranted by personal relations, furnishing or inspiring news paper comments or producing his photograph to be published in connection with cases in which he has been engaged or concerned. His signboard or name plate should be of a reasonable size. The signboard or name plate or stationery should not indicate that he is or has been President or Member of a Bar Council or has been President or Member of a Bar Council or of any Association or that he has

been associated with any person or organization or with any particular cause or matter or that he specializes in any particular type of work or that he has been a Judge or an Advocate General."

28. The above mentioned facts made it clear that a practicing Advocate is prohibited from submitting an application in response to an advertisement. Similar was the position as regards the professional engagement prior to Advocates Act, 1961, except the disciplinary control.

29. Mr. Dinesh Maheshwari in support of his contention that the lawyers cannot solicit brief in any manner, as per rule 36 of the Bar Council of India Rules, has placed strong reliance on the judgment of the Supreme Court reported in the matter of 'A' an Advocate (10).

30. In that case, an Advocate of the Supreme Court addressed a letter to the government of Maharashtra soliciting their briefs, At an informal inquiry made by the Registrar of the Supreme Court deputed for that purpose, the Advocate admitted that he had written the post-card and other such post-cards to other parties. In the inquiry held he flatly denied that he had written the letter. He, however, maintained that there was nothing unprofessional even if he had written the letter. Before the Supreme Court, the Advocate first took up the same attitude as he had adopted before the Tribunal but ultimately he admitted the truth that he had written the letter and had admitted the fact before the Registrar. The Supreme Court held:

"The Advocate was guilty of professional misconduct and deserved the punishment of suspension from practice for a period of five years. He condemned himself as a liar and as one who is either ignorant of the elementary rules of professional ethics or has no regard for them. If he knew that it was highly improper to solicit a brief and even then wrote the postcard in question, he is a very unworthy member of the learned profession. In any view of the matter, he does not appear to be possession of a high moral caliber, which is essential for a member of the legal profession. If anything, by adopting the attitude of denial which has been demonstrated to be false in the course of the proceedings before the Tribunal, he has not deserved well of the Court even in the matter of amount of punishment to be meted to him for his proved misconduct."

31. In that case, the Supreme Court imposed the punishment of suspension from practice for five years, which according to the Supreme Court, will give him enough time and opportunity for deciding for himself, after deep deliberation and introspection, whether he is fit to continue to be a member of the legal profession. In the view of the Supreme Court he is not.

32. In a case reported in *Harpal Singh Chauhan vs. State of U.P.*¹² the Supreme Court has observed that the members of the legal profession are required to maintain high standard of legal ethics and dignity of profession. They are not supposed to solicit work or seek mandamus from courts in matters of professional engagements. The said case is also of Public Prosecutor wherein mandatory provisions of Section 24(1) of Criminal Procedure Code are attracted. Paragraph - 19 is extracted herein below:

"19. The members of the legal profession are required to maintain high standard of legal ethics and dignity of profession. They are not supposed to solicit work or seek mandamus from courts in matters of professional engagements. We have been persuaded to Interfere in these matters to a limited extent, as we are satisfied that there is patent infraction of the statutory provisions of the Code. As we are of the view that the District Magistrate has not performed his statutory duty as enjoined by law, the appeals of the appellants have to be allowed."

33. Dealing with the UP Legal Remembrancer Manual relating to the appointment of District Government Counsel, the Hon'ble Supreme Court in the case of *State of U.P. vs. Ramchander*¹³ has held that the said appointment is to be understood only as a professional engagement of a Legal Practitioner. Although, the similar type of Clause 7(3) of the UP Manual is not in the Rajasthan Law & Judicial Department Manual, 1952, but still the nature of the duties performed by the District Government Counsel in UP and Government Advocate in Rajasthan in Subordinate Courts as well as in the High Court are the same, therefore, in the instant case also, the engagement of the Public Prosecutor, Government Advocate in High Court or subordinate courts is a professional engagement. Therefore, giving application in pursuance to the advertisement for Government Advocate is contrary to legal ethics and dignity of the legal profession. The Courts have held that the professional engagement made or continued on mutual trust and confidence. Considering the said aspect of the matter,

the Code of Civil Procedure also permits the termination of the professional engagement under Order 3 Rule 4(2) of the Advocate, client or pleader with the permission of the Court. This, the law recognize some extent of freedom in the matter of engagement/termination of the professional services and for which no advertisement even by the government is necessary. Grant of equal opportunity to eligible persons in the matter of employment guaranteed under Articles 14 and 126 of the Constitution of India cannot be equated with the appointment of Government Advocates for which already procedure has been prescribed. The advertisement is not essential in respect of high offices likewise Vice Chancellor, eminent Scientists, Professors where the procedure of consultation and empanelment and, thereafter, offer and acceptance is valid.

34. The Andhra Pradesh High Court in an Identical situation, in a case reported in 1989(1) Andhra Law times, 353 (13), has rejected the contention of non- consideration of claim of every eligible person in case of appointment of Legal Advisor and Standing counsel to the State in Supreme Court and has further held that in such cases, the procedure of advertisement and selection are neither contemplated nor warranted. The relevant para as appeared in AIR Manual, volume 9, 5th Edition, 1989 page 432, (Item No. 16) (supra) is reproduced hereunder:

"(16) Where a retired Judge of the High Court is appointed as a Legal Adviser and Standing counsel to the State Government in the Supreme Court of India, the appointment cannot be said to be arbitrary and violative of Article 14 of the Constitution on the ground that the claims of the other eligible persons are not considered. The appointment is not to any civil or statutory post. The nature and functions to be performed by the appointee is to tender advice when sought for and appear as a Standing Counsel for the State Government when its actions are challenged. The person must be one who commands the confidence of the party who engages him, as the best person to give the necessary legal advice and represent their cause before the court. In such cases, the procedure of advertisement and selection are neither contemplated nor warranted (1989) 1 Andh. LT 353)"

35. The Rajasthan Law & Judicial Department Manual, deals with the employment of private legal practitioners and their emoluments in criminal cases as well as in civil cases and the said provisions are also applicable in case of Panel Lawyers who

represent particular department of the Government for which also no advertisement is required/necessary for the reasons mentioned herein-above.

36. Sri Dalpat Raj Bhandari, learned counsel appearing for the petitioners has not cited a single example of arbitrariness in any of the appointment. Mere leveling of allegations is not sufficient. The petitioners will have to prove the same by cogent and convincing evidence/documents. In the absence of which, the same simply deserves to be ignored. As already noticed, so far the posts of Advocate General and Additional Advocate General are concerned, they are the constitutional posts and appointments on these posts are made in accordance with the provisions contained in the Constitution of India. These posts are not the posts under the government service and it is nowhere laid-down that such posts should be advertised. So far as the posts of Government Advocate and Public Prosecutors are concerned, these posts are filled up in accordance with the Rajasthan Judicial Manual read with Section 24 of the Code of Criminal Procedure. As rightly pointed out by Mr. Mehta, learned Advocate General for the State of Rajasthan, that the State Government has liberty to appoint Advocates of its choice and confidence in the interest of State litigation. We have already referred to the appropriate rules which are in existence and regulate appointment, termination etc. of the Government Advocates, Public Prosecutors etc. The State Government may or may not ascertain the view of the Advocate General or the Chief Justice or any Judges of the High Court or to take strict view of any committee that may be constituted for the purpose. It may or may not ascertain the view of any of them while making such appointments. Even where it chooses to consult them their views are not binding on it. It is for the State Government to select its own Advocates to conduct cases on behalf of the State in the High Court and in the courts subordinate to it. Change of Ministry and political party has nothing to do in the matter because, it is the State Government who makes appointment/termination etc.

37. The contention of the learned counsel for the petitioners alleging that in every case, the petitioner/private party engages Advocates of his/her own choice and, therefore, in such cases different Advocates are engaged by the individual litigants. In reply, the respondent has submitted that this cannot be applied qua the State Government nor it is practicable and possible for the State Government to engage/appoint a different Advocate/Panel Lawyer in each case nor the State is having huge funds to meet with the expenses by engaging different Advocates in each and every case. Therefore, the contention of the petitioner is wholly unwarranted and

cannot be gone into by us in this writ petition. The State Government has every right to engage the Panel lawyer/Government Advocates, Additional Government Advocates etc. of its own choice and confidence and to entrust the case to them as deemed proper by it. The petitioners cannot and should not have any grudge in this regard because it is for the State Government to think that how its interest can safeguarded in a better way.

38. The Advocates are enrolled by the Rajasthan Bar Council and it is no where provided under any law that the State has to provide room for their work, nor it is possible for the State Government to do so, because, litigation in the State is not dependent upon working of the Government, nor this Hon'ble Court can justifiably issue any direction to the State Government to provide avenues for their works. Likewise, the Constitution of India nowhere provides that there must be equal distribution of works and equal opportunity to seek work and compete for the persons like the petitioners, namely, the Advocates. This Court will not be justified to interfere in the matter of engagement of Lawyers by the State Government and that too, in the manner as suggested by the petitioners. It is nowhere enjoined upon the State Government to make equal distribution of the State litigation amongst the Lawyers who want to serve. It is well settled law that the State is free to appoint Advocates of its own choice and confidence. There is no requirement of law to advertise posts of Advocate General and the petitioner are free to apply for the posts which are advertised. The posts of Advocate General/Addl. Advocate General are not the posts under the Government service and therefore, they are not advertised, It is settled law that no one has a vested right to claim appointment even if he is selected by any Committee/Board or Agency. Besides, for the posts in question, no one can claim a right even for consideration because, these posts need not be advertised as State Government is empowered to make such professional appointments as per its requirement and to appoint the Advocates of Its own choice and confidence.

39. In a Division Bench case of Kerala High Court reported in *Balakrishna Pillai vs. State of Kerala*,¹⁴ comprising of AR. Lakshmanan & K. Narayana Kurup, JJ. (as they then were), it is held as under:

"Section 24 of the Code provides for appointment of Public Prosecutors which includes Special Public Prosecutors as well. Under the said section, the State Government, after consultation with the High Court, shall appoint a Public

Prosecutor and may also appoint one or more Additional Public Prosecutors for conducting in such Court any prosecution, appeal or other proceedings on behalf of the Central Government or State Government, as the case may be. Sub-Section (8) enables the Central Government or the State Government to appoint for the purposes of any case or class of cases a person, who has been in practice as an Advocate for not less than ten years, as Special Public Prosecutor. The expression used in Section 24(8) of the Code is "appoint". According to the appellant, third respondent was not appointed as per Section 24(8) and, therefore, he is not empowered to conduct the prosecution by virtue of Ext. P1 notification since he is not 'appointed', but only "authorized" to conduct the prosecution. The work 'appoint' means to assign authority to a particular use, task, position or office. Likewise, the work 'authorize' means to empower or to give a right or authority to act or effective legal power. So, in our view, both the words, 'appoint' and 'authorize' have to be considered as equivalent.

We are of the opinion that the State Government has made the appointment of the third respondent under the statutory powers conferred on it. It is the discretionary power vested in the government, the Government is the largest litigant in the country. The Government like any other private party, can choose and ap-point/authority any advocate to appear on their behalf in any court of law. It is not open to an accused in the case to suggest to the Government that it should not appoint/authorize the third respondent as their counsel since there is enmity between him and the third respondent which has nothing to do with the conduct of the case by the third respondent. It is also not in dispute that in no proceedings in the Idamalayar case the third respondent appeared against the interest of the State/prosecution. There is no basis for the allegation that the third respondent has been appointed to vindicate the grievance of the third party for whom he had been appearing. The said allegation is not only baseless but also unsupported by any materials on record. It is not correct to say that if a person who was appearing in the case in support of the prosecution, was later appointed as Special Public Prosecutor would act only with a view to secure conviction of the accused at all costs. We are of the opinion that conviction and awarding of sentence in a criminal case are powers conferred on the Court concerned depending upon the sufficiency of the evidence to the satisfaction of the Court and as provided under law. The fact that the third respondent appeared on behalf of Mr. V.S. Achuthanandan earlier in certain stages of the case cannot be interpreted by the appellant as a ground for alleging that the

appointment of the third respondent as Special Public Prosecutor as per Ext. P1 is politically motivated since the said Mr. Achuthanandan now represents the ruling party of the State as Convener of the Left Democratic Front. In our opinion, none of the grievance expressed by the appellant has any merit either on facts or on law".

40. For the foregoing circumstances, we are of the opinion that the contention raised by the petitioners regarding advertisement for the posts of Advocate General, Addl. Advocate General, Government Advocates etc. is liable to be rejected. The petitioners are not entitled to any relief prayed for in the writ petition.

41. Consequently, the writ petition fails and is hereby dismissed. No order as to costs.

Writ Petition dismissed.

Cases Referred.

1. (AIR 1993 Raj 1 = 1993(2) RLW 7)
2. AIR 1979 SC 1109
3. AIR 1982 SC 149
4. (2001 (1) RLW 604)
5. AIR 1993 SC 2493
6. (AIR 1993 Raj 76 = 1992(2) RLW 344)
7. (1975 Ker LT 678)
8. (AIR 1985 Gau 32)
9. (1978 Lab IC 1336)
10. AIR 1994 SC 1654
11. (1991 (1) SCC 212 = AIR 1991 SC 537)
12. (1993 (3) SCC 552)
13. (1995 (6) SCC 527)
14. (1999 (1) KLT 1)