Babie Shirin And Ors Vs State Of Manipur Through The Chief Secretary And Ors

Writ Appeal No. 70 Of 2019

Court: Manipur High Court

Date of Decision: Feb. 11, 2020

Acts Referred:
Code Of Criminal Procedure, 1973 â€" Section 24(8), 199, 199(2), 199(4), 225, 235, 301, 302#Indian Penal Code, 1860 â€" Section 302#Constitution Of India, 1950 â€" Article 217(2), 21

Hon'ble Judges: Ramalingam Sudhakar, CJ; Lanungsungkum Jamir, J

Bench: Division Bench

Advocate: H. Kenajit, Shyam Sharma, M. Rarry

Final Decision: Dismissed

Judgement

Ramalingam Sudhakar CJ

[1] The present appeal is filed challenging the order dated 07.11.2019 passed in W.P(C) No.769 of 2019 dismissing the writ of quo warranto against

the third respondent, an advocate who was appointed as a Special Public Prosecutor vide order dated 28.12.2018 issued by the Secretary, Law &

Legislative Affairs Department. The order reads as follows:-

Ã¢â‚¬Å“GOVERNMENT OF MANIPUR

SECRETARIAT: LAW & LEGISLATIVE AFFAIRS DEPARTMENT

ORDERS

Imphal, December 28, 2018

No. 5/104/2018-Case/L: The Governor of Manipur is pleased to engage Shri Rarry Mangsatabam, Advocate to conduct prosecution in Cril Complaint

Case No. 1 of 2018 [the Addl. Public Prosecutor (District), Manipur-vs- Ms. Babie Shirin & 2 others] on behalf of the complaint in the Court of

Sessions Judge, Imphal West.

2. The Public Prosecutor (District) in coordination with Shri Rarry Mangsatabam, Advocate are to file a petition under Section 302 of the Code of

Criminal Procedure, 1973 before the Sessions Judge, Imphal West for permission to conduct the prosecution in the above case.

By order and in the name of Governor.

Sd/-

(Nungsitombi Athokpam)

Secretary (Law)

Governor of ManipurÃ¢â‚¬â€‹

[2] This order appointing the third respondent as Special Public Prosecutor is challenged in W.P(C) No.769 of 2019 to issue a writ of quo warranto

against 3rd respondent pleading that the appointment is contrary to the provisions of the Code of Criminal Procedure, 1973 besides being arbitrary and

without reason. The relief sought for in the writ petition is as follows:-

Ã¢â‚¬Å“i) to call for the records of the case:

ii) to allow the Writ Appeal in full by setting aside/ modifying the impugned judgement and order dated 07-11-2019 (Annexure-D/2) passed by the

HonÃ¢â‚¬â„¢ble Single Bench in WP(C) No. 769 of 2019 and allow the prayers of the appellants/ petitioner as prayed for in the writ petition (Annexure-

D/1) in full.

iii) to pass any other appropriate order/direction as this HonÃ¢â‚¬â„¢ble Court deems fit and proper.

AND

In the interim, it is prayed that Your Lordship may graciously be pleased to pass an interim order for staying the further proceeding of the said Cril.

(C) Case No. 1 of 2018 during the pendency of the present petition so as to avoid the illegal/ irregular proceedings that are being conducted before the

Ld. Court and to pass any appropriate order/ direction which the HonÃ¢â‚¬â„¢ble Court may deem fit and proper in the facts and circumstances of the

case as the ends of justice may call for.Ã¢â‚¬â€‹

[3] The facts that led to the present appeal is as follows:-

In October, 2018, the State of Manipur through the Public Prosecutor (District) filed a Criminal Complaint Case No.1 of 2018 against the three

accused/appellants/ the writ petitioners in relation to an alleged act of defamation by the accused person jointly and severally against the Chief

Minister of Manipur in discharge of his public functions. The complaint was filed in terms of Section 199(2) of the Code of Criminal Procedure, 1973.

Sanction for prosecution in terms of Section 199(4) of the Code of Criminal Procedure, 1973 was issued by the State Government, Department of

Home vide order NO.2/8(1)/2018-H(CH) dated 27.10.2018.

[4] Section 199 (2) of the Code of Criminal Procedure, 1973 reads as follows:-

Ã¢â‚¬Å“199. Prosecution for defamation. (1)

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(2) Notwithstanding anything contained in this Code, when any offence falling under Chapter XXI of the Indian Penal Code (45 of 1860) is alleged to

have been committed against a person who at the time of such commission, is the President of India, the Vice-President of India, the Governor of a

State, the Administrator of a Union territory or a Minister of the Union or of a State or of a Union territory, or any other public servant employed in

connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his public functions a Court of Session may take

cognizance of such offence, without the case being committed to it, upon a complaint in writing made by the Public Prosecutor.Ã¢â‚¬â€‹

[5] The complaint u/s 199(2) Cr.PC was lodged before the District & Sessions Judge, Imphal West. The content of the complaint is not relevant for

the present adjudication. However, it is to be briefly mentioned that it is alleged that certain defamatory articles bereft of truth has been published. On

the basis of the complaint, the Public Prosecutor was examined as witness on 13.10.2018. According to the version of the State in para No.3.6 of the

affidavit dated 17.01.2020, since the Public Prosecutor was examined as witness, the need to appoint a Special Public Prosecutor became a necessity

and as a result, a request was made to the Government and the order dated 28.12.2018 was passed appointing 3rd respondent as Special Public

Prosecutor.

[6] Thereafter, an application was filed by the Public Prosecutor(District) under section 302 of the Code of Criminal Procedure, 1973 seeking

permission of the Court to conduct the prosecution through thea special Public Prosecutor, Mr. Rarry Mangsatabam, Advocate. That application was

filed on 03.01.2019 and was allowed on 03.01.2019 and the following order was passed at page 35:-

Accused are present with their conducting Counsel.

The complainant has filed an application u/s 302 Cr.P.C. for permission to conduct this case on his behalf by Shri Rarry Mangsatabam, Advocate.

Allowed.

P.W - 1 is examined and discharged.

Fix 11.01.2019 for P.W. hearing.

Sd/-

Sessions Judge,

Imphal west.Ã¢â‚¬â€‹

[7] The proceedings before the Sessions Judge were going on and after examination of two witnesses, the petitioners chose to file W.P(C) No.769 of

2019 in the month of September, 2019 as stated of Mr.H.Kenajit, learned counsel for the appellants. The appellant/ writ petitioners and the

respondents were heard and the writ petition was dismissed on 26.9.2019 as not maintainable. The appeal arises therefrom.

[8] The records state that learned Government Advocate was heard and case was disposed of at the admission stage. Learned Single Judge was of

the view that a writ of quo warranto as against the third respondent is not maintainable. The parameters for issuing a writ of quo warranto is not

attracted to the facts of the case placing reliance on the decisions of the Hon'ble Supreme Court in University of Mysore v. C.D.Govinda Rao,AIR

1965 SC 491; B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board EmployeesÃ¢â‚¬â„¢ Association, (2006) 11 SCC 73,1 N.

Kannadasan v. Ajoy Khose, (2OO9) 7 SCC 1 and High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat,(2003) 4 SCC 712.

[9] On the basis of these decisions and the facts of the case as pleaded, the learned Single Judge was of the view that there was no case made out for

issuing a writ of quo warranto against the third responded. The State appointed the 3rd respondent as Special Public Prosecutor and an application

was moved before the learned Sessions Judge, Imphal West who passed the order on 03.01.2019 as above. That order was passed in the presence of

the accused and they have not challenged the said order. The writ petition has been filed after a long period of time stating that the appointment of the

Special Public Prosecutor is without just reasons and contrary to the provisions of the law. Against this order when the present appeal was moved,

notice was issued on 11.12.2019. Mr.Shyam Sharma, learned Government Advocate entered appearance on behalf of the respondent Nos. 1 and 2.

The respondent No.3 appears as party in person. The respondent Nos. 1 and 2 filed affidavit-in-opposition on 17.01.2020 and the 3rd respondent filed

his affidavit-in-opposition on 15.01.2020.

[10] The contention of Mr.H.Kenajit, learned counsel for the appellants is that in terms of section 199(2) of Code of Criminal Procedure, 1973 where

a complaint is made on behalf of the persons specified therein, the prosecution for defamation for offences punishable under Chapter XXI of the

Indian Penal Code against a person mentioned in Section 199(2), the same shall be filed before the Court of Session who may take cognisance of such

offences on a complaint made by the Public Prosecutor. He pleaded that a trial before the Sessions Court in cases falling under Chapter XVIII,

Section 225 of the Code of Criminal Procedure, 1973 is attracted.

Section 225 Cr.P.C.

Ã¢â‚¬Å“225. Trial to be conducted by the Public Prosecutor :- In every trial before a Court of Session, the prosecution shall be conducted by a

Public Prosecutor.Ã¢â‚¬â€‹

Hence, in this case, the Public Prosecutor alone should conduct the trial and not the Special Public Prosecutor. Further, the appointment of the Special

Public Prosecutor, assuming that it is made in terms of Section 24 (8) Code of Criminal Procedure, 1973, it should be supported by reasons, and thirdly,

in the present case, no specific provision has been mentioned in the order of the State Government, appointing the 3rd respondent as the Special public

prosecutor. For all these reasons, a writ of quo warranto can be issued to call upon 3rd respondent to explain under what valid order he is appointed.

Section 24(8) of Code of Criminal Procedure, 1973 reads as follows:-

Ã¢â‚¬Å“24. Public Prosecutor.- (1)

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**** **** ****

(8) The Central Government or the State Government may appoint, for the purpose of any case or class of cases, a person who has been in practice

as an advocate for not less than ten years as a Special Public Prosecutor.Ã¢â‚¬â€‹

[11] It is pleaded that in this case, the order passed by the Government does not give any reason why 3rd respondent should be appointed. Learned

counsel for the appellants supported this plea on the basis of a decision by the Madhya Pradesh High Court in the case of Rajendra Nigam vs. State of

Madhya Pradesh & ors. reported in 1998 CriLJ 998. He therefore pleaded that the order appointing the 3rd respondent is bad and unlawful.

[12] Mr.Shyam Sharma, learned Government Advocate refers to para No.3.6 of the affidavit-in-opposition filed by the respondent Nos. 1 and 2 to

state the reason for appointing the Special Public Prosecutor. Para No.3.6 reads as follows:-

Ã¢â‚¬Å“3.6 The Criminal Complaint Case No. 1 of 2018 has been filed by the Complainant, the State of Manipur by invoking the Provision of Section 199

of Cr.P.C. As a result thereof, the P.P(District) has become the Complaint as the P.P. (District) is representing the State. It is for this reason that at

the stage of recording P.W Statement, which commenced with recording the statement of P.P District himself, a need was felt by the State

Government to engage an Advocate to conduct the Prosecution as the P.P. (District) had become a Complaint Witness (P.W. no.1) and in view

thereof, the State Government had taken a bonafide decision to engage the Respondent no.3 as an Advocate vide the impugned Order dated

28/12/2018. Hence, the Ld. Singly Judge has rightly observed that the Court could not find any malafide intention in appointing the Respondent no.3 as

an Advocate to conduct the Prosecution.Ã¢â‚¬â€‹

[13] Shri Shyam Sharma also pleaded that the Special Public Prosecutor could be appointed only in terms of Section 24(8) of Cr.P.C. and that the 3rd

respondent fully satisfies the eligibility criteria. He is a practising advocate with more than ten years standing and therefore, he is fully eligible to be

appointed as a Special Public Prosecutor. Once the eligibility criteria is satisfied, the appointment cannot be faulted in proceeding invoking quo

warranto. The plea is misconceived. On the same lines, he also stated that after passing of the order by the learned Sessions Judge, Imphal West on

January, 2019, the appellants/accused kept quiet for a long period of time and participated in the trial till September, 2019. Thereafter, after a period of

eight long months, in order to delay the trial, they have come up with this writ petition on untenable plea and to protract the proceedings.

[14] The 3rd respondent, who appears as party in person reiterated the stand taken by the respondent Nos. 1 and 2 and relied upon the decision of the

Chattisgarh High Court in Narayan Singh Chauhan vs. State of Chattisgarh in W.P(C) No.3620 of 2016 primarily on the plea that in a case of this

nature, writ of quo warranto is not attracted and has to be dismissed which was rightly dismissed by the learned Single Judge.

[15] We have heard the respective counsel. At the outset, it is to be pointed out that the 3rd respondent has been appointed as Special Public

Prosecutor in a case filed by the State against the accused persons in a complaint filed under section 199(2) of Code of Criminal Procedure, 1973 for

offences under Chapter XXI of IPC. It is not in the realm of doubt that the State or the Central Government has the power to appoint a person who

has been in practice as an Advocate for more than ten years, as a Special Public Prosecutor for any case or class of case in exercise of power u/s

24(8) of Cr.PC. If an appointment is made subject to satisfying the eligibility criteria, the issue of quo warranto will not arise. The plea that no reason

has been given will not render the appointment invalid because Section 24(8) of Code of Criminal Procedure does not contemplate or specify so.

[16] The Hon'ble Supreme Court while considering similar plea in cases of writ of quo warranto has elucidated the distinction between the eligibility

and suitability as relevant for deciding such cases. It held that in a case where there is an interdict on the eligibility of the persons, it will fall within the

scope of judicial review and not when it is a case of suitability of the persons to a particular post. It held that the scope of judicial review would be

excluded because that is not within the domain of the Courts to test suitability.

[17] A writ of quo warranto should be understood as follows:-

Corpus Juris Secundem defines quo warranto as follows: -

Quo Warranto is a proceeding to determine the right to the exercise of franchise or office and to oust the holder if his claim is not well-founded or if

he has forfeited his right.

(2005) 1 SCC 590 : (2004) 3 SCC 349

In Halsbury's Laws of England Fourth Edition Reissue Volume-I, para 265, the writ of quo warranto has been defined as follows: -

An information in the nature of quo warranto took the place of obsolete writ of quo warranto which is against a person who claimed or usurped an

office, franchise, or liberty to enquire by what authority he supported his claim in order that the right to the office or franchise might be determined.

It is well settled that issuance of writ of quo warranto is a discretionary remedy, authority of a person to hold a public office can be questioned inter

alia in the event the appointment is violative of statutory provision (AIR 2001 SC 3435). Unquestionably a writ of quo warranto can be issued inter alia

when the appointment is contrary to statutory rules and holder of the office lacks eligibility.

[18] The respondents relied upon the Chattaisgarh High Court case in Narayan Singh Chauhan vs. State of Chattisgarh in W.P(C) No.3620 of 2016

which followed the principle laid down by the Hon'ble Supreme Court in Mahesh Chandra Gupta vs. Union of India, (2014) 1 SCC 161 and recorded

in Para Nos. 26, 27, 28, 31 and 32 as follows:-

Ã¢â‚¬Å“26. In the matter of Central Electricity Supply Utility of Odisha v. Dhobei Sahoo and others, Their Lordships of the Supreme Court have held in no

uncertain terms that writ of quo warranto can be issued only when person holding public office lacks eligibility or when appointment is contrary to

statutory rules and held as under in paragraph 21: -

21. From the aforesaid exposition of law it is clear as noonday that the jurisdiction of the High Court while issuing a writ of quo warranto is a limited

one and can only be issued when the person holding the public office lacks the eligibility criteria or when the appointment is contrary to the statutory

rules. That apart, the concept of locus standi which is strictly applicable to service jurisprudence for the purpose of canvassing the legality or

correctness of the action should not be allowed to have any entry, for such allowance is likely to exceed the limits of quo warranto which is

impermissible. The basic purpose of a writ of quo warranto is to confer jurisdiction on the constitutional courts to see that a public office is not held by

usurper without any legal authority.

27. In a decision in the matter of Mahesh Chandra Gupta v. Union of India and others, Their Lordships of the Supreme Court have pointed out the

distinction between ""eligibility"" and ""suitability"" and held that ""eligibility"" is based on objective factor and it is therefore liable to judicial review, but

suitability"" pertains to realm of opinion and is therefore, not amenable to any judicial review, and held as under in paragraphs 39, 43 and 44: -

39. At this stage, we may state that, there is a basic difference between ""eligibility"" and ""suitability"". The process of judging the fitness of a person to

be appointed as a High Court Judge falls in the realm of ""suitability"". Similarly, the process of consultation falls in the realm of suitability. On the other

hand, eligibility at the threshold stage comes under Article 217(2)(b). This dichotomy between suitability and eligibility finds place in Article 217(1) in

juxtaposition to Article 217(2). The word ""consultation"" finds place in Article 217(1) whereas the word ""qualify"" finds place in Article 217(2).

43. One more aspect needs to be highlighted. ""Eligibility"" is an objective factor. Who could be elevated is specifically answered by Article 217(2).

When ""eligibility"" is put in question, it could fall within the scope of judicial review. However, the question as to who should be elevated, which

essentially involves the aspect of ""suitability"", stands excluded from the purview of judicial review.

44. At this stage, we may highlight the fact that there is a vital difference between judicial review and merit review. Consultation, as stated above,

forms part of the procedure to test the fitness of a person to be appointed a High Court Judge under Article 217(1). Once there is consultation, the

content of that consultation is beyond the scope of judicial review, though lack of effective consultation could fall within the scope of judicial review.

This is the basic ratio of the judgment of the Constitutional Bench of this Court in the case of Supreme Court Advocates-on-Record Assn. v. Union of

India (1993) 4 SCC 441 and Special Reference No. 1 of 1998, Re (1998) 7 SCC 739 W.P.(S)No.3620/2016.

Their Lordships further concluded that in case involving lack of eligibility, writ of quo warranto would certainly lie and observed in paragraphs 71 and

74 as under: -

71. ""The overarching constitutional justification for judicial review, the vindication of the rule of law, remains constant, but mechanisms for giving

effect to that justification vary"".

Mark Elliott ""Judicial review must ultimately be justified by constitutional principle.

Jowett In the present case, we are concerned with the mechanism for giving effect to the constitutional justification for judicial review. As stated

above, ""eligibility"" is a matter of fact whereas ""suitability"" is a matter of opinion. In cases involving lack of ""eligibility"" writ of quo warranto would

certainly lie. One reason being that ""eligibility"" is not a matter of subjectivity. However, ""suitability"" or ""fitness"" of a person to be appointed a High

Court Judge: his character, his integrity, his competence and the like are maters of opinion.

74. It is important to note that each constitutional functionary involved in the participatory consultative process is given the task of discharging a

participatory constitutional function; there is no question of hierarchy between these constitutional functionaries. Ultimately, the object of reading such

participatory consultative process into the constitutional scheme is to limit judicial review restricting it to specified areas by introducing a judicial

process in making of appointment(s) to the higher judiciary. These are the norms, apart from modalities, laid down in Supreme Court Advocates-on-

Record Assn. (supra) and also in the judgment in Special Reference No. 1 of 1998, Re. (supra). Consequently, judicial review lies only in two cases,

namely, ""lack of eligibility"" and ""lack of effective consultation"". It will not lie on the content of consultation.

28. In the matter of N. Kannadasan v. Ajoy Khose and others (2009) 7 SCC 1 W.P.(S)No.3620/2016 the Supreme Court has clearly held that it is not

for the court to embark upon an investigation of its own to ascertain the qualifications of the person concerned and observed in paragraphs 134 and

139 as under: -

134. Indisputably, a writ of quo warranto can be issued inter alia when the appointment is contrary to the statutory rules as has been held by this

Court in High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat(2003) 4 SCC 712 : 2003 SCC (L&S) 56 5and R.K. Jain (supra). (See also Mor

Modern Coop. Transport Society Ltd. v. Govt. of Haryana(2002) 6 SCC 269.) In Duryodhan Sahu (Dr.) (supra), this Court has stated that it is not for

the court to embark upon an investigation of its own to ascertain the qualifications of the person concerned. (See also Arun Singh v. State of Bihar

(2006) 9 SCC 375.) We may furthermore notice that while examining if a person holds a public office under valid authority or not, the court is not

concerned with technical grounds of delay or motive behind the challenge, since it is necessary to prevent continuance of usurpation of office or

perpetuation of an illegality. [See Kashinath G. Jalmi (Dr.) v. Speaker (1993) 2 SCC 703 W.P.(S)No.3620/2016.]

139. In R.K. Jain (supra), consultation by the executive which the Chief Justice having found to be not necessary, it was held that no case for

issuance of writ of quo warranto has been made out, stating: (SCC p. 173, para 73) ""73. Judicial review is concerned with whether the incumbent

possessed of qualification for appointment and the manner in which the appointment came to be made or the procedure adopted whether fair, just and

reasonable.Ã¢â‚¬â€‹

Exercise of judicial review is to protect the citizen from the abuse of the power, etc. by an appropriate Government or department, etc. In our

considered view granting the compliance with the above power of appointment was conferred on the executive and confided to be exercised wisely.

When a candidate was found qualified and eligible and was accordingly appointed by the executive to hold an office as a Member or Vice-President

or President of a Tribunal, we cannot sit over the choice of the selection, but it be left to the executive to select the personnel as per law or procedure

in this behalf.

In that case, it was held that no case for issuance of a writ of certiorari had been made out as a third party had no locus standi to canvass the legality

or correctness of the action seeking for issuance of a writ of certiorari. Only public law declaration would be made at the behest of the appellant who

was a public-spirited person.

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31. Very recently, in the matter of Registrar General, High Court of Madras v. R. Gandhi and others (2014) 11 SCC 547 W.P.(S)No.3620/201,6 the

Supreme Court has reiterated the principle of law laid down in Mahesh Chandra Gupta (supra) and held that judicial review is permissible only on

assessment of eligibility and not on suitability of an appointee.

32. In the matter of Renu and others v. District and Sessions Judge, Tis Hazari Courts, Delhi and another 28, Their Lordships of the Supreme Court

have reiterated that for issuance of writ of quo warranto, the Court has to satisfy that the appointment is contrary to the statutory rules and the person

holding the post has no right to hold it, and observed as under: -

15. Where any such appointments are made, they can be challenged in the court of law. The quo warranto proceeding affords a judicial remedy by

which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said

office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be

ousted from that office by judicial order. In other words, the procedure of quo warranto gives the judiciary a weapon to control the executive from

making appointment to public office against law and to protect a citizen from being deprived of public office to which he has a right. These

proceedings also tend to protect the public from usurpers of public office who might be allowed to continue either with the connivance of the executive

or by reason of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the court that the

office in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to an enquiry as to whether the

appointment of the alleged usurper has been made in accordance with law or not. For issuance of writ of quo warranto, the Court has to satisfy that

the appointment is contrary to the statutory rules and the person holding the post has no right to hold it. ...

The 3rd respondent in the case satisfies the eligibility criteria and this is not challenged by the appellants/writ petitioners. The Single Judge has also

recorded it.

[19] Therefore, at the outset, we have to clearly hold that since the third respondent is eligible and he satisfied the requirement of Section 24(8) of the

Code of Criminal Procedure and he has been appointed by virtue of the power vested with the State Government, the appointment cannot be assailed

as illegal or improper. Hence, the plea to issue writ of quo warranto has to be declined and was rightly declined by the Single Judge.

[20] Be that as it may, the other issue raised by the learned counsel for the appellant is that no reason has been given while appointing the 3rd

respondent as the Special Public Prosecutor. For this proposition, he relied upon the decision of the Madhya Pradesh High Court in the case ofS unil

Kumar Vs. State of Madhya Pradesh, 1992 MPLJ 77 2stating that reasons should be recorded and the State Government cannot exercise power

under section 24(8) of the Code of Criminal Procedure in an arbitrary manner without giving reasons.

[20] The learned counsel for the appellants was not able to place a copy of that judgment and order but referred to it by reading para 5 of the

judgment passed in the case of Rajendra Nigam vs. State of Madhya Pradesh & ors. decided by a Single Judge of the Madhya Pradesh High Court

on 6th May, 1997 reported in 1998 CriLJ 998.

The Madhya Pradesh case is a case of murder and Special Public Prosecutor was appointed to conduct the criminal trial. The Court held that the

appointment of Special Public Prosecutor was to please and satisfy the relation of the deceased. It is a case where a Special Public Prosecutor was

appointed in the place of the regular Public Prosecutor and no reason has been stated why the Special Public Prosecutor was appointed. Para No.5

reads as follows:-

Ã¢â‚¬Å“5. In the matter of Sunil Kumar v. State of M.P. MANU/MP/0165/1992 : 1992 MPL Judgment and order 772, a Division Bench of this Court has

observed that only in exceptional cases and for reasons to be recorded, the State Govt. can exercise its powers under Section 24(8) of the Code of

Criminal Procedure and appoint a Special Public Prosecutor. The Court was also of the opinion that the appointment order did not disclose any

reasons for appointment of the Special Public Prosecutor and the order further read that the Government would not pay any fees to the Special Public

Prosecutor would show that the Special Public Prosecutor was appointed not for any necessity, but just to please and satisfy the relations of the

deceased. The Court was also of the opinion that a Special Public Prosecutor cannot be appointed just for the sake of making, but the order must

stand on a proper foundation. In the instant case also the order Annexure 4 is conspicuously silent as to why a duly appointed Public Prosecutor has

been dislodged and Special Public Prosecutor was appointed. The order does not show that what persuaded the State Government to appoint the

Special Public Prosecutor and for what reasons the fees to the Special Public Prosecutor was not required to be paid by the State exchequer.Ã¢â‚¬â€‹

[21] In the present case, it is a complaint by the State in terms of Section 199(2) and the reason for appointment of the Special Public Prosecutor was

for the reason that the Public Prosecutor himself testified as a witness and therefore, the Government thought that appointment of a Special Public

Prosecutor is a necessity. It is on the basis of the above fact, the order was passed by the government. The order of appointment of Special Public

Prosecutor was placed before the learned Sessions Judge, Imphal West and an order has been passed in January, 2019 which has not been assailed

by the appellants/ accused so far.

The facts in the case of Sunil Kumar Vs. State of Madhya Pradesh (supra) is different. In that case, the Public prosecutor was available and was not

found to be ineligible for any specific reason, as in the present case. It is a case of appointment of Special Public Prosecutor to please the relation of

the deceased. In the present case, the State has been able to explain the need for the Special Public Prosecutor. It is a just reason given the factual

position as explained in the reply affidavit.

[22] The case of Madho Singh & anr. vs. State of Rajasthan decided on 19th November, 2001, 2002 CriLJ 1694 was relied upon to impress the role of

Public Prosecutor. Para 7, 8 and 9 of the said case reads as follows:-

Ã¢â‚¬Å“7 . Therefore, an Advocate who fulfills the eligibility may be appointed as a Special Public Prosecutor for the purpose of conducting trial in a

particular case or class of cases. The question does arise whether the State has a power to appoint the Special Public Prosecutor in any case as its

whims or there must be sufficient reasons, which should be recorded in writing, for making such an appointment, whether appointment of Special

Public Prosecutor should be made at the desire of the complainant; and whether it may provide that his fees and expenses shall be paid by the

complainant.

8. The position remains undisputed that the complainant's lawyer can always assist the Public Prosecutor by submitting the written arguments as is

permissible under Sections 235, 301 and 302 Cr.PC. The Division Bench of this Court in (1) Bhopal Singh v. State of Rajasthan and Ors.; 2001 (1)

RLR 349 :2001 Cr.L.R. (Raj.) 161 has upheld the validity of Sections 225, 301 and 302 wherein the complainant had challenged the validity of the said

provisions on the ground that he had a right to engage a counsel of his choice to conduct the prosecution of the accused and not by a Public

Prosecutor appointed under a spoiled-system. This Court rejected the said contention, upholding the validity of the said provisions, observing that it

does not violate the mandate of Article 21 of the Constitution as offence committed by an accused primarily is offence against the State and not

against an individual and the submission that Article 21 includes the right to prosecute the accused by the complainant because he has suffered the

loss of injury, was rejected.

9 . Public Prosecutor holds a ""Public Office"". The primacy given to him under the Scheme of Cr.PC has a ""special purpose"". Certain professional,

official obligations and privileges are attached to his office. His office may also be termed as an office of profit as he remains disqualified to contest

the election so long he holds the office, though permanency is attached to the office and not to the term of his office. His duties are of public nature.

He has an ""independent and responsible character"". He holds the public office within the scope of a ""quo-warranto proceedings"". Public Prosecutor is

not a part of investigating agency but is an ""independent statutory authority"". He performs statutory duties and functions. He holds a office of

responsibility as he has been enclothed with the power to withdraw the prosecution of a case on the directions of the State Government vide (2)

Mukul Dalai v. Union of India MANU/SC/0321/1988 : (1988) 3 SCC 14; 4(3) K.C. Sud v. S.G. Gudimani, (1991) 2 Cr. L.J. 1779; (4)M ahadeo v.

Shantibhai MANU/SC/0277/1968 : (5) Madhukar G.E. Pankaker v. Jaswant Chobbildas Rajani and Ors., MANU/SC/0279/1976 : AIR 1976 SC 2283

(6) Kanta Kathuria v. Manak Chand Surana, MANU/SC/0275/1969 : AIR 1970 SC 69; 4(7) Rabindra Kumar Nayak v. Collector, Mayorbhanj, IT

(1999) 1SC 591; (8) Mundrika Prasad Sinha v. State of Bihar MANU/SC/0017/1979 : AIR 1979 SC 187 a1nd (9) Hitendra Vishnu Thakur v.State of

Maharashtra MANU/SC/0526/1994 : AIR 1994 SC 2623).Ã¢â‚¬â€‹

It is to be noted that this decision was rendered in the facts of that case which is at para 2 and is extracted for better understanding.

Ã¢â‚¬Å“2 . The facts and circumstances giving rise to this case are that the petitioners are facing criminal trial for offence punishable under Section 302

IPC etc. The respondent No. 2-complainant (brother of the deceased) filed an application before the respondent No. 1 that Public Prosecutor in the

Sessions Court would not be able to conduct the trial for being very busy and hence the State should appoint respondent No. 3 as Special Public

Prosecutor on this expenses. Respondent No. 1 passed the impugned order dated 13.9.2001 (Annex.1) appointing respondent No. 3 as a Special

Public Prosecutor. Petitioners filed an application before the learned Sessions Judge, Jodhpur for quashing of the said appointment order dated

13.9.2001 (Annex.1) but the same has been rejected vide order dated 4.10.2001 (Annex.3) on the ground that he lacks the competence to quash such

order and the appropriate relief may be granted only by a Writ Court. Hence, this petition.Ã¢â‚¬‹

[23] As is evident that it is on the basis of an application filed by the brother of the deceased, complainant No. 2, the appointment of the Special Public

Prosecutor was made and that was challenged by way of writ petition to quash the appointment order. It is not a case of quo-warranto. The plea is

that the order is an erroneous order and should be quashed. The reason for holding that the decision to appoint Special Public Prosecutor was not

correct is evident from para 45 of the decision in Madho Singh & anr. vs. State of Rajasthan (supra) case. Para 45 reads as under:-

Ã¢â‚¬Å“45. Thus, in the light of the aforesaid settled propositions of law, order impugned cannot stand to judicial scrutiny. There is nothing on record to

show that any authority has applied its mind. It is also doubtful whether the order could have been passed by the Hon'ble Minister on the same date

when the application was moved ,particularly in view of the fact that the application was made to the Law Secretary and not to the Hon'ble Minister.

Whether the order could have been passed by the Hon'ble Minister or by the Law Secretary, also remains unexplained. Even if the Hon'ble Minister

was competent to pass the order, the application should have reached to him through proper channel after being processed by the Law Department.

No comments/ remarks have been called from any person nor any inquiry has been made on the grounds taken in the application. Thus, it is a clear

case of non application of mind by the Statutory Authority. The said authority did not consider it proper to record any reason as what was the public

interest involved in passing such order and what were the special features of the case which warranted appointment of Special Public Prosecutor.

Thus, in view of the above, the petition succeeds and is allowed. The impugned order dated 13.9.2001 cannot be sustained in the eyes of law and is

hereby quashed. The respondents are directed to reconsider the whole case by applying its mind and passing appropriate order recording the reasons

within a period of three weeks from the date of filing the certified copy of this order before the learned Law Secretary of the State of Rajasthan.

There shall be no order as to costs.Ã¢â‚¬‹

These facts are peculiar to the facts of Madho SinghÃ¢â‚¬â„¢s case and has no application to the facts of the present case.

[24] In the present case, the reason for appointment of Special Public Prosecutor has been clearly explained and this Court has taken note of it. It is

not a knee jerk reaction as in the case of Madho Singh (supra)Ã¢â‚¬â„¢s case where the relation of the victim seeks appointment of Special Public

Prosecutor. In any event, in a writ of quo-warrranto, the primary concern of the Court is to find out whether there is an error in the selection and

appointment of the 3rd respondent, contrary to the statutory provisions or the rule, whether the candidate fails the eligibility criteria test is to be

considered. The answer is a clear no.

[25] Tested on that parameters of the various Hon'ble Supreme Court decisions, we find that the third respondent has been appointed by the State

Government in exercise of power under section 24(8) of the Cr.P.C and that power cannot be disputed by the appellants. If the reason are found in

the proceedings connected with the appointment, then recording of separate reasons may not be necessary. The Hon'ble Supreme Court in the case of

(Union of India (UOI) and ors. Vs. E.G. Nambudiri reported in AIR 1991 SC 1216. In para No.6, the Hon'ble Supreme Court held as below:-

Ã¢â‚¬Å“6. Entries made in the character roll and confidential record of a Government servant are confidential and those do not by themselves affect any

right of the Government servant, but those entries assume importance and play vital role in the matter relating to confirmation, crossing of efficiency

bar, promotion and retention in service. Once an adverse report is recorded, the principles of natural justice require the reporting authority to

communicate the same to the Government servant to enable him to improve his work and conduct and also to explain the circumstances leading to the

report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the

explanation offered by the person concerned, whether the adverse report is justified. The superior authority competent to decide the representation is

required to consider the explanation offered by the Government servant before taking a decision in the matter. Any adverse report which is not

communicated to the Government servant, or if he is denied the opportunity of making representation to the superior authority, cannot be considered

against him. See: Gurdial Singh Fijji v. State of Punjab and Ors. MANU/SC/0455/1979 : [1979]3SCR518 . In the circumstances it is necessary that the

authority must consider the explanation offered by the Government servant and to decide the same in a fair and just manner. The question then arises

whether in considering and deciding the representation against adverse report, the authorities are duty bound to record reasons, or to communicate the

same to the person concerned. Ordinarily, Courts and Tribunals, adjudicating rights of parties, are required to act judicially and to record reasons.

Where an administrative authority is required to act judicially it is also under an obligation to record reasons. But every administrative authority is not

under any legal obligation to record reasons for its decision, although, it is always desirable to record reasons to avoid any suspicion. Where a statute

requires an authority though acting administratively to record reasons, it is mandatory for the authority to pass speaking orders and in the absence of

reasons the order would be rendered illegal. But in the absence of any statutory or administrative requirement to record reasons, the order of the

administrative authority is not rendered illegal for absence of reasons. If any challenge is made to the validity of an order on the ground of it being

arbitrary or mala fide it is always open to the authority concerned to place reasons before the Court which may have persuaded it to pass the orders.

Such reasons must already exist on records as it is not permissible to the authority to support the order by reasons not contained in the records.

Reasons are not necessary to be communicated to the Government servant. If the statutory rules require communication of reasons, the same must be

communicated but in the absence of any such provision absence of communication of reasons do not affect the validity of the order.Ã¢â‚¬â€‹

(emphasis supplied)

And a Division Bench of the High Court Of Andhra Pradesh in the case of Director of Income Tax (International Taxation) and Ors. Vs. Authority

for Advance Rulings and Ors. (Writ Petition Nos. 18132 and 18133 of 2010 Decided On: 25.03.2011) held in para No.51 as below :-

Ã¢â‚¬Å“51. The principles summed up infra - though not exhaustive; are culled out from M.P. Industries Limited v. Union of India MANU/SC/0044/1965 :

AIR 1966 SC 671, Bhagat Raja v. Union of India MANU/SC/0002/1967 : AIR 1967 SC 160, 6Som Datt, Travancore Rayon Limited v. Union of India

MANU/SC/0280/1969 : (1969) 3 SCC 868 : AIR 1971 SC 86, 2Mahabir Prasad Santosh Kumar v. State of U.P MANU/SC/0018/1970 : (1970) 1

SCC 764 : AIR 1970 SC 1302, Union of India v. M.L. Capoor MANU/SC/0405/1973 : (1973) 2 SCC 836 : AIR 1974 SC 8, 7Woolcombers of India

v. Their Workers Union MANU/SC/0283/1973 : (1974) 3 SCC 318 : AIR 1973 SC 275, 8Siemens Engineering and Manufacturing Co. v. Union of

India MANU/ SC/0211/1976 : (1976) 2 SCC 981 : AIR 1976 SC 178, 5Tara Chand v. Delhi Municipality MANU/SC/0549/1976 : (1977) 1 SCC 472 :

AIR 1977 SC 567, S.N. Mukherjee v. Union of India MANU /SC/0346/1990 : (1990) 4 SCC 594 : AIR 1990 SC 1984 and Shukla and Brothers.

(i) A quasi judicial authority is required to give reasons if the statute expressly requires the recording of reasons as mandatory (Mahabir Prasad

Santosh Kumar, M.L. Capoor and Siemens Engineering).

(ii) If the statute does not lay down expressly the requirement of recording reasons, the reasons have to be inferred from the facts and circumstances

of the case and on that ground, the order cannot be invalidated (Bhagat Raja, Som Datt and S.N. Mukherjee).

(iii) If the order of the quasi judicial authority is subject to appeal or revision, the necessity for recording reasons is greater because the appellate or

revisional authority cannot exercise their powers effectively without knowing the reasons which weighed with the quasi judicial authority (M.P.

Industries, Bhagat Raja, Travancore Rayons Limited and Mahabir Prasad Santosh Kumar).

(iv) Every quasi judicial order which is subject to judicial review by the High Court ought to be speaking order. Without reasons, the judicial scrutiny

would be ineffective and violates rule of law (Bhagat Raja, Travancore Rayons Limited and Mahabir Prasad Santosh Kumar).

(v) The extent, elaboration, nature of the reasons depend on each case; but quasi judicial decision without reasons would negate the rule of law. If the

reasons reveal the rationale nexus between the facts considered and conclusions reached, it would be sufficient compliance (M.P. Industries, Bhagat

Raja, M.L. Capoor, Woolcombers and Tara Chand).

(vi) Irrespective of the requirement as to the stage at which an authority has to record reasons, if the applicable statute excludes the reasons for the

decision, the order cannot be invalidated only on the ground of lack of reasons (Som Datt and S.N. Mukherjee).Ã¢â‚¬â€‹

(emphasis supplied)

[26] If the eligibility of the third respondent is not questioned on his individual merit and eligibility, then there is no question of issuing quo-warranto.

Assuming that the provision of the law has not been quoted, that would not make the proceeding invalid because the source of power is traceable to

section 24(8) of the Cr.P.C.

This faint and technical plea does not appeal to this Court. In such circumstances, there is absolutely no justification for filing this appeal. The writ

petition was correctly dismissed by the learned Single Judge. No writ in the nature of quo-warranto lies in the present case.

[27] Accordingly, the appeal stands dismissed.