**(1992) 11 KL CK 0038**

**High Court Of Kerala**

**Case No:** O.P. No. 10834 of 1992 M

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| Abdulkhadar Musliar | | APPELLANT |
| | Vs | |
| State of Kerala and Others | | RESPONDENT |

**Date of Decision:** Nov. 13, 1992

**Acts Referred:**

- Constitution of India, 1950 - Article 14
- Criminal Procedure Code, 1973 (CrPC) - Section 199, 2, 225, 24, 24(3)
- General Clauses Act, 1897 - Section 16, 21
- Penal Code, 1860 (IPC) - Section 199, 321

**Citation:** (1993) CriLJ 1249

**Hon'ble Judges:** K.T. Thomas, J

**Bench:** Single Bench

**Advocate:** J. Jose, for the Appellant; V.K. Beeran, A.A.G. for Respondent 1 and V.N. Achuta Kurup, for Respondents 4 and 5, for the Respondent

**Judgement**

K.T. Thomas, J.
Government of Kerala appointed fourth Respondent as Special Public Prosecutor and fifth Respondent as additional Special Public Prosecutor for conducting prosecution in the trial of a particular murder case. Subsequently, Government Cancelled the said appointment as per Ext. P-2 proceedings. Petitioner, father of the deceased in the said murder case, has filed this Original Petition Challenging Ext. P-2.

2. According to the Petitioner, the Muslim Community in Malappurara District is faction ridden, one group known as "A.P. group" owing allegiance to Congress party and the other known as "E.K. group" owing allegiance to Muslim League party and that all the accused in the murder case belong to "E.K. group" while deceased was loyal to the rival group. Petitioner challenges Ext. P-2 order mainly on the ground that it was passed at the behest of Muslim League which is a dominant constituent of the ruling in Kerala State,

solely for the purpose of helping the accused in the murder case.

3. Government of Kerala tried to defend Ext. P-2 order on different grounds in the affidavit sworn to by the Joint Secretary to its Home department. It is pointed out in the counter affidavit that the order appointing Respondents 4 and 5 as Special Public Prosecutor and Additional Special Public Prosecutor respectively, was passed without any deliberation much less any enquiry and that when Government received a petition alleging that the appointment order was politically motivated, it was enquired into through the Superintendent of Police, District Collector and Director General of Prosecutor and all of them recommended for cancellation of the appointment order on the promise that there was no special situation for appointing a Special Public Prosecutor in the case. Another reason advanced in defence of the cancellation order is that "Government is in utmost financial constraints". A third ground is that the regularly appointed Public Prosecutors are competent to conduct prosecution fairly and honestly and if a Special Public Prosecutors is appointed, except in extraordinary circumstances, the morale of the existing Public Prosecutors would be impaired.

4. It is not disputed that the Government has the power to cancel or revoke its own order. This power has been recognised in Section 16 and well as in Section 21 of the General Clauses Act, 1897 vide S.R. Tewari Vs. District Board Agra and Another, , Union of India (UOI) Vs. Gurbux Singh and Another, . However, in exercising such power, Government must Act fairly and reasonably. Otherwise, the exercise is arbitrary and consequently discriminatory and would offend Article 14 of the Constitution. Recently the Supreme Court has considered the question in the wake of termination of a batch of Government Counsel appointed in Utter Pradesh vide Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, . J.S. Verma, J., who wrote the judgment, pointed out thus:

The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the preamble. Exclusion of Article 14 in contractual matters is not permissible in constitutional scheme. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, it can be said that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. Therefore it would be difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.

Their Lordships followed the decision in Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, and Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, in reaffirming the aforesaid legal position.

5. Learned Additional Advocate General (Shri V.K. Beeran) invited my attention to the decision of a Division Bench of this Court in Mohammed Ashraff v. State of Kerala 1991 (2) KLT 818 where the ratio laid down in Shrilekha Vidyarthi''s case AIR 191 S.C. 537 (cited supra) was pressed into service. Learned Chief Justice, who wrote the judgment, found that in the termination of a batch of Government Pleaders there was no arbitrariness. The judgment speaks of the need to consider facts of each case separately to verify whether the allegation of arbitrariness is true or not.

6. In the present case, Government appointed Respondents 4 and 5 as Special Public Prosecutor and Additional Special Public Prosecutor respectively as per Ext. P-1 notification. The file relating to the said appointment has been produced by the Additional Advocate General. The file shows that this Petitioner had sent a representation to the Government on 4th September 1990 urging the Government to appoint Respondents 4 and 5 as Special Public Prosecutor and Additional Special Public Prosecutor respectively on the mere ground that the accused in the murder case have engaged Shri K. Kunhiraman Menon, a leading criminal lawyer as their Advocate to defend them. It appears that the Government without conducting any enquiry, without even calling for the remarks of any other officer, acceded to the said request and appointed Respondents 4 and 5 as Special Public Prosecutor and Additional Special Prosecutor to conduct prosecution in Crime No. 56 of 1989 of Tanur Police Station (which is the murder case in question).

7. A Special Public Prosecutor can be appointed u/s 24(8) of the Code of Criminal Procedure, 1973 (for short ''the Code''). The Code does not lay down in specific terms the conditions for appointment of a Special Public Prosecutor. But the scheme of Section 24 would unmistakably reveal that a Special Public Prosecutor can be appointed only in special circumstances.

8. Section 24(3) of the Code casts an obligation on the State to appoint a Public Prosecutor in every district. Sub-section confers a discretion on the Government to appoint Additional Public Prosecutor for the district. A Public prosecutor can be appointed only from a panel of names prepared by the District Magistrate. While preparing a panel, the District Magistrate concerned is under obligation to consult the Sessions Judge concerned in order to form the opinion whether a particular person is fit to be appointed as Public Prosecutor or Additional Public Prosecutor. It is specifically made clear that unless a person has put in practice as an Advocate for seven years, he is not eligible to be appointed. A District Magistrate is obliged to consult the Sessions Judge because it is the Sessions Judge who has better opportunities to assess the merits and capabilities of an Advocate. His views on the person, therefore, acquire considerable weight to help the District Magistrate in preparing the panel. A District Magistrate is not supposed to delete a person recommended by the Sessions Judge from the panel, nor could the District Magistrate include a name which has not been recommended by the Sessions Judge. Consultative process envisaged in the provision cannot be made a mere formality. So much statutory travels are provided in the appointment of a Public Prosecutor and

Additional Public Prosecutor. This is because the office of a Public Prosecutor carries very great public importance in the scheme of criminal trials in Sessions Courts.

9. A special feature of the administration of justice in the field of criminal law in India is that an accused before a Sessions Court is conferred with a privilege that the case against him can be prosecuted only by a Public Prosecutor. This is reflected in the mandate contained in Section 225 of the Code. There is no exception to this rule. Any private counsel engaged by the injured, or any Advocate briefed by the relatives of the deceased, however influential they may be, is not entitled to conduct the prosecution in Sessions Courts. This system is the glaring acknowledgment of the special status and position which the office of Public Prosecutor is expected to wild in our legal system vide Seethi Haji v. State of Kerala 1986 KLT 1274. Public Prosecutor is defined in Section 2(u) of the Code as "any person appointed u/s 24, and includes any person acting under the directions of a Public Prosecutor". Thus a Special Public Prosecutor also would be a Public Prosecutor in respect of the particular case or class of cases for which he is appointed. The powers conferred on him are seemingly so wide and unfettered that Parliament reposed confidence of great magnitude in the office a Public Prosecutor. The definition clause further indicates that a person once appointed as a Public Prosecutor can even make Anr. Public Prosecutor for many practical purposes if the latter would act under the directions of the former. It is the Public Prosecutor who shall open his case by describing charge brought against the accused. It is the Public Prosecutor who is empowered to file a complaint in writing before the Sessions Court alleging that an offence falling under Chapter XXI of the Indian Penal Code has been committed against the President of India or the Vice President of India or the Governor of a State or 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 in respect of his conduct in discharge of public functions (vide Section 199 of the Code). Then again, it is on a Public Prosecutor the absolute discretion is conferred to decide whether a case should be withdrawn from prosecution or whether any person either generally or in respect of any one or more of the offences for which he is tried should be withdrawn from prosecution (vide Section 321 of the Code). Thus, special status and position as well as great powers have been conferred on the office of Public Prosecutor. Every Public Prosecutor must remind himself constantly of this enviable position of trust and responsibility.

10. It is in the aforesaid background that the power conferred on the Government to appoint a Special Public Prosecutor need be understood. Section 24(8) of the Code reads thus:

The Central Government or the State Government may, 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 a Special Public Prosecutor.

The philosophy involved which can be discerned from the Sub-section is two fold. First is that there should be special circumstances for making such appointment. Second is that,

when a situation arises for appointing a Special Public Prosecutor, Government shall consider a more experienced Advocate for the assignment. Though circumstances may differ in different situations, the very idea behind conferment of the power is to meet special situations. In other words, a Special Public Prosecutor is not to be appointed in ordinary circumstances. Bhat, J. (as His Lordship then was) has pointed out in Narayanankutty v. State of Kerala 1982 KLT 605 that "Special Public Prosecutor could be appointed only when public interest demands it and not to vindicate the grievances of a private person, such as close relation of the deceased".

11. The mere fact that the accused in a particular case are engaging a leading criminal lawyer is hardly sufficient to make it a special situation warranting appointment of a Special Public Prosecutor. If a norm is accepted by Government that a Special Public Prosecutor shall be appointed when accused engage a competent or leading Advocate, it is likely to bring about anomalous situation because in very many sessions trials accused would engage leading criminal lawyers to defend them. Eg:- Government would be obliged to appoint Special Prosecutor in all cases in which accused engage Shri. K. Kunhiraman Menon to defend the accused, if such a norm is accepted. Quite evidently this is not the purpose for which Section 24(8) of the Code is provided.

12. When the Government found that the appointment of Special Public Prosecutor was bad in law, Government was justified in rescinding the same. Before passing Ext. P-2 order Government called for reports from Superintendent of Police, District Collector and Director General of Prosecution and considered those reports also. As the appointment cannot be supported, its cancellation by Government needs no interference.

Original Petition is, therfore, dismissed.