HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7232 OF 2004
With
CIVIL APPLICATION NO.983 OF 2005

Mrs.Neelima Sadanand Vartak. .. Petitioner

Versus

State of Maharashtra & others .. Respondents

Mr.A.V.Anturkar with Mrs.Vinita Bakre-Shastri for petitioner.

Mr.R.M.Kadam, Advocate General with Mr.S.R.Nargolkar, AGP for respondent Nos.1 to 3 and 5 & 9.

Mr.C.J.Sawant, Senior Advocate with Mr.R.V.Govilkar for respondent No.8.

Respondent Nos.4, 6 and 7 are served.

CORAM : H.L. GOKHALE &
SMT.R.S.DALVI, JJ.

DATE OF RESERVATION OF JUDGMENT : 21st July 2005

DATE OF PRONOUNCEMENT OF JUDGMENT : 12th August 2005

JUDGMENT : (Per H.L.Gokhale, J.)

1. This writ petition invoking Articles 14 and 226 of the Constitution of India seeks to challenge the Notification dated 1st June 2004 issued by respondent Nos.1 and 2 appointing respondent No.8 as the Public Prosecutor for the District of Pune for a period of 3 years. The Notification is sought to be challenged as being in breach of Section 24 of the Code of Criminal

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Procedure which contains the provision for the appointment of Public Prosecutors in the Districts under sub-sections (3), (4) and (5) thereof.

2. The petitioner has been working as a Law Officer for the State in Pune District right from 1986. Presently, she is working as Additional Public Prosecutor. Respondent No.1 to this petition is the State of Maharashtra, respondent No.2 is the Principal Secretary, Law and Judiciary Department, respondent No.3 is the Minister for Law and Justice, respondent No.4 is the Minister for State of Law and respondent No.5 is the Advocate General. Respondent Nos.6 and 7 are the then Cabinet Minister of Law and Judiciary and the Minister for State, Law and Judiciary, respectively when the impugned Notification was issued. Respondent No.9 to the petition is the District Magistrate and Collector of Pune.

3. Before we deal with the submissions of the petitioner as well as that of the State of Maharashtra and respondent No.8, it will be desirable to refer to the relevant provisions of the Code of Criminal Procedure ("Cr.P.C." for short). As stated above, we are concerned with Section 24 of Cr.P.C. This section, as existing

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in the Central Statute after the amendment with effect from 18.12.1978, reads as follows:-

" **24. Public Prosecutors**

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

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

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

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

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutor or Additional Public Prosecutors for the district.

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

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

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among the persons constituting such Cadre:

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

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

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

(9) For the purposes of sub-section (7)

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

As far as the State of Maharashtra is concerned, sub-sections (1) and (4) of Section 24 were amended with effect from 20th May 1981. In sub-section (1) the words "after consultation with the High Court" were deleted and in sub-section (4) the words "in consultation with the Sessions Judge" were substituted by the following words " with the approval of the State Government". Since we are concerned with the appointment of a Public Prosecutor for a district by the State Government, sub-sections (3), (4) and (5) are relevant for our purpose. The amended sub-section (4) now reads as follows for the State of Maharashtra with effect from 20.5.1981:-

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"The District Magistrate shall, with the approval of the State Government, prepare a panel of names of persons who are in his opinion fit to be appointed as Public Prosecutor or Additional Public Prosecutor for the district."

4. The principal grievance of the petitioner is that sub-section (4) has not been followed inasmuch as the sub-section requires the District Magistrate to prepare a panel of names who, in his opinion, are fit to be appointed as Public Prosecutors. It is contended that the sub-section implies a short-listing of such persons. It also requires that the persons to be placed in the panel have to be fit for being appointed as Public Prosecutors. It is submitted that even though the words "in consultation with the Sessions Judge" are now deleted from this sub-section, inasmuch as fitness for being appointed as Public Prosecutor is the material requirement, the District Magistrate is expected to consult the Sessions Judge of the District who would be in the best know of such fit persons. As against this submission of the petitioner, the contention of the respondents is that after the amendment of the section, it is not mandatory to have a

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consultation with the Sessions Judge. The District Magistrate has to prepare a panel of fit persons. The fitness, which is contemplated in this sub-section, is same as the eligibility under Rule 11 of the Maharashtra Law Officers (Appointment, Condition of Service and Remuneration) Rules, 1984. These rules are specifically invoked in the impugned order appointing respondent No.8 apart from Section 24(3) of Cr.P.C. and that the District Magistrate has tested the eligibility of the persons concerned. Although not mandatorily required, yet he has consulted the Sessions Judge and thus, there is no breach of Section 24(4) of Cr.P.C.

5. (a) In the petition it is stated that after the advertisement for the concerned post was issued by the District Magistrate, the petitioner made the necessary application giving her supporting documents. After coming to know about the appointment of respondent No.8 to this post, she wrote to the District Magistrate seeking certain information under the Maharashtra Right to Information Act. She had raised three questions and she did receive reply to those three questions from the District Magistrate. The three questions and the answers received were as follows:-

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(i) Firstly, whether the report was sought from the District Judge regarding scrutiny of applications for preparing the panel as per the Notification of November 2003. Answer to this was Yes.

(ii) The second question was as to whether the said reports were sent to the Government along with the panel and the answer received was Yes. The reports of the Hon'ble District Judge were sent to the Government, Law and Judiciary Department.

(iii) The third question was as to how many applications out of the applications received in this connection were sent to the Government and the answer to this question was that the District Collector had received 25 applications for the post of Public Prosecutor, Pune and Baramati and all those applications were forwarded to the Government.

(b). Another Government decision dated 15th December 2003 is also annexed to the petition constituting a committee of two persons viz. the Advocate General of the State and the Principal

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Secretary, Law and Judiciary to scrutinise all the applications received for the post of Law Officers in the State and to prepare a list and forward the same through the Hon'ble Minister for State of Law and Judiciary and then the Minister of Law and Judiciary to the Chief Minister for the final decision. One of the submissions raised in the petition is that the papers were not sent to the Minister for State of Law and Judiciary contrary to this Government decision.

6. Before we deal with the rival submissions, it will be advisable to refer to some of the relevant judgements. As far as the nature of this office and its importance is concerned, the same has been emphasized in paragraphs 71 to 78 in the judgment rendered in the case of **State of U.P. & anr. vs. Johri Mal reported in (2004) 4 SCC 714**. It has been emphasized therein that the District Government Counsel are not only officers of the Court but they also represent the State. The Court reposes a great confidence in them and their opinion carries great weight. They are supposed to render independent, fearless and non-partial views before the Court irrespective of the result of the litigation. They are supposed to perform statutory duties independently having regard to

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various provisions in the Cr.P.C. and particularly Section 320 thereof. They play a significant role in order to increase certainty of conviction in genuine cases. They represent interest of the general public before a Court of law. They must, therefore, have character, competence, sufficient experience and also a standing at the bar. It is, therefore, necessary to employ meritorious and competent persons in this high office. This was emphasized earlier in **State of U.P. & ors. vs. U.P. State Law Officers Association & ors. reported in (1994) 2 SCC 204**. In para-18 of the judgment the Apex Court observed that the mode of appointment of lawyers for the public bodies could be either by an open invitation to the lawyers to compete for the post or by inviting the best persons available although they may not have applied for the post. Thereafter the Court observed "Whatever the method adopted, it must be shown that the search for the meritorious was undertaken and the appointments were made only on the basis of the merit and not for any other consideration. "

7. The Public Prosecutors are holders of public offices and they have a public duty to perform. Thus, a public element is involved

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therein. In the case of **Mundrika Prasad Singh vs. State of Bihar reported in (1979) 4 SCC 701**, the nature of appointment of Government Pleaders came up for consideration and it was held that the office of a Government Pleader, as defined under Section 2(7) of the Code of Civil Procedure, is a public office. In para-15 of that judgment, the Apex Court referred with approval to a judgment of a Division Bench of Madras High Court in the case of **Ramachandran vs. Alagiriswami reported in AIR 1961 Madras 450** and then observed as follows:-

> " ... A Government Pleader is more than an advocate for a litigant. He holds a public office. We recall with approval the observations a Division Bench of the Madras High Court made in Ramchandran v. Alagiriswami and regard the view there, expressed in the Bihar set up.
>
> ... the duties of the Government Pleader, Madras are duties of a public nature. Besides, as already explained the public are genuinely concerned with the manner in which Government Pleader discharges his duties because, if he handles his cases badly, they have ultimately to foot the

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bill. ...

> I consider that the most useful test to be applied to determine the question is that laid down by Erle, J. in (1851) 17 QB 149. The three criteria are, source of the office, the tenure and the duties. I have applied that test and I am of opinion that the conclusion that the office is a public office is irresistible. "

Similarly in the case of **Mukul Dalal vs. Union of India reported in (1988) 3 SCC 144** it was observed by the Apex Court in paras 6 and 9 thereof that the office of the public prosecutor is a public office and that the primacy given to the Public Prosecutor under the scheme of Cr.P.C. has a social purpose.

8. The above observations in Mundrika Prasad Singh's case (supra) (per Krishna Iyer, J.) were quoted with approval in the case of **Kumari Shrilekha Vidyarthi & ors. vs. State of U.P. & ors. reported in (1991) 1 SCC 212**. The Government of U.P. had terminated the appointment of all Government Pleaders (Civil, Criminal and Revenue) in all the districts of the State

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sometimes in February 1990 and that decision was under challenge in Shrilekha Vidyarthi's case (supra). Thus, importance of the office of the Public Prosecutor and that it is a public office has come to be laid down in judgments after judgments. It is in this background that we have to look to the provisions contained in Section 23 of Cr.P.C.

9. In Mundrika Prasad Singh's case (supra), the Government Pleader for the District of Patna had challenged the Government's directives to make over the land acquisition matters to one of the Assistant Government Pleaders. The petition was dismissed by the Patna High Court and so was the Special Leave Petition by the Apex Court. However, while dismissing the SLP the Apex Court noted with approval that the Government of Bihar was appointing the Government lawyers after consultation with the District Judge. In Para-14 the Court observed as follows:-

> "14. **It is heartening to notice that the Bihar Government appoints these lawyers after consultation with the District Judge. It is in the best interest of the State that it should engage competent**

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> **lawyers** without hunting for political partisans regardless of capability. Public offices - and Government Pleadership is one - shall not succumb to Tammany Hall or subtler spoils system, if purity in public office is a desideratum. After all, the State is expected to fight and win its cases and sheer patronage is misuse of power. **One effective method of achieving this object is to act on the advice of the District Judge regarding the choice of Government Pleaders. "** (Emphasis supplied)

10. The judgment of the Apex Court in the case of **Harpal Singh Chauhan & ors. vs. State of U.P. reported in (1993) 3 SCC 552** is quite instructive for our purpose. In that matter, the appellants were working as Public Prosecutors in the District of Moradabad, U.P. The District Judge had recommended their extension but the District Magistrate, after receiving recommendation of the District Judge, did not recommend those names saying that on an inquiry at his level, their reputation, professional work, behaviour and conduct was not found in accordance with public interest. The State Government rejected the

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extension. The State Government had relied upon the provisions of U.P. Government Legal Remembrancer's Manual which contains the detailed provisions with regard to initial appointment, extension and renewal of Law Officers. The Apex Court held that the procedure prescribed in the Manual to the extent it is not in conflict with the provisions of Section 24 shall be deemed to be supplementing the statutory provisions. The Court further held that the procedure prescribed under Section 24 was not followed by the District Magistrate and the records could not show that any panel as required by Section 24(4) was prepared by the District Magistrate in consultation with the District and Sessions Judge. In paras 18 and 19, the Court held that there was patent infraction of the statutory provisions and that there was no effective or real consultation between the Sessions Judge and the District Magistrate. The SLP was, therefore, allowed and the District Magistrate was directed to perform his duty in accordance with Section 24 of the Cr.P.C. What the Apex Court has observed in para-11 is instructive for our purpose which reads as follows:-

> " 11. The Code prescribes the procedure for appointment of Public Prosecutor and

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Additional Public Prosecutor, for the High Court and the District Courts by the State Government. The framers of the Code, were conscious of the fact, that the Public Prosecutor and the Additional Public Prosecutor have an important role, while prosecuting, on behalf of the State, accused person, who are alleged to have committed one or the other offence. Because of that, provisions have been made for their selection in the Code. **It is for the Sessions Judge to assess the merit and professional conduct of the persons recommended for such appointments and the District Magistrate to express his opinion on the suitability of persons so recommended, from the administrative point of view.** Sub-section (5) of Section 24 provides that no person shall be appointed by the State Government as the Public Prosecutor or as an Additional Public Prosecutor "unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4)". **The aforesaid section requires an effective and real consultation between the Sessions Judge and the District Magistrate, about**

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the merit and suitability of person to be appointed as Public Prosecutor or as an Additional Public Prosecutor. That is why it requires, a panel of names of persons, to be prepared by the District Magistrate in consultation with the Sessions Judge. The same is the position so far the Manual is concerned. It enumerates in detail, how for purpose of initial appointment, extension or renewal, the District Judge who is also the Sessions Judge, is to give his estimate of the quality of the work of the Counsel from the judicial standpoint and the District Officer i.e. the District Magistrate is to report about the suitability of such person, from administrative point of view. "

(Emphasis supplied)

11. Then we come to the judgment in the case of **State of U.P. & anr. vs. Johri Mal reported in (2004) 4 SCC 714**. In this matter, the respondent who was working as a District Government Counsel (Criminal) at Merat in U.P. was declined renewal. In a writ petition filed before the Allahabad High Court, he contended that the denial was contrary to the recommendation of

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the District Judge and District Magistrate. The Government of U.P. failed to file a reply and the Allahabad High Court allowed the petition. In the SLP, it was pointed out to the Apex Court that the facts were to the contrary and that such a recommendation had not been made by the District Judge. The Apex Court allowed the appeal in view of these facts but what it observed on various legal aspects is material for our purpose. It is relevant to note that by the time this matter came to be decided, the State of U.P. had amended Section 24 of Cr.P.C. and deleted the requirement to consult the High Court in appointment of Public Prosecutors for the High Court as contained in sub-section (1). The State of U.P. deleted sub-sections (4), (5) and (6) altogether with effect from 16.2.1991. Thus, the renewal of term of District Government Counsel was to be governed by the Legal Remembrancer's Manual. Yet the Court observed emphasizing the consultation with the District Judge in paras 85 and 86 as follows:-

> " 85. **The age-old tradition on the part of the State in appointing the District Government Counsel on the basis of the recommendations of the District Collector in consultation with the District Judge is**

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based on certain principles. Whereas the District Judge is supposed to know the merit, competence and capability of the lawyers concerned for discharging their duties, the District Magistrate is supposed to know their conduct outside the court vis-a-vis the victims of offences, public officers, witnesses, etc. The District Magistrate is also supposed to know about the conduct of the Government Counsel as also their integrity.

86. We are also pained to see that the State of Uttar Pradesh alone had amended sub-section (1) of Section 24 and deleted sub-sections (4), (5) and (6) of Section 24 of the Code of Criminal Procedure. Evidently, the said legislative step had been taken to overcome the decision of this Court in Kumari Shrilekha Vidyarthi. We do not see any rationale in the said action. The learned counsel appearing for the State, when questioned, submitted that such a step had been taken having regard to the fact that exhaustive provisions are laid down in the Legal Remembrancer's Manual which is a complete

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code in itself. We see no force in the said submission as a law cannot be substituted by executive instructions which may be subjected to administrative vagaries. The executive instructions can be amended, altered or withdrawn at the whims and caprice of the executive for the party in power. Executive instructions, it is beyond any cavil, do not carry the same status as of a statute. "

(Emphasis supplied)

Ultimately, it again emphasized the dicta in Mundrika Prasad Singh's case (supra) as regards the necessity to consult the District Judge and giving primacy to his opinion. In para-87, the Court observed as follows:-

" 87. The State should bear in mind the dicta of this Court in Mundrika Prasad Singh as regards the necessity to consult the District Judge. While making appointments of District Government Counsel, therefore, the State should give primacy to the opinion of the District Judge. Such a course of action would demonstrate fairness and reasonableness of

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action and, furthermore, to a large extent the action of the State would not be dubbed as politically motivated or otherwise arbitrary. As noticed hereinbefore, there also does not exist any rationale behind deletion of the provision relating to consultation with the High Court in the matter of appointment of the Public Prosecutors in the High Court. **The said provision being a salutary one, it is expected that the State of U.P. either would suitably amend the same or despite deletion shall consult the High Court with a view to ensure fairness in action.** "

(Emphasis supplied)

12. An affidavit in reply has been filed by one Mr.L.B. Bediskar, Desk Officer, Law and Judiciary Department, Mantralaya, Mumbai. It is stated in para-8 of this reply that the District Judge, Pune forwarded his recommendations to the District Magistrate by his communication dated 20/24.3.2004. The District Magistrate concurred with his opinion and recommendations and thereafter has sent the panel of names along with a detailed comparative chart and the set of

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applications to the State Government. It is denied that the District Magistrate did not apply his mind and merely forwarded the recommendations. It is stated that he scrutinised the antecedents of the candidates and sent the application for comments and recommendations to the District Judge and then sought his comments.

13. Thereafter it is stated in para-12 of this reply that by subsequent Government Resolution dated 15.12.2003 (and not 22.7.2003 as claimed by the petitioner) Government appointed the Advocate General and the Principal Secretary to scrutinise the list forwarded by the District Magistrate. As regards the Minister for State of Law not signing the papers, it is stated in para-17 that he was on tour. It is thus stated that the decision dated 15th December 2003 constituting a two-member Committee to scrutinise the applications and then to route them through the Minister for State of Law, the Law Minister and the Chief Minister is followed.

14. Mr.Kadam, learned Advocate General, submitted that the impugned order appointing respondent No.8 as Public Prosecutor was a composite order appointing him as District

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Government Pleader under Rule 13 of the Maharashtra Law Officers Rule, 1984. He made available to us the Government File containing the recommendations of District Magistrate, the opinion of the District Judge, the note of further scrutiny by the then Advocate General and the Law Secretary and the final decision by the Law Minister and the Chief Minister. The petitioner has filed a separate Civil Application bearing No.983 of 2005 for production and giving inspection of the recommendations of the District Judge. As stated above, the File was made available for our perusal. Mr.Anturkar, learned Counsel appearing for the petitioner, did not insist on the inspection thereof.

15. However, the fact remains that the File showed that there were some 25 applications which were forwarded by the District Magistrate to the Government. He had made a chart and on that chart his comment was only whether they are eligible or not eligible. He has also enclosed the comments of the District Judge on all these 25 applications. As far as the scrutiny by the Advocate General and the Law Secretary is concerned, we find that they have made a note listing five names. The name of the petitioner

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figures at Sr.No.3 therein, whereas that of respondent No.8 figures at Sr.No.5. The Law Minister has then made the endorsement recommending respondent No.8 and the Chief Minister has signed accepting the recommendation.

16. Mr.Anturkar submitted that the judgment in State of U.P. vs. Johri Mal (supra) laid down that primacy had to be given to the opinion of the District Judge. In the instant case, what is seen is that the District Judge has made some comments with respect to these 25 applicants. Besides, the only aspect on which the District Magistrate has opined is that they are eligible. Mr.Anturkar, therefore, submitted that this is no way giving any consultation by the District Judge or opinion by the District Magistrate. He referred to a judgment of the Apex Court in the case of **Dolgobinda Paricha vs. Nimai Charan Misra & ors. reported in AIR 1959 S.C. 914**. The judgment is on the opinion evidence under Sections 50 and 60 of the Evidence Act. What is observed in para-6 of the judgment in the context of Section 50 is relevant for our purpose viz. " .... Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what

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one thinks on a particular question." He referred us to the Ramanath Aiyar's Law Lexicon wherein opinion is described as the result of reading, experience and reflection. He then referred us to Webster Dictionary for the definition of "opinion" as a belief stronger than mere expression. He referred us to the same Dictionary for the definition of the words "fit" and "primacy". The word "fitness" is defined as "suitable", whereas the word "primacy" is defined as "first in importance". For the definition of the word "panel", he referred us to the Webster Dictionary which defines it as "short-listing" and Black's Dictionary defines it as "a group of selected persons".

17. Mr.Anturkar submitted that what Section 24(4) required was preparing a panel of persons who are fit to be appointed as Public Prosecutors. It is only the District Judge who could give the opinion with respect to their fitness or suitability since it is concerning their functioning in Court. Their merit, competence and capability can be assessed only by the District Judge. That has to be reflected leading to short-listing of such persons. The District Magistrate has to do this in consultation with the

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District Judge as observed in para-85 in Johri Mal's case (supra). The District Magistrate may know about their conduct outside the Court. Section 24(4) required this exercise at the level of the District Magistrate in consultation with the District Judge and this requirement had been read into this section in Johri Mal's case (supra) although sub-sections (4), (5) and (6) of Section 24 were deleted by the State of U.P. Mr.Anturkar submitted that similarly in the present case also although the words "in consultation with the Sessions Judge" had been deleted, in view of the above judgment, that will have to be read as a necessary requirement. The opinion of the District Judge has to be given primacy as laid down in para-87 of that judgment. Any subsequent exercise by the committee of Advocate General and the Law Secretary is no substitute for the same. He, therefore, submitted that the decision has to be interfered and set aside.

18. Mr.Kadam, learned Advocate General, on the other hand, pointed out that the process of selection started with the District Magistrate advertising the post. This is done with the approval of the State Government which is now the requirement after the Amendment in Section 24(4).

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Thereafter, the District Magistrate received the applications. He looked into their eligibility as per Rule 11 of the Maharashtra Law Officers Rules, 1984. Even in para-85 of Johri Mal's case (supra), this role has been preserved to him to look into their antecedents etc. Thereafter he called for the report of the District Judge which he received on 20th March 2004 and then forwarded it to the Government on 29th March 2004. He submitted that after the deletion of the words "in consultation with the Sessions Judge" from Section 24(4), all that was required was to look into the eligibility of the candidates which the District Magistrate has done. Mr.Kadam submitted that the decision in Johri Mal's case (supra) was rendered on 21st April 2004. By that date this process until forwarding the names to the Government was completed in the present case. Only the scrutiny was to be done by the Advocate General and the Law Secretary and then the Government was to take its decision which was taken on 1st June 2004. In his submission, the decision in Johri Mal's case (supra) would operate prospectively. He accepted that the State will have to follow this decision in future. However, as far as the present case is concerned, in his submission, the decision could not be applied. On the facts of the present case,

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he submitted that the District Judge had been consulted and it could not be said that the State had ignored him. In his submission, it could not be said that the State had not shown him due respect and primacy that was expected.

19. Mr.Kadam drew our attention to paras 40 and 41 in Johri Mal's case (supra) and submitted that even this judgment laid down that so long as in appointing Counsel the procedure laid down under Cr.P.C. was followed and the reasonable or fair procedure was adopted, the Court will normally not interfere with the decision. The question as to whether the State is satisfied with the performance of its Counsel or not is primarily a matter between it and the Counsel. He, therefore, submitted that this is not a case for this Court to interfere.

20. Mr.Sawant, learned Counsel appearing for respondent No.8, by and large, adopted the arguments of Mr.Kadam. He submitted that preparation of the panel by the District Magistrate does not require any discussion on merits nor was any ranking contemplated. The only challenge in the present matter was on the basis of procedure and, therefore, no judicial review

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was called for. He pointed out that in para-28 of Johri Mal's case (supra), the Apex Court had warned the Courts not to step into areas exclusively reserved for other organs of the State. Mr.Sawant and Mr.Kadam submitted that no prejudice had been caused to the petitioner. She was considered all throughout and her name was included in the final list of 5 persons prepared by the Advocate General and the Law Secretary. No mala fides had been alleged. In the circumstances, no interference was called for.

21. (i) We have considered the submissions of the Counsel for the petitioner, the State as well as the contesting respondent No.8. From the discussion as recorded above, it is clear that prior to any such amendment to Section 24, the Apex Court had held that the consultation with the Sessions Judge was mandatory and it had to be given primacy. That position has been reiterated in Johri Mal's case (supra) which describes it in paragraph 85 as "age-old tradition". This judgment, by and large, reiterates the legal position which was enunciated in Mundrika Prasad Singh's case (supra) and in the case of Harpal Singh (supra). In Johri Mal's case, this position is reiterated in spite of deletion of sub-sections

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(4), (5) and (6) from Section 24 by State of U.P. It is only declaring the legal position which existed earlier. It is, therefore, not possible for us to accept the submission of the learned Advocate General that the judgment should be treated as prospective. It is only declaring the legal position as it exists.

(ii). Looking at it from a different point, sub-section (4) now requires the District Magistrate to prepare a panel of persons who are fit to be appointed as Public Prosecutors. The essential requirement is that the person should be fit for this job. This fitness implies the suitability for doing the particular work which is quite different from their eligibility. This fitness can only be assessed by the District Judge who may as well take the opinion of his colleagues but basically he is the person on the spot who can look into the credentials of the persons concerned, their capability and competency as well as merits. A District Magistrate would not know about it. He will, of course, find out their eligibility which will include their reputation, their status in the society at large and their conduct outside the Court. However, since the appointment is to be made for the post of a Public

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Prosecutor, the opinion that he has to give must contain the element about their competence and performance. With the deletion of the words "in consultation with the Sessions Judge" now the entire responsibility is on the District Magistrate. This being the position now, it is for him to get the view of the District Judge and then prepare the panel of persons fit for this job. In the present case, he received some 25 applications, out of which 6 did not mention the post for which the applications were made. The District Magistrate was to find out if they were otherwise eligible. He has not made any endorsement against three of them. He forwarded the comments of the District Judge with respect to 19 of them and the names of the other six applicants to the Government. This is no way of preparing a panel. Panel will positively mean a short-listing of the most meritorious candidates. As held by the Apex Court in Harpal Singh’s case (supra), there has to be effective and real consultation between the Sessions Judge and the District Magistrate and then he has to prepare a panel of names of persons by which it obviously means shortlisting. The fact that he prepared a panel of 25 Advocates (including six who had not mentioned the post applied for) and which included

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the names of three candidates without stating anything about their eligibility clearly shows his non-application of mind and dereliction of statutory responsibility.

22. What is to be borne in mind is that from this panel alone the Government has to appoint a Prosecutor as is laid down under sub-section (5). What is material to be noted is that the advertisement is for one post only. Therefore, if one person is to be appointed and the responsibility is cast on the District Judge to forward a panel, it certainly cannot contain a list of 25 persons. That is no way of short-listing for appointment to one post. It would only mean a dereliction of one's responsibility. It is immaterial that the Advocate General and the Law Secretary later-on reduced that list from 25 to 5 persons. This scrutiny is being justified under a Government decision. That is not the role ascribed to such functionaries. That is the role which the District Magistrate has to exercise under Section 24(4) of Cr.P.C.

23. As far as short-listing is concerned, we have two judgments by way of a guidance. In the

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case of **Ashok Kumar Yadav & ors. vs. State of Haryana & ors. reported in AIR 1987 S.C. 454**, one of the grievances was that the number of candidates called for the interview by the Public Service Commission was almost 20 times the number of vacancies. Thus, whereas the number of vacancies was about 119, some 1300 candidates were called for interview. The argument on behalf of the petitioners was that number of candidates to be called for interview should not exceed twice or at the highest thrice the number of vacancies, otherwise there would be considerable scope for arbitrariness. In para-20 of the judgment, the Apex Court accepted this submission and observed that this has necessarily to be done because otherwise the viva voce test would be reduced to a farce. Later-on, the Court observed in this paragraph as follows:-

> " Moreover, such a course would widen the area of arbitrariness, for even a candidate who is very much lower down in the list on the basis of marks obtained in the written examination, can, to borrow an expression used by the Division Bench, ‘gate-crash’ into the range of selection, if he is awarded unduly high marks at the

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viva voce examination. It has therefore always been the practice of the Union Public Service Commission to call for interview, candidates representing not more than twice or thrice the number of available vacancies. Kothari Committee's Report on the Recruitment Policy and Selection Methods for the Civil Services Examination also points out, after an in-depth examination of the question as to what should be the number of candidates to be called for interview :

" The number of candidates to be called for interview, in order of the total marks in written papers, should not exceed, we think, twice the number of vacancies to be filled..... "

We must, however, also note that while observing this, the Apex Court did not vitiate the appointment only on this ground since in its view something more than merely calling unduly large number of candidates must be shown in order to invalidate the selection. That, however, has to be read in the situation that was presented in that case before the Apex Court.

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24. In **S.B. Mathur & ors. vs. Hon'ble the Chief Justice of Delhi High Court & ors. reported in AIR 1988 S.C. 2073**, the Apex Court laid down that where many candidates satisfy minimum eligibility requirement, all need not be considered and the authority can restrict the zone of consideration in reasonable manner. That was done by the Delhi High Court in the matter of selection to the post of Superintendents. The Apex Court referred to the judgment in the case of A.K. Yadav vs. State of Haryana (supra) and in para-19, it observed as follows:-

> " This decision points out that the minimum eligibility qualification has to be kept distinct from the zone of consideration and even if there are a large number of candidates who satisfy the minimum eligibility requirement it is not always required that they should be included in the zone of consideration, it being open to the authority concerned to restrict the zone of consideration amongst the eligible candidates in any reasonable manner. "

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25. The aforesaid judgments point out that a proper proportion has to be maintained between the number of persons to be selected and the number of persons to be considered for the particular post. As held in the case of A.K. Yadav (supra), normally the number would be twice the number of posts or at the most thrice. In the present case, when only one Public Prosecutor was to be appointed and the District Magistrate had to communicate to the State and give a panel of fit persons for that post, surely, he was not expected to send the names of 25 persons. That is no way of preparing the panel. Once the initial process is flawed, naturally the subsequent decision of the Government would automatically bring in a larger element of arbitrariness. The function which is to be performed by the District Magistrate under sub-section (4) is a statutory responsibility which he has to do in consultation with the District Judge. A primacy has been given to the District Judge because the post which is to be filled is that of the Public Prosecutor in his Court. He is in the know of the best person in his Court. He knows their performance. The District Magistrate knows their reputation otherwise. After an effective consultation between the two, the short-listed panel is to be

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forwarded to the Government. The Law Secretary and the Advocate General cannot discharge this function and their short-listing is not a substitute to whatever is the statutory responsibility under Section 24(4).

26. It is no use saying that the petitioner had been considered under the last list and her name was at Sr.No.3 in the list of 5 persons short-listed by the learned Advocate General and the Law Secretary. When there is a statutory duty to discharge an obligation in a particular manner, the so-called absence of any prejudice cannot be a defence to the non-performance of the duty in the stipulated manner. Besides, a prejudice is undoubtedly caused to her because of preparing such a list as a result of which a good number of unequals have come to be treated as equals resulting into violation of Article 14 of the Constitution. If a short-listing of two or three panelists was done at the level of the District Magistrate in consultation with the District Judge, in all probability the picture would have been different and respondent No.8 would not have figured therein. This is because even in the list prepared by the then Advocate General and the Law Secretary he figures at the last number i.e.

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fifth. Besides, as seen from the file respondent No.8 was perhaps the junior most as an Assistant Public Prosecutor and had worked hardly for about a year and half by the time of the selection. There were good many other Advocates including the petitioner who had worked for the prosecution efficiently for a number of years. That apart, the file does not disclose any extraordinary merit in respondent No.8 as recorded in the note of the District Judge or otherwise, so that he should steal a march over all the others who had much more experience and better qualifications. As far as respondent No.8 is concerned, all that is stated by the District Judge is that his performance is satisfactory as against much better reports against many others including the other four amongst the five shortlisted by the Committee of the then Advocate General and Law Secretary. Although it is a matter for the State to decide the Prosecutor, there is an element of public interest and legitimate expectation of persons like the petitioner, which cannot be ignored.

27. In the circumstances, we accept the submission of Mr.Anturkar that there is a breach of Section 24(4) of Cr.P.C. in the present case and, therefore, the petition will have to be

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allowed and the appointment of respondent No.8 as the Public Prosecutor under the impugned order dated 1st June 2004 will have to be set aside. The same is accordingly set aside. The State Government is directed to start the process de novo and the District Magistrate will perform his statutory duty afresh in accordance with the requirements of Section 24 of Cr.P.C. as explained by the Apex Court from time to time and hereinabove. We expect the respondents to complete the procedure within 12 weeks, during which period respondent No.8 will continue to hold charge until the further decision is arrived at. The impugned order is a composite order appointing respondent No.8 as the District Government Pleader under Rule 13 of the Maharashtra Law Officers Rules for civil cases. That part of the order was not under challenge and hence, we were not required to express anything thereon.

28. Rule is made absolute as above. No order as to costs.

29. In view of the disposal of the main Writ Petition, no separate order is necessary on the Civil Application and the same is disposed of.

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(H.L. GOKHALE, J.)

(SMT. R.S.DALVI, J.)

30. Mr.Nargolkar, learned AGP and Mr.Sawant, learned Counsel appearing for respondent No.8, apply for stay of this order. Mr.Deshmukh opposes it. All that we have done is to apply the law as laid down by the Apex Court. Besides, we have given 12 weeks to the State to implement this order. If in the view of the State, our judgment is erroneous, it may move the Apex Court in the meanwhile after giving notice to the petitioner. Request for stay is, therefore, rejected.

(H.L. GOKHALE, J.)

(SMT.R.S. DALVI, J.)

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