

K.J. JOHN, ASSISTANT PUBLIC PROSECUTOR GRADE I,
PALAI ETC. ETC.

v.

STATE OF KERALA & ORS. ETC. ETC.

JULY 12, 1990

[M.H. KANIA AND N.M. KASLIWAL, JJ.]

Code of Criminal Procedure, 1973: Section 24(6)—State Government whether bound to appoint Public Prosecutors and Additional Public Prosecutors only from among persons constituting such 'regular cadre of prosecuting Officers'—Interpretation of.

The appellant in the civil appeal was an Assistant Public Prosecutor Grade I in the State of Kerala. The writ petition under Article 32 of the Constitution has been filed by the Uttar Pradesh Public Prosecutors' Association consisting of the membership of Assistant Public Prosecutors, including Prosecuting Officers, senior Prosecuting Officers, Deputy Director of Prosecution serving under the Government of Uttar Pradesh. In both the cases the controversy raised is that there exists a regular cadre of Prosecuting Officers and as such the State Government is bound to appoint Public Prosecutors and Additional Public Prosecutors only from among the persons constituting such cadre in view of section 24(6) of the Code of Criminal Procedure, 1973, as amended by the Criminal Procedure Code (Amendment) Act of 1978.

The appellant's writ petition filed in the High Court of Kerala was dismissed. The High Court was of the view that the provisions of sub-section (6) of section 24 could have application in respect of States where there was a regular cadre consisting of hierarchy of Prosecuting Officers with the Assistant Public Prosecutor at the lowest rung and having at the top level Additional Public Prosecutors and Public Prosecutors. The High Court held that there was no regular cadre of Prosecuting Officers in the State of Kerala comprising therein Public Prosecutors and Additional Public Prosecutors. The High Court further observed that under the Kerala Government Law Officers (Appointment and Conditions of Service) and Conduct of Cases Rules, 1978 the posts of Public Prosecutors and Additional Public Prosecutors were tenure posts and as such the Assistant Public Prosecutors who were regular hands could not be appointed to the tenure posts.

A Before this Court it was contended on behalf of the appellant/
petitioners that Assistant Public Prosecutors Grade I and Grade II
together constituted a cadre of Prosecuting Officers so as to attract the
applicability of sub-section (6) of section 24 of the Code. It was
urged that in case the meaning to the expression "regular cadre of
Prosecuting Officers" under sub-section (6) of section 24 was given as to
B consist of a regular cadre of Prosecuting Officers going upto Public
Prosecutor at the top, then there was no benefit to such persons by
enacting sub-sections (6) and (9) in section 24, by the Amending Act of
1978. It was further urged that there was no bar for appointment of
Assistant Public Prosecutors against tenure posts as officers on
deputation.

C The State of U.P. in its counter has brought out the distinction in
these two kinds of posts in the manner and terms of their appointment,
discharge of duties, emoluments etc. It was further urged that in Uttar
Pradesh there was no regular cadre of Prosecuting Officers within the
meaning of section 24(6) of the Code of Criminal Procedure and as such
D the petitioners were not entitled to appointment as Public Prosecutors
or Additional Public Prosecutors.

Dismissing the appeal and the writ petition, this Court,

E HELD: (1) The intention of introducing sub-section (6) and the
deeming fiction in sub-section (9) was in order to safeguard the promo-
tional rights of Prosecuting Officers in such of the States where there
was already in existence a regular cadre consisting of a hierarchy of
Prosecuting Officers going to the top level of Additional Public Pro-
secutors and Public Prosecutors. [334E-F]

F (2) The Kerala High Court was right in taking the view that the
expression "regular cadre of Prosecuting Officers" comprised a service
with Assistant Public Prosecutor at the lowest level and Public Pro-
secutors at the top. In case a regular cadre of Prosecuting Officers did
not go upto Public Prosecutor at the top, the State Government could
not be considered as bound to appoint Public Prosecutor or Additional
G Public Prosecutor only from among the persons constituting such cadre
under the Code of Criminal Procedure for conducting cases in the
Sessions Court. [334G-H]

H (3) It was within the competence of the State Government to keep
such posts of Public Prosecutor and Additional Public Prosecutor as
tenure posts for some period based on contract and not to make such

posts as regular or permanent under any service rule. In this view of the matter, till such posts were tenure posts, to be filled on contract basis for some period, the Assistant Public Prosecutors who were members of a regular service could not claim any right to be appointed on such posts under sub-section (6) of section 24 of the Code of Criminal Procedure. [335A-C]

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(4) The contention of the petitioners that Assistant Public Prosecutors can be appointed on such tenure posts on deputation and may return back to their parent service after completion of the period of such tenure posts, was not acceptable. [335C]

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1101 of 1981.

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On appeal by Certificate from the Judgment and Order dated 8.10.80 of the Kerala High Court in O.P. No. 1026/79E.

WITH

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Writ Petition (Civil) No. 346 of 1988.

(Under Article 32 of the Constitution of India).

M.K. Ramamurthi, G. Vishwanathan Iyer, Shiv Pujan Singh, N. Sudhakaran and K. Prasantha for the Appellants.

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Anil Dev Singh, P.S. Poti, Ms. Mukta Sharma, Mrs. S. Dikshit, K.R. Nambiar for the Respondents.

The Judgment of the Court was delivered by

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KASLIWAL, J. As identical questions of law are involved in both the above cases, they are disposed of by one single order.

Civil Appeal No. 1101 of 1981 is directed against the Judgment of High Court of Kerala at Ernakulam dated October 8, 1980. The High Court has granted a certificate under Article 133(1) of the Constitution of India certifying that the case involved a substantial question of law of general importance consisting the interpretation of Sub-section (6) of Section 24 of the Code of Criminal Procedure, 1973.

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The Writ Petition under Article 32 of the Constitution has been

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A filed by the Uttar Pradesh Public Prosecutors' Association consisting the membership of Assistant Public Prosecutors, including Prosecuting Officers, Senior Prosecuting Officers, Deputy Director of Prosecution serving under the Government of Uttar Pradesh. Petitioner No. 2 is the President of the Association. In both the cases the controversy raised is that there exists a regular cadre of Prosecuting Officers and as such the State Government is bound to appoint Public Prosecutors and Additional Public Prosecutors only from among the persons constituting such cadre in view of Section 24(6) of the Code of Criminal Procedure, 1973.

C In order to appreciate the controversy, it would be necessary to give the background of the law and rules relating to the appointment of public prosecutors. Sections 24 and 25 of the Code of Criminal Procedure, 1973 correspond to Section 492 of the Old Code and deal with the appointment of Public Prosecutors, Additional Public Prosecutors, Special Public Prosecutors and Assistant Public Prosecutors. Under the Old Code there could be any number of Public Prosecutors appointed by the Central Government or by the State Government or by the District Magistrate or by the Sub-Divisional Magistrate subject to the control of the District Magistrate. Under Section 495 of the Old Code any Magistrate enquiring into or trying a case could permit the prosecution to be conducted by any person who may do so personally or by a pleader. In the courts of Magistrates the prosecution was conducted generally by Police Officers or by persons recruited from the Bard styled as Police Prosecutors or Assistant Public Prosecutors all of whom worked under the directions of the Police Department. Moreover, no qualification was laid down in the old Code for the Advocates being appointed as Public Prosecutors. In Section 24 of the new Code for the first time such detailed provisions have been made. F In Section 24 as originally framed there were only two categories of public prosecutor—(1) those appointed by the Central or State Government under this Section, and (2) those engaged by the Public Prosecutor to act under his own direction, vide Section 2(U). Provision was also for the first time made for appointment of Public Prosecutor in the High Court for conducting any prosecution in the said court on behalf of the Central Government or the State Government. G by the concerned Government after consultation with the High Court. The appointment of Public Prosecutor or Additional Public Prosecutor of the State Government in every District could be made only from the panel of names of the persons prepared by the District Magistrate in consultation with the Sessions Judge. It was for the first time provided H that in the case of Public Prosecutor and the Additional Public Pro-

secutor he should be an Advocate of not less than seven years standing at the Bar and in the case of Special Public Prosecutor the standing at the Bar should not be less than 10 years.

The original Section 24 has been amended by the Criminal Procedure Code (Amendment) Act of 1978 (hereinafter referred to as the Amending Act of 1978) w.e.f. 18th December, 1978 and a new Section 24 has been substituted for the original Section 24. It would be necessary to reproduce Section 24 as it stood in the original Code of Criminal Procedure, 1973 as well as Section 24 which stood after the Criminal Procedure Code (Amendment) Act, 1978.

Section 24 of the Code as it stood prior to the amendment introduced by the Code of Criminal Procedure (Amendment) Act, 1978, reads as under:

"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 for conducting, in such court, any prosecution, appeal or other proceeding on behalf of the Central or State Government, as the case may be.

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

(3) 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 the public prosecutor or Additional Public Prosecutor for the District.

(4) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears on the panel of names prepared by the District Magistrate under sub-section (3).

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

A (6) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, an advocate who has been in practice for not less than ten years, as a Special Public Prosecutor”

The Section as amended by the Amendment Act, 1978 reads as under:

B “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.

C (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.

D (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.

E 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.

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

G (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 or names prepared by the District Magistrate under sub-section (4).

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

among the persons constituting such cadre:

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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-s. (4).

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(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.

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(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.

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

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A perusal of the above provisions would show that the changes that have been introduced in Section 24 by the Amending Act of 1978 are the addition of the new provisions now contained in sub-section (2), proviso to sub-section (3), sub-section (6) and sub-section (9). The main controversy put forward hinges on the new provision now contained in sub-s. (6) of Section 24. The contention raised on behalf of the petitioners is that sub-section (6) of Section 24 introduced by amendment clearly lays down that notwithstanding anything contained in sub-section (5) where in a State *there exists a regular cadre of Prosecuting Officers* (emphasis added), appointment to the post of Public Prosecutor or Additional Public Prosecutor shall be made by the State Government only from among the persons constituting such cadre.

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So far as the State of Kerala is concerned, it has been contended

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A on behalf of the appellant that the appointment of Assistant Public Prosecutors was governed by the Statutory Rules framed under Article 309 of the Constitution. These Rules were published on 7th September, 1962 and dealt with the posts of Legal Advisor to the vigilance division. Additional Legal Advisor to the Vigilance division and Assistant Public Prosecutors Grade I & II. As regards Assistant Public
B Prosecutors Grade I, the appointment was to be made by promotion from Assistant Public Prosecutor Grade II. So far as the Assistant Public Prosecutor Grade II is concerned, the appointment was to be made by direct recruitment. It was pointed out that under the above rules for appointment as Assistant Public Prosecutor Grade II a candidate was required to be a member of the Bar having not less than two
C years active practice in criminal courts. After selection he was to be kept on probation for two years and was also required to undergo a training for a period of six months. It was also pointed out that District was considered as unit for the appointment of Assistant Public Prosecutors Grade II and so far as Assistant Public Prosecutors Grade I are concerned they belonged to the State Cadre. It was thus urged on
D behalf of the appellant that a regular cadre of Prosecuting Officers in the State of Kerala was existing and in this view of the matter the appointment of a Public Prosecutor or Additional Public Prosecutor could only be made from amongst the persons constituting such cadre as envisaged under sub-section (6) of Section 24 of the Criminal Procedure Code after amendment.

E It may be pointed out at this stage that Sh. K.J. John, Assistant Public Prosecutor Grade I filed a writ petition in the High Court of Kerala and a Division Bench by Judgment dated 5th October, 1980 dismissed the writ petition. The High Court considered the meaning and scope of the expression "regular cadre of Prosecuting Officers"
F occurring in sub-section (6) of Section 24 of the Code. According to the High Court sub-section (9) of Section 24 provided a clue to the intention of the Parliament in using the said expression. It held that from sub-section (9) it would be clear that the expression "Prosecuting Officers" has been used in sub-section (6) as meaning any persons holding the post of Public Prosecutor, Additional Public Prosecutor,
G Assistant Public Prosecutor or any other Prosecuting Officer by whatever name called. Thus in the opinion of the High Court, sub-section (6) contemplated a prerequisite condition for its applicability the existence of a regular cadre consisting of officers holding all the aforementioned posts with a regular framework of service consisting of a hierarchy of such officers. The provisions of sub-section (6) of Section
H 24 can, therefore, have application in respect of States where there is a

regular cadre consisting of a hierarchy of Prosecuting Officers with the Assistant Public Prosecutor at the lowest rung and having at the top level Additional Prosecutors and Prosecutors. According to the High Court admittedly no such cadre of such officers existed in the State of Kerala and as such there was no question of applying the provisions of sub-section (6) of Section 24.

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It may also be pointed out that the High Court also noticed the provisions of Kerala Government Law Officers (Appointment and Conditions of Service) and Conduct of Cases Rules, 1978 which dealt with the method of appointment of Government Law Officers at District Court level and the duration of their appointment. These Rules specifically laid down that Government Law Officers at District Court Centres, Additional District Court Centres, inclusive of Public Prosecutors and Additional Public Prosecutors were to be appointed by the Government from a panel of advocates furnished by the District Collector who was to prepare such panel in consultation with the District and Sessions Judge. The appointment of a person as Public Prosecutor or Additional Public Prosecutor shall only be for a term of three years. The High Court considered that the posts of Public Prosecutors and Additional Public Prosecutors under the above Rules were tenure posts and as such the Assistant Public Prosecutors who were regular hands cannot be appointed to the tenure posts. The High Court ultimately held that there was no regular cadre of Prosecuting Officers in the State of Kerala comprising therein Public Prosecutors and Additional Public Prosecutors.

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Learned counsel appearing on behalf of the appellant K.J. John in Civil Appeal No. 1101 of 1981 contended that under the Old Code the qualification and method of appointment for Public Prosecutors did not require any condition for a candidate to be an advocate. In order to remove such unsatisfactory state of affairs the Legislature provided the qualification and the method of appointment of Public Prosecutors and Additional Public Prosecutors by making elaborate provisions in Section 24 of the Criminal Procedure Code, 1973. Under Section 24, as it stood before the 1978 amendment, provision was made for appointment of Public Prosecutors and Additional Public Prosecutors from a panel of names of advocates to be submitted by the District Magistrate in consultation with the Sessions Judge to the State Government. A provision was made for the first time that a period of seven years of practice at the Bar was necessary for appointment of Public Prosecutors and Additional Public Prosecutors.

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A It was further contended that this scheme of appointment of Public Prosecutors and Additional Public Prosecutors was again found to be unsatisfactory because the selection of persons for appointment as Public Prosecutors from the Bar was not found to be satisfactory. Further the Assistant Public Prosecutors with required experience and ability and who were amenable to the disciplinary jurisdiction of the

B Government and had no avenues of promotion, were denied promotion as Public Prosecutors. The Legislature wanted to rectify this defect and, therefore, amended Section 24 suitably to promote Assistant Public Prosecutors as Public Prosecutors and Additional Public Prosecutors at the District level. The amendment in Section 24 by Amending Act of 1978 was thus made with the above purpose and

C intention. It was thus contended that under sub-section (6) of Section 24 introduced by the amendment, it was never intended to include the posts of Public Prosecutors and Additional Public Prosecutors within the expression "exists regular cadre of Prosecuting Officers". It was urged that the regular cadre of Prosecuting Officers as mentioned in sub-section (6) of Section 24 is de hors the cadre of Public Prosecutors/

D Additional Public Prosecutors otherwise sub-section (6) becomes meaningless. It was thus submitted that the High Court committed an error in construing the expression "regular cadre of Prosecuting Officers" to comprise a service with Assistant Public Prosecutor at the lowest level and Public Prosecutor at the top. If Public Prosecutors and Additional Public Prosecutors are necessary in the existing cadre as

E interpreted by the High Court then there was no question of granting any benefit by the Legislature by introducing sub-section (6) in Section 24 by way of amendment.

It was next contended that the High Court misunderstood the scope of sub-section (9). A combined reading of sub-ss. (6), (7) & (9)

F is necessary to understand the intention of the Legislature. According to the learned counsel sub-section (6) provided for appointment of Public Prosecutors from a regular cadre of Prosecuting Officers, sub-section (7) provided that a person to be eligible for appointment as Public Prosecutor must have been in practice as an advocate for not less than seven years and therefore sub-section (9) was necessary to

G create the fiction that the period of 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 regards the reason given by the High Court that the post of Public Prosecutor and Additional Public Prosecutor were tenure

H posts for three years, it was submitted by learned counsel for appellant

that the Kerala Government Law Officers (Appointment and Conditions of Service) and Conduct of Cases Rules, 1978 as notified in the Kerala Gazette No. 25 dated 20th June, 1978 was made before the coming into force of the Criminal Procedure Code (Amendment) Act, 1978 on December 18, 1978. It was thus contended that the above Kerala Rules making the posts of Public Prosecutors and Additional Public Prosecutors as tenure posts cannot stand in the face of Section 24 of Criminal Procedure Code after Amendment Act of 1978. In the alternative it was also contended that even if the posts of Public Prosecutors and Additional Public Prosecutors in Kerala may be allowed to continue as tenure posts, there is no bar for appointment of Assistant Public Prosecutors on such posts. The Assistant Public Prosecutors will be in the same position as officers on deputation and will come back to their parent posts after the period of such tenure posts is over. It is contended that this cannot be considered as a circumstance or a ground to construe sub-section (6) of Section 24 to mean that the expression "regular cadre of Prosecuting Officers" does not enable the Assistant Public Prosecutors to claim appointment as Public Prosecutor.

Learned counsel appearing on behalf of the petitioners in the Writ Petition have also made identical arguments as made in the Kerala case. The State of U.P. in its counter affidavit has pointed out that the cadre of Prosecuting Officers working in lower district courts in criminal side is wholly different and it cannot include Public Prosecutors who work exclusively on contract basis in the Sessions Courts. Assistant Prosecuting Officers are appointed under Section 25 of the Code of Criminal Procedure. After 1980, the Assistant Prosecuting Officers have been appointed by the State Government through the Public Service Commission, on the basis of competitive written examination and interview of Law Graduates. On the other hand Public Prosecutors are appointed in terms of professional contracts under Section 24(4) and 24(5) of the Code of Criminal Procedure. A panel of names of advocates with seven years working experience is prepared by the District Magistrate in consultation with the District & Sessions Judge and sent to Law Department of the State Government for approval. Public Prosecutors are thus appointed by the Law Department of State Government, whereas Assistant Prosecuting Officers are appointed by the Home Department of the State Government as regular Government servants. It has been further submitted in the reply that Assistant Prosecuting Officers are regular Government servants and they get monthly salary and other allowances as admissible to other regular Government servants. The services of Assistant Prosecuting Officers are pensionable, while Public Prosecutors are

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- A appointed purely on the basis of contract, on a fixed fees. Assistant Public Prosecuting Officers work under the administrative control of Home Department and Director General (Prosecution) is Head of the Prosecution Department. The work and performance of Public Prosecutors is assessed by the District Magistrate at the District level and they are controlled by the Law Department of the State Government.
- B It has been further submitted in the reply that the Assistant Prosecuting Officers main work is to prosecute criminal cases in the lower District Courts i.e. courts of Judicial Magistrates, Chief Judicial Magistrate, Metropolitan Magistrates, Chief Metropolitan Magistrates, Munsif Magistrates, Executive Magistrates, District Magistrates and special Courts under the Terrorist Act and the Gangster Act. The Assistant Prosecuting Officers also help the Executive Magistrate to conduct the identification of accused in criminal cases and also report on bail applications of the accused. Assistant Prosecuting Officers also check the records of Sessions cases before their committal to Sessions Court and they also deal with the finger print branch and Malkhana of case properties. They are Legal Advisors of the Superintendents of Police in matters pertaining to investigation. The Public Prosecutor's main work is to prosecute the criminal cases in the Sessions Courts.

The State Government in its counter affidavit has further given the following chart showing the hierarchy pay scales and strength of cadre:

E	<i>Name of Post</i>	<i>Pay scale</i>	<i>Permanent</i>	<i>Temporary</i>	<i>Total No. of Posts</i>
	Joint Director Legal	Rs. 1840-2400	-	1	1
F	Joint Director (Admn.)	Rs. 1840-2400	-	1	1
	Dy. Director	Rs. 1250-2050	5	6	11
G	Sr. Prosecuting Officer (Gr. I)	Rs. 1250-2050	-	17	17
	Sr. Prosecuting Officer (Gr. II)	Rs. 850.1720	13	70	83
H	Prosecuting Officer	Rs. 770-1600	84	114	198

Asstt. Prosecuting Officer Rs. 625-1240 704 174 878

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As against the aforesaid cadre and pay scales the Public Prosecutors are retained on monthly fees/daily fees as the case may be. They are paid library allowances also. The rates in their cases have been indicated as under:

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	Monthly Fees	Library Allowance
(1) Public Prosecutor/District Govt. Counsel (Gr.)	Rs.2700	Rs.300
(2) Additional Public Prosecutor Gr. I/Addl. District Govt. Counsel (Gr.)	Rs.2550	Rs.250
(3) Addl. Public Prosecutor Gr. II/Asstt. Distt. Govt. Counsel (Gr.)	Rs.1800	Rs.200
(4) Addl. Public Prosecutor Gr. III	Rs.50	as daily fees.

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It has been further submitted in the reply that the petitioners have several promotional avenues in their own cadre and cannot claim any post outside their cadre. In Uttar Pradesh there is no regular cadre of Prosecuting Officers within the meaning of Section 24(6) of the Code of Criminal Procedure and as such the petitioners are not entitled to appointment as Public Prosecutors or Additional Public Prosecutors in Sessions Courts. It has also been pointed out that at present the total strength and posts of Assistant Prosecuting Officers is 878 out of which 661 have been filled and the rest are vacant. The total number of posts of Prosecuting Officers is 198 out of which 191 have been filled up and the rest are vacant. At present the posts of Senior Prosecuting Officer Gr. II & I are 83 and 17 respectively. Thus there is ample opportunity of promotion open to the petitioners.

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The main controversy hinges on the scope of sub-section (6) of Section 24 and specially the words "regular cadre of Prosecuting Officers" existing in this provision. Prior to coming into force of the Code of Criminal Procedure, 1973, the Prosecuting Officers were under the

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A control of Police Department. It was not necessary at that time that the Public Prosecutor or Additional Public Prosecutor should have any experience as an advocate. In order to remove such unsatisfactory state of affairs, the Legislature made an elaborate provision under Section 24 for the appointment of Public Prosecutors and Additional Public Prosecutors in the Criminal Procedure Code, 1973. Under this provision it was laid down that practice as an advocate for not less than seven years was necessary for appointment of Public Prosecutor and Additional Public Prosecutor. After sometime, it was considered by the Legislature that the above provision does not take into consideration the working experience of Prosecuting Officers and pleaders for eligibility for appointment as Public Prosecutor and Additional Public Prosecutor. The Legislature as such substituted a new Section 24 by the Criminal Procedure Code (Amendment) Act, 1978 brought into force w.e.f. 18th December, 1978. Under sub-section (9) of this new Section 24 it was provided that the period during which a person has been in practice as a pleader, or has rendered 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. This provision thus granted benefit of the period of service to the persons mentioned in the above provision and by a deeming fiction such period of service was considered as the period in practice as an advocate. Thus the above provision made the Prosecuting Officers such as Public Prosecutor, Additional Public Prosecutor, Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, also eligible for being included in the panel to be prepared by the District Magistrate in consultation with the Sessions Judge fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

F In this background we have to understand the scope of sub-section (6) of Section 24 which gives a clear mandate to appoint a Public Prosecutor or an Additional Public Prosecutor only from amongst the persons constituting a regular cadre of Prosecuting Officers. According to this provision any person from the advocates or from any other source cannot be appointed as a Public Prosecutor or an Additional Public Prosecutor if there already exists a regular cadre of Prosecuting Officers in a State. So far as the proviso to sub-section (6) of Section 24 is concerned it would not apply in the normal circumstances and would only be attracted where in the opinion of the State Government no suitable person is available in such regular cadre of Prosecuting Officers for appointment as Public Prosecutor or Addi-

tional Public Prosecutor. Admittedly the regular cadre of Prosecuting Officers in the State of Kerala as well as in the State of U.P. does not include Public Prosecutors or Additional Public Prosecutors. The case of the appellants is that Assistant Public Prosecutors Gr. I and Gr. II together constitute a cadre of Prosecuting Officers so as to attract the applicability of sub-section (6) of Section 24 of the Code. It has been contended on their behalf that unless the Government formed the requisite opinion that no suitable person is available in the said cadre for appointment as Public Prosecutor or Additional Public Prosecutor, the appointments to the posts of Public Prosecutor, and Additional Public Prosecutor can be made only from amongst persons holding the posts of Assistant Public Prosecutors Gr. I & Gr. II.

A combined reading of sub-section (6) and sub-section (9) of Section 24 gives a clue to the intention of the Legislature in determining the scope of the expression "regular cadre of Prosecuting Officers" occurring in sub-section (6). The intention of introducing sub-section (6) and the deeming fiction in sub-section (9) was in order to safeguard the promotional rights of Prosecuting Officers in such of the States where there is already in existence regular cadre consisting of a hierarchy of Prosecuting Officers going to the top level of Additional Public Prosecutors and Public Prosecutors. In sub-section (9) the expression "Prosecuting Officers" has been used as taking in any persons holding the post of Public Prosecutor, Assistant Public Prosecutor or any other Prosecuting Officer by whatever name called. Sub-section (6) independently can grant no benefit to the Prosecuting Officers unless the clause of deeming fiction contained in sub-section (9) makes them eligible for appointment as a Public Prosecutor or Additional Public Prosecutor. Sub-section (9) clearly speaks with regard to the service rendered as a Public Prosecutor or as Additional Public Prosecutor, or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called to be counted as the period as if such person had been in practice as an advocate for the purposes of sub-section (7) & sub-section (8). Thus we are clearly of the view that the expression "regular cadre of Prosecuting Officers" contained in sub-section (6) of Section 24 must comprise a regular cadre of Prosecuting Officers going up to the level of Additional Public Prosecutor and Public Prosecutor. It may be important to note that so far as the State of Kerala is concerned under Rule (5) of the Kerala Government Law Officer (Appointment & Conditions of Service) and Conduct of Cases Rules, 1978, it has been stated that the Legal Advisor to the Vigilance Department, Additional Legal Advisor to the Vigilance Department and Assistant Public Prosecutor Gr. I shall belong to the State Cadre

A in the sense that for the purpose of appointment, probation, seniority, discharge of probationers and approved probationers for want of vacancy, the State shall be the unit whereas in the case of Assistant Public Prosecutor Gr. II, the District concerned shall be the unit for all such purposes. Thus if we take the argument of learned counsel for the appellant to its logical conclusion, the result would be that in a State if there existed a cadre of Prosecuting Inspectors or Assistant Public Prosecutors only in that case also the State Government would be bound to appoint Public Prosecutor and Additional Public Prosecutor only from among such cadre under sub-section (6) of Section 24. It could not have been the intention of the legislature while enacting sub-section (6) of Section 24 of the Code. It was also contended on behalf of the petitioners that in case the meaning to the expression "regular cadre of Prosecuting Officers" under sub-section (6) of Section 24 is given as to consist of a regular cadre of Prosecuting Officers going upto Public Prosecutor at the top, then there is no benefit to such persons by enacting sub-section (6) and (9) in Section 24 of the Code. We find no force in this contention. The basic intention of the Legislature was to appoint Public Prosecutors and Additional Public Prosecutors from the advocates having atleast seven years practice. Section 24 as initially contained in Section 24 of the Code did not make any Prosecuting Officer even of the cadre of Public Prosecutor prior to 1973 as eligible for being appointed as Public Prosecutor or Additional Public Prosecutors, they were made eligible by substituting Sec. 24 by the Amending Act of 1978 by introducing a new provision under sub-section (9) of Section 24. In this background when we consider the provision of sub-section (6) of Section 24 which makes it incumbent to appoint Public Prosecutor and Additional Public Prosecutors only from a regular cadre of Prosecuting Officers, it can only be applied in case of such regular cadre which may go upto the level of Public Prosecutor.

In view of these circumstances we find that the Kerala High Court is right in taking the view that the expression "regular cadre of Prosecuting Officers" comprised a service with Assistant Public Prosecutor at the lowest level and Public Prosecutors at the top. In case a regular cadre of Prosecuting Officers did not go into Public Prosecutor at the top, the State Government cannot be considered as bound to appoint Public Prosecutor or Additional Public Prosecutor only from among the persons constituting such cadre under the Code of Criminal Procedure for conducting cases in the Sessions Court.

H There is another insurmountable difficulty which exists in the

way of the appellant and the petitioners in as much as the State Government has made the posts of Public Prosecutor and Additional Public Prosecutors as tenure posts. It lies within the competence of the State Government to keep such posts of Public Prosecutor and Additional Public Prosecutor as tenure posts for some period based on contract and not to make such posts as regular or permanent under any service rule. In this view of the matter till such posts are tenure posts, to be filled on contract basis for some period, the Assistant Public Prosecutors who are members of a regular service cannot claim any right to be appointed on such posts under sub-section (6) of Section 24 of the Code of Criminal Procedure. They are also eligible to be considered with any advocate of seven years standing if willing to join such post on tenure basis by the District Magistrate in consultation with the Sessions Judge. We cannot accept the contention of the learned counsel for the petitioners in this regard that Assistant Public Prosecutors can be appointed on such tenure posts on deputation and may return back to their parent service after completion of the period of such tenure posts. The State of U.P. in its counter has clearly brought out the distinction in these two kinds of posts in the manner and terms of their appointment, discharge of duties, emoluments etc. The Assistant Public Prosecutors have avenues of promotion in their own cadre and no argument can however be advanced in interpreting the provision of sub-section (6) of Section 24 on this basis.

In the result both the above cases are dismissed with no order as to costs.

R.S.S.

Appeal and Petition dismissed.