M.T. KHAN AND ORS. A

*v.*

GOVERNMENT OF ANDHRA PRADESH AND ORS.

JANUARY 5, 2004

[V. N. KHARE, CJ AND S.B. SINHA, J.] B

*Constitution of India, 1950; Articles 162, 165 and 367:*

*Appointment of Additional Advocate Generals by the State—Challenge to—Writ Petition dismissed by High Court holding that having regard to* C
*Article 367 of the Constitution and Section 13 of the General Clauses Act, the provisions for appointment of an Advocate General in singular would include plural—It cannot be presumed that Additional Advocate General/Generals so appointed would perform Constitutional functions—On appeal, Held: State, in exercise of its executive power, is competent to appoint as many Lawyers of* D
*its choice as it thinks adequate to defend it in the legal proceedings—State could also confer on them such designation as it may deem fit and proper but they can not be authorized to perform Constitutional/Statutory functions—However, State could not appoint more than one Advocate General—Interpretation of Statute—Golden rule of literal interpretation—Code of Criminal procedure, 1973; Ss. 24, 25/General Clauses Act; Section 13.* E

*Executive power vis-a-vis Constitutional power—Exercise of—Distinction between—Discussed.*

*Words and Phrases:*

F

*"unless the context otherwise requires"—Meaning of in the context of Article 367 of the Constitution of India.*

**The question which arose in this appeal was as to whether the State has power/authority to appoint Additional Advocate Generals in terms of Article 165 of the Constitution of India.** G

**It was contended for the appellants that Article 165 of the Constitution of India is clear and unambiguous and thus being not open to any interpretation; that provision of Section 13 of the General Clauses Act and Article 367 of the Constitution could not be invoked in the facts** H

A and circumstances of the case; that the appointment of Additional Advocate General under Article 165 of the Constitution by the State was without jurisdiction; and that the Advocate General is not only required to discharge constitutional functions but also statutory functions.

On behalf of the respondents, it was submitted that appointment of
B Additional Advocate General has necessitated because of increase in workload and the Advocate General alone could not handle such a heavy workload; and that State possess power to appoint Additional Advocate General.

C Dismissing the appeal, the Court

HELD: 1.1. Provision under Article 165 of the Constitution clearly shows that the Governor of the State has power *to appoint a person who is qualified to be appointed as Judge of a High Court, as Advocate General.* The constitutional scheme, thus, is that when a constitutional post is required
D to be filled up by a person having the qualification specified therefor, he would alone perform the duties and functions, be it constitutional or statutory, attached to the said office. The Constitution does not envisage that such functions be performed by more than one person. The office of the Advocate General is a public office. He not only has a right to address the Houses of Legislature but also is required to perform other statutory
E functions. Such public functions are required to be performed by the holder of a constitutional post having regard to his stature and keeping in view the fact that the State intended to endow such responsibility upon him. [112-C-G]

F 1.2. The Government of a State as a litigant can appoint as many Lawyers as it likes to defend it. The State is not prohibited from conferring such designation on such legal practitioners as it may deem fit and proper. But, the State cannot appoint more than one Advocate General. [122-H]

1.3. High Courts, in their various decisions including the impugned
G judgment, have proceeded on the basis that having regard to the provisions of Section 13 of the General Clauses Act and Article 367 of the Constitution of India, singular would include plural. The High Courts committed an error insofar as they failed to take into consideration the crucial words occurring in Article 367 of the Constitution "unless the context otherwise requires". It is a well-settled principle of law that the
H provisions of the Constitution shall be construed having regard to the

expressions used therein. The question of interpretation of a Constitution would arise only in the event the expressions contained therein are vague, indefinite and ambiguous as well capable of being given more than one meaning. Literal interpretation of the Constitution must be resorted to. If by applying the golden rule of literal interpretation, no difficulty arises in giving effect to the Constitutional scheme, the question of application of the principles of interpretation of a statute would not arise. [123-A-D]

*Gurudevdatta Vksss Maryadit and Ors.* v. *State of Maharashtra and Ors.*, [2001] 4 SCC 534 and *Balram Kumawat* v. *Union of India and Ors.*, [2003] 7 SCC 628, relied on.

1.5. It cannot be said that the appointments of Additional Advocate Generals cannot be traced to the source of the State's power under Article 162 of the Constitution of India. It is now well-settled principle of law that non-mentioning or wrong mentioning of a provision of law does not invalidate an order in the event it is found that a power therefor exists. [124-D]

*Union of India* v. *Khagan Singh,* AIR (1992) SC 1535 and *State of Karnataka* v. *Krishnaji Srinivas Kulkarni and Ors.*, [1994] 2 SCC 558, referred to.

1.6. The matter relating to the appointment of a legal practitioner by a Government may be subject-matter of a legislation. The State by amending the provisions of Sections 24 and 25 of the Code of Criminal Procedure may make a law regulating the appointment of the Public Prosecutor or Additional Public Prosecutor. Such a law can also be made for regulating appointment of other State counsel. In the absence of any legislation in this behalf, various States have laid down executive instructions. Thus, the State in exercise of its jurisdiction under Article 162 of the Constitution of India, is competent to appoint a lawyer of its choice and designate him in such manner as it may deem fit and proper. Once it is held that such persons who are although designated as Additional Advocate Generals are not authorized to perform any constitutional or statutory functions, indisputably such an appointment must be held to have been made by the State in exercise of its executive power and not in exercise of its constitutional power. Consequently, Additional Advocate General so appointed is not in constitutional scheme and does not hold constitutional office. [124-H; 125-A-C]

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4 of 2004.

From the Judgment and Order dated 30.4.1998 of the Andhra Pradesh High Court in W.P. No. 13202 of 1998.

Har Dev Singh and Ms. Madhu Moolchandani for the Appellants.

B Sudhir Chandra and Guntur Prabhakar for the Respondents.

The Judgment of the Court was delivered by

**V. N. KHARE, CJ.** Leave granted.

C The authority of a State to appoint Additional Advocate General in terms of Article 165 of the Constitution of India is the core question involved in this appeal which arises out of a judgment and order dated 30.4.1998 passed by the High Court of Andhra Pradesh in Writ Petition No.13202 of 1998.

D The appellants herein filed the aforementioned writ petition questioning the appointment of two Additional Advocate Generals by the Government of Andhra Pradesh on various grounds. The main contention of the appellants raised before the High Court as also before us, however, is that having regard to the expression used in Article 165 of the Constitution of India appointment of more than one Advocate General is not contemplated therein.

E The High Court negatived the said contention holding : (i) Having regarding to Article 367 of the Constitution of India as also Section 13 of the General Clauses Act, 1897, the provision in singular for appointment of an Advocate General would include plural; (ii) Having regard to the fact that Additional Advocate Generals have been appointed in the States of Rajasthan, F Jammu & Kashmir and Kerala, there is no reason as to why Additional Advocate Generals cannot be appointed in the State of Andhra Pradesh.; and (iii) Merely because there is a post of Additional Advocate General, the same would not mean and imply that Additional Advocate General can perform the constitutional statutory functions.

G In support of its findings, reliance has been placed on *M.K. Padmanabhan* v. *State of Kerala,* [1978] 1 LAB.I.C. 1336; *Regional Transport Authority, Jodhpur* v. *Sitaram,* AIR (1993) Rajasthan 76 and *Bhadreswar* v. *S.N. Choudhury,* AIR (1985) Gauhati 32.

Mr. Har Dev Singh, learned Senior Counsel appearing on behalf of the H appellants, in support of the appeal contended that having regard to the fact

that Article 165 of the Constitution of India is clear and unambiguous and, thus, being not open to any interpretation, the provisions of Section 13 of the General Clauses Act as also Article 367 of the Constitution of India could not be invoked as the same applies in dealing with interpretation "unless the context otherwise requires". A

The submission of the learned senior counsel is that Article 367 is applied having regard to Article 372 of the Constitution of India which in turn deals with adaptation of existing law, which has got no relevance in the instant case. The learned counsel urged that if such an interpretation is given to Article 165 of the Constitution of India, Articles 53, 63, 74, 76, 124, 148, 168, 216, 234 and 280 of the Constitution of India will have to be interpreted similarly which would lead to absurdity. It was contended that Advocate General appointed under Article 165 of the Constitution of India is not only required to discharge constitutional functions assigned to him, as for example, he has a right to address the Houses of Legislature under Article 177 of the Constitution; but also statutory functions in terms of Section 302 of the Code of Criminal Procedure, Section 92 of the Code of Civil Procedure and Section 23 of the Advocates Act. Furthermore, he as a leader of the Bar has a right of pre-audience. It was submitted that as the appointment of Additional Advocate General by the Government of Andhra Pradesh in purported exercise of its power under Article 165 of the Constitution of India was without jurisdiction, the same are liable to be set aside and such appointment cannot be saved by tracing their source of power to Article 162 of the Constitution of India. B C D E

Mr. Sudhir Chandra, learned Senior Counsel appearing on behalf of the respondents, on the other hand, contended that the appointment of Additional Advocate General has necessitated because of the growth and spread of the State activities, as a result thereof it is not possible for an Advocate General alone to handle the heavy work involved on behalf of the State. The learned counsel further contended that even if it be held that the State has no power to appoint Additional Advocate General in terms of Article 165 of the Constitution of India, such power must be held to exist under Article 162 thereof. F G

Article 165 of the Constitution of India reads thus :

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

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

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

A bare reading of the said provision clearly go to show that power of C the Governor of the State in this behalf is to appoint *a person who is qualified to be appointed a Judge of a High Court.* Similar expressions have been used by the Constitution-makers for the purpose of appointment of a holders of constitutional posts including the Attorney General of India, Comptroller and Auditor General of India, the Chief Justice and Judges of the High Courts D and Supreme Court. The constitutional scheme, thus, is that when a constitutional post is required to be filled up by a person having the qualification specified therefor, he would alone perform the duties and functions, be it constitutional or statutory, attached to the said office. The Constitution does not envisage that such functions be performed by more than one person. The reason therefor is obvious. If more than one person is E appointed to discharge the constitutional functions as also the statutory functions, different Advocate Generals may act differently resulting in a chaos. The State and the other litigants would in such an event would be totally at a loss as to which opinion the decision to be acted upon. The office of the Advocate General is a public office. He not only has a right to address the F Houses of Legislature but also is required to perform other statutory functions in terms of Section 302 of Code of Criminal Procedure, Section 92 of the Code of Civil Procedure and Section 23 of the Advocates Act. Each of such functions by the Advocate General is of great public importance. Such public functions are required to be performed by the holder of a constitutional post having regard to his stature and keeping in view the fact that the State G intended to endow such responsibility upon him.

The Government of a State as a litigant can appoint as many as it likes lawyers to defend it. For the said purpose, the State is not prohibited from conferring such designation on such legal practitioners as it may deem fit and proper. But, the State, in our considered view, cannot appoint more than one H Advocate General.

The decisions of the High Courts including the impugned judgment, as noticed hereinbefore, have proceeded on the basis that having regard to the provisions of Section 13 of the General Clauses Act and Article 367 of the Constitution of India, a singular would include a plural. The High Courts while adopting the said view, in our opinion, committed an error insofar as they failed to take into consideration the crucial words occurring in Article 367 of the Constitution "unless the context otherwise requires".

It is a well-settled principle of law that the provisions of the Constitution shall be construed having regard to the expressions used therein. The question of interpretation of a constitution would arise only in the event the expressions contained therein are vague, indefinite and ambiguous as well capable of being given more than one meaning. Literal interpretation of the Constitution must be resorted to. If by applying the golden rule of literal interpretation, no difficulty arises in giving effect to the constitutional scheme, the question of application of the principles of interpretation of a statute would not arise only.

*In Gurudevdatta Vksss Maryadit and Ors.* v. *State of Maharashtra and Ors.*, [2001] 4 SCC 534, this Court held :

> "Further we wish to clarify that it is a cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver. The courts have adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a statute as being inapposite surpluses, if they can have a proper application in circumstances conceivable within the contemplation of the statute..."

In *Balram Kumawat* v. *Union of India and Ors.*, [2003] 7 SCC 628, this Court held :

A "The Courts will therefore reject that construction which will defeat the plain intention of the Legislature even though there may be some inexactitude in the language used. [See *Salmon* v. *Duncombe,* (1886) 11 AC 627 at 634]. Reducing the legislation futility shall be avoided and in a case where the intention of the Legislature cannot be given effect to, the Courts would accept the bolder construction B for the purpose of bringing about an effective result. The Courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that the Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve. (See *BBC Enterprises* v. *Hi-Tech Xtravision Ltd.,* [1990] 2 All ER C 118 at 122-3)"

We are, however, unable to agree with the submission of Mr. Har Dev Singh to the effect that the appointments of Additional Advocate Generals cannot be traced to the source of the State's power under Article 162 of the Constitution of India. It is now well-settled principles of law that non-D mentioning or wrong mentioning of a provision of law does not invalidate an order in the event it is found that a power therefor exists.

*In Union of India* v. *Khazan Singh,* AIR (1992) SC 1535, this Court held :

E "...The Appellate Authority did not mention in its order as to under which sub-rule of Rule 25(1) the appeal was being disposed of. The tribunal while noticing Rule 25(1)(e) of the rules and conceding that the Appellate Authority could remand the case to the disciplinary authority for further inquiry under the said sub-rule, grossly erred in setting aside the order on the concession of the learned counsel to the F effect that the Appellate Authority had passed the order under Rule 25(1)(d) of the Rules..."

*In State of Karnataka* v. *Krishnaji Srinivas Kulkarni and Ors.,* [1994] 2 SCC 558, this Court held :

G "...Quotation of a wrong provision does not take away the jurisdiction of the authorities to inquire under Section 79-B(3) of the Act..."

The matter relating to the appointment of a legal practitioner by a Government may be subject-matter of a legislation. The State by amending the provisions of Sections 24 and 25 of the Code of Criminal Procedure may H

make a law regulating the appointment of the Public Prosecutor or Additional Public Prosecutor. Such a law can also be made for regulating appointment of other State counsel. In absence of any legislation in this behalf, various States have laid down executive instructions. Thus, the State in exercise of its jurisdiction under Article 162 of the Constitution of India, is, in our considered view, competent to appoint a lawyer of its choice and designate him in such manner as it may deem fit and proper. Once it is held that such persons who are although designated as Additional Advocate Generals are not authorised to perform any constitutional or statutory functions, indisputably such an appointment must be held to have been made by the State in exercise of its executive power and not in exercise of its constitutional power. Consequently, Additional Advocate General so appointed is not in constitutional scheme and does not hold constitutional office.

For the reasons aforementioned, we are of the opinion that the impugned Government orders need not be set aside. For the aforementioned we upheld the judgment under appeal, albeit for different reasons. The appeal is dismissed. No costs.

S.K.S. Appeal dismissed.