THE HIGH COURT OF MADHYA PRADESH,INDORE BENCH

SINGLE BENCH

Writ Petition No.5376-2019

Pawan Kumar Joshi s/o late Shri Champalalji Joshi

Vs.

State of Madhya Pradesh and seven others

Coram : Hon'ble Ms. Justice Vandana Kasrekar

Shri Praveen Kumar Pal, learned counsel for the petitioner.

Shri R.S. Chhabra, learned Additional Advocate General with Shri Mudit Maheshwari, learned Panel Lawyer for the respondent /State.

Shri Amit Bhatia, learned counsel for the respondent No.3.

Shri G.P. Singh, learned counsel for the respondent No.4.

Shri Aniket Naik, learned counsel for the respondent No.5.

Shri Pratyush Mishra, learned counsel for the respondent No.6.

Shri Vibhor Khandelwal, learned counsel for the respondent No.7.

Whether approved for reporting : **Yes**

O R D E R

(Passed on 07 / 01 / 2020)

The petitioner has filed the present petition under Article 226 of the Constitution of India, challenging the order dated 31.1.2019 (Annexure P/6) passed by the respondent No.2, thereby appointing the respondents Nos.3 to 7 on the post of Government Advocate and Dy. Government Advocate in the Office of Advocate General.

2. The petitioner is an Advocate under the definition of the Advocates Act and member of the High Court Bar Association and also a regular practitioner being an Advocate before the High Court of M.P. Bench at Indore since 2002 i.e. almost for last more than 16 years and recently last three years the petitioner has appeared in more than 100 cases as an Advocate. When the petitioner came to know that the applications were invited from the office of the Additional Advocate General, Indore for appointment of Law Officer for the State of M.P. to appear before the High Court, as per rules in a form Annexure A/1. The said application form also contained rules and principles containing eligibility/procedure for the appointment of Law Officer. As per the said rules/principles, for appointment to the post of Additional/Deputy Advocate General/Government Advocate/Deputy Government Advocate one must have a minimum experience of 10 years or more practicing as an Advocate before the High Court at respective Benches and second condition as per clause 10 of Annexure A/1, that he has to submit minimum list of 20 cases with evidence in which the candidate has appeared in the last three years. These are the two eligibility criteria/requirement for the

appointment on the post of Law Officer. As the petitioner, who has fulfilled the above criteria has submitted his application as per rules in the given format in Annexure A/1 along with all supporting documents before the Additional Advocate General Office, Indore. As per the Rules No.3, the respondent Nos. 1 and 2 for the appointment of the Law Officer have to see the experience of the person being a practitioner for the High Court Advocate, work experience and eligibility and goodwill. Contrary to this Rule, the respondent No.2 has issued the order dated 31.1.2019 appointing the Law Officer for the Advocate General Office Jabalpur, Indore and Gwalior. However, name of the petitioner does not find in the said appointment order and contrary to the rule, the respondent Nos. 3 to 7 have appointed as Law Officers. It has further been submitted that the respondent Nos. 3 to 7, who have been appointed as Law Officers are not eligible for appointment of the said post because they did not fulfill the criteria as prescribed under the rules. These respondents No. 3 to 7 did not have requisite experience of 10 years for appointment on the said post and also the respondent No.7 does not have 20 cases in the last three years. Therefore, the respondents are ineligible for the

post on which they have appointed. Being aggrieved with the said order, the petitioner has filed the present petition.

3. Learned counsel for the petitioner has submitted that the impugned order has been passed without any application of mind or without considering the eligibility of the candidate. That, the State Government has issued a Circular dated 28.2.2013 which contains the eligibility qualification of the person to be appointed on the post of Additional/Deputy Advocate General/Government Advocate/Deputy Government Advocate must have a minimum experience of 10 years or more practicing as an Advocate before the High Court and they should have appeared in minimum 20 cases in last three years. He submitted that none of the private respondents i.e. respondent Nos. 3 to 7 has fulfilled the criteria. Therefore, the appointment order of the respondent Nos. 3 to 7 deserves to be quashed.

4. The respondent Nos. 1 and 2 have filed their reply and in the reply, they have stated that the appointment of the Law Officers by the State Government is purely a professional engagement. The holder of the post of the Law Officer does not hold a civil post and, therefore, it does not create any right for appointment of the petitioner. The nature

of the office held by the lawyer vis-a-vis, the State being in the nature of professional engagement, whether the State is satisfied with the performance of its counsel or not is primarily a matter between it and the counsel. The incumbent or the petitioner has no legally enforceable right. There are no statutory Rules/Acts governing the field of eligibility of Law Officers in M.P. The Law Manual which is a code for working of the Law Department and the Office of the Advocate General is itself silent on this aspect. It is further submitted that the Law Manual itself and all the instructions and guidelines emanating thereto are merely executive instructions not having any statutory force and has not been issued by the Governor under Article 309 of the Constitution of India and, therefore, that would not bind any state authorities in any stretch of imagination. The instructions dated 28.2.2013 are in the nature of executive instructions as the same have not been issued under any statutory power. It has further been stated that, the State Government is acting as a client and engages its own Advocates to defend the interest of the Government. As a client, it has got confidence on the Law Officers to defend the policy decision of the Government. The Law Officers are engaged on adhoc basis

and their performances are reviewed by the Advocate General and Additional Advocate Generals. No undue favour has been shown in the appointment of the Law Officers and proper mechanism to assess the performance of the law Officers is maintained. The Law Officers are appointed only after considering their period of bar, experience, merit and ability as an Advocate. Their performance is reviewed from time to time by the Advocate General and Additional Advocate Generals in all Benches. So far as appointment of the petitioner on the post of Law Officer is concerned, the respondents have stated that, merely by submitting an application for appointment on a particular post does not create any right in the candidate. The petitioner cannot claim as a matter of right for appointment on the said post and, therefore, writ of mandamus and/or certiorari cannot be issued in the present case. The respondent Nos. 1 and 2 have further stated in the reply that, the petitioner does not fall within the category of aggrieved person and lacks of the necessary *locus standi* as held by the Apex Court. In the light of the aforesaid facts, learned Additional Advocate General has submitted that no right would accrue to the petitioner as he would not be entitled as a matter of right to

the appointment in any case since the case of the petitioner was considered along with other candidates and he was not found fit for appointment on the said post. The appointment of the respondent Nos.3 to 7 was made on the basis of merit and performance. The petitioner has failed to aver that the exercise has been conducted in an arbitrary manner or malafide.

5. The respondent No.7 has filed the reply and in the reply he has stated that in the petition the petitioner has made specific averments that the respondent No.7 is not eligible and competent for being appointed on the post Government Advocate since he does not fulfills the eligibility criteria adopted by the State Government. The respondent No.7 has further stated that he has been appointed on the post of Government Advocate vide order dated 31.1.2019. Prior to his appointment, the respondent No.7 is practicing before this Court since last 18 years. Further the appointment of the respondent No.7 was challenged by the petitioner on the ground that the respondent No.7 is not having appeared before this Court in minimum 20 cases since last three years. He has further stated that the guidelines on which the petitioner is relying are merely

executive instructions and such executive instructions can be amended by relaxing or making the stringent by any subsequent executive instructions. Since the said eligibility fixed for a candidate of having a minimum 20 cases during last three years has been relaxed by the respondent No.2 no irregularity has been committed by the respondent No.2 for the appointment of the respondent No.7 as Government Advocate.

6. The respondent No.3 has filed the reply and in the reply he has stated that the petitioner has challenged the appointment of the respondent No.3 on the ground that the respondent No.3 does not fulfills the eligibility criteria of having 10 years of professional practice before this High Court and, therefore, in the light of Section 24 of the Cr.P.C. the respondents No. 3 to 7 are not being eligible for the appointment as Government Advocates. The respondent No.3 has further stated that, as per the settled law held by this Court as well the Apex Court, no person can claim his appointment as Government Advocate as a matter of right. It is prerogative of the State Government to appoint Law Officer in its own discretion though after consultation with the Advocate General. The qualifications, eligibility and the

competency of the petitioner is not in question. However, it was being the prerogative of the State Government to appoint a Government Advocate; the petitioner cannot claim the appointment of the said post as a matter of right. The petitioner participated in the appointment process by filing his application and at the relevant time he had not raised any issue regarding the appointment process. That, for appointment of Public Prosecutor and Additional Public Prosecutor, the statutory requirement under Section 24 of Cr.P.C. cannot be relaxed. It has further been stated that the minimum years of practice required for being appointed as Public Prosecutor or Additional Public Prosecutor cannot be less than seven years but the post of Public Prosecutor and Government Advocate are altogether different. The eligibility criteria, conditions and proceedings of appointment, qualification, pay scale and salary of both posts are also different from each other. The requirement of seven years minimum practice as an advocate is required only for conduction of any prosecution, appeal or other proceedings in criminal matters but, there is no such requirement for appearing in the cases of civil nature or Constitution as well as service matters. The Government Advocates and Deputy

Government Advocates derived their power and authority to appear in the criminal cases only while acting under the directions of Advocate General or Additional Advocate General, who are appointed as Public Prosecutor by the State of M.P. and the Law Officers only act under the directions of the Advocate General or Additional Advocate General and thus, fall within the definition of Public Prosecutor as provided under Section 2 (u) of Cr.P.C., 1973. A Public Prosecutor may direct any person to act under this direction and there is no minimum eligibility or qualification defined for any such person acting under direction of Public Prosecutor. Therefore, the appointment of the respondent Nos. 3 and 4 is in accordance with law and there is no statutory violation in their appointment. In such circumstances, the petition deserves to be dismissed.

7. The respondent No.4 has also filed the reply reiterate the said stand taken in the reply filed by the other respondents.

8. The petitioner has filed the rejoinder and in the rejoinder the petitioner has stated that, the appointment of the Law Officer is governed by the appointment Rules Annexure P/4, which provides for rules, procedure and

eligibility criteria also, and therefore, the same is binding upon the respondents and the same has to be followed by the respondents. So far as the absence of any statutory rules governing the appointment of the Law Officer is concerned, the petitioner has stated that law manual itself provides for the procedure for appointment on the said post. The petitioner has stated that the rules for the appointment of Law Officers as per Annexure P/4, issued by the respondents deemed to be issued under Section 24 (8) of Cr.P.C., which provides for the appointment of Law Officer other than the Public Prosecutor appointment for the District Court. Therefore, the rules are having the statutory and legal force and binding upon the respondents. He further contended that the respondent Nos.1 and 2 have not produced any documents to show on what basis the appointment of ineligible persons has been made. The petitioner has further stated that the respondent while rejecting his candidature for the post of Law Officer has not produced any material before this Court which proves that the respondent Nos. 3 to 7 were legally appointed and, therefore, the petitioner has *locus standi* to challenge their appointment and claim his appointment on that post. He further submitted that he has

obtained the information under Right to Information Act with regard to the appointment of the respondents. As per the information supplied by the respondents, the minimum qualification for the appointment of the Law Officer is 10 years or more than 10 years, which was in certain circumstances relaxed by them as per Section 24(7) of Cr.P.C. for 7 or more than 7 years and specifically at serial No.45 in Jabalpur list the person is having 6 years experience has excluded from the list. Thus, according to the recommendation itself Law Officer having experience less than 7 years in the present case respondents is not entitled to be appointed as a Law Officer. The appointments were made by the Government without considering the merits of the applicants. Under circumstances, learned counsel for the petitioner has prayed that the impugned order be quashed.

9. The respondents Nos. 1 and 2 have filed additional reply also rebutting all the allegations made in the rejoinder.

10. Heard the learned counsel for the parties and also perused the record.

11. In the present case, Section 24 (7) of the Cr.P.C. deals with eligibility criteria for appointment of a Public Prosecutor, which reads as under :-

> **"(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."**

12. The term Public Prosecutor is defined under Section 2 (u) of the Cr.P.C.. Extract of Section 2(u) of the Cr.P.C. is reproduced as under :-

> **"(u) Public Prosecutor means any person appointment under Section 24, and includes any person acting under the directions of a Public Prosecutor."**

13. Thus, from bare perusal of Section 2 (u) of the Cr.P.C., I find that any person acting under the Public Prosecutor is also deemed to be a Public Prosecutor in the eyes of law. The State Government had issued an order dated 7.1.2019 appointing the Additional Advocate General in the High Court of M.P. Bench at Indore as Public Prosecutor and all the Law Officers are working under the instructions and the guidance of the Additional Advocate General High Court of M.P. Bench at Indore. Thus, the term any person means any person to whom the instructions have been issued by the Public Prosecutor and will include Government Advocate, Deputy Government Advocate, Panel Lawyer or any other third person. The appointment of the respondent Nos. 3 to 7 has

been challenged by the petitioner firstly on the ground that the respondents Nos. 3 to 7 do not possess the required experience for appointment on the said post and secondly on the ground the respondent No.7 did not appear in minimum 20 cases before this Court since last three years. So far as experience part of the respondent Nos. 3 to 7 is concerned, as per Section 24(7) of the Cr.P.C., the applicant has been in practice as an advocate for not less than seven years before the High Court in the criminal case. However, there is no such bar for appearing in civil cases. Under Section 24 of the Cr.P.C., the State Government has appointed Additional Advocate General as a Public Prosecutor and all other Law Officers have to be worked under the Public Prosecutor. Thus, all the Government Advocates, who are appearing on behalf of the Government, are deemed to be Public Prosecutor.

14. Reliance is placed upon the judgments of **State of U.P. vs. Rakesh Kumar Keshari, (2011) 5 SCC 341** and also **State of U.P. and another vs. Johri Mal (2004) 4 SCC 714.**

In the case of **Syndicate Bank vs. Ramchandran Pillai, (2011) 15 SCC 398,** the Hon'ble Supreme Court has

held that the guidelines/executive instructions not statutory in character, are not law. They confer no legal right to see a direction in a court of law for compliance with such guidelines even if there has been any violation or breach of such non-statutory guidelines. An order validly made in accordance with a statute cannot be interfered with, even if there has been any transgression of any guidelines, except where it is arbitrary or *mala fide* or in violation of any statutory provision.

It has further been held and reiterated in the cases of **State of U.P. vs. Rakesh kumar Keshari (supra)** and **State of U.P.vs. Johri Mal (supra)** that, even if the provisions of Law Manual are non-binding/non-statutory in nature and the State may seek any fair and transparent procedure for appointments of Law Officers as long as the same is not arbitrary.

Further reliance is also placed upon the judgments of the Madras High Court in the case of **Ramchandra vs. Alagiriswami** reported in **AIR 1961 Mad.450** to contend that any such letter/communication does not have any statutory force.

It has been submitted that the State Government is acting as a client and engages its own Advocates to defend

the interest of the Government. As a client, it has got confidence on the Law Officers to defend the policy decision of the Government. The Law Officers are engaged on adhoc basis and their performances are reviewed by the Advocate General and Additional Advocate Generals. No undue favour has been shown in the appointment of Law Officers and proper mechanism to assess the performance of the Law Officers is maintained. The Law Officers are appointed only after considering their period of bar, experience, merit and ability as Advocate. Their performance is reviewed from time to time by the Advocate General and Additional Advocate Generals in all Benches. As already observed by the Division Bench of this High Court in W.P. No.5967/2017, any interference into the discretion of the State into how and who should be appointed as Law Officers would be an inroad into the functions of the State.

> "9. In so far as appointment of Law Officers in the M.P. High Court is concerned, it is the concern of the State Government to appoint the Law Officers who have got reputation in the field, of course based on their efficiency. It is the say of the learned Advocate General that the State of M.P. is continuously monitoring the performance of Law Officers in consultation with the Advocate General of M.P.
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> 10. As per Annxure R/1, the State Government has adopted a specific procedure as per discretionary power vested in the Government relating to appointment of Law Officers. The Apex Court has observed that the States would do well to reform their system of selection and appointment to make the same more transparent, fair and, objective and if necessary, may amend the Manuals/Rules

> and Regulations on the subject. Therefore, it is for the State Government to consider the directions issued by the Apex Court to reform their system. No Public Interest Litigation is involved in this aspect except the State Government to take care of the situation. Issuance of any direction as prayed for by the petitioner will be an inroad into the function of the State Government.'

That, without any prejudice to the aforesaid it is submitted that the present petition challenging the appointment of Law Officers and praying for a direction for the appointment of the petitioner is wholly misconceived and not maintainable for the reason that no person by merely applying for a particular post is entitled for his appointment for the post of law officer or otherwise. It is submitted that the petitioner is clearly misconstruing the words 'eligibility' with 'entitlement' and has failed to aver that how he is entitled as a matter of right to the said appointment merely because he might be eligible for the same. It is a settled position of law that the writ of mandamus and/or certiorari can only be moved by a person for enforcement of any of his rights under law. Merely by applying to the said post, or being eligible would not accrue any right in his favour. This is even more so when since the petition fails to disclose any infraction of any fundamental rights the same is not maintainable and is liable to be dismissed *in limine*. In this regard reliance is placed upon certain judgments of the Apex Court as reflected in the Constitution Bench

judgment in the case of **Shankarsan Dash vs. Union of India** reported in **(1991) 3 SCC 47**, wherein it has been held as under :-

> "7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates is found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha and Others, [1974] 1 SCR 165; Miss Neelima Shangla v. State of Haryana and Others, [1986] 4 SCC 268 and Jitendra Kumar and Others v. State of Punjab and Others, [1985] 1 SCR 899.
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> 8. In State of Haryana v. Subhash Chander Marwaha and Others, (supra) 15 vacancies of Subordinate Judges were advertised, and out of the selection list only 7, who had secured more than 55% marks, were appointed, although under the relevant rules the eligibility condition required only 45% marks. Since the High Court had recommended earlier, to the Punjab Government that only the candidates securing 55% marks or more should be appointed as Subordinate Judges, the other candidates included in the select list were not appointed. They filed a writ petition before the High Court claiming a right of being appointed on the ground that vacancies existed and they were qualified and were found suitable. The writ application was allowed. While reversing the decision of the High Court, it was observed by this Court that it was open to the Government to decide how MANY appointments should be made and although the High Court had appreciated the position correctly, it had ``somehow persuaded itself to spell out a right in the candidates because in fact there were 15 vacancies''. It was expressly ruled that the existence of vacancies does not give a legal right to a selected candidate. Similarly, the claim of some of the candidates selected for appointment, who were petitioners in Jitendra Kumar and Others v. State of Punjab and

> Others, was turned down holding that it was open to the Government to decide how many appointments would be made. The plea of arbitrariness was rejected in view of the facts of the case and it was held that the candidates did not acquire any right merely by applying for selection or even after selection. It is true that the claim of the petitioner in the case of Miss Neelima Shangla v. State of Haryana was allowed by this Court but, not on the ground that she had acquired any right by her selection and existence of vacancies. The fact was that the matter had been referred to the Public Service Commission which sent to the Government only the names of 17 candidates belonging to the general category on the assumption that only 17 posts were to be filled up. The Government accordingly made only 17 appointments and stated before the Court that they were unable to select and appoint more candidates as the Commission had not recommended any other candidate. In this background it was observed that it is, of course, open to the Government not to fill up all the vacancies for a valid reason, but the selection cannot be arbitrarily restricted to a few candidates notwithstanding the number of vacancies and the availability of qualified candidates; and there must be a conscious application of mind by the Government and the High Court before the number of persons selected for appointment is restricted. The fact that it was not for the Public Service Commission to take a decision in this regard was emphasised in this judgment. None of these decisions, therefore, supports the appellant.'

Further the Constitutional Bench of the Apex Court in the case of **State of Orissa vs. Ram Chandra** reported in **AIR 1964 SC 685** has clearly held as under :-

> "Under Art. 226 of the Constitution, the jurisdiction of the High Court is undoubtedly very wide. Appropriate writs can be issued by the High Court under the said article even for purposes other than the enforcement of the fundamental rights and in that sense, a party who invokes the special jurisdiction of the High Court under Art. 226 is not confined to cases of illegal invasion of his fundamental rights alone. But though the jurisdiction of the High Court under Art. 226 is wide in that sense, the concluding words of the article clearly indicate that before a writ or an appropriate order can be issued in favour of a party, it must be established that the party has a right and the said right is illegally invaded or threatened. The existence of a right is thus the foundation of a petition under Art. 226.

15. Therefore, the respondents No.3 to 7 are eligible for appointment on the post of Law Officer. It is further noticed that the appointment of a Government Advocate is purely prerogative of the State Government and the Court cannot interfere into the appointment made by the State Government because the appointment of a Government Advocate is purely a professional engagement. It is for the client to whom he wants to appoint his counsel. The incumbent/petitioner has no legally enforceable right to claim the appointment on the post of Government Advocate as a matter of right. So far as the guidelines issued by the State Government regarding the appointment of Law Officer is concerned, that they are neither merely an executive instruction nor a statutory rules because they have neither been issued nor under any provision of law under Article 309 of the Constitution of India. The Apex Court in the case of **Syndicate Bank (supra)** has held that the guidelines/executive instructions are not statutory in character, are not law. They confer no legal right to see a direction in a court of law for compliance with such guidelines even if there has been any violation or breach of such non-statutory guidelines. An order validly made in accordance with a statute cannot be interfered with, even if there has been any transgression of any guidelines, except where it is arbitrary or mala fide or in violation of any statutory provision. The

Apex Court in the case of **State of U.P. vs. Rakesh kumar Keshari (supra)** has held that, even if the provisions of Law Manual are non-binding/non-statutory in nature and the State may seek any fair and transparent procedure for appointments of Law Officers as long as the same is not arbitrary.

16. The State Government is acting as a client and engages its own counsel to defend the interest of the Government. As a client, it has got confidence on the Law Officers to defend the policy decision of the Government. The Law Officers are engaged on adhoc basis and their performances are reviewed by the Advocate General and Additional Advocate Generals. No undue favour has been shown in the appointment of Law Officers and proper mechanism to assess the performance of the Law Officers maintained. The Law Officers are appointed only after considering their period of bar, experience, merit and ability as an Advocate. Therefore, no case to interfere with the impugned order, as prayed for is made out.

17. In the light of the aforesaid, the present writ petition is dismissed as being sans merit.

No order as to costs.

(Ms. Vandana Kasrekar)
JUDGE

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HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE

Writ Petition No.5376 / 2019

Indore, Dated: 03 / 12 /2019

Shri Praveen Kumar Pal, learned counsel for the petitioner.

Shri R.S. Chhabra, learned Additional Advocate General with Shri Mudit Maheshwari, learned Panel Lawyer for the respondent /State.

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Shri Aniket Naik, learned counsel for the respondent No.5.

Shri Pratyush Mishra, learned counsel for the respondent No.6.

Shri Vibhor Khandelwal, learned counsel for the respondent No.7.

Arguments heard.

Reserved for orders.

(Ms. Vandana Kasrekar)
Judge

Indore, Dated: 07 / 01 /2020

Order passed, signed and dated.

(Ms. Vandana Kasrekar)
Judge

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