

# State Of U.P & Ors vs Rakesh Kumar Keshari & Anr on 4 May, 2011

**Equivalent citations:** AIR 2011 SUPREME COURT 1705, 2011 (5) SCC 341, 2011 AIR SCW 2919, AIR 2011 SC (CRIMINAL) 1277, 2011 (4) ALL LJ 174, (2011) 5 LAB LN 51, (2011) 3 SERVLR 690, (2011) 5 SCALE 303, (2011) 3 ESC 413, (2011) 3 ALL WC 3153, (2011) 2 SERVLJ 424, (2011) 130 FACLR 1, (2011) 6 MAD LJ 791, (2011) 3 SCT 111, 2011 (2) KLT SN 110 (SC), 2011 (8) ADJ 71 NOC

**Author: J.M. Panchal**

**Bench: H.L.Gokhale, J.M. Panchal**

REPORTABLE

THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3935 OF 2011

(Arising out of S.L.P. (Civil) No. 11888 OF 2006)

State of U.P. & Ors.

... Petitioner(s)

Versus

Rakesh Kumar Keshari & Anr.

... Respondent(s)

## J U D G M E N T

J.M. Panchal, J.

1. Leave granted.

2. This appeal by Special Leave is directed against Judgment dated 11.07.2005 rendered by the Division Bench of High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 28444 of 2005 by which order dated 07.09.2004 of the Principal Secretary to the Chief Minister, Uttar Pradesh directing the District Magistrate to submit another panel/list for appointment to the two posts of the Assistant District Government Counsel (Criminal) in Ghazipur District of the State of U.P. is set aside and District Magistrate, Ghazipur is directed to consult the District Judge and thereafter to furnish better particulars in respect of 10 persons whose names had been included in the two panels dated 01-05-2004 with the consultation of the District Judge, whereas the State Government is directed not to consider revised panel unless the panel submitted by the District Magistrate in consultation with the District Judge is rejected on some disclosed grounds.

3. Backgrounds facts sans unnecessary details are as under:-

The respondents nos. 1 and 2 were appointed on contract basis, to the vacant posts of Assistant District Government Counsel (Criminal) ("A.D.G.C." for short), in Ghazipur District of State of U.P. on 22.10.2001. As the terms of the appointment of the respondents were up to 10.10.2002, the District Judge, Ghazipur after being satisfied with the work and conduct of the respondents had recommended to the District Magistrate, Ghazipur to get extended their terms by communication dated 31.07.2002. The District Magistrate, Ghazipur had recommended to the State Government to extend the terms of the respondents vide communication dated 31.07.2002. The Post of Assistant A.D.G.C. (Criminal) on which the respondents were working were advertised by the then District Magistrate, Ghazipur. In pursuance of the said advertisement, the respondents also applied for the post in question. Their applications were forwarded by the District Judge, Ghazipur to the then District Magistrate along with his Report. However, no action whatsoever was taken by the appellants either for renewing the terms of the respondents on the recommendation dated 31-07-2002 of the District Magistrate or for appointing them on the post of Assistant A.D.G.C. (Criminal) pursuant to the above mentioned advertisement. Again by advertisement dated 16.01.2004 the District Magistrate, Ghazipur had advertised the post of A.D.G.C. (Criminal) under the Judgeship of Ghazipur. The respondents had again applied for the post of A.D.G.C. (Criminal) along with other candidates. Pursuant to the advertisement dated 16-01-2004, applications from 29 candidates were received. From the record it is evident that two letters dated 07-02-2004 and 01-03-2004 were addressed by the District Magistrate to the District Judge, Ghazipur for regular appointment of two A.D.G.C. (Criminal). In response to those two letters, the District Judge, Ghazipur by communication dated 07-04-2004 informed the District Magistrate that after obtaining opinion of the other Judicial Officers two panels of candidates, each containing 5 names were prepared. By a letter dated 19-04-2004, the District Magistrate had suggested to the District Judge to change/alter the two panels but District Judge had vide communication dated 28-04-2004, informed the District Magistrate that, it would not be in the fitness of things to change or alter the two panels which were prepared after taking much pains.

However, by the said communication, the District Judge also mentioned that the work, conduct and legal knowledge of the remaining candidates were satisfactory. Thereupon, the District Magistrate, Ghazipur addressed a communication dated 01-05-2004 to the Special Secretary, Government of U.P., Lucknow informing him that the two posts of A.D.G.C.(Criminal) were advertised and 29 applications were received regarding which approval of the District Judge was obtained on 28-04-2004. It was further stated in the said letter that the District Judge, Ghazipur had mentioned that the work, conduct and legal knowledge of all the candidates were satisfactory and as he was agreeing with the view of the District Judge, Ghazipur expressed in respect of 29 candidates, he was forwarding necessary data of 29 candidates. By the letter dated 01-05-2004 the District Magistrate had requested the Special Secretary to take necessary action of making appointments to the two posts of A.D.G.C. (Criminal). Instead of acting upon recommendation made by the District Magistrate to make appointments of suitable candidates whose names were mentioned in the panel, the Special Secretary and Upper Legal Remembrancer, Government of Uttar Pradesh, Lucknow, by an order dated 07- 09-2004 directed the District Magistrate to submit another panel/list for appointment to the posts of A.D.G.C. (Criminal).

The District Magistrate by his letter dated 14.02.2005 declined to submit another list stating that a panel list had already been submitted by him. After the receipt of the letter dated 14.02.2005 the Special Secretary and Upper Legal Remembrancer returned the first panel list sent by the District Magistrate on 01-05-2004 without assigning any reason and directed the District Magistrate, Ghazipur to advertise the posts of A.D.G.C. (Criminal), afresh for appointment vide letter dated 18.03.2005. According to the respondents there was no occasion to advertise the posts of A.D.G.C. (Criminal) at all in view of the recommendation made by the District Magistrate on 01-05-2004.

4. Pursuant to the direction contained in the letter dated 18.03.2005, the District Magistrate again re-advertised the aforesaid posts vide advertisement dated 01.04.2005. The respondents were of the view that action of the appellants in not considering the recommendations made by the District Magistrate on 01-05-2004, pursuant to the earlier advertisement dated 16.01.2004 and returning the same and further compelling the District Magistrate to re-advertise the posts was illegal, arbitrary and not in accordance with law.

Therefore, they approached the High Court of Judicature at Allahabad by filing Civil Misc. Writ Petition No. 28444 of 2005.

In the writ petition, the prayer was to quash order date 18.03.2005 issued by the Special Secretary and Upper Legal Remembrancer Government of Uttar Pradesh, Lucknow by which the District Magistrate was directed to re-advertise the posts as well as advertisement dated 01.04.2005 issued by the District Magistrate, Ghazipur to fill up two posts of A.D.G.C. (Criminal). Another prayer which was sought was to direct the appellants to consider the recommendations of the District Magistrate

made on 01.05.2004 with which a panel list was sent which included the names of the respondents for appointments to the posts of A.D.G.C. (Criminal). The respondents had also prayed to direct the appellants not to interfere with their functioning as A.D.G.C. (Criminal) under the Judgeship of District Ghazipur.

5. On service of notice the appellants had filed the reply and contested the claim made by the respondents.

6. The Division Bench which heard the Writ Petition had perused original records. On perusal of original records, the High Court found that two panels had been submitted for two posts and after going through the same, the state authorities had considered it proper to seek revised panel/proposal by order dated 07-09-2004 of the Principal Secretary to the Chief Minister. Having noticed this, the High Court took into consideration, the submission made by the learned counsel for the respondents that instead of sending the new names, it would be desirable that in respect of those ten candidates, whose names had been included in the aforesaid two panels, better particulars were sent to the State Government and the State Government was asked to decide the two names after considering better particulars.

The abovestated submission found favour with the High Court and the High Court has set aside order dated 07-09-2004 holding that unless the panel submitted by the District Magistrate in consultation with the District Judge is rejected by the State Authorities on some disclosed grounds, it is not open to the State to ask the District Magistrate to constitute the revised panel. By the impugned Judgment, the High Court while allowing the Writ Petition filed by the respondents has directed the District Magistrate, Ghazipur after consultation with District Judge to furnish better particulars in respect of only those ten candidates whose names were included in the two panels whereas the Government is directed to make appointments therefrom in accordance with law, giving rise to the present appeal.

7. This Court has heard the learned Counsel for the parties at length and considered the documents forming part of the appeal.

8. The vital issue raised in the appeal relates to the right of the State Government to engage, disengage and renew the terms of its Counsel and Law Officers in keeping with the need to best safeguard the public interest, monetary consideration, suitability of the incumbent and the interest of the Government as the client. It may be mentioned that the entire gamut of this exercise is governed by L.R. Manual which is governing the conduct of legal affairs of the State of Uttar Pradesh since last several decades, in matters relating to the engagement, disengagement and renewal of Government Counsel and Law Officers for the State Government. The specific issue raised in the appeal involves the question as to whether a legally enforceable right to claim renewal of appointment to the post of A.D.G.C. (Criminal) is available to the respondents and what is the scope of judicial review in this regard. As observed earlier the High Court has regarded the right to renewal of appointment as a legally enforceable one and therefore has chosen to interfere with the decision of the State Government seeking to fill the post by direct selection instead of renewing the terms of the respondents as was claimed by them in the Writ Petition.

9. Before considering the question mentioned above, it would be relevant to reproduce some of the provisions of the L.R.Manual relating to the appointment and renewal of the term of the Government Counsel. They are as under:-

"7.06 Appointment and renewal (3) The appointment of any legal practitioner as a District Government Counsel is only professional engagement terminable at will on either side and is not appointment to a post under the Government. Accordingly the Government reserves the power to terminate the appointment of any District Government Counsel at any time without assigning any cause.

7.07 Renewal of term (1) At least three months before the expiry of the term of a District Government Counsel, the District Officer shall after consulting the District Judge and considering his past record of work, conduct and age, report to the Legal Remembrancer, together with the whether in his opinion the term of appointment of such counsel should be renewed or not. A copy of the opinion of the District Judge should also be sent along with the recommendations of the District Officer.

(2) Where recommendation for the extension of the term of a District Government Counsel is made for a specified period only, the reasons therefore shall also be stated by the District Officer.

(3) While forwarding his recommendation for renewal of the term of a District Government Counsel-

(i) The District Judge shall give an estimate of the quality of the counsel's work from the judicial stand point, keeping in view the different aspects of a lawyer's capacity as it is manifested before him in conducting State cases, and specially his professional conduct.

(ii) The District Officer shall give his report about the suitability of the District Government Counsel from the administrative point of view, his public reputation in general, his character, integrity and professional conduct.

(4) If the Government agrees with the recommendations of the District Officer for the renewal of the term of the Government Counsel, it may pass orders for re-appointing him for a period not exceeding three years.

(5) If the Government decides not to re-

appoint a Government Counsel, the Legal Remembrancer may call upon the District Officer to forward fresh recommendations in the manner laid down in para 7.03.

(6) The procedure prescribed in this para shall be followed on the expiry of every successive period of renewed appointment of a District Government Counsel.

21.07. The appointment of Public Prosecutor or Additional Public Prosecutor shall be made for a period of three years but the State Government may terminate such appointment at any time without notice and without assigning any reasons.

The State Government may extend the period of appointment from time to time, and such extension of term shall not be treated as a new appointment."

10. At this stage it would be relevant to notice certain facts emerging from the reply affidavit filed by the appellants before the High Court. The reply inter alia mentions that though the District Magistrate had recommended renewal of tenure of the respondents, he had furnished information regarding the work done by the respondents in Form 4 perusal of which indicated that the respondent no.1 Mr. Rakesh Kumar Keshari had appeared in 25 cases in all and that in all those 25 cases the accused were acquitted, whereas the respondent no.2 Mr. Kripa Shankar Rai had appeared in 28 cases out of which in 26 cases the accused were acquitted. The reply stated that the percentage of success in cases handled by Mr. Keshari was Nil whereas in the case of Mr. Rai the percentage was only 17 and therefore when the matter of renewal of their tenure was considered by the Government, the Government had decided not to extend the terms of those Government Counsel whose success rate was very low. It was stated in the reply that on the basis of this decision the terms of the respondents were not extended and after expiry of their term they had ceased to work on their respective posts. It was further mentioned in the reply that on so many occasions the respondents had approached the Government for extension of their terms and many recommendations were forwarded to the Government but since the performance of the respondents was not found to be satisfactory, a decision was taken not to renew their terms and to issue advertisement for selection of better candidates.

11. In view of the provisions quoted from the L.R. Manual above as well as in view of poor performance of the respondents as A.D.G.C. (Criminal) in Ghazipur District, this Court is of the opinion that the right of the State Government to engage, disengage and renew the terms of its Counsel and Law Officers in keeping with the need to best safeguard the public interest and monetary considerations, suitability of the incumbent and the interest of the Government as the client, will have to be upheld.

12. This question has been considered by a three Judge Bench of this Court in State of U.P. & Anr. Vs. Johri Mal (2004) 4 SCC 714, almost in similar circumstances. The respondent therein was appointed as D.G.C. (Criminal) at Meerut on 07.01.1993. His term was renewed on 12.03.1996 and he was again appointed in the same capacity on 17.09.1997 for one year. However, subsequent thereto, despite his request his term was not renewed and on 18.09.1998 he was relieved from the charge of the said post.

The vacancy was, thereafter, advertised. The respondents had thereupon filed Writ Petition before the Allahabad High Court challenging order dated 18.09.1998 on the ground that as the District Magistrate and the District Judge had found his conduct and work satisfactory and had recommended for renewal of his term, the renewal ought to have been granted as a matter of course. The High Court had held that there was no good or cogent reason for rejecting the recommendation

of the District Judge. Therefore, the High Court had directed the State Government to renew the respondent's term as D.G.C. (Criminal). After referring to the decision of nine-Judge Bench of this Court in Special Reference No. 1 of 1998, Re. (1998) 7 SCC 739, wherein it is ruled that the opinion of the Chief Justice of India which has primacy in the matter of recommendations for appointment to the Supreme Court, has to be formed by a collegium consisting of the Chief Justice of India and the four senior most puisne Judges of the Supreme Court, the High Court had further opined that the District Judge should not make the recommendation alone but should constitute the 5 Member Collegium headed by himself for that purpose. Although the State had pointed out to the High Court that the respondent's case was not recommended by the District Judge or the District Magistrate, the High Court had directed that the question of renewal of the respondent's term be considered afresh by the Collegium. The State had then filed appeals before this Court. The State Government had contended before this Court that the High Court had proceeded on wrong premise that the recommendation for renewal of the respondent's term as D.G.C. (Criminal) had been made by the District Magistrate and since the appointment of Public Prosecutor was governed by the provisions of the Criminal Procedure Code and renewal thereof by the U.P. Legal Remembrancer's Manual, the High Court committed a manifest error in directing the Constitution of Collegium. It was also argued by the State before this Court that the professional engagement of a lawyer could not be equated with the appointment in a civil post as there exists a relationship of client and a lawyer between the State and the Public Prosecutor. On behalf of the respondent it was submitted that the High Court had felt the need to constitute a Collegium as the action on the part of the State in the appointment and/or renewal of the term of D.G.C.s was found to be arbitrary. It was also contended that the Public Prosecutors were looking after the prosecution work and therefore the office held by them was public in nature.

13. Allowing the appeal filed by the State this Court has held that for a public law remedy enforceable under Article 226 of the Constitution, the actions of the authority need to fall in the realm of a public law - be it a legislative act of the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element. This Court has further held that the question is required to be determined in each case having regard to the nature of and extent of authority vested in the State. After holding that the power of judicial review is not intended to assume a supervisory role or don the robes of the omnipresent, this Court has, in terms, ruled that the power of judicial review is not intended either to review governance under the rule of law nor do the Courts step into the areas exclusively reserved by the Constitution to the other organs of the State and has further cautioned that the Court shall not ordinarily interfere with a policy decision of the State. The Court also held that the decisions and actions which do not have adjudicative disposition would not strictly fall for consideration before a judicial review court. According to this Court the limited scope of judicial review is (i) Courts, while exercising the power of judicial review, do not sit in an appeal over the decisions of administrative bodies (ii) A petition for judicial review would lie only on certain well-

defined grounds (iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself was perverse or illegal (iv) A mere wrong decision without anything more is not enough to attract the power of judicial review (v) The supervisory jurisdiction conferred on a Court is limited to seeing

that the Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice and (vi) the Court shall not ordinarily interfere with a policy decision of the State.

14. After referring to the L.R. Manual this Court has specifically held that appointment of a Public Prosecutor or a District Counsel would be professional in nature. This Court in the said case, noticed the concession made on behalf of the respondent therein that the holder of the office of the Public Prosecutor does not hold a civil post and thereafter has held that by holding a post of District Counsel or the Public Prosecutor no status is conferred on the incumbent. This Court in the said case has further ruled that so long as in appointing a Counsel, the procedure laid down in L.R. Manual is followed and a reasonable or fair procedure is adopted, the Court would normally not interfere with the decision. What is emphasized by this Court is that the nature of the office held by a lawyer vis-à-vis, the State being in the nature of professional engagement, the Courts are normally chary to overturn any decision unless an exceptional case is made out.

According to this Court the question as to whether the State is satisfied with the performance of its Counsel or not is primarily a matter between it and the Counsel and the extension of tenure of Public Prosecutor or the District Counsel should not be compared with the right of renewal under a licence or permit granted under a statute. What is laid down as firm proposition of law is that an incumbent has no legally enforceable right as such and the action of the State in not renewing the tenure can be subjected to judicial scrutiny inter alia only on the ground that the same was arbitrary. It is also held that the Court normally would not delve into the records with a view to ascertain as to what impelled the State not to renew the tenure of the Public Prosecutor or a District Counsel and the Jurisdiction of the Courts in a case of this nature would be to invoke the doctrine of "Wednesbury unreasonableness". This Court further held that L.R. Manual contains executive instructions and is not law within the meaning of Article 13. After emphasizing that a Public Prosecutor is not only required to show his professional competence but is also required to discharge certain administrative functions, it is held that the respondent therein had no effective control over A.D.G.C.s for taking steps and therefore action on the part of the State was not wholly without jurisdiction requiring interference by the High Court in exercise of its power of judicial review while setting aside the direction given by the High Court to constitute the five member Collegium headed by the District Judge to make recommendation for appointment to the post of D.G.C. (Criminal), this Court had to take pains to explain to all concerned that the appointment of District Government Counsel cannot be equated with the appointments of the High Court and Supreme Court Judges and a distinction must be made between professional engagement and a holder of high public office. This Court has explained that various doctrines and the provisions of the Constitution which impelled the Supreme Court in Special Reference Case, (1998) 7 SCC 739 to give meaning of 'Consultation' as 'Concurrence' and wherein the Chief Justice of India will have a primacy, cannot be held to be applicable in the matter of consultation between the District Magistrate and the District Judge for the purpose of preparation of a panel of the District Government Counsel.

15. Applying the principles of law laid down by this Court in the above quoted decision, this Court finds that the decision of the State Government not to accept the recommendation made by the



District Magistrate cannot be said to be arbitrary. There is no manner of doubt that the A.D.G.C. (Criminal) are not only officers of the Court but also the representatives of the State. They represent the interest of the general public before a Court of law. The holders of the post have a public duty to perform. However, in the matter of engagement of A.D.G.C. (Criminal) a concept of public office does not come into play. The choice is that of the Government and none can claim a right to be appointed because it is a position of great trust and confidence. Article 14, however in a given case, may be attracted to a limited extent if the State fails to discharge its public duty or acts in defiance, deviation and departure of the principles of law.

16. This position is again made clear in an unreported decision of this Court dated November 11, 2010 rendered in Civil Appeal No. 3785 of 2003. In the said case the State of U.P. by its order dated 03.06.2002 had rejected the request of the respondent Satyavrat Singh for renewal of the extension of his term as District Government Counsel (Criminal). The respondent had challenged the same in the Writ Petition. The Allahabad High Court had quashed the order 03.06.2002 refusing renewal of the term of the respondent as District Government Counsel (Criminal) and had directed the State Government to renew the term of the respondent as Government Counsel. While allowing the appeal filed by the State Government this Court has held as under:-

"It is difficult to discern as to how the High Court has upheld the unstatable proposition advanced by the respondent for extension of his term as Government Counsel. We wish to say no more in this matter since the subject matter that arises for our consideration is squarely covered by the decision of this Court in State of U.P. and another Vs. Johri Mal 2004 (4) SCC 714. This Court took the view that in the matter of engagement of a District Government Counsel, a concept of public office does not come into play. The choice of a counsel is for the Government and none can claim a right to be a counsel. There is no right for appointment of a Government Counsel.

The High Court has committed a grave error in renewing the appointment of the respondent as Government Counsel.

Needless to state that the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India cannot compel the State to utilize the services of an advocate irrespective of its choice. It is for the State to select its own counsel.

The impugned order of the High Court is set aside.

The appeal is accordingly, allowed."

17. Thus it was not open to the respondents to file Writ Petition under Article 226 of the Constitution for compelling the appellants to utilize their services as Advocates irrespective of choice of the State. It was for the State to select its own Counsel. In view of the poor performance of the respondents in handling/conducting criminal cases, this Court is of the opinion that the High Court committed a grave error in giving direction to the District Magistrate to forward better particulars of

10 candidates whose names were included in the two panels prepared pursuant to advertisement dated 16.01.2004 and in setting aside order dated 07-09-2004 of the Principal Secretary to the Chief Minister, U.P. calling upon the District Magistrate to send another panel/list for appointment to the two posts of A.D.G.C. (Criminal).

18. The directions given by the High Court in the impugned Judgment run contrary to the well-settled principles of law and therefore cannot be upheld. Thus, the appeal deserves to be allowed.

19. For the foregoing reasons the appeal succeeds. The Judgment dated 11.07.2005 rendered by the Division Bench of High Court of Allahabad in Civil Misc. Writ Petition No. 28444 of 2005 is set aside. The appeal accordingly stands disposed of. In peculiar facts of the case there shall be no orders as to cost.

.....J. [J.M. Panchal] .....J. [H.L.Gokhale] New Delhi;

May 04, 2011.