

MHCC020074432012



IN THE COURT OF SESSION FOR GREATER BOMBAY
AT MUMBAI
ORDER BELOW EXHIBIT-762
IN
SESSIONS CASE NO.548 OF 2012
(C.R.NO.44 OF 2012)

Vjay Bhivajirao Palande
presently in Judicial custody

... Applicant/
Accused No.1 (in person)

Versus

The State of Maharashtra
1. Principal Secretary,
Law and Judiciary Department,
Government of Maharashtra,
Madam Cama Road, Hutatma
Rajguru Chowk, Mantralaya,
Mumbai- 400 032.

2.The Director of Prosecution,
Through Law and Judiciary Department,
Government of Maharashtra,
Madam Cama Road, Hutatma Rajguru
Chowk, Mantralaya, Mumbai- 400 032.

3. Public Prosecutor,
Greater Mumbai
Old Secretariat Annex,
Sessions Court, Mumbai- 400 032.

4. Shri. Ujjwal Devrao Nikam,
Rajya Sabha Member and BJP spokesperson
2902, W-54, Bal Govinddas Road,
Near Ruparel College, Mahim,
Mumbai- 400 016.

... Respondents

Appearance :-

Accused No.1 in person.

Ld. Addl. PP. Jaysing Desai for the State.

Ld. SPP Ujjwal D. Nikam for the State.

**CORAM : HHJ R. J. PAWAR,
ADDITIONAL SESSIONS JUDGE
(COURT ROOM NO. 17)**

DATED : 05th FEBRUARY, 2026.

ORDER

The present application has been filed by the accused No.1 seeking urgent action against learned Ujjwal Devrao Nikam for simultaneous holding of the office of Special Public prosecutor and membership of Rajya Sabha.

2. It has been submitted by the accused No.1 that, the learned Ujjwal Nikam has been appointed as a member of Rajya Sabha and he still continues to hold the position of the Special Public Prosecutor for the State of Maharashtra. Further, Ld. Ujjwal Nikam has been appointed by the State Government and he is paid from public exchequers. Therefore, it is clear that he holds an office of profit under the Government of State. Further, as per Section 24 of the Code of Criminal Procedure, 1973 a Special Public Prosecutor in India is considered as a "Public Servant". The role of Special Public Prosecutor is to represent the State in criminal proceeding. Therefore, the Special Public Prosecutor has various responsibilities as a public servant. At the

most the learned Ujjwal Nikam as a member of Rajya Sabha, can handle private cases but he cannot hold the office of Special Public Prosecutor as it is an office of profit under the State Government.

3. According to the accused No.1, he has strong apprehension that learned Ujjwal Nikam being a member of Rajya Sabha and official spoke person of ruling BJP Government, he will use undue influence and power to tilt the case in his favour and will go to any length to seek conviction in this case. Learned Ujjwal Nikam has harbored a personal grudge and animus malus against the accused No.1 as he had vehemently opposed his re-appointment as Special Public Prosecutor in the present case. The accused No.1 has also apprehension that after appointment of learned Ujjwal Nikam as Special Public Prosecutor, he would be the ultimate sufferer and there would be maximum chances of causing prejudice to this Court which would be against fair trial. Hence, the present application.

4. The present application has been opposed by the respondent No.4 i.e. learned Ujjwal Nikam, the Special Public Prosecutor by filing his reply below Exhibit-762-A. It has been submitted that there is no such provision either under the old Code of Criminal Procedure, 1973 or Bhartiya Nagrik Surkhsha Sanhita, 2023 which would disqualify and/or restrain the Special Public Prosecutor from discharging his functions as the Special Public Prosecutor after he has been nominated by the Hon'ble President of India as a member of Rajya Sabha. Moreover, the appointment of Special Public Prosecutor is made purely on contract basis and his appointment is contractual engagement occupied temporarily and not holding any office permanently. There is also no master- servant relationship between the

State and Special Public Prosecutor. Therefore, the Special Public Prosecutor does not hold any office of profit under the State Government. The Special Public Prosecutor has been appointed by the order of Maharashtra Government dated 27.09.2012. Further, Article 102(1)(a) of the Constitution of India provides that the disqualification arises only when a member of parliament holds an office of profit under the Government. On perusal of notification dated 27.09.2012, it clearly reveals that the appointment of Special Public Prosecutor is case specific and as such not holding any office of profit. Therefore, it is prayed that the present application being misconceived, arbitrary, illegal, is liable to be rejected and it may kindly be rejected.

5. The present application has also been opposed by the respondents No.1 to 3 i.e. State of Maharashtra (Principal Secretary, Law and Judiciary Department, Mantralaya, Mumbai, Director of Prosecution, Mumbai and Public Prosecutor, Sessions Court, Mumbai) by filing their reply below Exhibit-762-C. It has been submitted that the Special Public Prosecutor has been appointed in this case by the notification of Maharashtra Government dated 27.09.2012. However, he had tendered his resignation on 26.04.2024. Thereafter, the respondent No.3 had appointed another additional public prosecution by official order dated 06.05.2024 to conduct the present case. Thereafter, the Maharashtra Government had again appointed learned Ujjwal Nikam as Special Public Prosecutor by its notification dated 10.06.2024. Further, as per the Section 24(8) of the Code of Criminal Procedure, 1973, the state has right to appoint any advocate as the Special Public Prosecutor. Further, the appointment of Special Public Prosecutor does not create any independent office as contemplated under Article 102(1) of the

Constitution of India as the appointment of Special Public Prosecutor does not create permanent office, which can be successively held and it is a contractual appointment. Therefore it is prayed that the present application may be rejected.

6. Heard the accused No.1 in person, learned Ujjwal Nikam, the Special Public Prosecutor and learned Jaysing Desai, Public Prosecutor for Gr. Mumbai.

7. In support of his submissions, the accused No.1 placed reliance on the Judgment of Hon'ble Supreme Court in the case of **Jaya Bachchan V/s. Union of India and Others. In Writ Petition (C) No.199 of 2006 dated 08.05.2006 (2006) 5 Supreme Court Cases 266: 2006 SCC OnLine SC 556** in that case it was held that, *"An office of profit is an office which is capable of yielding a profit or pecuniary gain. Holding an office under the Central or State Government to which some pay, salary, emolument, remuneration or non-compensatory allowance is attached, is "holding an office of profit". The question whether a person holds an office of profit is required to be interpreted in a realistic manner. Nature of the payment must be considered as a matter of substance rather than of form. Nomenclature is not important. In fact, mere use of the word "honorarium" cannot take the payment out of the purview of profit, if there is pecuniary gain for the recipient. Payment of honorarium, in addition to daily allowances in the nature of compensatory allowances, rent free accommodation and chauffeur driven car at State expense, are clearly in the nature of remuneration and a source of pecuniary gain and hence constitute profit.*

For deciding the question as to whether one is holding an office of profit or not, what is relevant is whether the office is capable of

yielding a profit or pecuniary gain and not whether the person actually obtained a monetary gain. If the “pecuniary gain” is “receivable” in connection with the office then it becomes an officer carries with it, or entitles the holder to, any pecuniary gain other than reimbursement of out of pocket/ actual expenses, then the office will be an office of profit for the purpose of Article 102(1)(a).

Where the office carries with it certain emoluments or the order of appointment states that the person appointment is entitled to certain emoluments, then it will be an office of profit, even if the holder of the office chooses not to receive/ draw such emoluments. What is relevant is whether pecuniary gain “receivable” in regard to the office and not whether pecuniary gain is, in fact, received or received negligibly.”

8. The accused No.1 also placed reliance on the Judgment of Hon'ble Bombay High Court in the case of **Dr. Deorao Laxman Anande V/s. Keshav Laxman Borkar**, A. F. O. D. No.737 of 1957 and Civil Appln. No.2738 of 1957, against decision of Member, Election Tribunal, Surat, in Election Petn. No. 190 of 1957 dated 14.11.1957 1957 SCC OnLine Bom 135: AIR 1958 Bom 314 : (1958) 60 Bom LR 217 : 13 ELR 334. In that case it was held that, *“In our opinion, the principal tests for deciding whether an office is under the Government, are (1) what authority has the power to make an appointment to the office concerned, (2) what authority can take disciplinary action and remove or dismiss the holder of the office and (3) By whom and from what source is his remuneration paid? Of these, the first two are, in our opinion, more important than the third one.”*

9. As against this, the learned Ujjwal Nikam, the Special Public Prosecutor placed reliance on the judgment of Hon'ble Supreme Court in the case of **State of Maharashtra and Others V/s. Prakash Prahlad Patil and Others, Criminal Appeal No.748 of 2009 dated 16.04.2009 (2010) 1 Supreme Court Cases (Cri.) 539 (2009)12 Supreme Court Cases 159**. In that case it was held that "*The courts cannot be called upon to undertake government duties and functions. The courts should not ordinarily interfere with a policy decision of the State. While exercising power of judicial review, the court is more concerned with the decision making process than the merit of the decision itself.*"

10. Also placed reliance on the judgment of Hon'ble supreme Court in the case of **Srimati Kanta Kathuria V/s. Manak Chand Surana, Civil Appeal No.1869 (N.C.E.) of 1968 dated 16.10.1969 (1969) 3 Supreme Court Cases 268**. In this case it was held that "*The language was accepted as generally sufficient by Lord Atkin and Lord Wright in Macmillan V. Guest (H. M. Inspector of Taxes) Lord Atkin observed at P 201: "There is no statutory definition of 'office'. Without adopting the sentence as a complete definition, one may treat the following expression of Rowlatt, J., in Great Western Railway Co. v. Bater, (1920) 3 KB, at p. 274, adopted by Lord Atkinson in that case, (1922) 2 AC, at p.15, as a generally sufficient statement of the meaning of the meaning of the word; 'an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders'.*"

11. Perused the record in the light of submissions of both the sides.

12. Article 102 (1)(a) of the Constitution of India states that “(1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament- (2) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by the Parliament by law not to disqualify its holder.” From perusal of Article 102 (1)(a) of the Constitution of India, it transpires that a person shall be disqualified for being a member of Rajya Sabha, if he holds any office of profit under the Government of India or any State. The judgment relied upon by the accused No.1, makes clear the position of law as to which kind of office is said to be office of profit. Therefore, before being chosen as, and for being a member of either house of parliament, it has to be seen whether he holds any office of profit under the Government of India or any State. From the appointment of learned Ujjwal Nikam, the Special Public Prosecutor, it is clear that he had been qualified for being a member of Rajya Sabha when he did not hold any office of profit. Article 102 (1)(a) nowhere states that any person shall be disqualified for being a Special Public Prosecutor if he holds any office of profit under the Government of India or any State. Therefore, it is clear from reading of Article 102 (1)(a) that the accused No.1 has misconceived the provisions of Article 102 (1)(a). Moreover, as per the provisions of Section 24 (8) of the Code of Criminal Procedure, 1973, the State Government is entitled to appoint any person as Special Public Prosecutor. Therefore, it is seen that the Court cannot interfere with

policy decision of State thereby appointing learned Ujjwal Nikam as Special Public Prosecutor as per the aforesaid decision of Hon'ble Supreme court in the case of State of Maharashtra and Others V/s. Prakash Prahlad Patil and Others.

13. In the circumstances, considering the facts of the case, submissions of both the sides and keeping in view the aforesaid judgments of Hon'ble Supreme Court and Hon'ble Bombay High Court, I find that the present application is not tenable in the eyes of law and hence, it deserves to be rejected. Hence, I pass the following order:-

ORDER

The Application Exhibit- 762 in Sessions Case No.548 of 2012 stands rejected and disposed of accordingly.

Date : 05.02.2026.

Typed on : 05.02.2026.
HHJ signed on : 10.02.2026.

(R. J. Pawar)
Additional Session Judge,
City Civil & Sessions Court,
Gr. Bombay (C.R.17)

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER.”		
Upload Date	Upload Time	Name of Stenographer
10.02.2026	05.15 p.m.	Vasanti D. Bhosale (Stenographer Grade-I)

Name of the Judge (With Court Room No.)	HHJ Smt. R. J. Pawar (Court Room No.17)
Date of Pronouncement of JUDGMENT/ORDER	05.02.2026
JUDGMENT/ORDER signed by P.O. on	10.02.2026
JUDGMENT/ORDER uploaded on	10.02.2026