IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

FRIDAY, THE 3RD DAY OF DECEMBER 2021 / 12TH AGRAHAYANA, 1943

WP(C) NO. 29093 OF 2020

PETITIONER:

ASHOK KUMAR M., AGED 36 YEARS,
S/O. LATE A. G. MANI, PULIKKALTHARA,
VALLANGI, NENMARA P.O., PALAKKAD - 678 508.

BY ADVS. S. SABARINADH
SMT. INDULEKHA JOSEPH

RESPONDENTS:

1 THE STATE OF KERALA,
REPRESENTED BY ITS CHIEF SECRETARY,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.

2 THE GENERAL ADMINISTRATION
(COMPASSIONATE EMPLOYMENT CELL) DEPARTMENT
REPRESENTED THROUGH SECRETARY, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.

3 THE SECRETARY, FINANCE DEPARTMENT
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM - 695 001.

4 THE PUBLIC WORKS DEPARTMENT
REPRESENTED THROUGH SECRETARY,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.

5 THE CHIEF ENGINEER (ADMINISTRATION)
PUBLIC WORKS DEPARTMENT, PUBLIC OFFICE COMPLEX,
MUSEUM P.O., THIRUVANANTHAPURAM - 695 033.

6 THE KERALA PUBLIC SERVICE COMMISSION
REPRESENTED BY ITS SECRETARY, THULASI HILLS,
PATTOM PALACE P.O., THIRUVANANTHAPURAM - 695004.

7 R. PRASHANTH,
S/O. K. K. RAMACHANDRAN NAIR (LATE),
RESIDING AT PRASHANTH BHAVAN,
ALATHUR P.O., CHENGANNUR - 678 541.

R1 TO R5 BY SRI. ASOK M. CHERIAN, ADDITIONAL ADVOCATE GENERAL
R6 BY ADV. SRI. P.C SASIDHARAN, SC, KERALA PUBLIC SERVICE COMMISSION - KPSC
R7 BY ADVS. SRI. SRI.K.JAJU BABU (SR.)
SMT.M.U.VIJAYALAKSHMI
SRI.BRIJESH MOHAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 03.12.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R"

J U D G M E N T

S. Manikumar, CJ

Instant Public Interest Litigation is filed for the following reliefs:

(i) Issue a writ, order or direction, in the nature of certiorari, quashing Exhibit-P1 G.O.(Ms.) No.79/2018/G.A.D dated 6.4.2018, issued by the Secretary, General Administration (Compassionate Employment Cell) Department, Thiruvananthapuram; and Exhibit-P3 Appointment Order No. E.C.2/8829/2018 dated 10.04.2018, issued by the Chief Engineer (Administration) to the 7th respondent;

(ii) Issue a writ of *quo warranto* and such other writ, order or direction, causing removal of the 7th respondent from the Government service and the post/office of the Assistant Engineer (Electronics) in the Public Works Department; and

(iii) Issue a writ, order or direction, in the nature of mandamus, commanding respondents 1, 3 and 4, to recover from the 7th respondent all monies, which were received as salary/ pay/allowances/increments/bonus/any other payment bearing any nomenclature, by him while he was holding the post of Assistant Engineer, from the State Exchequer, within a time frame to be stipulated by this Court.

2. Facts leading to the filing of the instant writ petition are that, respondent No.7, son of a deceased member of Kerala Legislative

Assembly from Chengannur Constituency, was appointed to the post of Assistant Engineer (Electronics), Public Works Department, Government of Kerala, vide G.O.(Ms.) No.79/2018/G.A.D dated 6.4.2018 (Exhibit-P1), issued by the 2nd respondent, viz., the General Administration (Compassionate Employment Cell) Department, represented through Secretary, Government Secretariat, Thiruvananthapuram, and Exhibit-P3 appointment order dated 10.04.2018, issued by the Chief Engineer (Administration).

3. Petitioner has further stated that MLA is not a Government servant and that his son, the 7th respondent, does not come under the purview of Exhibit-P4 G.O.(P) No.12/99/P&ARD dated 24.05.1999, issued in respect of compassionate employment.

4. He has further contended that Exhibits-P1 & P3 cannot be issued under Exhibit-P4 scheme, or under any other law in force, and therefore, issued without power, and thus, a nullity.

5. Petitioner has further stated that the post of Assistant Engineer (Electronics), in the 4th respondent Public Works Department, is a Gazetted Post, in the pay-scale of Rs.39,500-83,000/- and that the source

of appointment is, either by promotion or by direct recruitment, through Public Service Commission. The duties assigned to the said post are, in accordance with paragraph Nos.105.4 & 202.10 of the PWD Manual [revised as per G.O.(P) No.13/2012/PWD dated 1.2.2012 (Exhibit-P2)].

6. Petitioner has further stated that Public Service Commission, when it comes to the mode of direct recruitment of an Assistant Engineer, conducts a series of tests and thereafter interview, to ascertain the competency and suitability of a person to become an Assistant Engineer. According to the petitioner, once a person passes the standards set out by the PSC, he/she is found suitable and competent, in the eye of law.

7. Petitioner has further stated that the 7th respondent was appointed as per Exhibit-P3 order, which clearly states that "Compassionate Appointment for the Son of Late MLA". According to the petitioner, Exhibit-P4 is a compassionate scheme, solely applicable to Government servants and that the order in the nature of Exhibit-P3, cannot be said to have been issued in accordance with Exhibit-P4 scheme.

8. According to the petitioner, Exhibits-P1 & P3 orders cannot be said to be a policy. Even if the State Government maliciously defends their

act of unconstitutionality, claiming that Exhibits-P1 and P3, as their policy, it is in contravention to Article 16 of the Constitution of India, which cannot stand the test of law.

9. In the above circumstances, petitioner has sought indulgence of this Court, for three reasons, viz., (i) the merit system of equality envisaged by the Constitution, is sabotaged by Exhibits-P1 & P3 orders, (ii) young meritorious aspirants of public service have become scapegoats and (iii) every common taxpayer is suffering the incompetence and inefficiency of the likes of 7th respondent. Hence, this writ petition is filed for the reliefs stated supra.

10. In support of the prayers sought for, petitioner has raised the following grounds:

A. On the question as to whether petitioner has *locus standi* to approach this Court, he has contended that he is a public spirited individual and a taxpayer. 7th respondent is an illegal usurper of a Civil post, drawing 'public money', which includes petitioner's contributions as well. Petitioner, who is an educator, has approached this Court on behalf of the student community. There is no private motive/oblique interest behind this writ petition. He has no other private

interest or ill motive than to do his duty, as a fellow citizen to the society. That apart, he is also not planning to get into any of the public services.

B. Petitioner has further contended that the subject matter and issues portrayed in the writ petition are matters of utmost public importance and interest, because Exhibits-P1 and P3 are appointment orders to a Civil Post in the Government of Kerala, which is a gazetted post, and the issuance of Exhibits-P1 & P3 appointment orders to the 7th respondent is arbitrary, whimsical and is on the basis of favouritism and clear political agendas. Such arbitrariness by the 'Executive' of the State questions the very foundation of the Constitution and disregards the judicial system (check and balance) of the country.

C. Petitioner has further contended that Exhibit-P2 PWD Manual [revised as per G.O.(P) No.13/2012/PWD] dated 1.2.2012, in particular paragraphs 105.4 & 202.10, reveals that the post held by the 7th respondent is supposed to discharge multitudes of complex functions that affect the public at large. Either an experienced promotee /competent PSC hand is supposed to discharge the function, competence is assessed either through “Test of Competency” (by PSC) or through experience. According to the petitioner, 7th respondent is neither experienced nor

assessed competent by PSC. Therefore, he is absolutely incompetent to hold the post and such an incompetent person jeopardises the whole department as well as the beneficiaries of service i.e., the public.

D. Petitioner has further contended that a person, belonging to an average family, appears to be qualified in a direct recruitment conducted by PSC, would be deprived of his hard earned benefits, since the existing and arising vacancies would be filled by persons like respondent No.7 through illegal orders such as Exhibits-P1 & P3 which gives a message to the public that 'unless you are born into an affluent living conditions, you are destined to rot'.

E. On the aspect of maintainability of the writ petition, petitioner has contended that accountability of any Government formed under the Indian Constitution, which can only be recalled once in five years through ballot, can only be ensured through judicial mechanism. Article 226 of the Constitution empowers this Court to entertain any matter for enforcement of the fundamental rights and ‘for any other purposes’. According to the petitioner, Exhibit P1 & P3 falls under both of these heads.

F. Petitioner has further contended that Exhibits P1 & P3 orders violate Articles 16 and 14 of the Constitution of India, guaranteed upon every citizen of this State. The

challenge upon Exhibits P1 & P3 cannot be treated as a service matter. it is rather relating to the ex facie unconstitutional functioning of the State Government and fraud upon the Constitution and Public.

G. Relying on the decision of the Hon'ble Apex Court in **Chandra Kumar v. Union of India** [(1997) 3 SCC 261], petitioner has contended that functioning of an Administrative Tribunal is supplemental to the High Court under Article 226 of the Constitution and the Hon'ble Apex Court under Article 32. Therefore, such a statutory remedy cannot prevent a public spirited person from taking recourse to Article 226, since it is the only way approved. He has also relied on the decision in **Hari Banshi Lal v. Sahodar Prasad Mahto and Others** (**AIR 2010 SC 3515)**.

H. Petitioner has also contended that Exhibits-P1 and P3 orders are *ultra vires* Exhibit-P4. It could be seen that the impugned orders are issued under 'Compassionate Appointment' and are claimed to be passed under Exhibit-P4 scheme, which is specifically intended for 'dependents of Government Servants who die-in-harness'. In this case, the 7th respondent was already a dependent of his father, who was an MLA. An MLA cannot be a Government Servant going by Rule 2(d) of the Kerala Civil Service (Classification, Control & Appeal) Rules, 1960. Referring to the meaning of

Government Servant in the said rules, petitioner has submitted that Government servant is a person, who is a member of a service, State or Subordinate or who holds a civil post under the Kerala Government. He also referred to Rule 2(f) of the KCS Rules and submitted that service means a group of persons classified by the State Government as a State or Subordinate Service. Hence, he submitted that by any stretch of imagination, an MLA cannot be said to be a Government Servant and that an MLA can never be a part of 'Service', as contemplated under the provisions of Kerala Civil Service (Classification, Control & Appeal) Rules, 1960.

I. Petitioner has further contended that the impugned orders are *ultra vires* to Article 309 of the Constitution of India and service laws of the State. Article 309 read with Section 2 of the Kerala Public Service Act, 1968 empowers the State Government to formulate rules/regulations to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State of Kerala. That apart, he has also invited our attention to Rule 3 in Part II of the Kerala State & Subordinate Service Rules, 1958. The rules applicable to the post now adorned by the 7th respondent only permits direct recruitment through PSC or by promotion. None of the rules/ regulations/statutes passed under Article 309 of the Constitution of India read with Section 2 of Act, 1968

permits issuance of Exhibits-P1 and P3 orders. That apart, petitioner has raised various contentions as regards the circumstances under which, a writ of *quo warranto* can be issued.

11. Refuting the averments made in the writ petition, the Principal Secretary to the Government, General Administration Department, Secretariat, Thiruvananthapuram, 2nd respondent, has filed a detailed counter affidavit contending, *inter alia*, that it is well settled that certiorari jurisdiction can be exercised only at the instance of a person, who is qualified to the post and is a candidate for the post.

12. He has further contended that there is no averment in the writ petition that the petitioner is qualified to become an Assistant Engineer in PWD or he has applied to the said post.

13. Challenge against Exhibits-P1 & P3 orders alleging contravention of Article 16 of the Constitution of India, cannot be urged by one, who is not an aspirant to the post. Respondent No.2 has also contended that this view is fortified by a catena of decisions by this Court, as well as the Hon'ble Supreme Court.

14. As regards the 2nd prayer sought for, it is submitted that for issuance of a writ of *quo warranto*, petitioner has to satisfy the Court that the appointment is contrary to the statutory rules, and without authority. It was further contended that, it is well settled that a writ of *quo warranto* can be issued only in exceptional circumstances and that, it can be issued only against an usurper of an office, in other words, against a person, who holds an office, without any authority. He has also contended that it is the duty of the petitioner to establish that the 7th respondent is holding a post, without any authority.

15. Respondent No.2 has further contended that the Government have issued Exhibit-P1 order invoking the power under Rule 39 of Part II KS & SSR. Under Rule 39, power and authority is conferred on the Government to deal with a special circumstance, as may appear to the Government to be just and equitable, if the Government thinks so.

16. Rule 39 further confers power on the Government, not only to cover exemption from the condition regarding service, but also, regarding exemption, in the matter of appointment to a service, when it appears to the Government that it would be just and equitable.

17. The 2nd respondent has further contended that as per the Cabinet decision on 24.01.2018, Government have decided to offer employment assistance to the 7th respondent, S/o. K. K. Ramachandran Nair, who died accidentally while in service, as a member of the Legislative Assembly from Chengannur constituency. The 7th respondent is a B. Tech Graduate in Electronics and Communication Engineering. His request was to appoint him as Assistant Engineer either in PWD or in any other similar departments like Local Self Government Department and Harbour Engineering Department. Since, there was no vacancy in the PWD Department or in any other department, the Council of Ministers decided to appoint the 7th respondent as Assistant Engineer in PWD as a special case, in relation to the existing rules, after creating a supernumerary post of Assistant Engineer (Electronics) in P.W.D. Pursuant to the same, consequential orders were issued by the 5th respondent as per Exhibit-P3.

18. That apart, the 2nd respondent has contended that Exhibit-P4 scheme has no application insofar as the petitioner's case is concerned. The 2nd respondent also submitted that Exhibit-P1 order dated 6.4.2018 is

not an order issued under compassionate employment scheme and the contention otherwise made in the writ petition is, without understanding the legal and factual aspects of the matter.

19. Respondent No.2 has further contended that though the petitioner has sought for issuance of a writ of *quo warranto*, the writ petition lacks the ingredients to justify the said prayer. As per Rule 9 of the KCS and CCA Rules, Government is the appointing authority for all the posts to the State and Subordinate Services. With the above power, in order to do justice to a bereaved family, Government have invoked Rule 39, an inherent power, and given appointment, considering the qualification of the 7th respondent and other eligibility criteria. When such a power is exercised, a public interest litigant cannot state that the 7th respondent is holding the post, without any authority.

20. Relying on the decision of the Hon'ble Apex Court in **Hari Bansh Lal v. Sahodar Prasad Mahto** [(2010) 9 SCC 955], the 2nd respondent contended that for issuance of a writ of *quo warranto*, High Court has to satisfy that the appointment is contrary to the statutory rules. For the foregoing reasons, he prayed for dismissal of the W.P.(C).

21. Respondent No.7 has filed a counter affidavit, contending, *inter alia*, as under:

> "(a) At the outset, it is submitted that the instant Writ Petition has been filed on a mistaken notion regarding the appointment of respondent No.7. It is further submitted that the appointment was not under the Compassionate Employment Scheme, based on Ext-P4 Government Order. On the other hand, the Government, invoking its power under Rule 39 of Part II KS&SSR, has decided to grant the 7th respondent appointment based on his qualification. Of course, compassion is the motive behind the order.
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> (b) Respondent No.7 has further contended that the Government is empowered to issue orders, in the nature of Ext-P1, which is based on Cabinet decision, and therefore, the challenge against his appointment, cannot be sustained. It is further submitted that he joined the duty pursuant to Exts-P1 and P3 on 16.4.2018; that he got married on 6.6.2019 telling the bride and her family; that he holds a permanent appointment as per Ext-P3; and that his appointment was regularized as per Order No. E.C.2/8829 dated 28.9.2019 issued by the 5th respondent. The above Writ Petition is filed nearly three years after the issuance of Ext-P1. If Ext-P1 is interfered with, it would result in injustice. Hence, there is no justification to exercise the discretionary jurisdiction.
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> (c) Respondent No.7 has further contended that the Writ Petition has been filed primarily contending that the

member of the Legislative Assembly is not a civil servant and therefore, 7th respondent cannot be granted appointment under the Compassionate Employment Scheme, in terms of Exhibit-P4 Government Order. As stated supra, the appointment of the 7th respondent was not under the Compassionate Employment Scheme or as per Exhibit-P4 Government order. The Cabinet took a decision on 24.01.2018 to appoint the 7th respondent to a suitable post according to his qualification and therefore, the same cannot be said to be against the rules. According to the 7th respondent, the Government is empowered to take a decision in respect of any candidate for appointment to a service *de hors* any rules. If that be so, the 7th respondent contended that his appointment cannot be found to be faulty as stated by the petitioner.

(d) The petitioner has no case that respondent No.7 is not qualified for appointment to the post of Assistant Engineer. Therefore, when the appointing authority finds the 7th respondent eligible for appointment, there is no justification for questioning the same.

(e) Respondent No.7 has further contended that as per the provisions of the Kerala Financial Code, the Government is empowered to create supernumerary posts as per the prevailing circumstances, which is what has been done in the case of the 7th respondent. Since, there was no vacancy for accommodating the 7th respondent as the Assistant Engineer, a supernumerary post was created by the Government, which is well within the jurisdiction and

authority of the Government. There is no public interest as claimed in the writ petition and the same is filed only due to political considerations and more so, in view of the election to the Legislative Assembly.

(f) Respondent No.7 has further stated that the contention of the petitioner that the post held by the 7th respondent requires high expertise cannot be sustained. It is for the appointing authority to decide the eligibility and sustainability of a person to hold a particular post. In the instant case, the Government has found it proper to post the 7th respondent as Assistant Engineer, which is not liable to be annulled after the lapse of more than two years. In such circumstances, he prayed for dismissal of the W.P.(C).

22. The paramount contention advanced by Mr. S. Sabarinadh, learned counsel for the petitioner, is that accountability of any Government, formed under the Indian Constitution, which can only be recalled once in five years through ballot, can only be ensured through judicial mechanism, and therefore, petitioner has no other alternative remedy than to approach this Court seeking to exercise the power under Article 226 of the Constitution of India, to issue a writ of *quo warranto* calling upon the 7th respondent, who is appointed in a supernumerary post, without any selection process envisioned under the laws made

thereto, as to how the 7th respondent is continuing in the post of Assistant Engineer (Electronics).

23. He further submitted that the State Government has taken Exhibit-P1 decision in G.O.(Ms.) No.79/2018/G.A.D dated 06.04.2018, to make compassionate appointment, by creating a supernumerary post of Assistant Engineer (Electronics) in the Public Works Department, which according to the petitioner, is illegal, since a supernumerary post can only be created in accordance with the provisions of the Kerala Financial Code. Such provisions are violated.

24. In support of the above contention, learned counsel for the petitioner referred to Exhibit-P6, the relevant portion of Kerala Financial Code, Volume I, Seventh Edition, in particular paragraph 69 thereto, which states that in making appointments of supernumerary posts, the principles contained therein should be followed.

25. Learned counsel for the petitioner further submitted that Exhibit-P1 order dated 6.4.2018, creating a supernumerary post of accommodating the 7th respondent, and Exhibit-P3 order of appointment dated 10.04.2018, said to be in accordance with the order of the

Government, in the electronics wing of Public Works Department, issued by the Chief Engineer (Administration), are unconstitutional. That apart, it is contended that Exhibit-P4 scheme dated 24.05.1999 was introduced by the Government in public services for compassionate employment of the dependents of Government servants, who die in harness.

26. Learned counsel for the petitioner further submitted that in the present case, appointment of the 7th respondent is made consequent to the death of a Member of Legislative Assembly, which is not in accordance with the scheme prepared by Government, for that purpose.

27. He further submitted that it is an undisputed fact that under the scheme, there is no enabling provision for appointment of a son of an MLA to any public services in the State. Thus, according to the learned counsel, Exhibits-P1 Government order dated 6.4.2018 issued by the 2nd respondent and Exhibit-P3 appointment order dated 10.04.2018 issued by the Chief Engineer (Administration) to the 7th respondent are *ultra vires* to Article 309 of the Constitution of India and service laws of the State.

28. Apart from the above, it is also contended that going by Rule 2(d) of the Kerala Civil Services (Classification, Control and Appeal) Rules,

1960, MLA is not a Government servant. It is also pointed out that as per Rule 2(f) of the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960 , “service” means a group of persons classified by the State Government as a State or Subordinate Service, as the case may be.

29. According to the learned counsel for the petitioner, by any stretch of imagination, a Member of Legislative Assembly can never be part of Government service. Therefore, it is contended that respondent No.7 is an usurper to the services of the State and requires to be removed by issuing a writ of *quo warranto*.

30. *Per contra*, Mr. Asok M. Cherian, learned Additional Advocate General appearing for respondents 1 to 5, contended that certiorari jurisdiction can be exercised only at the instance of a person, who is qualified to the post and is a candidate for the post, and in the absence of any such averment that the petitioner is qualified to be appointed as an Assistant Engineer (Electronics) in the Public Works Department or he has applied to the said post, petitioner is not entitled to challenge the appointment made by the State Government, creating a supernumerary post. He also contended that challenge against Exhibits-P1 and P3 orders

violate Articles 14 and 16 of the Constitution of India, cannot be urged by the petitioner, who is not an aspirant to the post in question.

31. Learned Additional Advocate General further contended that for issuance of a writ of *quo warranto*, petitioner has to satisfy the Court that the appointment of respondent No.7 is contrary to the statutory rules and without authority, the 7th respondent is holding the post.

32. He further contended that the State Government has issued Exhibit-P1 order dated 6.4.2018, in exercise of the powers under Rule 39 of Part II Kerala State & Subordinate Service Rules, 1958, and by virtue of the same, authority is conferred on the Government to deal with a special circumstance, just and equitably, if the Government thinks so.

33. He also contended that the power conferred under Rule 9 of Part II KS&SSR is not only to cover exemption from the condition regarding service, but also, regarding exemption in the matter of appointment to a service, when it appears to the Government to deal with just and equitable situations.

34. Learned Additional Advocate General further submitted that the 7th respondent is a B. Tech Graduate in Electronics and Communication

Engineering, and that he made a request for appointing him either in PWD or in other similar departments, like Local Self Government Department and Harbour Engineering Department. But, since there was no vacancy in PWD or in any other departments, the Council of Ministers have decided to appoint respondent No.7 as Assistant Engineer in PWD, as a special case in relaxation to the existing rules, after creating a supernumerary post of Assistant Engineer (Electronics) in PWD.

35. Yet another contention advanced by the learned Additional Advocate General is that since the petitioner has failed to plead and prove that the person, who has been given compassionate appointment, was not having the requisite qualification prescribed for the post, which he holds, petitioner is not entitled to seek for a writ of *quo warranto*, which is a prerogative writ issued by the Constitutional courts, if the situation absolutely warrants and when any appointment is made contrary to the statutory provisions.

36. Apart from the above, learned Additional Advocate General contended that as per Rule 9 of KCS(CCA) Rules, 1960 , Government is the appointing authority for all the posts in the State and Subordinate

Services and by invoking the said rule, Government is entitled as of right, to invoke Rule 39 of Part II KS & SSR, which is an inherent power to make appointment and to do justice to a bereaved family. He also contended that Assistant Engineer is not discharging a sovereign function, as he is subordinate to superior officers, and on this score also, the petitioner is not entitled to challenge the appointment by filing a writ petition, seeking for a writ of *quo warranto*.

37. Mr. K. Jaju Babu, learned Senior Counsel appearing for the 7th respondent, submitted that the issue to be decided by this Court is that taking into account the plight of the family of an MLA, and after realising that the family is not supported by adequate economic and financial situations, the Government have decided to create a supernumerary post, and provide appointment to the 7th respondent, and therefore, when power is conferred on the State Government under Rule 39 of Part II KS & SSR, to make an appointment, petitioner is not entitled to challenge the same because, the Government have exercised its absolute administrative power, provided under Rule 39.

38. He also submitted that in the instant case to decide the issue,

rather than the head, the Court may engage its heart, so as to render justice to the family of the deceased MLA.

39. In reply to the contentions raised by both the State, as well as the 7th respondent, in their respective counter affidavits, the petitioner has filed a reply affidavit along with additional documents.

40. Heard Mr. S. Sabarinadh, learned counsel for the petitioner, Mr. Asok M. Cherian, learned Additional Advocate General for the State, Mr. K. Jaju Babu, learned Senior Counsel appearing for the 7th respondent, and perused the material on record.

41. One of the contentions advanced by the learned Additional Advocate General is that petitioner has no *locus standi* to file this writ petition, as he is not a person aggrieved. At this juncture, it should be noticed that the writ petition is filed as a Public Interest Litigation and not as a person aggrieved.

42. As this juncture, we deem it fit to consider what is 'public interest' and 'Public Interest Litigation', and when a Public Interest Litigation can be filed as hereunder:

(i) In Strouds Judicial Dictionary, Volume 4 (IV Edition), 'Public Interest' is defined as under:

> "Public Interest a matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected."

(ii) In Black's Law Dictionary (Sixth Edition), "public interest" is defined as under:

> "Public Interest something in which the public, or some interest by which their legal rights or liabilities are affected. It does not mean anything the particular localities, which may be affected by the matters in question. Interest shared by national government...."

(iii) In **Forward Construction Co. v. Prabhat Mandal (Regd.)**, [(1986) 1 SCC 100], it has been held as under:

> "2. Public interest litigation is a comparatively recent concept of litigation but it occupies an important status in the new regime of public law in different legal systems. By its very nature, the concept of public interest litigation is radically different from that of traditional private litigation. Ordinary tradition litigation is essentially of an adversary character where there is a dispute between the two litigating parties, one making the claim or seeking relief against the other and the other opposing such claim or resisting such relief. While public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another, as happens in the case of ordinary litigation, it is intended to prosecute and vindicate public interest which demands that violation of constitutional or legal rights of a large number of people, who are poor, ignorant or socially and economically in disadvantaged position, should not go unnoticed, unredressed for that would be destructive

> of the rule of law. Rule of law does not mean protection to a fortunate few or that it should be allowed to be prosecuted by vested interests for protecting and upholding the status quo. The poor too have a civil and political right. Rule of standing evolved by Anglo-Saxon jurisprudence that only a person wronged can sue for judicial redress may not hold good in the present setting. Therefore, new strategy has to be evolved so that justice becomes easily available to the lowly and the lost. Law is not a closed shop. Even under the old system it was permissible for the next friend to move the court on behalf of a minor or a person under disability or a person under detention or in restraint. Public interest litigation seeks to further relax the rule of locus standi."

43. Another contention raised by the learned Additional Advocate General is that Public Interest Litigation in service matters is not maintainable. It is well settled that there is an exception, i.e., writ of *quo warranto*. In **Narendra Mishra v. The State of Bihar and Ors.** reported in AIR 2015 Pat 69, the High Court of Patna held as under:

> "29. A writ of quo warranto is a writ based upon challenge of a right of a person to hold public office and is maintainable by any one at large. That is different from a PIL as generally understood. Keeping this in mind, if we see the decision in the case of Salil Sabhlok (supra), the Apex Court therein had clearly held that what was in challenge was not an appointment of a person holding a civil post. In other words, what was challenged by way of PIL was not a service matter, but what was challenged was selection of a person holding a constitutional post of the Chairman of the Public Service Commission. It was

clearly a case of quo warranto and not a case of PIL simplicitor in a service matter. I am constrained to observe that the decision in **State of Punjab v. Salil Sabhlok and Ors.** [(2013) 5 SCC 1], relied upon by Mr. Santosh Kumar, is not an authority for the proposition he has sought to canvas.

30. To me, the law, in relation to PIL, is clear. A PIL is not to be an adversarial litigation; but inquisitorial in character. PIL is meant to deal with larger public interest litigation at the behest of public spirited person(s) espousing cause(s) of people, who are voiceless and who may not be in a position to move Courts to vindicate their rights. It is a litigation claiming no personal right and claiming no personal relief. The moment an individual claims to enforce a personal right and claims a personal relief, it ceases to be a subject matter of PIL and is not maintainable as such; more particularly, if the subject matter relates to service dispute. Enforcement of personal right and asking for a personal relief are clearly beyond the object with which PIL was conceived. Individuals have well defined forums for vindicating their individual rights and PIL is not for the said purpose nor can individual disputes be brought for adjudication in a PIL and, in fact, in terms of the Patna High Court Rules relating to PIL, a certificate is required to be submitted by an applicant stating that none of his personal interest is involved in the public interest litigation, whereas the prayers, for stay of suspension and quashment, made by Sri Kuldip Narayan had no element of public interest, but purely private and individual interest.

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117. No one has challenged the legal proposition that in a PIL (public interest litigation and not personal or private interest litigation), pure service matter cannot be

> raised, except to a certain extent in quo warranto proceedings of PIL in nature. Service matters are outside the scope of PIL proceedings. Then, if suspension be a service matter, it cannot be impugned in a PIL. In quo warranto, no one challenges suspension but challenges appointment/holding of public office. If these be the positions, when no final order warranting quashment of suspension can be passed in a PIL, then, can any stay application be at all entertained? Answers must be in the negative. It would have been entirely a different fact situation, if Sri. Kuldip Narayan had merely brought the order of suspension to the notice of the Court in the second PIL and pointed out that because of the suspension order, he is unable to comply with the earlier orders of the Court and, then, leaving it to the Court to decide as to what steps are to be taken, which could, in appropriate case, be in the contempt jurisdiction but after due notice in this regard. But that was not to be; rather, he invited, in a PIL, the Court to adjudicate upon the merits of suspension order including mala fide on the part of the Government. This surely is beyond the ambit of PIL. He was not remediless."

44. That apart, in **Xavier P. Mao v. Union of India (UOI) and Ors.** [2007 (2) GLT 87], the Gauhati High Court held as under:

> "4. Thus, the question whether a person has the locus standi to bring a proceeding under Article 226 of the Constitution depends mostly on whether he possesses a legal or fundamental right and whether such right has been violated. The well-known recognized exceptions are a writ of habeas corpus, a writ of quo warranto and a Public Interest Litigation (PIL). No other exception appears to have been developed as yet by the Apex Court.....

> 6. Reading the propositions of law laid down in D.C. Wadhwa Case (supra), and the observations made in S.P. Gupta case (supra), extracted above in juxtaposition, in my considered view, unmistakably reveals that the law on standing that only a person whose legal or constitutional right has been infringed can maintain a writ petition still holds good and that the grievances ventilated by the petitioner No. 1 in D.C. Wadhwa case (supra) were allowed to be raised as a public interest litigation and not as an ordinary writ petition. That is why the Apex Court has time and again warns that judgment of a Court of law should not be read like Euclid's theorem. To quote, it is neither desirable nor permissible to pick out a work or a sentence from the judgment of the Court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by the Supreme Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Supreme Court. While applying the decision of the Supreme Court to the later case, the Courts must carefully try to ascertain the true principle laid down by the decision and not to pick words or sentences from the judgment divorced from the context of the question under consideration by the Court (see CIT v. Sun Engg. Works (P) Ltd. [1992] 198 ITR 297 (SC) . At the risk of repetition, it is reiterated that a judgment of a Court of law cannot be read like a statute. It is manifest that instead of helping the case of the petitioner, D.C. Wadhwa case (supra), which is a decision of the Constitution Bench, restated the well-settled and well-recognized law of locus standi that only a person whose legal right has been affected can challenge the action or inaction of public authorities and that this rule is departed from only in the case of a writ of quo warranto, a writ of habeas corpus and public interest litigation."

45. The Constitution Bench of the Hon'ble Supreme Court in **The University of Mysore and another v. C.D. Govinda Rao and another** (AIR

1965 SC 491) while dealing with the nature of writ of quo warranto has observed as under:-

> "7. ...Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the enquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office, in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not."

46. In **Centre for PIL and Another v. Union of India and another** [(2011) 4 SCC 1], Their Lordships of the Hon'ble Supreme Court have laid down the requisites and object of issuance of writ of quo warranto.

Paragraph 51 states as under:-

> "51. The procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions. Before a citizen can claim a writ of quo warranto he must satisfy the court inter alia that the office in question is a public office and it is held by a person without legal authority and that leads to the inquiry as to whether the appointment of the said person has been in accordance with law or not. A writ of quo warranto is issued to prevent a continued exercise of unlawful authority."

47. In **Central Electricity Supply Utility of Odisha v. Dhobei Sahoo and others** [(2014) 1 SCC 161], the Hon'ble Supreme Court held in no uncertain terms that writ of *quo warranto* can be issued only when person holding public office lacks eligibility or when appointment is contrary to statutory rules. Paragraph 21 of the decision reads as under:

> "21. From the aforesaid exposition of law it is clear as noonday that the jurisdiction of the High Court while issuing a writ of quo warranto is a limited one and can only be issued when the person holding the public office lacks the eligibility criteria or when the appointment is contrary to the statutory rules. That apart, the concept of locus standi which is strictly applicable to service jurisprudence for the purpose of canvassing the legality or correctness of the action should not be allowed to have any entry, for such allowance is likely to exceed the limits of quo warranto which is impermissible. The basic purpose of a writ of quo warranto is to confer jurisdiction on the constitutional courts to see that a public office is not held by usurper without any legal authority."

48. In the light of the above decisions, contention of the learned Additional Advocate General as to the maintainability of the writ petition cannot be countenanced.

49. As a writ of *quo warranto* is sought for by the petitioner, let us consider a few decisions on the said aspect.

(i) In **J. A. Samaj v. D.Ram**, reported in **AIR 1954 Pat 297**, election to the Working Committee of the Bihar Rajya Arya Pratinidhi Sabha, was challenged by a writ of *quo warranto*, and the Hon'ble High Court of Patna, held as under:-

> "The remedy which Article 226 contemplates is a, public law remedy for the protection and vindication, of a public right. It is essential in this connection to remember that there is a distinction between *jus privatum* and *jus publicum* which is the most fundamental distinction of corpus juris. This Roman distinction has been carried into modern law and the scope of public law in this context embraces all the rights, and duties, of which the State or some individual holding delegated authority under it, is one part and the subject is the other part. The language of the Article 226 supports the inference that the remedy is provided only for the assertion of a public law right. Article 226 states that the High Court shall have power to issue to any person or authority, including it appropriate cases any Government, directions, orders or writs, including writs in the nature of *habeas corpus*, man damns, prohibition, *quo warranto* and certiorari. All these writs are known in English law as prerogative writs, the reason being that they are specially associated with the King's name. These writs were always granted for the protection of public interest and primarily by the Court of the King's Bench. As a matter of history the Court of the King's Bench, was held to be *coram rege ipso* and was required to perform quasi-governmental functions. The theory of,

> the English law is that the King himself superintends the due course of justice through his own Court—preventing cases of usurpation of jurisdiction and insisting on vindication of public rights and personal freedom of his subjects. That is the theory of the English law and our Constitution makers have borrowed the conception of prerogative writs from the English law.The interpretation of Article 226 must therefore be considered in the background of English law and so interpreted, it is obvious that the remedy provided under Article 226 is a remedy for the vindication of a public right."

(ii) In **The University of Mysore and Ors. v. C.D. Govinda Rao and Ors**. (AIR 1965 SC 491), the Hon'ble Supreme Court held as under:

> "6. The judgment of the High Court does not indicate that the attention of the High Court was drawn to the technical nature of the writ of quo warranto which was claimed by the respondent in the present proceedings, and the conditions which had to be satisfied before a writ could issue in such proceedings.
>
> 7. As Halsbury has observed :
>
> "An information in the nature of a quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to inquire by what authority he supported his claim, in order that the right to the office or franchise might be determined."
>
> 8. Broadly stated, the quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has not title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the Judiciary a weapon to control the Executive from making appointment to

public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office, who might be allowed to continue either with the connivance of the Executive or by reason of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the Court that the office in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to the enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not.

9. In the present case, it does not appear that the attention of the Court was drawn to this aspect of the matter. The judgment does not show that any statutory provisions for rules were placed before the Court and that in making the appointment of appellant No. 2 these statutory provisions had been contravened. The matter appears to have been argued before the High Court on the assumption that if the appointment of appellant No. 2 was shown to be inconsistent with the qualification as they were advertised by appellant No. 1, that itself would justify the issue of a writ of quo warranto. In the present proceedings, we do not propose to consider whether this assumption was well-founded of not. We propose to deal with the appeals on the basis that it may have been open to the High Court to quash the appointment of appellant No. 2 even if it was shown that one or the other of the qualifications prescribed by the advertisement published by appellant No. 1 was not satisfied by him."

(iii) In **P.L. Lakhanpal v. A.N. Ray and Ors.** reported in **AIR 1975 Delhi 66**, the Hon'ble Delhi High Court, held as under:-

"(7) Before I deal with the points raised, I will state what I understand to be the scope and ambit of a writ of quo warranto. A writ of quo warranto poses a question to the holder of a public office. In plain English language, the question is "where is your warrant of appointment by

which you are holding this office? " In its inception in England such a writ was a writ of right issued on behalf of the Crown requiring a person to show by what authority he exercised his office, franchise, or liberty. Webster's Third New International Dictionary, Volume Ii, describes it as "a legal proceeding that is brought by the state, sovereign, or public officer, has a purpose similar to that of the ancient writ of quo warranto, is usually criminal in form and sometimes authorizes the imposition of a fine but is essentially civil in nature and seeks to correct often at the relation or on the complaint of a private person a usurpation, misuser, or nonuser of a public office or corporate or public franchise, and may result in judgments of ouster against individuals and of ouster and seizure against corporations."

(8) HALSBURY'S Laws of England, Third Edition, Volume 11, Para 281 (1) contains a summary of the decisions of English Courts with regard to the discretion of the Court in issuing a writ of quo warranto. It is said:-

"AN information in the nature of a quo warranto was not issued, and an injunction in lieu thereof will not be granted, as a matter of course. It is in the discretion of the Court to refuse or grant it according to the facts and circumstances of the case..... the Court might in its discretion decline to grant a quo warranto information where it would be vaxatious to do so, or where an information would be futile in its results, or where there was an alternative remedy which was equally appropriate and effective."

(9) The leading case on the subject of quo warranto from which many of the statements are derived is R. v. Speyer : (1916) 1 K.B. 595. Lord Reading, Chief Justice has observed:-

> "If the irregularity in the appointment of an office held at pleasure could be cured by immediate reappointment, the Court in the exercise of its discretion would doubtless refuse the information."

Lush, J. expressed the view that the Court would not make an order ousting the holders of public offices from their office if the existing defect, if there is one, could be cured, and they could be reappointed. Rex v. Stacey : 99 Engl Rep 938 holds that writ of quo warrant, is not a motion of course and it is in the discretion of the Court to issue it considering the circumstances of the case. Frederic Guilder Julius v. The Right Rev. The Lord Bishop of Oxford : The Rev. Thomas Thellusson Carter : 5 AC 214 (3) also states that the issue of writ of quo warranto is in the discretion of a Court. The Canadian view as stated in The **King excel Boudret v. Johnston** : (1923) 2 DLR 278 is that the Court has to take into consideration public interest, the consequences to follow the issue of a writ of quo warranto and all the circumstances of the case. These general propositions have been accepted in America as appears from the statements contained in sections 5, 9, 10 and 18 in American Jurisprudence, Second Edition, Volume 65.

(10) The above views and statements indicate and reflect the principles which have guided courts outside our country in issuing writs of quo warranto. There is abundant authority that these principles have been accepted and applied in this country. **University of Mysore and another v. C. D. Govinda Rao and another** [1964] 4 SCR 575 affirms some of these principles. One is that a writ of quo warranto is a writ of technical nature. The following statement in Halsbury's Laws of England, Third Edition, Volume Ii, page 145 is quoted with approval:-

> "An information in the nature of a quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to inquire by what authority he supported his claim, in order that the right to the office or franchise might be determined." It is then stated:- "Broadly stated, the quo warranto proceeding affords a judicial remedy

> by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the judiciary a weapon to control the Executive from making appointments to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office, who might be allowed to continue either with the connivance of the Executive or by reason of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the Court that the office in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to the enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not."

(11) The other cases cited hereafter affirm and apply some other principles.

(12) Now, one of the main heads in the contention of the Attorney General, as is pointed out later, is based on **R v. Speyer** (supra) and it is that a writ of quo warranto will not issue if it is found that the issuance of such a writ will be futile where the alleged usurper could be immediately re-appointed to the very post. It is contended on behalf of the petitioners that this principle has not been accepted in this country, that the limitations mentioned for the issue of a writ of quo warranto are not applicable here and that the scope of quo warranto as also of other writs which can be issued

by the High Courts and the Supreme Court is wider in view of the words "in the nature of" appearing in Articles 32 and 226 of the Constitution. These words do not justify the argument because these very words preface the words "a Quo Warranto" as is apparent from para 273 at page 145 of Halsbury's Laws of England, Third Edition, Volume II. Certain cases have been cited to support this proposition. I do not think any of them supports it. The first case is **Statesman (Private) Ltd. v. H. R. Dev and others**:[1968] 3 SCR 614. The question in this case was whether a Sub-Deputy Collector vested with magisterial powers could be said to have held a judicial office within the meaning of Section 7(3)(d) of the Industrial Disputes Act, 1947 so as to make him eligible for appointment as the Presiding Officer of a Labour Court. The case started by way of a writ of certiorari under Article 226 of the Constitution against the order of the Presiding Officer. It was held that a Magistrate holds a judicial office. Sub-section (1) of section 9 of the Act conferred finality to orders Constituting Boards etc. It was in the context of this section that a passing observation was made by the Supreme Court that "although the provisions of s. 9 cannot shut out an inquiry (if there is a clear usurpation) for purposes of a writ of quo warranto but at least in an unclear case the intent of the legislature is entitled to great weight ..... The High Court in a quo warranto proceeding should be slow to pronounce upon the matter unless there is a clear infringement of the law." In effect, these observations are no different than those in **University of Mysore and another v. C. D. Govinda Rao and another**, (supra). It was further observed that it may be open in a quo warranto proceeding to challenge the appointment of persons employed on multifarious duties and in addition performing some judicial functions on the ground that they do not hold essentially a judicial office because they primarily perform other functions. This case is not relevant to the argument of the wider scope of writs issuable under Articles 226 of the Constitution. It was a case to which the principle "could be re-appointed"

would not apply. In **Mrs. Priti Prabha Goel v. Dr. C. P. Singh and others**: (1969) 2 Lab IC 913, the appointment of the respondent as Professor in the University of Jodhpur was challenged on the ground that such an appointment could be made by the Syndicate only on the recommendation of the selection committee and in the absence of such recommendation, the Syndicate is incompetent and has no power to appoint any one as a teacher in the University. It was held by the Rajasthan High Court that there is a public policy behind the salutary provision of selection committee prescribed in the Statutes and as the University is a State under Article 12 of the Constitution, every citizen has a right to be considered for these posts if he is duly qualified as otherwise there will be violation of Article 16 of the Constitution. No argument of futility of the writ was advanced in this case because it was irrelevant. In **M. S. Mahadeokar v. The Chief Commissioner, Union Territory, Chandigarh and others**: (1973) 1 SLR 1042, the appointment of two of the respondents was challenged by a writ of quo warranto. One of the respondents did not fulfill the qualifications under the service rules and was not eligible for the posts while the other was junior to the petitioner. A contention was raised by the respondents that a writ of quo warranto cannot be issued if the defect can be remedied by the authority who committed the mistake by amending the rules with retrospective effect. The principle of "could be reappointed" is entirely different. It does not contemplate a change in the existing law. It proceeds on the basis that there is no legal impediment to a re-appointment according to the law as it stands. A possibility of change in the law with retrospective effect, as suggesed in this case, would not come within the principle of futility of the writ. By reason of lacking in qualifications or being junior, there was an existing legal impediment to re-appointment. The next case relied upon is **Prabhudutt Sharma v. State of Rajasthan and others**: 1971 Lab Indu Cas 556. This case, rather than support the petitioners, goes against their contention. It is clearly stated that the conditions for the

issue of a writ of quo warranto are similar to those for laying an information in the nature of a quo warranto in England. Then it specifies the four requisites for a writ of quo warranto namely, (1) the office must be held under the State or have been created by a statute, (2) it should be an office of a substantive character, (3) its duties must be of a public nature and (4) it should have been usurped by some person. Then it proceeds to state what is more important that even when these requirements are fulfilled, it is in the discretion of the Court to refuse or grant the writ after taking into consideration the circumstances of the case and the consequences which would follow if it is allowed and that it should be in the public interest to grant the writ. These are some of the limitations which obtained in England as to a writ of quo warranto. In fact, this case refers to and relies on **R v. Speyer** (supra) and the statements made in paragraph 281, Volume Ii in the Third Edition of Halsbury's Laws of England which have been already quoted. In this case it was alleged that the appointments of two of the respondents were in violation of the statute as they were ineligible for appointment as they did not posses the necessary qualifications. The Rajasthan High Court found as a fact that the two holders of the office lacked the essential qualifications and were not eligible for appointment. If the holder of a public office is ineligible for appointment to that office and remains ineligible up to the date of the hearing of the writ petition, he is undoubtedly a usurper and the application of the principle of futility of writ by re-appointment or of in the circumstances of the case or of the discretion of the Court would not arise. It is, Therefore not, possible to see how this case advances the contention of the petitioners that the scope of a writ of quo warranto in India is wider than that in England. In fact, in **Hari Shankar Prasad Gupta v. Sukhdeo Prasad and another** : Air 3954 All 227 **R v. Speyer** (supra) was referred and the principle of futility of issue of a writ of quo warranto was applied. The writ of quo warranto was refused as the holder of the office though not qualified on the date of his appointment thereto acquired the

necessary qualification during the pendency of the petition. With respect, I agree with this view rather than with the view expressed in **Govinda Panicker v. K. Balakrishna Marar and another**: Air 1955 TC 42. If the view of the Travancore-Cochin High Court is to be accepted, it will mean that the principle "could be re-appointed" does not apply. In my view it does. In **Narayan Keshav Dandekar v. R. C. Rathi and another**: AIR 1963 MP 17. Apart from holding that the appointment was in violation of the provisions of a statute, it was held that the appointment had been made contrary to Article 16 of the Constitution as before making the appointment, the post was not regularly advertised nor were any applications invited from persons qualified to hold the post. No argument of futility was addressed in this case possibly because the appointment was held to be in violation of Article 16 of the Constitution thereby depriving other person from applying for the post. This case can, Therefore, be no authority for the proposition now being considered. In **Puranlal Lakhanpal v. Dr. P. C. Ghosh and others**: AIR 1970 Cal118, the question was whether a writ of quo warranto should issue to a person who had resigned from his office. I do not at all see the relevancy of this case to the contention being discussed now. None of these cases, Therefore, supports the argument that scope of Articles 32 and 226 is wider in so far as the writ of quo warranto is concerned.

(13) On the other hand, in **Janardan Reddy and others v. The State of Hyderabad and others**: 1951 Supreme Court Reports 344 (14), it has been observed that the power given to it under Part Iii of the Constitution is not wider than it is in England and courts in this with well established principles. In **T. C. Basappa v. T. Nagappa and another**: [1955] 1SCR 250 the same principle has been repeated but it has been clarified that the procedural technicalities of the English law do not apply. These cases help me to re-affirm the view that the scope of the power of the High Court to issue a writ of quo warranto under Article 226 of the

> Constitution is not wider than it is in England and courts in this country have followed the principles including the limitations which have been well established in England. In fact, in University of Mysore and another v. C. D. Govinda Rao and another (supra), the Supreme Court has observed that a writ of quo warranto is a writ of technical nature and has approved the statements made in Halsbury's Laws of England in that behalf."

(iv) In **Mohammad Tafiuddin and Ors. v. State of West Bengal and Ors.** reported in **1979 (2) CLJ 494**, at paragraph Nos.13 to 16, the Hon'ble High Court of Calcutta, held thus:-

> "13. In terms of the determinations in the case of **Hamid Hasan Nomani v. Banwarilal Roy and Others**, AIR 1947 P. C. 90 an information in the nature of quo warranto is the modern from of the obsolete writ of quo warranto , which lay against a peon, who claimed or usurped in office franchise or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined. It has also been observed to be a remedy to try the Civil right to a public office. In view of the determinations in the case of **University of Mysore v. Govinda Rao,** AIR 1965 SC 491 the procedure of *quo warranto* confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against statutory, provisions or statutes, it also protects a subject from being deprived or public office, to which he may have a right. As observed in the case of Statesman (P) Ltd. v. H.R. Deb, AIR 1968 SC 1495 the High Court in a proceeding for quo warranto should be also in its pronouncement unless there is a case of infringement of law.
>
> 14. A Writ of *quo warranto* is not the same as a Writ of Certiorari, or Prohibition or Mandamus and in a such a proceeding for *quo warranto*, it is not necessary for the applicant to establish that he has been prejudicially affected by any wrongful act of public nature or that his fundamental right is infringed or that he is denied any

legal right or that any legal duty is owed to him. The scope of a proceeding for *quo warranto* is very limited and it is only for the determination, whether the appointment of the Respondent is by a proper authority and in accordance with law, if there is some express statutory provision. The High Court's power of interference in a proceeding for *quo warranto* is also limited and it cannot act as an appellate authority. *Quo warranto*, in terms of the determination in the case of **Bhaimlal Chunilal v. State of Bombay,** AIR 1954 Bom. 116 is a remedy given in law at the discretion of the Court and is not a proceeding or a writ of course. The High Court can in a proceeding for *quo warranto*, as observed in the case of **Lalit Mohan Das v. Biswanath Ghosh** AIR 1952 Cal. 868, issue an order not only prohibiting an officer from acting in an office to which he is not entitled, but can also declare the Office to be vacant. As observed in ***Hamid Hasans*** case (Supra) information in the nature of quo warranto is in nature of a Civil proceedings and such writ can be issued when a post created under or by a statute or a public office, is usurped wrongly, illegally or without any authority. The tests of public office, as observed in the case of **Sashi Bhusan Ray v. Pramatha Nath Bandopadhaya** (70 CWN 892), are whether to the duties of office are of public nature and whether it is a substantive office under a statute. It has been held and observed in the case of **Amarendra Chandra Aich v. Narendra Kumar Basu** (56 CWN 449), that a writ of quo warranto will not be available in respect of an office of private nature.

15. Thus, in terms of the determinations an the case of **University of Mysore v. Govinda** (Supra) the first and foremost criteria for the issue of a writ of *quo warranto* should be that the office must be public and pursuant to the determinations in the case of **Shyabudinsab Mohidinsate Akki v. Gadaj Belgeri Municipal Borough** (AIR 1975 SC 314), a proceeding for *quo warranto* will not be in respect of office or a private charitable institution or of a private association and the test of a public office is whether the duties of the office

> are public nature. On the basis of the determinations as mentioned above, it can also be deduced that the office moist be substantive in character and must be, as mentioned hereinbefore created by statute or by Constitution itself. So neither the statutory nor constitutional character being satisfied in the instant case is so far the offices of Respondent Nos. 4 or 7 of 18 (a), I am of the view that even in spite of the determinations on merit, the petitioners would not be entitled to the issue of a writ of *quo warranto*."

(v) In **Arun Kumar v. Union of India (UOI) and Ors.** (AIR 1982 Raj 67), at paragraph Nos.4 to 6, the Hon'ble Rajasthan High Court held as under:

> "4. Article 226 of the Constitution empowers the High Court to issue to any person or authority including the Government within its territorial jurisdiction, directions, orders or writs in the nature of mandamus, certiorari prohibition or *quo warranto* for the enforcement of fundamental rights or for the enforcement of the legal rights and for any other purpose.
>
> 5. The founding fathers of the Constitution have couched the Article in comprehensive phraseology to enable the High Court to remedy injustice wherever it is found, but it is equally true that a person invoking the extraordinary jurisdiction of this Court should be an aggrieved person. If he does not fulfil the character of an aggrieved person and is a 'stranger' the Court will, in its discretion, deny him this extraordinary remedy save in very special and exceptional circumstances. The petitioner challenging the order must have some specialised interest of his own to vindicate, apart from a political concern, which belongs to all. Legal wrong requires a judicial and enforceable right and the touchstone to the justiciability is injury to legally protected right. A nominal, imaginary, a highly speculative adverse effect to a person cannot be said to be sufficient to bring him within the expression of "aggrieved person". The words "aggrieved person" cannot be confined within the bounds of a rigid formula. Its scope and meaning depends on diverse facts and

> circumstances of each case, nature and extent of the petitioner's interest and the nature and extent of the prejudice or injury suffered by him.
>
> 6. Any information in the nature of *quo warranto* would not be issued, and an injunction in lieu thereof would not be granted as a matter of course. It is in the discretion of the Court to refuse or grant it according to the facts and circumstances of each case. The Court would inquire into the conduct and motive of the applicant and where there are grounds for supposing that the relator was not the real prosecutor but was the instrument of other persons and was applying in collusion with stranger, the Court may refuse to grant a writ of *quo warranto*."

(vi) In **K.C. Chandy v. R. Balakrishna Pillai** [AIR 1986 Ker. 116], a Hon'ble Full Bench of this Court, had an occasion to consider on the aspect, as to whether a writ of *quo warranto* can be issued, and held as under:

> "2. The main questions that fall for decision in this writ petition are: (i) whether breach of oath committed by a Minister would be a constitutional impediment for his continuance in office; and (2) whether, in such circumstances, a writ of quo warranto or an information in the nature of quo warranto would be issued from this Court.
>
> 5. In fact, as far as we could see, breach of oath of office is not a disqualification specified in the Constitution or under any law made by Parliament. Even then, it could not be assumed that there is no sanctity to the oath taken before assumption of office or that there is no authority to take action if there is violation of that oath. Article 164(3) insists that no Minister could enter upon his office unless the Governor administers to him the oaths of office and of secrecy. The constitutional requirement of an oath before assumption of office could not thus be treated merely as 'an additional moral obligation' (as stated by Willoughby in Vol. III, II Edn. of The Constitutional Law of the United States) without any legal consequences whatsoever. The oath of office insisted upon under the Constitution is the

prescription of a fundamental code of conduct in the discharge of the duties of these high offices. The oath binds the person throughout his tenure in that office, and he extricates himself from the bonds of the oath only when he frees himself from the office he holds. Breach of this fundamental conduct of good behaviour may result in the deprivation of the very office he holds. When posts are held, not at the pleasure of the President or the Governor, but during 'good behaviour' breach of the oaths of office and of secrecy may attract the impeachment clauses and when posts are held at the pleasure of the President or the Governor, the termination, at their will, of the tenure may be the possible outcome of such breach.

8. Breach of oath is different from absence of oath. Absence of oath prevents entry into office while breach affects the continuance after a valid entry. If no oath is taken before assumption of office as enjoined by the Constitution, there is no legal title to hold that office and a writ of quo warranto will naturally go from this Court. Similarly, a Minister, who, for any period of six consecutive months, is not a member of the Legislature of the State shall, at the expiration of that period, cease to be a Minister. This is the mandate of Article 164(3) of the Constitution. A person without authority cannot function; and the jurisdiction under Article 226 could be invoked to prevent that usurper in office from functioning.

9. Breach of oath requires a termination of the tenure of office. This power can be exercised by the appointing authority under the Constitution, and according to the procedure, if any, prescribed therein. The termination of that tenure is not the function of a Court; and it would not be appropriate to exercise jurisdiction under Article 226 in such cases. Proceedings under Article 226 in such cases do not lie. It was Jefferson who said:

> "Our peculiar security is in the possession of a written Constitution; let us not make it a blank paper by construction" (Government by Judiciary -- Raoul Berger -- p. 304).

10. The question as to whether there was breach of oaths of office and of secrecy committed by a Minister is outside judicial review under Article 226 of the Constitution. It is to be decided mother appropriate forums; and in the case of the Minister in a State, it falls within the discretionary domain of the Chief Minister and/or the Governor. Breach of oath prescribed by the Constitution may, in certain circumstances, attract the penal provisions under the Indian Penal Code. When the Criminal Law is set in motion, it is of course for the criminal Court to decide whether an offence has been committed or not. That is an independent remedy which does not affect the Constitutional power, of withdrawing the pleasure to continue in office, ingrained in Article 164(1). As Raoul Berger refers in 'Government by Judiciary' at page 293: 'Judiciary was designed to police constitutional boundaries, not to exercise supra constitutional police making decisions' -- (Hamilton).

12. The next question that would naturally arise would be whether a writ of quo warranto would be issued if a Minister is found to have committed breach of oath. For our limited purpose it might not be necessary to trace the historical background of the writ of quo warranto. Suffice it to examine whether a writ of quo warranto can issue in respect of an appointment held at the pleasure of the appointing Authority. In one of the earliest cases, Darley v. The Queen, (12 Clause & F. 520 (537)), Tindal, C.J. expressed thus:

> "This proceeding by information in the nature of quo warranto will lie for usurping an office, whether created by charter alone, or by the Crown, with the consent of Parliament, Provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others, for with respect to such an employment, the Court certainly will not interfere and the information will not properly lie." and proceeded to hold in that case thus:

> 'The function of the treasurer were clearly of a public nature.....and it is equally clear that though appointed by the Magistrate, he is not removable at their pleasure, and not, we think, be treated not as their servant, but as an independent officer."

14. It would be appropriate at this stage to advert to the ruling of the Division Bench of this Court in **Sukumaran v. Union of India** (AIR 1986 Ker 122). The Division Bench ruling cannot be understood to lay down a proposition that breach of oath will not entail a termination of the tenure in office. The decision only held that breach of oath is not a disqualification under Article 191. To that extent we agree. Even apart from Article 191, if the Constitution provides and clearly indicates that the breach of oath may give rise to proceedings and actions for removing the alleged offender from the scene of activity, the Court cannot hold that Article 191 alone provides for the disability to continue as member of the Legislative Assembly. We hold that in the present case, the question as to whether there was a breach of oaths of office and of secrecy, is a matter to be decided under Article 164(1) for the purpose of the 'pleasure doctrine' applicable to the time in office of a Minister. The Minister holds office only 'at the disposal' of the Chief Minister and/or Governor and his office is held 'durante bene placito' of the Chief Minister and/or Governor."

(vii) In **Kallara Sukumaran v. Union of India (UOI) and Ors.** [AIR 1986 Kerala 122], this Court observed as under:

> "2. The 3rd respondent was, and respondents 4 to 6 are, Ministers in the State of Kerala. They belong to the 'Kerala Congress', one of the constituents of the 'ruling front' which has formed the Ministry. Kerala Congress had a patty convention at Ernakulam on the 25th of May, 1985. These respondents participated and spoke in that meeting. The appellants-petitioners alleged that the 3rd respondent in his speech, aggressively exhorted for a 'Punjab model' agitation, directed against the Central Government.

According to them, that speech was the result of an 'anti-centre' conspiracy hatched by many including respondents 4 to 6. Respondents 4 to 6 even encouraged the 3rd respondent in his speech, and had stood by him even subsequent to his resignation from the Ministry. The speech undermines the sovereignty and integrity of the Indian Union. It, therefore, subverts the Constitution as by law established. In so acting, they have violated the oath taken, by them under Article 164(3) as Ministers before the assumption of office. They have also violated the oath as Members of the Legislative Assembly taken under Article 188 of the Constitution. Such a wanton violation of the constitutional oath entails a forfeiture of their position both as Ministers and as Members of the Assembly. They are therefore usurpers of office. A Writ of Quo Warranto is therefore sought seeking ouster of the usurpers of office. The acts also constitute a serious offence of sedition punishable under Section 124-A of the Indian Penal Code. No effective steps have been taken either by the Union or by the State for prosecution for that serious offence. A writ of mandamus is sought to compel the Central and State Governments to perform their statutory duty to bring to book the offenders involved in such a serious crime.

5. The Writ of Quo Warranto is one on information afforded in a judicial enquiry into the question whether the holder of a public office occupies that office without legal authority. The Court is enabled by such a writ to control executive action in the matter, of making appointments to public offices against the relevant statutory provisions. See *University of Mysore v. Govinda Rao,* (AIR 1965 SC 491). It is also available to have the holding of an office declared forfeited, "if, having once been rightfully possessed and enjoyed, it has become forfeited for misuser or nonuser." (See "Extraordinary Legal Remedies" by Ferris, Page 125).

6. Under Article 164 of the Constitution, the Chief Minister is to be appointed by the Governor and Ministers other than the Chief Minister are to be appointed by the Governor on the advice by the Chief Minister. It is not disputed that respondents 4 to 6 became Ministers in accordance with this constitutional provision. The

contention is that they became subsequently disqualified for the reasons alluded to above. The correctness of the contention has to be evaluated by a reference to the constitutional scheme in that behalf.

7. A pivotal role is played by the high functionary of the State, the Governor. Article 164(1) is explicit that the Ministers shall hold office during the pleasure of the Governor. Consistent with the constitutional provisions and democratic conventions, it is open to the Governor to withhold his pleasure and dismiss the Ministry or any member of the Council of Ministers.

8. It is conceivable that situations may arise where a person enters office as a Minister lawfully and properly, but forfeits the right to continue so by the operation of the disqualifying provisions of the Constitution. Thus, for example, a person can become a Minister even if he is not the member of the Legislature of the State. But he can function so -- as one not duly elected -- only for a period of six months. At the expiration of that period, he would cease to be a Minister, if, by that time, he is not a member of the Legislature. That is the effect of Article 164(4) of the Constitution.

9. There may also arise situations where a member of the Assembly becomes subsequently disqualified in any one of the modes made mention of in Article 191. That, in turn, has a direct impact on such a person continuing as a Minister, as a result of the conjoint operation of Articles 164(4) and 191. It is to be noted that under Article 191, the disqualification not only extinguishes the existing membership but also operates as a bar for further or future choice of the person as a member of the Assembly. Such a situation has not arisen in the present case: for, the eventualities in which a disqualification attaches itself for being a member of the Assembly are: (1) the holding of any office of profit as referred to in Clause (a), (2) the declaration by a competent Court of the person being of unsound mind, (3) undischarged insolvency, (4) ceasing to be a citizen of India, voluntarily acquiring the citizenship of a foreign State, or being under acknowledgment of

allegiance or adherence to a foreign State, and (5) the disqualification which may be provided by any law made by Parliament in that behalf under Clause (a). It is agreed that the only law so made by the Parliament as visualised in Clause (e) is the Representation of the People Act, 1951. The corrupt practices and other grounds of disqualification are referred to in Sections 8, 8A, 9, 9A and 11A of that Act. The Constitution itself nominates the authority competent to decide about the disqualification referred to in Article 191. That authority is the Governor. The modality of his action is also regulated by the constitutional provision. Before giving any decision on disqualification, the Governor shall obtain and act according to the opinion of the Election Commission, (vide Article 192). The provisions referred to forcefully suggest that the Constitution exhaustively deals with and provides for the heads of disqualification. They are such of those expressly referred to in the Constitution itself and those to be notified by law in that behalf. When the constitutional scheme thus indicates the existence of an exhaustive scheme regarding the heads of disqualification, it is not ordinarily for this Court to expand the scope of disqualification or increase the heads of disqualification. What was observed by the Supreme Court of Maryland, though in a different context, affords a guidance in the present situation. The Supreme Court held that "where the Constitution defined the qualifications of an officer, it was not in the power of the legislature to change or super-add to them, unless the power to do so was expressly or by necessary implication conferred by the Constitution itself." (See "A Treatise on the Constitutional Limitations" by Thomas M Cooley, 1972, page 64). Here is a similar case. The Constitution defined the disqualifications of a member of the Assembly. It is not in. the power of the Court to change or superadd to them, there being no power either expressly conferred or inferable by necessary implication by the Constitution.

11. The argument is fraught with other anomalous consequences. In the case of a minister for a State, the oath relates to the following matters: (1) bearing true faith and allegiance to the Constitution, (2) upholding the

sovereignty and integrity of India, (3) faithful and conscientious discharge of duties as a Minister, and (4) doing right to all manner of people in accordance with the Constitution and the law, without fear or favour, affection or ill-will. In the case of a member of the Assembly, many matters which are special and peculiar to a Minister who wields power, are absent. However, bearing true faith and allegiance to the Constitution and upholding the sovereignty and integrity of India are the high-lights of that oath too. The form and content of the oaths would certainly demonstrate the solemnity and seriousness of the matters covered thereby. They are not to be looked upon or treated in a casual or light hearted manner. The question, however, is whether being unfaithful to the oaths or any portion thereof, would operate as a disqualification as a member of the Assembly or as a member of the Council of Ministers. A divagation from the oath can happen in respect of many a matter referred to therein. Take for example the case where it is established that a Minister omits to faithfully or conscientiously discharge his duties as a Minister; or again, his acting under fear of an extra-constitutional authority, or out of motive to favour a partisan. Take even the case where actions arise out of affection, or are the projections of a pronounced ill-will. Will anyone of these violations of oath spell in the realm of a disqualification as Minister? We are of the view that it will not. A malfunctioning of a Minister or by a member of Assembly would be primarily a matter for assessment and judgment at the political level. That assessment and that judgment would have to be made by the party to which the erring members belong or by the people to whom he has, under our constitutional scheme, an established accountability. May be, in situations warranting drastic action, the constitutional functionaries such as the Chief Minister or the Governor, could intervene in the matter and bring about a corrective to the situation. Even if the Chief Minister of the State or the Governor fail in that behalf, the Constitution still has the safety valve of a Presidential action under Article 356 of the Constitution, whereunder, the President is enabled to act on receipt of a report from the Governor or otherwise on his satisfaction that there is

a break-down of the constitutional machinery in the State.

12. The morality or propriety of an undesirable person continuing as a Minister is essentially a political question to be eminently dealt with and at any rate initially, at the political level, such as by the Chief Minister, by the Legislature, and 'the general public holding a watching brief over them', and later by the constitutional functionaries as provided in the Constitution itself. Such was the reaction of Dr. Ambedkar when he referred to this topic. (Constituent Assembly Debates Vol. VII, page 1160). If that be so, that is an area where the High Court's jurisdiction under Article 226 is hardly attracted. This view has the support of the decision of the Delhi High Court in *Inder Mohan v. Union of India*, (AIR 1980 Delhi 20). Whether Sri. Bahuguna could with propriety continue as a Minister of the Union Government was not a matter for the Court to decide -- it was held. The idea is cogently and forcefully expressed by Frankfurter J. in *Charles W. Baker v. Joe C. Carr (1962) 369 US 186 : 7 Led 2 663* :

> ".....there is not under our constitution a judicial remedy for every political mischief..... In this situation, as in others of like natures, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives."

13. In this connection, the following passage dealing with disqualification of Members of House of Commons (as contained in De Smith's Judicial Review of Administrative Action", 4th Edn. page 465) appears to be apposite:

> "The question of qualification to sit as a member of either House of Parliament falls within the scope of parliamentary privilege and is not, therefore, cognisable by Courts of law except in so far as Parliament has expressly provided for a judicial determination. The relevant statutory provisions do not empower the Courts to award

> injunctions to restrain persons from sitting as members. "
>
> 16. We shall now consider the prayer for the issue of a Writ of Mandamus. We are not satisfied that the learned Judge was right in declining the relief on the technical ground of the prayer not being preceded by a prior demand. It is well known that the trammels of the English Courts in relation to the ancient writs do not fetter the jurisdiction of the High Court under Article 226 of the Constitution. Circumstances justifying, this Court could issue a writ or a direction, under that extraordinary and extensive power. The question, however, is whether a case has been made out at this stage, for the exercise of such a power."

(viii) In **S. Mahadevan v. S. Balasundaram and Ors.** reported in (1986) 1 Mad LJ 31, at paragraph 21, High Court of Madras held as under:-

> "For the issuance of a writ of *quo warranto*, the Court asks the question-where is your warrant of appointment? It enjoins an enquiry into the legality of the claim which the party asserts to an office and if the appointment and holding on to the office are illegal and violative of any binding rule of law, then the Court shall oust him from his enjoying thereof. This Court, within the scope of the enquiry for the issuance of a writ of *quo warranto*, is not concerned with any other factor except the well laid down factors which require advertance to and adjudication. The existence of the following factors have come to be recognised as conditions precedent for the issuance of a writ of *quo warranto*: 1) The Office must be public; 2) The Office must be substantive in character, that is, an office independent in title; 3) the office must have been created by statute or by the Constitution itself; 4) the holder of the office must have asserted his claim to the office; and 5) the impugned appointment must be in clear infringement of a provision having the force of law or in contravention of any binding rule of law. This Court shall not frown upon an appointment to the office on the ground of irregularity, arbitrariness or caprice or mala fides and these features, even if they are present,

> could not clothe this Court with the power for the issuance of a writ of *quo warranto*. The scope of the enquiry is riveted to only the aforesaid factors. Prerogative writs, like the one for *quo warranto*, could be and should be issued only within the limits, which circumscribe their issuance. It is not possible to wider their limits. A writ of *quo warranto* is of a technical nature. It is a question to an alleged usurper of an office to show the legal authority for his appointment and holding on to it. If he shows his legal authority, he cannot be ousted from the office. The invalidity of the appointment may arise either for want of qualifications prescribed by law or want of authority on the part of the person who made the appointment, or want of satisfaction of the statutory provisions or conditions or procedure governing the appointment and which are mandatory. This Court, under Article 226 of the Constitution of India, can issue a writ of *quo warranto* only if the salient conditions delineated above stand satisfied and not otherwise.

(ix) In **Kallara Sukumaran v. Union of India (UOI) and Ors.** reported in **AIR 1987 Kerala 212**, there was an allegation of breach of Oath by a Minister and on that ground, a writ petition was filed under Article 226 of the Constitution of India, to declare the same as disqualification and consequently, removal. Addressing the said aspect, a Hon'ble Division Bench of these High Court, at paragraphs 22 to 24, held as under:

> "22. The Full Bench has held that there is no express provision in the Constitution or the law made by the Parliament which attaches specifically any disqualification to the Minister who commits breach of his oath. Even then, it is pointed out that it could not be assumed that there is no sanctity to the oath taken before assumption of office or that there is no authority to take action if there is a violation of that oath. In para 5 of the judgment, it is observed :
>
> "The oath of office insisted upon under the Constitution

is the prescription of a fundamental code of conduct in the discharge of the duties of these high offices. The oath binds the person throughout his tenure in that office, and he extricates himself from the bonds of the oath only when he frees himself from the office he holds. Breach of this fundamental conduct of good behaviour may result in the deprivation of the very office he holds. When posts are held, not at the pleasure of the President or the Governor, but during 'good behaviour' breach of the oaths of office and of secrecy may attract the impeachment clauses and when posts are held at the pleasure of the President or the Governor, the termination, at their will, of the tenure may be the possible outcome of such breach."

Then the Full Bench proceeds to observe in para 7:

"Breach of oath may thus be a betrayal of faith. The appointing authority, the Governor, in such cases, can consider whether there was, in fact, any breach of oath. It is not for this Court to embark on any such enquiry." What has been held by the Full Bench, therefore, is that breach of oath may result in the deprivation of the office and there is no forfeiture of the office automatically whenever there is breach of oath. In other words, what is held is that deprivation of the office may be one of the consequences that the Minister, who commits breach of oath, may have to face. It is for the appointing authority to decide whether, in fact, there was a breach of oath and, if so, whether he should for that reason remove the Minister from the office. The Full Bench has in categorical terms held that it is not for this court to embark on any such enquiry. This is made further clear by what is stated in para 9 of the judgment :

"Breach of oath requires a termination of the tenure of office. This power can be exercised by the appointing authority under the constitution, and according to the procedure, if any, prescribed therein. The termination of that tenure is not the function of a Court; and it would not be appropriate to exercise jurisdiction under Article

226 in such cases. Proceedings under Article 226 in such cases do not lie."

The Full Bench had no hesitation in taking the view that termination of office on the ground of breach of oath is a power which could be exercised under the Constitution by the appointing authority and that the High Court has no jurisdiction under Article 226 of the Constitution to take action for the breach of oath of office committed by the Minister. This principle has been reiterated very clearly in para 10 of the judgment where it is stated:

> "The question as to whether there was breach of oaths of office and of secrecy committed by a Minister is outside judicial review under Article 226 of the Constitution. It is to be decided in other appropriate forums; and in the case of the Minister in a State, it falls within the discretionary domain of the Chief Minister, and/or the Governor."

When the Full Bench held that the question as to whether there was breach of oath is outside judicial review under Article 226 of the Constitution, and that it is a question which is within the "discretionary domain" of the Chief Minister, and/or the Governor, that authority has the discretion to remove or not to remove the Minister on the ground of breach of oath. It is a matter left entirely to the discretion of the Chief Minister and/or the Governor as to what is the proper action to be taken, if he is satisfied that the Minister has committed a breach of oath. It is so held because the Minister holds his office at the pleasure of the Chief Minister and/or the Governor and neither the Constitution nor any law made by the Parliament either prescribes breach of oath as a disqualification for holding the office of a Minister or provides forfeiture of office as a penalty for breach of oath. It has been so held by the Full Bench in para 13 of the judgment, wherein it is observed :

"13. This statement of the law was approved in the leading case **R. v. Speycr (1916) 1 KB 595** and it has

been cited in all the important cases relating to quo warranto jurisdiction. A writ of quo warranto or a writ by way of information in the nature of quo warranto cannot issue in these cases when a post is held 'at pleasure'. This is the normal rule. Even in those cases, however, the non fulfillment of the conditions prescribed for assumption of office or the absence of the required qualification to hold that office affecting the title to that office will give rise to the issuance of this writ. Once the office is held under a valid title, and the continuance depends on the pleasure doctrine, the writ of quo warranto does not run; and no such writ, which can be defeated immediately by the mere exercise of an executive will, will therefore issue."

In para 14, the Full Bench observes :

> "We hold that in the present case, the question as to whether there was a breach of oaths of office and of secrecy, is a matter to be decided under Article 164(1) for the purpose of the 'pleasure doctrine' applicable to the tenure in office of a Minister. The Minister holds office only 'at the disposal' of the Chief Minister and/or Governor and his office is held 'durante bene placito' of the Chief Minister and/or the Governor."

23. But it was contended on behalf of the petitioners that the observations in para 16 of the judgment of the Full Bench clearly show that the above findings are only obiter dicta. The observation relied upon reads :

> "While no quo warranto will go from this court on the allegation that the Minister had committed breach of his oath, it would not be even expedient for this Court to exercise the discretion for issuance of the writ asked for when the Chief Minister is already seized of the matter."

We do not agree. The Full Bench, in para 16 not only rejected the petitioner's request for adducing evidence in court but stated yet another ground to reject the prayer

for the issuance of a quo warranto. The Full Bench, in fact, went into the whole question exhaustively and critically and decided the case on the merits, though there was a faint argument that the writ petition had become infructuous with the resignation of the Minister and no attempt was made to withdraw the writ petition.

24. Thus, we find that the Full Bench has clearly laid down the following propositions :

(1) That breach of oath of office taken by the Minister is not a disqualification constitutionally listed under Article 191 of the Constitution or specified under any law made by the Parliament;
(2) That the oath of office is the prescription of a fundamental code of conduct in the discharge of the duties of a Minister and not a mere moral obligation and binds him throughout his tenure of office.
(3) That the office of the Minister is held at the pleasure of the Governor/Chief Minister and therefore termination at their will may be the possible outcome of breach of oath;
(4) That the question as to whether there was breach of oath can be considered by the appointing authority under Article 164(1) of the Constitution and not by the High Court under Article 226. It falls within the discretionary domain of the Governor and/or the Chief Minister.
(5) That breach of oath requires termination and this power can be exercised by the appointing authority at its discretion and not by the Court under Article 226 of the Constitution.
(6) That the court has no jurisdiction under Article 226 to oust a Minister on the ground that he has committed breach of oath."

(x) In **Devi Prasad Shukla and Another v. State of Uttar Pradesh and Another**, reported in **1989 Lab IC 1086**, at paragraph No.34, the

Hon'ble Allahabad High Court, held as under:-

> "34. To illustrate the point, we may mention that in a writ petition even the person called upon to show whether he possesses the necessary qualifications prescribed for that office can also be asked whether the authority which he produces is by the person who is authorised to make appointment to the Office which he holds. By showing that he possesses the necessary qualifications by demonstrating that there is no legal impediment in the way of his appointment to the office and by showing that the person who issued the appointment or warrant of his appointment is authorised by law to do so, no writ of quo warranto will be issued against him. If all these things are demonstrated by him in his favour, he cannot be said to be a usurper."

(xi) In **Hardwari Lal v. Ch. Bhajan Lal and Ors.** reported in **AIR 1993 P&H 3**, at paragraph No. 16, the Hon'ble Punjab and Haryana High Court, held as under:

> "15. As a necessary corollary of our aforesaid discussion it follows that this Court is not competent to issue a writ of quo warranto or any other kind of writ or direction removing the Chief Minister for his having committed the breach of oath. It is now well settled that when a post or office is held at pleasure no writ of quo warranto can issue. Once a person enters upon an office lawfully and is legally entitled to hold it and the continuance depends upon the pleasure doctrine, it will not be permissible to issue a writ by way of information in the nature of quo warranto or a writ of quo warranto. The reason is that such a writ can immediately and easily be defeated by the executive will as it shall be open to it to allow such a person to assume that office against. The Full Bench of the Kerala High Court in **K. C. Chandy's** case (supra) quoted a passage from Darley v. The Queen 12 Cl & F 520, as follows:
>
> > "This proceeding by information in the nature of quo warranto will lie for usurping an office

> whether created by charter alone, or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others, for with respect to such an employment, the Court certainly will not interfere and the information will not properly lie."

Expressing the same view, the Full Bench of the Andhra Pradesh High Court in **D. Satyanarayana Ramachandran's case** (supra) held that the Governor may have to tolerate the continuance in office of the Chief Minister so long as he enjoys the confidence of the majority of the Members of the Assembly unless, of course, he suffers any of the disqualifications to hold that office. Since the power to terminate the tenure of the Minister vests in the Governor, it will not be just for the Courts to assume limitless jurisdiction as that may lead to a state of functional anarchy which has to be avoided in the larger public interest itself, A Chief Minister is accountable to the electorates who hold a watching brief to prevent misperformance and misrule by the elected representatives. We may quote the Full Bench to say,-

"No gratuitous advice, much less any specific direction, from this Court is necessary,"

The Court then expressed the definite view in paragraph 14 of the judgment that whatever be the merits of the allegations made, if and when found appropriate, the power to terminate the tenure of office of the Chief Minister being vested solely in the Governor under Art. 164(1) of the Constitution, no writ of quo warranto would issue from the Court. We have no reason to take a different view, nor could we be successfully persuaded to differ.

(xii) In **B.R. Kapur v. State of Tamil Nadu and Ors**. reported in **(2001) 7 SCC 231**, at paragraph Nos.79 to 81, the Hon'ble Supreme Court held as under:

> "79.....A writ of quo warranto is a writ which lies against the person, who according to the relator is not entitled to hold an office of public nature and is not an usurper of the office. It is the person, against whom the writ of quo warranto is directed, who is required to show, by what authority that person is entitled to hold the office. The challenge can be made on various grounds, including on the grounds that the possessor of the office does not fulfill the required qualifications or suffers from any disqualification, which debars the person to hold such office. So as to have an idea about the nature of action in a proceedings for writ of quo warranto and its original form, as it used to be, it would be beneficial to quote from Words and Phrases, Permanent Edn., Vol. 35-A, p. 648. It reads as follows:
>
> The original common-law writ of quo warranto was a civil writ at the suit of the Crown, and not a criminal prosecution. It was in the nature of a writ of right by the King against one who usurped or claimed franchises or liabilities, to inquire by what right he claimed them. This writ, however, fell into disuse in England centuries ago, and its place was supplied by an information in the nature of a quo warranto, which in its origin was a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him or seize it for the Crown. Long before our revolution, however, it lost its character as a criminal proceeding in everything except form, and was applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only and such, without any special legislation to that effect, has always been its character in many of the States of the Union, and it is therefore a civil remedy only. Ames v. State of Kansas 4 S.Ct. 437, 442 : 111 US 449 : 1 Ed 482 (1884), People v. Dashaway

Assn. 24 P 277, 278 : 84 Cal 114.

80. In the same volume of Words and Phrases, Permanent Edn., at p. 647 we find as follows:

The writ of 'quo warranto' is not a substitute for mandamus or injunction nor for an appeal or writ of error, and is not to be used to prevent an improper exercise of power lawfully possessed, and its purpose is solely to prevent an officer or corporation or persons purporting to act as such from usurping a power which they do not have. State Ex inf. McKittrick v. Murphy 148 SW 2d 527, 529, 530 : 347 Mo 484.

Information in nature of 'quo warranto' does not command performance of official functions by an officer to whom it may run, since it is not directed to officer as such, but to person holding office or exercising franchise, and not for purpose of dictating or prescribing official duties, but only to ascertain whether he is rightfully entitled to exercise functions claimed. **State ex inf. Walsh v. Thatche** 102 SW 2d 937, 938 : 340 Mo 865.

(emphasis supplied)

81. In Halsbury's Laws of England, 4th Edn., Reissue Vol. I, p. 368, para 265 it is found as follows:

> "266. In general -- An information in the nature of a quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to inquire by what authority he supported his claim, in order what the right to the office or franchise might be determined."
>
> (emphasis supplied)

(xiii) In **Waseem Abdullah v. J and K Academy of Art, Culture and Languages and others,** reported in 2004 (3) JKJ 407, at paragraph No.11, the Hon'ble High Court of Jammu and Kashmir at Jammu, held as under:

> "11. In **High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat** [(2003) 4 SCC 712], Their Lordships of the Supreme Court opined that the High Court in exercise of its writ jurisdiction in a matter of the nature of the present case is required to determine at the outset as to whether a case has been made out for issuance of a writ of certiorari or a writ of quo warranto. The jurisdiction of the High Court to issue a writ of quo warranto is a limited one and while issuing such a writ, the Court merely makes a public declaration but will not consider the respective impact of the candidates or other factors, which may be relevant for issuance of a writ of certiorari. In paragraph 23 of the judgment, their lordships have emphatically held that a writ of quo warranto can only be issued when the appointment is contrary to the statutory rules."

(xiv) In **Raju Puzhankara v. Kodiyeri Balakrishnan and Ors.** reported in 2009 KHC 244, a Hon'ble Division Bench of this Court at paras 5 to 10, held as under:

> "5. The next question is whether a Minister is holding a public office, so that a quo warranto writ can be issued, if he is functioning as a Minister without any legal authority. Another incidental question is, even if his initial assumption is valid in law, whether if he subsequently disqualify to hold office, can a writ of quo warranto be issued. There is no dispute that if a Minister is holding his office against law, a quo warranto writ can be issued. In **S.R. Chowdhury v. State of Punjab and Ors.** [AIR 2001 SC 2707], quo warranto writ was issued by the Supreme Court. In that case, a person who was not a member of the legislative assembly was appointed as Chief Minister. The Hon'ble Supreme Court held that even though under Article 164(4) of the Constitution of India, he can be appointed for an initial period of six months, he cannot be repeatedly continued to hold the office beyond the period of six months and, therefore, after

the first six months, he cannot be appointed again and in that particular case quo warranto writ was issued. The Court also noticed that if he is repeatedly appointed to the above post, it will be flouting the constitutional scheme and mandate. In **B.R. Kapur v. State of Tamil Nadu and Anr.** (AIR 2001 SC 3435), the Hon'ble Supreme Court also held that even if a person is disqualified to become a member of the legislature, he cannot be appointed as a Minister or Chief Minister under the guise of Article 164(4) and a quo warranto writ can be issued to oust such person from office. In that case, Smt. Jayalalitha, who was convicted and sentenced by a Court of law for imprisonment for more than two years, without becoming a member of the Legislative Assembly occupied office of Chief Minister of Tamilnadu by virtue of Article 164(4) of the Constitution. The Apex Court held that if she is not qualified to become a member of the Legislative Assembly, she cannot be appointed as a Minister or a Chief Minister. The Hon'ble Apex Court held as follows:

> "50. ...The Constitution prevails over the will of the people as expressed through the majority party. The will of the people as expressed through the majority party prevails only if it is in accord with the Constitution. The Governor is functionary under the Constitution and is sworn to 'preserve, protect and define the Constitution and the laws' (Article 159). The Governor cannot, in the exercise of his discretion or otherwise, do anything that is contrary to the Constitution and the laws. It is another thing that by reason of the protection the Governor enjoys under Article 361, the exercise of the Governor's discretion cannot be questioned. We are in no doubt at all that if the Governor is asked by the majority party in the legislature to appoint as Chief Minister a person who is not qualified to be a member of the legislature or who is disqualified to be a member of the legislature or who is disqualified to be such,

the Governor must having due regard to the Constitution and the laws, to which he is subject, decline and the exercise of discretion by him in this regard cannot be called in question.

51. If perchance, for whatever reason, the Governor does appoint as Chief Minister a person who is not qualified to be a member of the legislature or who is disqualified to be such, the appointment is contrary to the provisions of Article 164 of the Constitution, as we have interpreted it, and the authority of the appointee to hold the appointment can be challenged in quo warranto proceedings. That the Governor has made the appointment does not give the appointee any higher right to hold the appointment. If the appointment is contrary to the constitutional provisions it will be struck down. The submission to be contrary-unsupported by any authority-must be rejected.

52. The judgment of this Court in **Shri Kumar Padma Prasad v. Union of India** [(1992) 2 SCC. 428] is a case on point. One K.N. Srivastava was appointed a Judge of the Gauhati High Court by a warrant of appointment signed by the President of India. Before the oath of his office could be administered to him, quo warranto proceedings were taken against him in that High Court. An interim order was passed directing that the warrant of appointment should not be given effect to until further orders. A transfer petition was then filed in this Court and was allowed. This Court, on examination of the record and the material that it allowed to be placed before it, held that Srivastava was not qualified to be appointed a High Court Judge and his appointment was quashed. This case goes to show that even when the President, or the Governor, has appointed a person to a constitutional office, the qualification of that

person to hold that office can be examined in quo warranto proceedings and the appointment can be quashed.

6. As far as the present case is concerned, the first Respondent was elected as the Member of the Legislative Assembly and he became the Home Minister after complying with all legal formalities. There is no dispute with regard to his initial appointment and there is no contention that he was disqualified under any of the provisions of the enactments or the Constitution. The only contention is that he has violated the oath of secrecy which was taken at the time of assumption of office. The form of oath of office to be taken at the time of assumption of office is as follows:

> "I.....swear in the name of God/solemn affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will faithfully and conscientiously discharge my duties as a Minister for the (State of Kerala) and that I will do right to all manner of people in accordance with the Constitution and the law without fear or favour, affection or ill-will."

The oath of secrecy to be taken is as follows:

> "I.....swear in the name of God/solemnly affirm that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the (State of Kerala) except as may be required for the due discharge of my duties as such Minister."

In this case, CBI prepared a final report after investigation. Two Government officers and one ex-Minister are arrayed as accused. C.B.I., has sought

sanction to prosecute them and the Minister. It is stated in Ext. P-2 paper report that the first Respondent has stated that cases are not new to Pinarayi and they will fight the case politically. According to the Petitioner, by the above statement, the Minister has divulged the information that Pinarayi, an ex-minister, is an accused and thereby violated the oath. The violation of oath of office is a very serious matter. But the questions are whether there is any violation, and even if there is violation of oath, who is the authority to take action and whether writ of quo warranto will lie. When final report was filed levelling charges against an ex-Minister, a spontaneous reaction was made by the first Respondent. Whether such expression by the Home Minister before consideration of the issue by the Cabinet is improper is not a question to be considered by us. Impropriety of a statement by the Minister is nonjusticiable. Violation of oath is different from impropriety. In any event, a writ of quo warranto cannot be issued on the ground of impropriety and, in any view, for the impropriety in the conduct of a Minister writ of quo warranto will be issued by the Court sparingly in very special circumstances. It is a discretionary remedy. Even though the CBI has filed charges against the ex-Minister, unless he is found guilty by the Court, he is deemed to be innocent. Prima facie, we are of the opinion that the observations made by the Minister is not a violation of oath. This is only a prima facie opinion, as we are not called upon to give a verdict on that aspect in this proceedings.

7. Even assuming that there is violation of oath, a Full Bench of this Court in **K.C. Chandy v. R. Balakrishna Pillai** [1985 K.L.T. 762 F.B] held that quo warranto cannot be issued in such situation. The Court held that breach of oath is different from absence of oath and if there is breach of oath, action has to be exercised by the appointing authority under the Constitution. Whether breach of oath of office and of secrecy committed by a minister is outside the judicial review

under Article 226 of the Constitution of India. The Full Bench held as follows:

> "7. Breach of oath may thus be a betrayal of faith. The appointing authority, the Governor, in such cases, can consider whether there was, in fact, any breach of oath. It is not for this Court to embark on any such enquiry.
>
> 8. Breach of oath is different from absence of oath. Absence of oath prevents entry into office while breach affects the continuance after a valid entry. If no oath is taken before assumption of office as enjoined by the Constitution, there is no legal title to hold that office and a writ of quo warranto will naturally go from this Court. Similarly, a Minister, who, for any period of six consecutive months, is not a member of the Legislature of the State shall, at the expiration of that period, cease to be a Minister. This is the mandate of Article 164 of the Constitution. A person without authority cannot function; and the jurisdiction under Article 226 could be invoked to prevent that usurper in office from functioning.
>
> 9. Breach of oath requires a termination of the tenure of office. This power can be exercised by the appointing authority under the Constitution and according to the procedure, if any, prescribed therein. The termination of that tenure is not the function of a Court; and it would not be appropriate to exercise jurisdiction under Article 226 in such cases. Proceedings under Article 226 in such cases do not lie. It was Jefferson who said:
>
> > "Our peculiar security is in the possession of a written Constitution; let us not make it a blank paper by construction.(Government by Judiciary- Raoul Berger – p.304.)

> 10. The question as to whether there was breach of oaths of office and of secrecy committed by a Minister is outside judicial review under Article 226 of the Constitution. "

(xv) In **N. Kannadasan and Ors. v. Ajoy Khose and Ors.** [(2009) 7 SCC 1], on the issuance of a writ of quo warranto, the Hon'ble Apex Court held as under:

> "148. Concedingly, judicial review for the purpose of issuance of writ of Quo Warranto in a case of this nature would lie:
> (A) in the event the holder of a public office was not eligible for appointment ;
>
> (B) Processual machinery relating to consultation was not fully complied.
>
> 149. The writ of quo warranto proceedings affords a judicial remedy by which any person who holds an independent substantive public office is called upon to show by what right he holds the same so that his title to it may be duly determined and in the event it is found that the holder has no title he would be directed to be removed from the said office by a judicial order. The proceedings not only give a weapon to control the executive from making appointments to public office against law but also tend to protect the public from being deprived of public office to which it has a right.
>
> 150. It is indisputably a high prerogative writ which was reserved for the use of Crown.
>
> 151. The width and ambit of the writ, however, in the course of practice, have widened and it is permissible to pray for issuance of a writ in the nature of quo warranto.
>
> 152. In **Corpus Juris Secundum** [74 C.J.S. Quo Warranto § 14], `Quo Warranto' is defined as under:

Quo warranto, or a proceeding in the nature thereof, is a proper and appropriate remedy to test the right or title to an office, and to remove or oust an incumbent.

It is prosecuted by the state against a person who unlawfully usurps, intrudes, or holds a public office. The relator must establish that the office is being unlawfully held and exercised by respondent, and that realtor is entitled to the office.

153. In the Law Lexicon by J.J.S. Wharton, Esq., 1987, 'Quo Warranto' has been defined as under:

QUO WARRANTO, a writ issuable out of the Queen's Bench, in the nature of a writ of right, for the Crown, against him who claims or usurps any office, franchise, or liberty, to enquire by what authority he supports his claim, in order to determine the right. It lies also in case of non-user, or long neglect of a franchise, or mis-user or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise having never had any grant of it, or having forfeited it be neglect or abuse.

154. Indisputably a writ of Quo Warranto can be issued inter alia when the appointment is contrary to the statutory rules as has been held by this Court in High Court of Gujarat v. Gujarat **Kishan Mazdoor Panchayat**, (supra) and **R.K. Jain v. Union of India and Ors**. (1993) 4 SCC 119. See also **Mor Modern Coop. Transport Society Ltd. v. Financial Commr. & Secy**.[2002] SUPP 1SCR 87.

155. In **Dr. Duryodhan Sahu and Ors. v. Jitendra Kumar Mishra and Ors.** (1998) IILLJ 1013 SC, this Court has stated that it is not for the court to embark upon an investigation of its own to ascertain the qualifications of the person concerned. [See also **Arun Singh alias Arun Kr. Singh v. State of Bihar** and Ors. AIR 2006 SC 1413]

> 156. We may furthermore notice that while examining if a person holds a public office under valid authority or not, the court is not concerned with technical grounds of delay or motive behind the challenge, since it is necessary to prevent continuance of usurpation of office or perpetuation of an illegality. [See Dr. Kashinath G. Jalmi and Anr. v. The Speaker and Ors. [1993]2SCR820].
>
> 157. Issuance of a writ of quo warranto is a discretionary remedy. Authority of a person to hold a high public office can be questioned inter alia in the event an appointment is violative of any statutory provisions.
> 163. It was held that a Writ of Quo Warranto can be issued even when the President or the Governor had appointed a person to a constitutional office. It was furthermore held that the qualification of that person to hold that office can be examined in a quo warranto proceedings and the appointment can be quashed."

(xvi) In **Hari Bansh Lal v. Sahodar Prasad Mahto and Ors.** reported in **(2010) 9 SCC 655**, the Hon'ble Supreme Court held as under:

> "10. Writ of quo warranto lies only when appointment is contrary to a statutory provision. In High Court of **Gujarat and Anr. v. Gujarat Kishan Mazdoor Panchayat and Ors.** (2003) 4 SCC 712, (three-Judges Bench) Hon'ble S.B. Sinha, J. concurring with the majority view held:
>
> > "22. The High Court in exercise of its writ jurisdiction in a matter of this nature is required to determine at the outset as to whether a case has been made out for issuance of a writ of certiorari or a writ of quo warranto. The jurisdiction of the High Court to issue a writ of quo warranto is a limited one. While issuing such a writ, the Court merely makes a public declaration but will not consider the respective impact of the candidates or other factors which may be relevant for

issuance of a writ of certiorari. (See R.K. Jain v. Union of India, SCC para 74.)

23. A writ of quo warranto can only be issued when the appointment is contrary to the statutory rules. (See Mor Modern Coop. Transport Society Ltd. v. Financial ComMr. & Secy. to Govt. of Haryana)

11. In **Mor Modern Cooperative Transport Society Ltd. v. Financial Commissioner & Secretary to Govt. of Haryana and Anr.** [(2002) 6 SCC 269], the following conclusion in para 11 is relevant.

"11. ... The High Court did not exercise its writ jurisdiction in the absence of any averment to the effect that the aforesaid officers had misused their authority and acted in a manner prejudicial to the interest of the appellants. In our view the High Court should have considered the challenge to the appointment of the officials concerned as members of the Regional Transport Authority on the ground of breach of statutory provisions. The mere fact that they had not acted in a manner prejudicial to the interest of the appellant could not lend validity to their appointment, if otherwise, the appointment was in breach of statutory provisions of a mandatory nature. It has, therefore, become necessary for us to consider the validity of the impugned notification said to have been issued in breach of statutory provision."

12. In **B. Srinivasa Reddy v. Karnataka Urban Water Supply and Drainage Board Employees Assn. and Ors.** (2006) 11 SCC 731this Court held:

"49. The law is well settled. The High Court in exercise of its writ jurisdiction in a matter of this nature is required to determine, at the outset, as to whether a case has been made

> out for issuance of a writ of quo warranto. The jurisdiction of the High Court to issue a writ of quo warranto is a limited one which can only be issued when the appointment is contrary to the statutory rules.

It is clear from the above decisions that even for issuance of writ of quo warranto, the High Court has to satisfy that the appointment is contrary to the statutory rules. In the later part of our judgment, we would discuss how the appellant herein was considered and appointed as Chairman and whether he satisfied the relevant statutory provisions.

20. From the discussion and analysis, the following principles emerge:

> (a) Except for a writ of quo warranto, PIL is not maintainable in service matters.
>
> (b) For issuance of writ of quo warranto, the High Court has to satisfy that the appointment is contrary to the statutory rules.
>
> (c) Suitability or otherwise of a candidate for appointment to a post in Government service is the function of the appointing authority and not of the Court unless the appointment is contrary to statutory provisions/rules."

(xvii) In **Mahesh Chandra Gupta v. Union of India,** [(2014) 1 SCC 161] Hon'ble Supreme Court, at paragraph (26), held as under:

> "26. ..... writ of quo warranto can be issued only when person holding public office lacks eligibility or when appointment is contrary to statutory rules and held as under in paragraph 21:-
>
> > "21. From the aforesaid exposition of law it is clear as noonday that the jurisdiction of the High Court while issuing a writ of quo warranto is a limited one and can only be issued when the

> person holding the public office lacks the eligibility criteria or when the appointment is contrary to the statutory rules. That apart, the concept of locus standi which is strictly applicable to service jurisprudence for the purpose of canvassing the legality or correctness of the action should not be allowed to have any entry, for such allowance is likely to exceed the limits of quo warranto which is impermissible. The basic purpose of a writ of quo warranto is to confer jurisdiction on the constitutional courts to see that a public office is not held by usurper without any legal authority."

(xviii) In **Renu and Ors. v. District and Sessions Judge, Tis Hazari and Ors.** reported in **(2014) 14 SCC 50**, the Hon'ble Apex Court held thus:

> "15. Where any such appointments are made, they can be challenged in the court of law. The quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the Judiciary a weapon to control the Executive from making appointment to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office who might be allowed to continue either with the connivance of the Executive or by reason of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the Court that the office in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to an enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not. For issuance of writ of quo warranto, the Court has to

> satisfy that the appointment is contrary to the statutory rules and the person holding the post has no right to hold it. (Vide: **The University of Mysore and Anr. v. C.D. Govinda Rao and Anr.** (AIR 1965 SC 491); **Shri Kumar Padma Prasad v. Union of India and Ors.** (AIR 1992 SC 1213); **B.R. Kapur v. State of Tamil Nadu and Anr.** (AIR 2001 SC 3435); **The Mor Modern Co-operative Transport Society Ltd. v. Financial Commissioner and Secretary to Govt., Haryana and Anr.** (AIR 2002 SC 2513); **Arun Singh v. State of Bihar and Ors.** (AIR 2006 SC 1413); **Hari Bansh Lal v. Sahodar Prasad Mahto and Ors.** (AIR 2010 SC 3515); and **Central Electricity Supply Utility of Odisha v. Dhobei Sahoo and Ors**. (2014) 1 SCC 161)."

(xix) In **K.D. Prathapan v. State of Kerala and Ors.** reported in **2015 KHC 606**, this Court observed thus:

> "34. Before we proceed to examine the above judgments relied on by the learned counsel for the petitioner, it is relevant to note the scope of a writ of quo warranto. In the present Writ Petition petitioner has prayed for issue of writ of quo warranto calling upon respondent No. 4, to show cause before this Court under what authority he is holding the office of Vice Chancellor. Further to quash Ext. P8 by which the State Government has restored respondent No. 4 in the post of Vice Chancellor in obedience of the judgment of the Division Bench dated 30.07.2012 in W.A. No. 347 of 2012. The Constitution Bench of the Apex Court in University of Mysore v. Govinda Rao (AIR 1965 SC 491) had occasion to consider the scope of writ of quo warranto. In the above case respondent Govinda Rao had filed a Writ Petition in the High Court under Article 226 of the Constitution praying for issue of a writ of quo warranto calling one Niya Gowda (respondent in the Writ Petition) to show cause as to under what authority he was holding the post of Research Reader in English in the Central College, Bangalore. High Court held that appointment of Niya Gowda was invalid. Appeal was filed by the University. The Constitution Bench examined the content and scope of writ of quo warranto and following was laid down in paragraph 6 and 7:

"6. The judgment of the High Court does not indicate that the attention of the High Court was drawn to the technical nature of the writ of quo warranto which was claimed by the respondent in the present proceedings, and the conditions which had to be satisfied before a writ could issue in such proceedings.

7. As Halsbury has observed:

"An information in the nature of a quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined."

Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly

> invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not."

35. In **Centre For PIL and another** (supra), with regard to writ of quo warranto the following was laid down in paragraph 51 which is to the following effect:

> "51. The procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions. Before a citizen can claim a writ of quo warranto he must satisfy the Court inter - alia that the office in question is a public office and it is held by a person without legal authority and that leads to the inquiry as to whether the appointment of the said person has been in accordance with law or not. A writ of quo warranto is issued to prevent a continued exercise of unlawful authority."
>
> Thus writ of quo warranto is for a judicial enquiry in which a person holding public office is called upon to show by what right he hold the said office. If the enquiry reaches to the finding that the holder of the office has no valid title the issue of writ of quo warranto will oust him from that office. Court in the proceedings can enquire as to whether appointment of defendant is made contrary to the statutory provisions.

36. The Hon'ble Apex Court in ***Rajesh Awasthi*** (supra) has laid down the following in paragraph 19:

> "19. A writ of quo warranto will lie when the appointment is made contrary to the statutory

> provisions. This Court in **Mor Modern Coop. Transport Coop. Transport Society Ltd. v. Govt. of Haryana**, [(2002) 6 SCC 269 held that a writ of quo warranto can be issued when appointment is contrary to the statutory provisions. In B. **Srinivasa Reddy** (supra), this Court has reiterated the legal position that the jurisdiction of the High Court to issue a writ of quo warranto is limited to one which can only be issued if the appointment is contrary to the statutory rules. The said position has been reiterated by this Court in **Hari Bans Lal** (supra) wherein this Court has held that for the issuance of writ of quo warranto, the High Court has to satisfy that the appointment is contrary to the statutory rules."

(xx) In **Premkumar T.R. v. Mahatma Gandhi University and Ors.** reported in **ILR 2018 (1) Kerala 993**, this Court held as under:

> "27. Well established is the legal proposition that a writ of quo warranto lies when the appointment is made contrary to the statutory provisions. True, the University and Dr. Sebastian, too, have questioned Premkumar's locus standi to file the writ petition. Dr. Sebastian has, in fact, alleged that Premkumar was fielded by persons unhappy with his appointment as the Vice Chancellor. But this objection to the suitor's standing in a writ of quo warranto cannot detain us for long. Legion are the judicial precedents.
>
> 28. If we examine this prerogative writ--quo warranto--from the judicial perspective of England, the place of its origin, the writ's primary object is to shield the sovereignty of the Crown from invasion, and to prevent abuse of public office, by a usurper or intruder. So every subject is deemed to be interested and may institute quo warranto proceedings.[Halsbury's Laws of England (4th Edn.) Vol. 1, paras 179-80, as quoted in V.G. Ramachandran's Law of Writs, EBC (2006), p. 1355]
>
> 29. In India, too, any person may challenge the validity of an appointment to a public office, whether or not that

> person's fundamental or other legal right has been infringed. But the Court must be satisfied that the person so applying is bona fide, and there is a necessity in public interest to declare judicially that there is a usurpation of public office. [Id., 1355] Indisputably, a writ of quo warranto questioning a usurper's occupying public office, according to the Supreme Court, can be maintained even by a busybody (**N. Kannadasan v. Ajoy Khose** [(2009) 7 SCC 1 : 2009 (8) SCALE 351]).
>
> 30. A citizen can claim a writ of quo warranto, for he stands in the position of a relater. He need not have any special or personal interest. The real test is to see whether the person holding the office is authorised to hold the same under law. Delay and laches, according to the Supreme Court in **Rajesh Awasthi v. Nand Lal Jaiswal** [AIR 2013 SC 78 : (2013) 1 SCC 501], constitute no impediment for the Court to deal with the lis on merits.
>
> 31. In **Central Electricity Supply Utility of Odisha v. Dhobei Sahoo** [2013 (13) SCALE 477 : AIR 2014 SC 246], the Supreme Court has pointed out that the concept of locus standi, which strictly applies to service jurisprudence, should have no entry, for such allowance is likely to exceed the limits of Quo Warranto. The basic purpose of a Writ of Quo Warranto, it was pointed out, is to confer jurisdiction on the Constitutional Courts to see that the public office is not held by a usurper, a person with no legal authority."

(xxi) In **Bharati Reddy v. The State of Karnataka and Ors**. reported in (**2018) 6 SCC 162**, the Hon'ble Supreme Court held as as under:

> "26. In **K. Venkatachalam v. A. Swamickan** (AIR 1999 SC 1723) : (1999) 4 SCC 526, the challenge was to the election of the Appellant to the Legislative Assembly in Tamil Nadu by way of a writ Under Article 226 of the Constitution filed by the contesting candidate (Respondent therein) for a declaration that the Appellant was not qualified to be a Member of Tamil Nadu Legislative Assembly, since he was not

enrolled as an elector in the electoral roll in the concerned constituency for the general elections in question. The Court analysed the factual matrix which pointed out that, admittedly, the incumbent was not an elector of the concerned constituency and that he blatantly and fraudulently impersonated himself as another elector in the constituency. Accepting that indisputable position, the Court proceeded to conclude that the Appellant was not eligible to contest elections from the concerned constituency, not being a voter in that constituency. It thus held that the Appellant therein lacked the basic qualification under Clause (c) of Article 173 of the Constitution of India read with Section 5 of the 1951 Act, which was quintessential to be elected from the constituency. On such finding, the Court entertained the writ petition Under Article 226 and declared the Appellant to be occupying the public office without legal authority and issued a writ of quo warranto. In other words, the matter was decided on the basis of indisputable and established facts. This judgment will be of no avail to the writ Petitioners in the present case, so long as the Income and Caste Certificate issued to the Appellant is in force.

27. In **Kurapati Maria Das v. Ambedkar Seva Samajan** [(2009) 7 SCC 387], the Court distinguished the decision in **K. Venkatachalam** (supra) being on the facts of that case and reversed the judgment of the High Court under challenge, whereby a writ of quo warranto was issued against the Appellant therein. The reason for doing so may have some bearing on the matter in issue as in that case, there was dispute about the caste status of the Appellant. The Court opined that the issue regarding the caste status can be decided only by the Competent Authority under the relevant enactment and not by the High Court. The Court accepted the contention of the Appellant that continuance of the post of Chairperson depended directly on his election, firstly, as a ward member and secondly as the Chairperson, which election was available only to the person belonging to the Scheduled

> Caste. In paragraph 32 of the reported decision, the Court while accepting the contention of the Appellant noted that the question of caste and his election are so inextricably connected that they cannot be separated and therefore, when the writ Petitioners challenged the continuation of the Appellant on the ground of his not belonging to a particular caste what they actually challenged was the validity of the election of Appellant though, apparently, the petition was for a writ of quo warranto."

50. Before adverting further, let us consider a few decisions of the Hon'ble Supreme Court as to why the scheme of compassionate appointment is evolved, as hereunder:

> "(i) In **Umesh Kumar Nagpal v. State of Haryana and Ors.** [(1994) 4 SCC 138], the Hon'ble Supreme Court explained the basic purpose of providing compassionate appointment to the dependent of a deceased employee, who had died in harness, and held thus:
>
> > "...The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Class-Ill and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency.....

> 6. For these very reasons, the compassionate employment cannot be granted after a lapse of a reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

(ii) In **Director of Education (Secondary) and Ors. v. Pushpendra Kumar and Ors.** reported in (1998) 5 SCC 192, the Hon'ble Supreme Court observed that compassionate appointment is an exception to the general provision and, being an exception, it should not interfere unduly with the rights of the other persons, and held as under:

> "The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependents of the deceased who may be eligible for such appointment. Such a provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot subsume the main provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for

> grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment of seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependent of a deceased employee."

(iii) In **State of Manipur v. Md. Rajaodin**, reported in (2003) 7 SCC 511, at paragraphs 9 and 11, the Hon'ble Supreme Court held as under:

> "9. Admittedly, the respondent's father died before the Office Memorandum came into operation. In the memorandum a time period is stipulated. Since the scheme itself was not in operation when the respondent's father died, the time stipulation as provided in the scheme would not be strictly applicable to the case of the respondent and anyone seeking for relief thereunder has to at least move within the time stipulated commencing from the date of the order. Nevertheless, keeping in view at any rate the object for which such appointments which are also compassionate appointments are made the minimum requirement is that the request for appointment should be made as expeditiously as the circumstances warrant. It could not be brought to our notice whether there was any scheme in operation prior to the scheme of 1984 referred to above. As the appointments of such nature envisaged under the said scheme are made to tide over immediate difficulties, there is an inbuilt requirement of urgency in making the application. Though it was contended that the respondent was a minor at the time of his father's death, it is to be noted that he was of 10 years of age in 1980 when his father died. Even if a responsible period after he attained majority is taken, certainly the application on 25.7.1997 seeking appointment was highly belated.

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11. In **Smt. Sushma Gosain and Ors. v. Union of India and Ors**., [1989] 4 SCC 468, it was observed that in all claims of appointment on compassionate grounds, there should not be any delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread-earner in the family. Such appointments should, therefore, be provided immediately to redeem the family in distress. The fact that the ward was a minor at the time of death of the father is no ground, unless the scheme itself envisage specifically otherwise, to state that as and when such minor becomes a major he can be appointed without any time consciousness or limit. The above view was re-iterated in Phoolwati (Smt.) v. Union of India and Ors., [1991] Supp. 2 SCC 689 and Union of India and Ors. v. Bhagwan Singh, [1995] 6 SCC 476. In Director of Education (Secondary) and Anr. v. Pushpendra Kumar and Ors., [1998] 5 SCC 192, it was observed that in matter of compassionate appointment there cannot be insistence for a particular post. Out of purely humanitarian consideration and having regard to the fact that unless some source of livelihood is provided the family would not be able to make both ends meet, provisions are made for giving appointment to one of the dependants of the deceased who may be eligible for appointment. Care has, however, to be taken that provision for ground of compassionate employment which is in the nature of an exception to the general provisions does not unduly interfere with the right of those other persons who are eligible for appointment to seek appointment against the post which would have been available, but for the provision enabling appointment being made on compassionate grounds of the dependant of the deceased employee. As it is in the nature of exception to the general provisions it cannot substitute the provision to which it is an exception

> and thereby nullify the main provision by taking away completely the right conferred by the main provision."

(iv) In **National Hydroelectric Power Corporation and Ors. v. Nanak Chand and Ors.** reported in AIR 2005 SC 106, the principle of compassionate appointment was formulated by the Hon'ble Apex Court as under:

> "5. It is to be seen that the appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointments being made on open invitation of application on merits. Basic intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. The object is to enable the family to get over sudden financial crises."

(v) In **Commissioner of Public Instructions and Ors. v. K.R. Vishwanath** reported in (2005) 7 SCC 206, the principle of compassionate appointment was formulated by the Hon'ble Apex Court as under:

> "….. the claim of person concerned for appointment on compassionate ground is based on the premises that he was dependant on the deceased-employee. Strictly this claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right.....High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate

grounds when the regulations framed in respect thereof do not cover and contemplates such appointments."

(vi) In **V. Sivamurthy v. State of Andhra Pradesh and Ors.** [(2008) 13 SCC 730], the Hon'ble Supreme Court held as under:

"(a) Compassionate appointment based only on descent is impermissible. Appointments in public service should be made strictly on the basis of open invitation of applications and comparative merit, having regard to Articles 14 and 16 of the Constitution of India. Though no other mode of appointment is permissible, appointments on compassionate grounds are well recognised exception to the said general rule, carved out in the interest of justice to meet certain contingencies.

(b) Two well recognized contingencies which are carved out as exceptions to the general rule are:

(i) appointment on compassionate grounds to meet the sudden crisis occurring in a family on account of the death of the bread-winner while in service.

(ii) appointment on compassionate ground to meet the crisis in a family on account of medical invalidation of the bread winner.

Another contingency, though less recognized, is where land holders lose their entire land for a public project, the scheme provides for compassionate appointment to members of the families of project affected persons. (Particularly where the law under which the acquisition is made does not provide for market value and solatium, as compensation).

(c) Compassionate appointment can neither be claimed, nor be granted, unless the rules governing the service permit such appointments. Such appointments shall be strictly in accordance with the scheme governing such appointments and against existing vacancies.

> (d) Compassionate appointments are permissible only in the case of a dependant member of family of the employee concerned, that is spouse, son or daughter and not other relatives. Such appointments should be only to posts in the lower category, that is, class III and IV posts and the crises cannot be permitted to be converted into a boon by seeking employment in Class I or II posts."

(vii) In **Bhawani Prasad Sonkar v. Union of India (UOI) and Ors.** [(2011) 4 SCC 209], the Hon'ble Supreme Court held as under:

> "15. Now, it is well settled that compassionate employment is given solely on humanitarian grounds with the sole object to provide immediate relief to the employee's family to tide over the sudden financial crisis and cannot be claimed as a matter of right. Appointment based solely on descent is inimical to our Constitutional scheme, and ordinarily public employment must be strictly on the basis of open invitation of applications and comparative merit, in consonance with Articles 14 and 16 of the Constitution of India. No other mode of appointment is permissible. Nevertheless, the concept of compassionate appointment has been recognized as an exception to the general rule, carved out in the interest of justice, in certain exigencies, by way of a policy of an employer, which partakes the character of the service rules. That being so, it needs little emphasis that the scheme or the policy, as the case may be, is binding both on the employer and the employee. Being an exception, the scheme has to be strictly construed and confined only to the purpose it seeks to achieve
>
> 19. Thus, while considering a claim for employment on compassionate ground, the following factors have to be borne in mind:
>
> (i) Compassionate employment cannot be made in the absence of rules or regulations issued by the Government or a public authority. The request is to be

considered strictly in accordance with the governing scheme, and no discretion as such is left with any authority to make compassionate appointment dehors the scheme.

(ii) An application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time.

(iii) An appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the bread winner while in service. therefore, compassionate employment cannot be granted as a matter of course by way of largesse irrespective of the financial condition of the deceased/incapacitated employee's family at the time of his death or incapacity, as the case may be.

(iv) Compassionate employment is permissible only to one of the dependants of the deceased/incapacitated employee, viz. parents, spouse, son or daughter and not to all relatives, and such appointments should be only to the lowest category that is Class III and IV posts."

51. Exhibit-P1 G.O.(Ms.) No.79/2018/G.A.D dated 06/04/2018 is extracted hereunder:

"Government of Kerala
Summary

Department of General Administration-Compassionate appointment-Order is issued for creating Supernumerary post of Assistant Engineer (Electronics) in PWD Department and for approving appointment of Sri. R. Prasanth S/o. Deceased MLA Adv. K.K. Ramachandran to Supernumerary post of Assistant Engineer (Electronics).

G.A.D. (C.E.Cell) Department

G.O.(Ms.) No.79/2018/G.A.D

Thiruvananthapuram, Date: 06/04/2018

Reference:- 1. Applications dated 03/02/2018 and 12/02/2018 submitted by Sri. R. Prashanth, to the Secretary G.A.D.

2. Unofficial note of General Administration Department by No. A2/19/2018/G.A.D.

ORDER

It has been decided in the cabinet meeting dated 24/01/2018, to give appropriate Government jobs in accordance with the educational qualifications of Sri. R. Prasanth, pursuant to the accidental death of MLA of Chengannur, Adv. K. K. Ramachandran. As per Ref. (1) Sri. R. Prasanth requested to appoint him in the post of Assistant Engineer, in accordance with his qualification as he has Second Class in 'Electronics and Communications'.

2) Vide reference (2) Public Works Department has intimated that even though Sri. R. Prasanth has eligibility to be appointed as Assistant Engineer (electronics), there is no vacancy in existence in the Public Works Department other than that is reported to PSC.

3) Under this circumstance, on the basis of detailed inspection by the Government, in this case, it is ordered to create a Supernumerary post of Assistant Registrar (Electronics) in PWD Department for appointing Sri.

Prashanth, S/o. Deceased MLA of Chengannur, Adv. K.K.Ramachandran as Assistant Engineer (Electronics). It is also permitted to appoint Sri. R. Prashanth in the said supernumerary post of Assistant Engineer (Electronics), by treating this as a special case and also subject to the existing criteria. Further steps have to be taken by the Public Works Department.

By Order of Governor
Bishwanath Sinha IAS
Principal Secretary"

52. Exhibit-P3 Order No. E.C.2/8829/2018 dated 10/04/2018 passed by the Chief Engineer, Public Works Department (Administrative Section), Thiruvananthapuram, 5th respondent, is extracted hereunder:

"**Order No. E.C.2/8829/2018 dated 10/04/2018**

Vide reference, it is ordered to create a Supernumerary post of Assistant Engineer (Electronics) in the PWD , in the absence of vacancy other than that is reported to PSC, for appointing Sri. R. Prashanth, S/o. Adv. K.K. Ramachandran, who died while serving as MLA of Chengannur to the post of Assistant Engineer in accordance with his qualifications and it is also permitted to appoint Sri. R. Prashanth in the said Supernumerary post of Assistant Engineer (Electronics), subject to existing criteria.

In this circumstance, it is hereby ordered to appoint

Shri. R. Prashanth as Assistant Engineer (Electronics) with a salary scale of 39500-83000, to the Supernumerary post in the Electronics Section of PWD department, at the office of the Assistant Executive Engineer, Electronic Subdivision, Kottayam.

Qualifications for appointment to the post of Assistant Engineer (Electronics) as per Special Rules of the Electronic Section as as follows: [G.O.(P) No.423/94/PW&T dated 03/06/1994].

1. Degree in Electrical Engineering or equivalent preferably with Electrical Communication as a special subject.

2. Degree in Radio Engineering or Telecommunication of a recognised University.

3. Degree or Diploma in electronics of the Madras Institute of Technology or any other equivalent qualification.

4. Diploma in Electrical Communication Engineering of Indian Institute of Science, Bangalore or any other equivalent diploma.

5. M.Sc in Physics or Applied Physics with Wireless as a special subject.

Shri R. Prashanth has to appear along with the Original Certificates enlisted below for verification proceedings at the office of the Chief Engineer Public Works Department (Administration), which is functioning at the Public Office building opposite to the Trivandrum Museum, within 10 days of date of receipt of appointment order. After verification proceedings, he has to report at the

concerned Subdivision Office, of the Office where appointment is made, within 15 days from the date of verification proceedings.

1. Certificate evidencing date of birth along with the self attested copy.

2. Certificate evidencing educational qualification along with the self attested copy.

3. Physical Fitness certificate issued by Medical Officer not below the rank of Civil Surgeon along with fingerprint and attested photo (in accordance with GO(P) No. 20/2011/P &ARD dated 30/06/2011)

4. At the time of joining the duty the details of movable and immovable property has to be produced in accordance with the prescribed model annexed to order No. GO(P) No. 171/2016/FIN dated 15/11/2016.

5. Annexure 1 (in accordance with G.O.MS No. 170/1974/PD dated 18/07/1974) available at the official website of the Public Works Department.

6. Original of Aadhaar card/Voters identification card with photo along with self attested copy.

7. Four passport size photographs

8. Gazetted entitlement register

The aforesaid person's appointment shall be regularised in accordance with the police investigation regarding candidate's character and antecedents and the availability of vacancy in the post of Assistant Engineer. Within three years of service from the date of joining of duty, the candidate has to satisfactorily complete 2 Years of probation. The authorities recruiting candidates have to

mandatorily follow the following procedures.

1. The information of candidate joining duty has to be reported in time at this office.
2. Steps have to be taken to make candidate a member of National Pension Scheme [GO(P) No.20/2013/FIN dated 07/01/2013]
3. Within one year of joining duty, the candidate has to join Provident Fund, State Life Insurance, and Group Insurance.
4. If the candidate was doing service in some other institution, the no objection certificate of the authority of the said institution has to be submitted at the time of joining the duty.

In case of correction regarding date of birth, application has to be submitted within five years from the date of joining duty as per [G.O.(P) No. 45/91/P&ARD dated 20/12/1991.

Signature
Chief Engineer"

53. Exhibit-P4 G.O.(P) No.12/99/P&ARD dated 24.05.1999 issued by the Secretary to the Government, Personal and Administrative Reforms (Advice-C) Department, Government of Kerala, in regard to compassionate appointments, is extracted hereunder:

"**GOVERNMENT OF KERALA**

Abstract

PUBLIC SERVICES-SCHEME FOR THE COMPASSIONATE EMPLOYMENT OF THE DEPENDENTS OF GOVERNMENT SERVANTS WHO DIE IN HARNESS-MODIFIED-ORDERS ISSUED

PERSONAL AND ADMINISTRATIVE REFORMS (ADVICE-C DEPARTMENT

G.O.(P) No.12/99/P&ARD

Dated, Thiruvananthapuram, 24th May, 1999

Read:- 1. G.O.(Ms.) No. 20/70/PD dated 21-1-1970
2. G.O.(P) No.7/95/P&ARD dated 30-3-1995
3. Judgment in O.P. No.10287/95 dated 26-7-1995 of the Hon'ble High Court of Kerala.
4. G.O.(P) No.21/95/P&ARD dated 21-10-1995.
5. G.O.(P) No.14/96/P&ARD dated 25-3-1996.
6. G.O.(P) No.23/96/P&ARD dated 10-7-1996.
7. G.O.(P) No.39/96/P&ARD dated 29-11-1996.
8. G.O.(P) No.4/97/P&ARD dated 12-7-1997.
9. G.O.(P) No.1/98/P&ARD dated 5-1-1998.

ORDER

As per the Government order read as 1st paper above, the Government have introduced a scheme to provide employment assistance to the dependents of Government Servants who die in harness. The intention of the schemes was to provide expeditious relief to the immediate family of the deceased Government Servants, who will suffer in the absence of such a relief. Several relaxations and restrictions have taken place over the past 29 years to the scheme and rules. This scheme was liberalised as per G.O. read as 2nd paper above. While disposing OP No.10287 of 1995, the Hon'ble High Court has observed that the provisions contained in G.O.(P) No.7/95/P&ARD dated 30-3-1995 regulating the scheme contravene the instructions issued by the Hon'ble Supreme Court of India in two of their judgments and directed the

Government to revise the scheme adhering to the rules enunciated by the Supreme Court.

2. Government have considered in detail all the relevant aspects and are now pleased to issue the following orders, in supersession of all the existing orders to regulate the appointment under the compassionate employment scheme.

Date of effect

xx xxx xxxxx

Eligibility

4. Applications for dependents of Government Servants who die in harness will be considered for employment assistance under the scheme. 'Government Servants' shall include contingent and work establishment personnel, part-time employees, N.M.R. Workers, Seasonal Employees under various Government Departments, Permanent Labourers of the Agricultural Department and Panchayat employees.

5. Dependents of the employees of the Municipalities and Corporations who die in harness will also be eligible for employment assistance on the pattern of this scheme. However, their appointment shall be confined to the Municipalities and Corporations only.

6. Dependents of Government Servants missing while in service, if it is not proved otherwise as laid down in

Section 108 of the Indian Evidence Act, will be eligible for employment assistance under the scheme treating that the incumbent had died while in service.

7. Dependents of Government Servants who die in harness irrespective of the circumstances of the death (including suicide) will be eligible for employment assistance under the scheme.

8. Dependents of Government Servants who have availed themselves of invalid pension and in whose case death takes place before the normal date of superannuation shall also be eligible for employment assistance under the scheme.

9. The scheme is not applicable to the employees of private colleges.

xx xxx xxxxx xxxxxxxxxxxxx

Minimum Service

15. There shall be no minimum service restriction. Dependents of those Government Servants who are regularly appointed and employed in Government service shall be eligible for the benefit of the scheme irrespective of the length of service.

Category of appointment

16. Appointment under the scheme will be limited to Class III and Class IV posts in the Subordinate Service, Last Grade Service and in Part-time Contingent Service to

> which direct recruitment is one of the methods of appointment. In the case of posts for which different methods of appointment are prescribed, the appointment under the scheme shall be set off against the quota earmarked for direct recruitment.
>
> ***Qualification for posts***
>
> 17. The qualification prescribed for direct recruitment to the post will apply. No relaxation in the qualifications will be allowed under the scheme.
>
> xx xxxx xxxxxxxxxxxxxxxxx"

54. The Kerala Financial Code mainly contains the rules relating to all financial transactions of Government which fall into two broad classes, viz., receipts and disbursements. These rules should be followed by every Government servant in the matter of receipt, custody and disbursement of Government money. These rules are supplementary to treasury rules and should be applied in conjunction with them.

55. Chapter (iv) deals with establishments, claims of Government Servants and recoveries from them. Rule 69 - Clause (ii) of Chapter IV-Establishment, speaks about the powers of subordinate authority to sanction additional establishment, and it reads as under:

"(ii) ESTABLISHMENT

Powers of subordinate authority to sanction additional establishments

(a) No authority subordinate to the Government may sanction the creation of any additional establishment, permanent or temporary except to the extent and subject to the conditions mentioned in the Book of Financial Powers. The delegation specified there are subject to the General conditions -

(1) that either a sufficient specific appropriation for the expenditure involved already exists or provision can be made for it by re-appropriation by the sanctioning authority under its own powers without reference to the Government, and

(2) that the provisions of the Kerala Service Rules are observed in fixing the pay of the persons appointed to hold the posts created under the delegated powers.

(b) An order sanctioning a temporary establishment should invariably specify the period for which it is sanctioned. It should also specify the date from which the sanction for a temporary establishment will take effect. If no date is specified, the sanction will take effect from the date of actual employment of the staff or of the Head of the staff.

(c) When a person is appointed substantively to a post in a class or grade of appointments in an establishment over and above its sanctioned strength without at the same time increasing the sanctioned number of posts in the class or grade, the officer so appointed is termed a 'Supernumerary' in that class or grade. Such an appointment may be sanctioned by the Government, when owing to reduction in an establishment or for any other reasons, they consider it necessary to retain the services of an officer without adding to the permanent strength of the establishment. When such an appointment is sanctioned, it shall be the duty of the Head of the

Department or office to absorb in the first vacancy, permanent or acting, that occurs in the class or grade after the appointment of the supernumerary and no vacancy occurring in that class or grade shall be filled up until all the existing supernumerary officers are absorbed. Supernumeraries should not be shown as belonging to a separate class by themselves, but should be shown as belonging to the particular class or grade to which each of them belongs, along with the other incumbents, constituting that class or grade.

Note:— For the purpose of this rule, all the non-gazetted ministerial officers of an office or establishment shall be treated as belonging to a single class and similarly all the last grade Government servants.

In making appointments of 'supernumeraries' the following principles should be generally followed:-

(i) A supernumerary post is normally created to accommodate the lien of an Officer, who in the opinion of the authority competent to create such a post is entitled to hold a lien against a regular permanent post but who, due to non-availability of a regular permanent post, cannot have his lien against such a post.

(ii) It is normally a shadow post i.e., no duties are attached to such a post. The officer, whose lien is maintained against such a post, generally performs duties in some other vacant temporary or permanent post.

(iii) It can be created only if another vacant permanent or temporary post is available to provide work for the person whose lien is retained by the creation of the supernumerary post. In other words, it should not be created in circumstances which, at the time of the creation of the post or thereafter, would lead to an excess of the working strength.

(iv) It is always a permanent post. Since, however, it is a post created for accommodating a permanent officer till he is absorbed in a

regular permanent post, it should not be created for an indefinite period as other permanent posts are, but should normally be created, for a definite and fixed period sufficient for the purpose in view.

(v) It is personal to the officer for whom it is created and no other officer can be appointed against such a post. It stands abolished as soon as the officer for whom it was created vacates it on account of retirement or confirmation in another regular permanent post or for any other reason. In other words, no officiating arrangements can be made against such a post. Since a supernumerary post is not a working post, the number of working posts in a cadre will continue to be regulated in a manner that, if a permanent incumbent of one of the regular posts returns to the cadre and all the posts are manned one of the officers of the cadre will have to make room for him. He should not be shown against a supernumerary post.

(vi) No extra financial commitment is involved in the creation of such posts in the shape of increased pay and allowances, pensionary benefits, etc.

(vii) Heads of Departments should maintain a record of the supernumerary posts, the particulars of the individuals who hold lien[against them and the progressive abolition of such posts as and when the holders of the posts retire or are absorbed in regular permanent posts for the purpose of verification of service for pension.”

(emphasis supplied)

56. Since the facts are admitted, as regards creation of supernumerary posts and appointment made by the State Government, we bestow our anxious consideration to Rule 39 of Part II KS & SSR, 1958,

as the dispute revolves around the applicability of the said provision, which reads as under:

> "**39**. Notwithstanding anything contained in these rules or in the Special Rules or in any other Rules or Government Orders the Government shall have the power to deal with the case of <u>any person or persons serving in a civil capacity under the Government of Kerala or any candidate for appointment to a service in such manner as may appear to the Government to be just and equitable</u>:
>
> Provided that where such rules or orders are applicable to the case of any person or persons, the case shall not be dealt with in any manner less favourable to him or them than that provided by those rules or orders.
>
> This amendment shall be deemed to have come into force with effect from 17th December 1958."

57. Reading of the provision extracted above makes it clear that it starts with a *non obstante* clause, viz., "notwithstanding anything contained in these rules or in the Special Rules or in any other Rules or Government Orders", the Government shall have the power to deal with the case of any person or persons under the Government of Kerala or any candidate for appointment to a service in such a manner as may appear to the Government, to be just and equitable.

58. It is clear that the aforesaid provision contains two limbs. The

first one deals with the cases of any person or persons already in service in a civil capacity under the Government of Kerala and the second limb deals with any candidate for appointment to a service, as may appear to the Government to be just and equitable.

59. Admittedly, the case projected in the writ petition falls under the second limb of Rule 39 of Part II KS & SSR, which clearly specifies that it can be applied only to make appointment of any candidate seeking appointment, and the Government should bear in mind that the appointment has to be just and equitable.

60. As per the rule in question, in order to make appointment just and equitable, Government have to bear in mind not only the situation that is prevailing, so far as a candidate for appointment is concerned, but also the other aspects under the Constitution of India and rules made by the Government.

61. Therefore, the power so vested cannot be exercised to protect personal interest of any individual or a family, and the qualifying words “just and equitable”, have to be understood, construed and applied in that sense, which thus means, the extraordinary power cannot be

exercised by the Government at its whims and fancies.

62. It is an admitted fact that a supernumerary post was created by the State Government for the purpose of appointment of the respondent No.7 in the electronics wing of Public Works Department. As evident from Exhibit-P6, the relevant portion of Kerala Financial Code, Volume I, VII Edition, incorporating the amendments upto 19.04.2008, which we understand to be the provisions in force, guides us with respect to the manner in which a supernumerary post has to be created. It also specifies that a supernumerary post is normally created to accommodate the lien of an Officer, who in the opinion of the authority competent to create such a post, is entitled to hold a lien against a regular permanent post, but who, due to non-availability of a regular permanent post, cannot have his lien against such a post.

63. The provision further says that it is normally a shadow post, i.e., no duties are attached to such a post and the officer, whose lien is maintained against such a post, generally performs duties in some other vacant temporary or permanent post. That apart, the provision makes it further clear that it can only be created if another vacant permanent or

temporary post is available, to provide work for the person, whose lien is retained by creation of the supernumerary post. In other words, it should not be created in circumstances which, at the time of creation of the post or thereafter, would lead to an excess of the working strength.

64. Clause (iv) of paragraph 69 of the Kerala Financial Code further specifies that it is always a permanent post. However, since it is a post created for accommodating a permanent officer, till he is absorbed in a regular permanent post, it should not be created for an indefinite period as other permanent posts are, but should normally be created, for a definite and fixed period sufficient for the purpose in view. Therefore, it could be deduced that for creation of a supernumerary post, there are clear provisions made under the Kerala Financial Code, and therefore, the question emerges for consideration is as to whether the State Government can flout the rules and create a supernumerary post by invoking the powers under Rule 39 of Part II KS & SSR. This we say so because, no other provision of Part II of Kerala State and Subordinate Service Rules, 1958, provide for appointment to be made flouting the rules in existence.

65. The issue with respect to invocation of power under Rule 39 of Part II KS & SSR, is no more *res integra*, in the light of a Full Bench decision of this Court in **T.C. Sreedharan Pillai and Ors. v. State of Kerala and Ors.** reported in **ILR 1973 (1) Ker. 364**, wherein it was held as under:

> "12. We now come to the more important question as to the precise nature, scope and amplitude of the power conferred by R.39. We may say at the outset itself that the amendment introduced by the notification dated the 10th July, 1972 has made no alteration at all in the scope or content of the power conferred by the rule and the position in that regard remains the same both before and after the said amendment.
>
> 13. The import, content and scope of Art.14 of the Constitution has been elaborately considered and explained in a number of authoritative pronouncements of the highest court of our country. The first part of the Article is a declaration of equality of civil rights of all citizens within the territories of India and the second part which is a corollary of the first, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination and favouritism; it is a pledge of the protection of equal Jaws, that is, laws that operate alike on all persons under like circumstances. The prohibition under the Article is directed against the 'State' which expression is defined in Art.12 as including not only the legislatures but also the Governments in the country. Art.13 of the Constitution has defined 'law' as including among other things any order, rule or notification having the force of law so that even executive orders or notifications must not infringe Art.14. The principle of equality laid down in Art.14 is reiterated in Art.16 of the

Constitution which guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. All statutory rules and notifications pertaining to matters "relating to employment or appointment to any office under the State" (which words are wide enough to include conditions of service and all like matters incidental to the employment must, therefore, conform to the principles enunciated in Art.14 and 16 of the Constitution. The principle of equality does not, however, mean that every law must have universal application to all persons even if they are not by nature, or circumstance similarly situated What is insisted by Art.14 and 16 is that equal laws have to be applied to all in the same situation and that there should be no discrimination between one person and another, if as regards the subject matter of the legislation or rule their position is substantially the same. The legislature or the rule making authority has the undoubted right of classifying persons and applying different rules or principles' to persons differently situated, but such a classification must rest upon some real and substantial distinction bearing a reasonable and just relation to the object and purpose sought to be served by the rules. A law will be liable to be struck down as offending Art.14 and 16 if it empowers any authority to arbitrarily pick and choose according to its sweet will and pleasure certain persons from out of a large group of individuals similarly situated and subject them either to a hostile or a favourable treatment.

14. We have considered it necessary to restate the settled legal position relating to the scope and effect of Art.14 and 16 of the Constitution because it has material relevance in determining the precise nature and amplitude of the power conferred by R.39. The attack made against the validity of the rule on the ground of arbitrariness has been repelled by us by holding that the rule contains sufficient indication of its policy and purpose

for the guidance of the authority exercising the power conferred by it. We have, therefore, to construe the rule as would eliminate arbitrariness and would also render its provisions consistent with Art.14 and 16 of the Constitution. An interpretation which would lead to the result of laying the rule open to attack on the ground that it permits dissimilar treatment of persons situated alike, has manifestly to be avoided.

15. In the light of the principles stated above we feel no doubt that the proper construction to be placed on R.39 is to understand it as conferring power on the authority designated therein to mete out special treatment only in cases where the facts and circumstances are such that a reasonable classification is possible. The classification must, no doubt, be based on some real and substantial distinction having a just and reasonable relation to the object and purpose of the rules. It is in this context that the words "just and equitable" occurring in R.39 assume great importance as they furnish the guiding principle on the basis of which the classification is to be made. In our opinion, R.39, so understood, is perfectly valid and constitutional. Any action taken in purported exercise of the power conferred by the said rule will however be liable to be set aside by the Court if it fails to satisfy the test of reasonable classification. The interference by the Court will then be not so much on the ground that the action is in violation of Art.14 and 16 of the Constitution but more for the reason of the impugned action being not sanctioned or authorised by the rule itself and hence, ultra vires.

16. The setting in which R.39 appears has also a bearing on the construction to be placed upon it. It is the last amongst the general rules contained in Part II of the Kerala State and Subordinate Services Rules. Detailed provisions have been made in R.1 to 38 laying down the conditions of service relating to the methods of

recruitment, promotion, special qualifications departmental tests, the grant of temporary exemption from test qualification for purposes of promotion, reservation of appointments for backward classes and scheduled castes etc., probation, its suspension, termination or extension, seniority, principles for the reckoning of and entitlement for promotion to non selection posts, mode of making appointments to selection category, postings and transfers of officers, temporary promotions etc. etc. **It is thereafter that R.39 occurs whereby power is reserved with the authority designated therein to deal with the case of any person serving in a civil capacity under the Government or any candidate for appointment to service in such manner as may appear to it to be just and equitable. In our view, it would not be correct to interpret R.39 as conferring an unbridled discretion on the competent authority to decide at its sweet will and pleasure either to apply or not to apply the provisions of the remaining rules in the case of any person or groups of persons, much less to ignore or violate all those rules. In fact, the conferment of such an arbitrary power would be plainly violative of Art.14 and 16 of the Constitution and will not be valid**.

17. In a case recently decided by the Supreme Court ***R. N. Nanjundappa v. T. Thimmiah and Another, 1972 (1) SCC 409*** their Lordships had occasion to consider the question whether it is competent for the Governor to invoke the power under the proviso to Art.309 of the Constitution for regularising an appointment which had been made in violation of the existing rules governing the subject. One Dr. Thimmiah, who was holding substantively only the post of an Assistant Geologist which is a Class III post in the Technical Education Department of the Mysore Government, was appointed Principal, School of Mines with effect from the 15th February, 1958 as per order passed by the State Government dated July 3, 1959. The post of Principal was a Class I post. Under the relevant

provisions of the Mysore State Civil Services (General Recruitment) Rules, 1957 and the Mysore Education Department Services (Technical Education Department) Recruitment Rules, 1964 Dr. Thimmiah was not eligible to be appointed as Principal either on deputation or by way of promotion. His appointment was, therefore, one made in contravention of the existing service rules framed under the proviso to Art.309. To get over this difficulty the Governor of Mysore, in purported exercise of the power conferred by the proviso to Article 309, published the following "Special Recruitment Rules" on February 9, 1967:

"In exercise of the powers conferred by the proviso to Art.309 of the Constitution of India, and all other powers enabling him in this behalf, the Governor of Mysore hereby makes the following rules, namely

1. Title.-- These rules may be called the Mysore Education Department Services (Technical Education Department (Special Recruitment) Rules, 1967.

2. Provisions relating to regularisation of appointment of Principal, School of Mines, Oorgaum, Kolar Gold Fields.

Notwithstanding any rule made under the proviso to Art.309 of the Constitution of India, or any other rules or Order in force at any time, Dr. T. Thimmiah. B. Sc. (Hons.) PH. D. (Lond.) F. G. S., shall be deemed to have been regularly appointed as Principal, School of Mines, Ooragaum. Kolar Gold Fields, with effect from February, 15, 1958.

(By order and in the name of the Governor of Mysore)
(Sd.) S. N. Sreenath, Under Secretary to the Government
Education Department."

The challenge before the Supreme Court was against these "Special Rules". It was contended on behalf of the State

Government of Mysore that the State had the power under the proviso to Art.309 of the Constitution to make a rule regularising the appointment of an officer even though the appointment had been made contrary to the existing rules on the subject. This plea was rejected by the Supreme Court and the impugned rules were declared to be void. Their Lordships said: --

"Assume that rules under Art.309 could be made in respect of appointment of one man but there are two limitations. Art.309 speaks of rules for appointment and general conditions of service. Regularisation of appointment by stating that notwithstanding any rules the appointment is regularised strikes at the root of the rules and if the effect of the regularisation is to nullify the operation and effectiveness of the rules, the rule itself is open to criticism on the ground that it is in violation of current rules. Therefore the relevant rules at the material time as to promotion and appointment are infringed and the impeached rule cannot be permitted to stand to operate as a regularisation of appointment of one person in utter defiance of rules requiring consideration of seniority and merit in the case of promotion and consideration of appointment by selection or by competitive examination.

x x x x

If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules.

The above observations of the Supreme Court lend full support to our view that a rule cannot be validly framed under the proviso to Art.309 conferring an arbitrary discretion on the State Government or any other authority to totally ignore the existing rules governing any aspect of the service conditions and to mete out special treatment to any particular officer or groups of officers in such a way as to totally nullify the operation and effectiveness of the rules. Hence, if R.39 is to be valid it has to be interpreted in such a manner as would read its provisions consistent with the above legal position. If, as laid down by the Supreme Court in the decision above cited, an action taken in contravention of the existing rules cannot be validated by making a special rule for that purpose under the proviso to Art.305, it is equally clear that no such action can be authorised to be done by any special provision made in that behalf under the proviso to Art.305, it is equally clear that no such action can be authorised to be done by any special provision made in that behalf under the proviso to Art.309, such as R.39 of the Kerala State and Subordinate Services Rules; much lese can it be done by an executive order passed pursuant to the power conferred by such a rule.

18. R.1 to 38 contained in Part I of the Kerala State and Subordinate the Government as on the officers in its service. While framing those roles in would appear to have been, however, recognised by the rule making authority that instances may sometimes occur where a strict and rigorous application of the aforementioned rules may result in manifest injustice or inequality and it is only to deal with such an extraordinary situation that the power has been conferred under R.39. It goes without saying that the said power is to be sparingly exercised and its use must be restricted to cases of a very exceptional nature. If due regard be had to the real nature and purpose of the power as explained above, there can be no difficulty in seeing that it can be exercised only in those individual

cases where the authority finds that on account of special circumstances a separate or differential treatment is justified and that such action is necessary in order to mete out justice and equity. The actual exercise of the power must therefore be preceded by a careful application of the mind of the authority to all the relevant facts and circumstances and a satisfaction being arrived at by it to the effect indicated above. In this context it is necessary to remember that the service rules framed under the proviso to Art.309 most ordinarily be taken to be in perfect conformity with accepted notions of justice and equity.' It could not, therefore, have been the intention of the rule making authority in framing R.39 that the power conferred by the said rule is to be utilised whenever it is found that the enforcement of any particular service rule results in some hardship to any officer or groups of officers. The remedy for such a situation, if it is found to exist, will be only to amend the offending rule and the power under R.39 cannot be resorted to as an easy substitute.

19. We have already pointed out that it is not the purpose of R.39 to empower the authority designated in it to arbitrarily deal out special treatment to any officer or officers according to its sweet will and pleasure, by passing orders in direct contravention of any of the Rules Nos. 1 to 38. The non obstante clause occurring in R.39 cannot be construed as enabling the authority designated in the Rule to nullify by an executive order the provisions contained in the remaining rules. The expression 'notwithstanding anything contained in these rules' occurs in various other rules contained in Part II also for example, see R.3(c), R.9(c), R.9(d), R.13AA. R.17A, R.30, R.35(f) and R.37. An examination of the context in which these identical words have been used in the other rules reveals that the object underlying the incorporation of the non obstante clause is only to declare that in regard to the particular topic dealt with in the concerned rule, where the clause occurs, the

provisions of the said rule shall prevail, notwithstanding anything to the contrary contained in any of the other rules contained in Part II or in the special rules. In other words, the intention is not that the particular rule where the clause occurs will override the provisions of all the remaining rules in respect of all matters; it only means that for the limited purpose of effectuating the provision of that particular rule in relation to its subject matter the other rules would not stand in the way In our view, it is this restricted interpretation that is to be given to the non obstante clause occurring in R.39 also and it will not be correct to understand the said rule as giving a carte blanche to the authority named in it to cast to the winds the provisions contained in the general or special rules and in dealing with the cases of any set of officers. As pointed out by the Supreme Court in ***S. G. Jaisinghani v. Union of India & Others*** (AIR 1967 SC 1427), "the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and citizen should know where he is."

20. Ordinarily, therefore, it is not expected that the power under R.39 should be resorted to merely for the purpose of getting round the provision contained in any of the general rules or special rules. R.39 is to be invoked only to meet exceptional situations where gross injustice or inequity is seen to result from the application of the rules in all their rigour. In such cases and such cases alone, R.39 empowers the designated authority to mete out equity and justice by passing appropriate orders in relaxation of the provisions of the rules concerned.

21. We may now summarise the conclusions that emerge from the preceding discussion. We hold that R.39 is valid and that it does not suffer from the vice of arbitrariness or excessive delegation. We are of the view that the said Rule does not warrant the passing of any general order with respect to any undefined or large group of persons exempting them from the operation of any existing rule or granting a relaxation of the rules in favour of such a group. The rule only authorises the authority designated therein to deal with any specific case or cases of individual officers and to pass orders in a just and equitable manner after a full application of the mind of the authority to all the relevant facts and circumstances necessary for a proper determination of the question as to what would constitute justice and equity. In exercising this power it is open to the authority to relax the rigour of the rules to such extent as may be necessary to ensure justice and equity, but it cannot completely nullify the operation and effectiveness of the rules in the guise of relaxing their rigour. If, however, special circumstances do exist warranting a valid classification of the particular case or cases it will also be open to the authority exercising the power under R.39 to accord a special treatment in respect of such exceptional cases even by exempting the person or persons concerned from the operation of any particular rule. In saying this we consider it necessary to emphasise that such a course will be permissible only in those rare cases where very strong grounds exist justifying a valid classification of the cases of the officers in question for the purposes of Art.14 and 16 of the Constitution. In determining what is 'just and equitable' the authority should take into account the overall effect that the proposed order would have in relation not merely to the particular officers whose cases are specifically dealt with by it but also to all others belonging to the same service, category or class. The mere fact that the enforcement of

a rule creates hardship to an officer or a group of officers will be no ground for invoking the power under R.39, because it must be assumed that the possibility of the causation of any such hardship must have been duly taken into account at the time when the rule in question was made and the rule making authority has nevertheless thought it fit to enact such a provision.

22. Though it was strongly contended on behalf of the petitioners that the power under R.39 can under no circumstances be exercised in such a way as to affect the rights of any of the other persons in the service, we find it difficult to uphold the said contention when it is stated in such a wide form. While explaining the scope of R.39 we have already held that it is permissible under the said rule to grant a relaxation of the rigour of the rules or even an exemption from any provision contained in the rules in favour of any officer or officers, in regard to whom the facts and circumstances are such that a valid classification for according special treatment would be justified under Art.14 and 16 of the Constitution. It is quite possible that when such an order is passed it may directly or indirectly have repercussions regarding the seniority, rank or chances of promotion of some of the other officers in service. That, however, has to be regarded as an inevitable incident of service flowing from the exercise of the power under R.39 which is as much a rule regulating the conditions of service of all the officers in the service of the State as the other provisions contained in the Kerala State and Subordinate Services Rules. The rights conferred on the members of service by the earlier Rules Nos. 1 to 38 in the Kerala State and Subordinate Services Rules are not absolute in character but are inherently subject to the contingent liability of being affected by any order validly passed under R.39.

23. We are not impressed with the argument advanced on behalf of the petitioners that the proviso to R.39 has

the effect of prohibiting any order being passed under the said rule in favour of any particular person or persons in such a way as to adversely affect other persons in the service. What is laid down by the proviso is only that in dealing with the case of any person under R.39 the order passed by the authority should not have the effect of placing him in a more disadvantageous position than what it would be if the rules in force were strictly applied to his case; in other words, the proviso only introduces a safeguard that the special treatment meted out to any person whose case is dealt with under R.39, should not have the result of placing him in a position less favourable than under the rules. The expression "any person" occurring in the proviso has reference only to the person whose case is specifically dealt with under R.39 and it will not take in other officers belonging to the service. It is therefore not correct or possible to construe the proviso as imposing a restriction that an order passed in the legitimate exercise of the power under R.39 should under no circumstances affect adversely other persons in the service. Counsel appearing for the petitioner relied on an unreported decision of our learned brother Govindan Nair, J. in O. P. No. 851 of 1968 wherein the learned Judge has expressed the view that "what can be done under R.39 is only to pass an order in favour of the employee provided that order does not adversely affect other employees who are governed by the same service Rules". We are informed that though a writ appeal - W. A. No. 137 of 1970 was filed against the above decision, it was dismissed in limine.

24. For the reasons indicated in the preceding two paragraphs we are constrained to disagree with the view expressed by Govindan Nair, J We do not find any justification for reading into R.39 a limitation that no order can be passed in favour of an employee in exercise of the power conferred by it if it will adversely affect any of the other employees who are governed by the same service rules. In our view, the effect of importing such a restriction

would be virtually to nullify the utility and the very purpose of the rule and to render its provisions nugatory.

25. The possibility of the proposed order having an adverse effect on the rights of other employees is, however, a matter vitally relevant for determining whether the course of action proposed would be 'just and equitable". It is mandatory on the part of the authority exercising the power under R.39 to apply its mind to this important aspect also before taking a final decision to invoke R.39 in each specific case, because it will not be "just or equitable" if for the purpose of relieving some genuine hardship that may exist in the case of an individual officer, undue prejudice or hardship is caused to others.

26. We have already made it clear that R.39 cannot be regarded as conferring an arbitrary power to ignore the existing service rules and to deal with cases of any officer or officers in violation of the existing rules. Its main purpose, as we see it, is to invest the authority designated in it with the power to relax the rigour of the rule in regard to matters that are merely procedural or incidental in nature and which do not go to the root of any of the substantive service conditions dealt with in the rules. We have also indicated that in rare and exceptional cases where there are valid grounds for a reasonable classification, it is permissible under R.39 to accord a special treatment by granting a partial or even total relaxation of a substantive provision contained rules.

28. We are, however, unable to accept the petitioners' broad contention that in every case where action is taken under R.39 all the persons in service who are likely to be even very remotely affected by such an order should be notified and heard. We can well conceive of many orders that may be legitimately passed under R.39 giving only a relaxation of some procedural provisions, which will not

have any direct effect on the rights of others in the service. Even if such orders may have some very remote or indirect repercussion on the prospects of promotion etc. of other officers, we are not prepared to recognise any obligation on the part of the authority exercising the power under R.39 to give a notice or hearing to all the personnel in service in regard to whom there may be such a remote likelihood of indirect prejudice. As already observed by us, the applicability of the rules of natural justice would depend upon the nature of the order that is passed in each given case and the consequences, if any, that it will bring about in relation to the rights of the other personnel in service. We have already indicated the view that in all cases where in respect of any matter relating to the seniority, rank or promotion of others which was already settled by an earlier order the existing position is sought to be altered or will be directly affected by the order proposed to be passed under R.39, the principle of *audi alteram partem* will get automatically attracted.

29. Having thus explained in detail the nature, intent and scope of the power conferred by R.39 it is next necessary to test the validity of the impugned orders in the light of the principles that we have enunciated. However, before proceeding to do so we may briefly advert to a contention strongly urged by the petitioners' advocate which concerns the validity of the notification Ext. P16 dated the 10th July, 1972 in so far as it purports to give retrospective operation to the amendments introduced by it in R.39. According to the provisions, in para 2 of the said notification, the amendments effected in R.39 are to be deemed to have come into force with effect from 17-12-1958. By virtue of S.3 of the Kerala Public Services Act, 1968, which came into force on the 17th September, 1968, the Kerala State and Subordinate Services Rules, though originally framed under the proviso to Art.309 of the Constitution of India, are to be deemed to have been made under the aforesaid Act. It is in the exercise of the

power conferred by S.2(1) read along with S.3 of the aforesaid Act that the Government of Kerala issued the notification Ext. P16 dated the 10th July, 1972 substituting a new provision in the place of the old R.39. S.2 of the Kerala Public Services Act empowers the Government to make rules either prospectively or retrospectively to regulate the recruitment and conditions of service of persons appointed to Government service. The argument of the petitioners is that in as much as the Kerala Public Services Act, 1968 itself came into force only on the 17th September, 1968 the rule making power conferred by S.2 cannot have the effect of enabling the subordinate rule making body to bring into force the rules framed by it with effect from any date anterior to the date of coming into force of the parent enactment. It is pointed out on behalf of the petitioners that the Kerala Public Services Act has not been given any retrospective operation and that it was brought into force only with effect from the 17th September, 1968. Counsel for the petitioners contend that just as a child cannot be older than its mother it is not legally possible for a rule framed under the statute to have operation or effectiveness during a period when the parent enactment itself had not come into force. In answer to this contention the Government Pleader relied very strongly on the deeming provision contained in S.3 of the Act. That Section is in the following terms:

> "3. Continuance of existing rules.-- All rules made under the proviso to Art.309 of the Constitution of India, regulating the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the State of Kerala and in force immediately before the commencement of this Act, shall be deemed to have been made under this Act as if this Act had been in force on the date on which such rules were made and shall continue to be in force unless and until they are superseded by any rules made under this Act."

> According to the learned Government Pleader, by virtue of the above deeming provision a legal fiction is created that the provisions of the Act were in force on the date on which the Kerala State and Subordinate Services Rules were framed under the proviso to Art.309 of the Constitution. The correctness of this submission regarding the effect of the deeming provision contained in S.3 is strongly refuted by the learned advocate appearing for the petitioners. Both sides addressed somewhat detailed arguments concerning the interpretation to be placed on the provisions of S.2 and 3 of the Act. We do not, however, consider it necessary for the purposes of these cases to express any final opinion on the said matter because, we have come to the conclusion that even if the provision in the notification Ext. P16 giving retrospective operation to the amendments made in R.39 is to be regarded as valid, still the impugned orders are all liable to be struck down as illegal on the ground that they do not evidence a proper or legitimate exercise of the powers of the State Government even under the provisions of the amended rule and are, therefore, ultra vires. Hence we do not propose to decide the question whether the amended rule has been validly given retrospective operation but shall proceed to examine the legality of the impugned orders on the basis that the provisions of R.39 as amended will govern these cases."

66. On the aspect of creating a supernumerary post, in **D.K. Reddy And Anr. v. Union Of India (Uoi) And Ors.** [(1996) 10 SCC 177], the Hon'ble Supreme Court held as under:

> "A supernumerary post is a permanent post and Govt. of India's own instructions relating to creation of such posts occur under the definition of permanent posts given in fundamental rules 9(22) from which the

following features would emerge:

i) It is always a permanent posts,

ii) It is created to accommodates the lien of an officer, who in the opinion of the authority competent to create such post, is entitled to hold a lien against a regular permanent post,

iii) It is created due to non-availability of a regular permanent post. Such post is personal to the officer for whom it is created and stands abolished as soon as the officer for whom it was created vacates it.

iv) It is a shadow post, in as much as no duties are attached to it and the officer concerned performs duties in some other vacant temporary or permanent posts."

67. In **Himachal Road Transport corporation v. Dinesh Kumar and Another** reported in (**1996) SCC 4 560**, persons in the waiting list, maintained for appointment under the kith and kin policy of the Corporation, approached the Administrative Tribunal seeking for appropriate orders. The Himachal Road Transport Corporation expressed inability to accommodate them in regular posts, as there were no regular vacancies. Notwithstanding the stand, the Tribunal directed the Corporation to appoint them in regular vacancies or to create supernumerary post to accommodate them. When the said decision was

challenged, while setting aside the order, the Hon'ble Apex Court held as under:

> "10. We are of the view that the Himachal Pradesh Administrative Tribunal acted illegally and without jurisdiction, in passing the orders dated 27.3.1995 and 6.3.1995 and in directing that the respondents be appointed in the regular clerical posts forthwith. In the absence of a vacancy it is not open to the Corporation to appoint a person to any post. It will be a gross abuse of the powers of a public authority tc appoint persons when vacancies are not available. If persons are so appointed and paid salaries, it will be a mere misuse of public funds, which is totally unauthorised. Normally, even it the Tribunal finds that a person is qualified to be appointed to a post under the kith and kin policy, the Tribunal should only give a direction to the appropriate authority to consider the case of the particular applicant, in the light of the relevant rules and subject to the availability of the post. It is not open to the Tribunal either to direct the appointment of any person to a post or direct the concerned authorities to create a supernumerary post and then appoint a person to such a post. We are of the view that directions given by the Administrative Tribunal, in these two appeals, are totally unauthorised and illegal. We are, therefore, constrained to set aside the orders appealed against. We hereby do so and allow the appeals. There shall be no order as to costs.
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> 11. Before concluding, we should record the factual position conceded by the counsel appearing for the Corporation. It is stated that Shri Dinesh Kumar as serial number 16 in the priority list for regular appointment as clerk and that Ms. Parveen Kumari is serial number 10 for appointment in the waiting panel

> for the post of clerk on contract basis. As and when vacancies arise for appointment to such posts, the Corporation shall conform to the priorities mentioned hereinabove in the matter of filling up the posts, subject to the fulfillment of necessary qualifications by the candidates concerned."

68. From the above, it could be seen that even the directions of the Administrative Tribunal, directing creation of supernumerary post is held as illegal, even in the case of claims under the kith and kin policy. While that be the case, Government of Kerala, cannot create a supernumerary post solely for providing appointment to the 7th respondent.

69. In **Sandeep Kumar Sharma v. State of Punjab and Others** reported in **(1997) 10 SCC 298**, the Hon'ble Apex Court had an occasion to consider the question of permitting relaxation in the Recruitment Rules and held that Government must get a pragmatic construction as to achieve effective implementation of a good policy of the Government. Relevant portion of the said decision reads thus:

> "13. In ***Atlas Cycle Industries Ltd. Sonepat v. Their Workmen*** (AIR 1962 SC 1100), a Constitution Bench of this Court considered the question whether a policy taken in the wake of an individual's case would offend Art.14 of the Constitution as the object then would have been to benefit a particular person. In that case,

> Government of Punjab raised the age of retirement of the Presiding Officers of Industrial Tribunals from 65 to 67 on 3-6-1957. One incumbent Sri A. N. Gujral would have attained the age of 65 on 4-6-1957. The Bench repelled the contention and observed thus:
>
> > "The occasion which inspired the enactment of the statute might be the impending retirement of Sri A. N. Gujral. But that is not a ground for holding that it is discriminatory and contravenes Art.14, when it is, on its terms, of general application. "

70. In **Renjeev v. State of Kerala** reported in **2000 (3) KLT 871**, a learned single Judge of this Court had occasion to consider the power of the Government under Rule 39 Part II KS & SSR *vis-a-v*is temporary appointment, made under Rule 9(a)(1) of the Rules, 1958, and held that continued long service was the circumstances, which persuaded the Government to be just and equitable, to deal with the cases of temporary appointment, in terms of Rule 39, and therefore, it was just and equitable. Relevant portion of the said decision reads as under:

> “4. But R.39 in Part II of the Kerala State and Subordinate Service Rules, 1958 provides that Government in appropriate cases can deal with cases of 'any candidate for appointment to a service in such manner as may appear to Government to be just and equitable'. Thus R.39 is wide enough not only not to cover exemption from the conditions regarding service but also regarding

exemption in the matter of appointment to a service when it appears to the Government to be dealt with justly and equitably. So R.39 of the General Rules in the K.S. & S.S.Rules contains a provision regarding exemption not only from the rules regarding service conditions; but also regarding appointment. So in the matter of appointment also it is possible in appropriate cases or in exceptional cases to deal with the case of any group of persons, if it is necessary according to the Government to meet the ends of justice or equity. Candidates covered by Ext. P9 were appointed on the basis of a notification issued by the Government inviting applications for training following the communal rotation. It was necessary at that point of time, because of dearth of qualified hands for appointment to the post concerned. Of course there was no consultation with the P.S.C. They were appointed on ad hoc basis, as there was no ready list of P.S.C. and as it was necessary in the exigencies of situation to appoint them. They continued for a long. It was in the above circumstances, Government found it just and equitable to deal with their cases separately in terms of R.39 and to direct their regularisation. While doing so, as per Ext. P9, Government had taken note of the list prepared by the P.S.C. and the candidates being advised against vacancies reported. Therefore in Ext. P9 Government ordered that absorption of such temporary hands into regular service would be subject to the claims of the candidates to be appointed against the vacancies reported to the P.S.C. and to be advised by the P.S.C. and also subject to the seniority, which means the length of service, of such temporary appointees. Therefore that order does not in any way affect petitioners 1 and 2 who had already been advised by the P.S.C., adversely. Petitioner No.3 is only seeking a chance for appointment as and when the P.S.C. invites applications. He did not

> apply either when temporary appointment was notified or when regular appointment was notified, obviously as he was not qualified at those respective occasions. Therefore, Ext. P9 cannot be said to be totally arbitrary warranting interference under Article 226 of the Constitution."

71. In **Venugopal v. State of Kerala** reported in **2002 (1) KLT SN 53 (C. No.64)**, a Hon'ble Division Bench of this Court had an occasion to consider the question of regularisation of contract appointment of certain employees in the State service and held that Government have got the power and, at times, a duty to invoke Rule 39 of Part II State and Subordinate Services Rules, 1958 (Kerala), in meting out justice, which should be just and equitable to both sides and to the public at large.

72. In **Dinesh Shankar v. State of Kerala** reported in **2016 (4) KLT SN 30 (C. No.33)**, a Hon'ble Division Bench of this Court had an occasion to consider the rigour of Rule 39 of Part II KS & SSR, wherein it was held that power under Rule 39 of Part II KS & SSR cannot be exercised capriciously or arbitrarily to give undue advantage or favour to an individual employee and such power cannot be exercised as a matter of course, without considering as to whether it is for a just and equitable

reason, as mandated in the rule itself.

73. In **Showkath Ali v. State of Kerala** reported in **2017 (4) KLT 559 (SC)**, the Hon'ble Supreme Court had an occasion to consider the power of the Government under Rule 39 exempting 37 directly recruited Assistant Sub-Inspectors from passing the test prescribed under the Special Rules, which was held to be perfectly in order. In the said decision, the Hon'ble Apex Court held as under:

> "10. We do not think that it needs any elaborate discussion to note that R. 39 of the Rules is to operate notwithstanding anything contained in the Rules or Special Rules or Government Orders. No doubt, under R.13AA, the passing of test is obligatory for members of the Scheduled Caste and Scheduled Tribe below the rank of Sub-Inspectors in the Police Department. But it has to be seen that it is R.39 which is an exception to the exemption contemplated under R. 13AA. R.39 is to operate notwithstanding anything prescribed not only in the Kerala State and Subordinate Services Rules or the Special Rules but even in any Government Order. The whole purpose of such residuary power is to remedy an otherwise unjust and inequitable situation. Therefore, the Government Order dated 05/02/2000 also does not stand in the way of the Government invoking R.39. That apart, R.13AA operates in the matter of promotion whereas in the instant case, R.39 is operated in the matter of probation.
>
> 11. The reliance placed on the Full Bench decision in ***T. C. Sreedharan Pillai and others (supra)***, according to us, is of no avail to the appellants. The Full Bench has

summarized the law on R.39 in paragraphs - 20 and 21, which read as follows (paragraph numbers are given as they appear in MANU / KE/0299/1972):

"20. We may now summarise the conclusions that emerge from the preceding discussion. We hold that R.39 is valid and that it does not suffer from the vice of arbitrariness or excessive delegation. We are of the view that the said Rule does not warrant the passing of any general order with respect to any undefined or large group of persons exempting them from the operation of any existing rule or granting a relaxation of the rules in favour of such a group. The rule only authorises the authority designated therein to deal with any specific case or cases of individual officers and to pass orders in a just and equitable manner after a full application of the mind of the authority to all the relevant facts and circumstances necessary for a proper determination of the question as to what would constitute justice and equity. In exercising this power it is open to the authority to relax the rigour of the rules to such extent as may be necessary to ensure justice and equity, but it cannot completely nullify the operation and effectiveness of the rules in the guise of relaxing their rigour. If, however, special circumstances do exist warranting a valid classification of the particular case or cases it will also be open to the authority exercising the power under R.39 to accord a special treatment in respect of such exceptional cases even by exempting the person or persons concerned from the operation of any particular rule. In saying this we consider it necessary to emphasise that such a course will be permissible only in those rare cases where very strong grounds exist justifying a valid classification of the cases of the officers in question for the purposes of Articles 14 and 16 of the Constitution. In determining what is 'just and equitable' the authority should take into account the overall effect that the proposed order would have in relation not merely to the

particular officers whose cases are specifically dealt with by it but also to all others belonging to the same service, category or class. The mere fact that the enforcement of a rule creates hardship to an officer or a group of officers will be no ground for invoking the power under R.39, because it must be assumed that the possibility of the causation of any such hardship must have been duly taken into account at the time when the rule in question was made and the rule making authority has nevertheless thought it fit to enact such a provision.

21. Though it was strongly contended on behalf of the petitioners that the power under R.39 can under no circumstances be exercised in such a way as to affect the rights of any of the other persons in the service, we find it difficult to uphold the said contention when it is stated in such a wide form. While explaining the scope of R.39 we have already held that it is permissible under the said rule to grant a relaxation of the rigour of the rules or even an exemption from any provision contained in the rules in favour of any officer or officers, in regard to whom the facts and circumstances are such that a valid classification for according special treatment would be justified under Art.14 and Art.16 of the Constitution. It is quite possible that when such an order is passed it may directly or indirectly have repercussions regarding the seniority, rank or chances of promotion of some of the other officers in service. That, however, has to be regarded as an inevitable incident of service flowing from the exercise of the power under R.39 which is as much a rule regulating the conditions of service of all the officers in the service of the State as the other provisions contained in the Kerala State and Subordinate Services Rules. The rights conferred on the members of service by the earlier Rules Nos. 1 to 38 in the Kerala State and Subordinate Services Rules are not absolute in character but are inherently subject to the contingent liability of being affected by any order validly passed under R.39."

(Emphasis supplied)

12. Close to the facts, a situation where the Government had not conducted the tests, had arisen for consideration before the Kerala High Court in ***Sherafuddin v. State of Kerala***, 2004 (2) KLT 731, where at paragraph - 9, it was held that [paragraph numbers are given as they appear in MANU / KE / 0299/1972):

"9. The Government having never conducted the examination, it will be unjust and inequitable to deny the service benefits to the incumbents if they are otherwise fit for such benefits. In fact the very purpose of the rule is to tide over such situations. There is no point in requiring the incumbents to perform an impossibility. They are required to pass the examination if only it is held. Admittedly it was never held. Therefore, the invocation of R.39 in such circumstances is justifiable in terms of justice and equity. The purpose of the rule is to use the principles of justice to supplement law in a fair and reasonable manner and for a just and equitable cause. The action / inaction of the Government shall not prejudice an incumbent who is otherwise fit for service benefits and hence the order is perfectly justifiable."

and at paragraph - 13, it has been further held:

> "13.....When there is failure of justice resulting in inequity and injustice, R. 39 of the General Rules is to be invoked in the interests of equity and justice. Such power can be exercised even with retrospective effect for doing complete equity....."

xxxxxx

15. Back to the facts, in ascertaining equity and justice, the simple question to be addressed is what would happen to those thirty seven Assistant Sub-Inspectors in service, in case the exemption is not granted. For no fault on their part, should they have to continue as Assistant Sub-Inspectors only till their retirement? Is there any

> point, nay, does it even appeal to common sense, to subject them to the test after more than twelve years of entering service and serving in promoted posts as well? Certainly, to remedy such a situation, an equitable relief deserves to be granted to such employees in the interest of justice by invoking R.39. That is what has been done by the Government as per the impugned Order dated 17/11/2000."

74. In **Aboobacker v. Emilia Morris** reported in **2020 (1) KLT Online 1092**, yet another Division Bench of this Court held that the power under Rule 39 of Part II - State and Subordinate Services Rules 1958 (Kerala) is extensive, but the question is as to whether the power is all pervasive, to be exercised in all situations and in whatever manner the Government decides, to favour a person or group of persons, to the detriment of another person or group of persons, to circumvent the mandatory requirements in the Service Rules. After analysing the situation, it was further held that exercise of power under Rule 39 of Part II KS & SSR is qualified by the words 'just and equitable', which definitely indicates that the Government shall exercise the power only in such a manner as may appear to be just and equitable and the justness of an order is liable to be tested on the touchstone of fairness. It was also held that equity

presupposes consideration of all the relevant factors and hearing of all the affected persons.

75. The discussion of facts made above would make it clear that the State Government can only make supernumerary posts to tide over the situation of providing promotion or appointment to an employee, who is due for such appointment in the Government service and it can never be created for making compassionate appointment in service.

76. We are also of the view that while making an appointment, invoking the 2nd limb of Rule 39, Government will have to bear in mind the Constitutional guarantees, contained under Part III of the Constitution of India, and more importantly, Articles 14 and 16. Article 14 of the Constitution of India clearly specifies that the State shall not deny to any person equality before the law or equal protection of the laws, within the territory of India, whereas, Article 16 makes it imperative that there should be equality of opportunity to all citizens in matters relating to employment or appointment to any office under the State.

77. In our considered opinion, while taking a policy decision by the Government, even in an individual case, State is duty bound to bear in

mind the Constitutional framework contained under Articles 14 and 16 of the Constitution of India. This we say so because, Rule 39 of Part II KS & SSR only permits the Government to overlook the rules specified thereto, but the Government is enjoined with a duty to see that the provisions of the Constitution are not violated. Therefore, the test of just and equitable, imposes duty and obligation on the Government to ensure that the interest of the public is not, in any manner, violated, which aspect is antithesis to the basic structure theory of fairness in action.

78. If a supernumerary post created and appointment given to a dependent of an MLA, if permitted, to be continued, it would give a free hand to the Government, to make similar appointments to the children of persons holding various posts, right from the President of a Panchayat upto the top level posts, and if it happens, it would be nothing, but absolutely crippling equality and equal protection of laws, making the qualified candidates waiting outside to get a berth in Government service.

79. It is also to be taken into account the fact that any person, who has to secure an employment under the Government, will have to make earnest efforts of preparation, participate in a written test and interview

or such other procedures, so as to ensure that he gets an appointment. While Rule 39 of Part II KS & SSR is invoked by the Government, all the above aspects are given a go-bye and the 7th respondent has been appointed to the service of the State, on the sole consideration that he is the son of a Member of the Legislative Assembly, and his family requires employment on compassionate grounds. Thus, the 7th respondent is individually put on a higher pedestal, violating all the cannons of law and overlooking and flouting the rules made for that purpose, and therefore, there is no public element involved in it, or to put it otherwise, it is only a consideration of the individual concerned. That is why, clear conditions are mandated under the second limb of Rule 39 of Part II KS & SSR, that such appointments made shall be just and equitable.

80. Considering the above aspects, we are of the opinion that since the appointment of the 7th respondent is made, creating a supernumerary post, there is no other option to the petitioner, than to approach this Court, by filing a writ petition seeking for a writ of *quo warranto*, which in our view, is in public interest and is maintainable in law.

81. Giving due consideration to the above decisions, contentions of

Mr. Asok M. Cherian, learned Additional Advocate General, that the validity of appointment of the 7th respondent can only be tested on the principles of a writ of certiorari, are rejected.

82. Contention of the learned Additional Advocate General that in the post of Assistant Engineer (Electronics) in the Public Works Department, the 7th respondent is not discharging any sovereign functions, as he is subordinate to others, and therefore, no writ of *quo warranto* can be issued, cannot be countenanced for the reason that the 7th respondent is duty bound to discharge the statutory functions referable to the exercise of sovereign power delegated to public servants.

83. Therefore, even though the learned Senior Counsel appearing for the 7th respondent submitted that we have to engage our heart rather than head, for considering the subject issue, we may have to use our heart and head, since a Constitutional court, while discharging the functions under Article 226 of the Constitution of India, has necessarily to take care of the mandates contained under Articles 14 and 16 of the Constitution of India, apart from Article 309 dealing with the intricacies of public employment.

84. On the aspect of creation of a supernumerary post, it is already indicated in the foregoing paragraphs that the Kerala Financial Code makes it clear as to when the prerogative power of the Government can be exercised, in order to meet special circumstances, and in the case on hand, there is no such eventuality and, therefore, there cannot be a special concession to the 7th respondent. Once there is a policy of the Government, providing employment assistance on compassionate grounds and thus, the State have prescribed guidelines to ameliorate the financial hardship of the kith and kin of the Government servants or employees, who died in harness, and set apart a percentage of the vacancies in the departments, it is not open to the Government to extend the same to the kith and kin of MLAs or any other person of their choice, relaxing the rigour of Rule 39 of the Kerala State & Subordinate Service Rules, 1958. Compassionate employment is given to the persons satisfying the requirements only if there are vacancies and not otherwise. Direction to create supernumerary posts to accommodate an outsider to the scheme is not permissible.

85. In the light of the above discussion and decisions, we have no

hesitation to hold that the reliefs sought for by the petitioner are justifiable to be granted. Accordingly, we hold that respondent No.7 is not entitled to continue in the post of Assistant Engineer (Electronics) in the 4th respondent - Public Works Department, Thiruvananthapuram, on the basis of Exhibit-P1 Government order dated 6.4.2018 issued by the 2nd respondent and Exhibit-P3 appointment order dated 10.04.2018 issued by the Chief Engineer (Administration).

Writ petition is allowed. Exhibit-P1 G.O.(Ms.) No.79/2018/G.A.D dated 6.4.2018, issued by the Secretary, General Administration (Compassionate Employment Cell) Department, Thiruvananthapuram; and Exhibit-P3 Appointment Order No. E.C.2/8829/2018 dated 10.04.2018, issued by the Chief Engineer (Administration) are quashed. Writ of *quo warranto* is issued. There will be a direction to the State Government, to terminate the services of the 7th respondent forthwith.

Sd/-
S. Manikumar
Chief Justice

Sd/-
Shaji P. Chaly
Judge

krj

APPENDIX

PETITIONER'S EXHIBITS:

EXHIBIT P1 A TRUE PHOTOCOPY OF THE G.O.(MS) NO.79/2018/G.A.D. DATED 06/04/2018 ISSUED BY THE 2ND RESPONDENT ALONG WITH ITS TRANSLATION.

EXHIBIT P2 TRUE PHOTOCOPY OF THE RELEVANT EXTRACTS OF THE PWD MANUAL (REVISED AS PER G.O.(P) NO.13/2012/PWD DATED 01/02/2012).

EXHIBIT P3 A TRUE PHOTOCOPY OF APPOINTMENT ORDER NO.E.C.2/8829/2018 DATED 10/04/2018 ISSUED BY CHIEF ENGINEER (ADMINISTRATION) TO THE 6TH RESPONDENT ALONG WITH ITS TRANSLATION.

EXHIBIT P4 A TRUE PHOTOCOPY OF THE G.O.(P) NO.12/99/P&ARD DATED 24/05/1999.

EXHIBIT P5 A TRUE PHOTOCOPY OF THE JUDGMENT RENDERED BY A THREE-JUDGE BENCH OF THE HIGH COURT OF KERALA IN T.C. SREEDHARAN PILLAI & ORS. V. STATE OF KERALA & ORS. REPORTED IN 1973 KLT 151.

RESPONDENTS' EXHIBITS : NIL

//TRUE COPY//

P.A. TO JUDGE