

(1950) 03 MP CK 0003

In the Madhya Pradesh High Court

Case No : Civil Miscellaneous Application No. 8 of 1950

Harendranath Sharma

APPELLANT

Vs

State of Madhya Bharat and Others

RESPONDENT

Date of Decision : 02-03-1950

Acts Referred:

Constitution of India, 1950 — Article 139, 189, 226, 226(1), 245
Indore City Municipal Act, 1909 — Section 10(1), 3

Citation : (1950) 03 MP CK 0003

Hon'ble Judges : Mehta, J;Dixit, J

Bench : Division Bench

Advocate : M.B. Rege, V.R. Newaskar, R.G. Waghmare and S.R. Joshi, for the Appellant; K.A. Chitale, General for Respondent Nos. 1 and 2, S.M. Samvatsar, N.V. Karanjkar and G.R. Dighe for Respondent Nos. 3 and 4, for the Respondent

Final Decision : Dismissed

Judgement

Dixit, J.—This is a petition for the issue of a writ under Article "226 of the Constitution of India, directed against the State, Shri, R.S. Sharma, Qua Health Minister, Laxmansingh Chouhan and Chhotelal (opponents Nos. 2, 3 & 4) praying for a declaration that the order dated 4th July 1949 of the Madhya Bharat Government revoking the acceptance of the resignation of the opponents NO. 3 & 4 as members of the Indore Municipal Council and revoking the nomination of the Petitioner, Harendra Nath Sharma as a member of the said Council is illegal and ultra vires the Indore Municipal Act, a declaration that the Petitioner is a validly nominated member of the Council, and an order requiring the opponents No. 3 & 4 to forbear from exercising the powers and functions of a councilor.

2. The facts and circumstances leading up to these proceedings are of somewhat peculiar kind and may be shortly stated as follows.

3. The Indore City Municipal Council is a cor. porate body, constituted under the Indore Municipal Act (NO. IV [4] of 1909). It consists of 94 Councilors, 22 of whom are elected and 12 are nominated by the Government. When the Council

was last formed, the non-Applicants No. 3 & 4 along with others were nominated by the Government to the Council. It is alleged by the Petitioner that on or about 1st December 1948, these two nominated members tendered their resignation of the membership of the Council to the then Minister, in charge of the Municipalities, Syed Hamid Ali that the resignations were accepted on 27th April 1949 and in the casual vacancies, created by the resignation, Government in the exercise of its powers conferred u/s (3) and 10(1)(b), Indore Municipal Act, nominated the Petitioner and Shri Bhanudas Shah, an Advocate of this Court, as Councillors. Subsequently, when there was a change in the Council of Ministers of the State, the opponents No. 3 & 4 presented an application to Shri T.S. Gokbale,, the succeeding Minister in charge of Municipalities, for a review of the order dated 27th April 1949 of the Government. A notice of the application for review was served on the Petitioner to show cause. The Petitioner states that on the date of the hearing of the review application Shri R.S. Sharma, Health Minister, to whom the portfolio of Municipalities had been transferred in the meantime took the view that in considering the review petition he was engaging himself in an administrative matter and as such counsel for the parties to the review application could not be heard. The Petitioner makes a grievance that he had requested Shri Bhanudas Shah who was also interested in the matter to represent him at the hearing of the review petition and on that expectation he himself did not appear in person but that the sudden decision of the Health Minister to disallow the parties to appear by Counsel deprived the Petitioner of an opportunity of stating his case. On 4th July 1949, the Health Minister allowed the review petition, holding that the acceptance of the resignation of opponents Nos. 3 & 4 and the subsequent nomination of the Petitioner as void and ordered the restoration of the status quo which existed on 27th April 1949 before the acceptance of the order of the resignation. The contention of Harendranath Sharma in his affidavit in support of the petition is that the order dated 4th July 1949 of the Madhya Bharat Government is illegal and ultra vires the Indore Municipal Act and in passing the said order the Health Minister acted in violation of the principles of natural justice and that by the said order he has been illegally and unlawfully deprived of the membership of the Council. The Applicant in his petition asks this Court to issue a writ of mandamus for the relief:

(1) That the order given by opponent No. 2 on 4th July 1949 be declared illegal and ultra vires.

(2) That the opponents Nos. 3 and 4 be directed that their status as Municipal Councillors ceased to exist on 27th April 1949 and they are not entitled to the status of Councillors and they cannot work and function as Councillors.

(3) That it be declared that the Petitioner is entitled to take seat as nominated member of the Municipal Council as notified in the Government Gazette dated 7th May 1949.

(4) That the Madhya Bharat Government and the opponent No. 2 be directed to dismiss the review application of the opponents No. 3 & 4 being against the

provisions of the Municipal Act and to annul their order dated 4th July 1949 and further restore the Petitioner to the office enjoyed by him up to 4th July 1949.

4. At this stage it will be useful to set out Paras 3 & 5 of the reply, filed on behalf of the State by Mr. Mulak, Dey. Secretary to Government in the Ministry of Health Madhya Bharat.

The facts of the case clearly revealed to the Government that the opponents Nos. 3 & 4 had not resigned their office as Municipal Councillors.

(a) Their letter dated 1-12-48, read with the covering letter addressed to the City Congress Committee, on its true construction, is neither an absolute and an unequivocal resignation of their office nor was it communicated to the Government in the official course of the business. In the Inward Register maintained by the Ministry of Health, this letter has also not been entered.

(b) The letter does not constitute a valid resignation within the meaning of law as it has not been addressed to the Municipal Council of which they were members.

(c) Despite their letter dated 1st December 48, the opponents Nos. 3 & 4 and the other signatories continued in their office and discharged the duties as Municipal Councillors till they were thrown out by the order of the Government, communicated to them on 20th April 1949.

(d) The opponents Nos. 3 & 4 as also the other signatories of the letter had revoked the resignation before it was communicated to the Hon'ble the then Minister. It is denied that the opponents Nos. 3 & 4 gave their resignation on or about 1st December 48, as alleged in Para 3 of the petition. It is, therefore, submitted that no casual vacancy occurred.

The opponents Nos. 3 & 4 amongst others made a petition to the Government to review the order dated 27th April 49, contending that they had not in fact resigned, having revoked their resignation before its communication to the Hon'ble the Minister and to his knowledge. At the hearing of this petition, parties present and their counsel were heard for the determination of the nature of the petition. The Petitioner had not appeared personally or through pleader. It was conceded by those who appeared that the Government were dealing with an executive matter and counsel had no right to be heard. On questions of fact, the parties present were called upon to swear affidavits and on the material produced before the Government, order dated 4th July 1949, was passed holding that the opponents Nos. 3 & 4 amongst others had not resigned their office as Municipal Councillors and that no casual vacancy arose. The nomination of the present Petitioner was thus invalid. The opponent No. 2 had satisfied himself on the materials placed before him that the resignations had been revoked before they were communicated to the Government. The effect of the order passed by Hon'ble Shree Hamidall was to throw out the bulk of the elected members from the Municipal Council, a result which violated the spirit of the Municipal Act.

5. The Government also contend in their reply that this Court has no jurisdiction

to issue any writ under Article 226 of the Constitution of India and that the petition is not maintainable for the reason that the Petitioner did not approach the Government to seek redress before having recourse to an extraordinary remedy of the kind, contemplated by Article 226 and that he has already moved the civil Court. The reply of opponents Nos. 3 & 4 is substantially the same as that filed on behalf of the State. The opponents No. 3 & 4 state that on account of a difference of opinion with the members of the Congress party in the Municipal Council in the matter of presentation of an address to Jai Prakash Narain, a Socialist leader, they along with others had as mark of protest and indignation delivered to the President of the City Congress Committee a joint resignation from the Municipal Council; that the resignation was addressed to the Government but it was not absolute and unequivocal and further that in accordance with the opinion of the Secretary of the All India Congress Committee the President of the City Congress Committee was subsequently directed by the Secretary of the Provincial Congress Committee not to proceed further with the resignation and that at their suggestion the party leader Shri. Sarvate had also informed the President of the City Congress Committee of the revocation of the resignation, delivered to him on 1st December 1948 and that, therefore, the President of the City Congress Committee had no authority to forward the resignation to the Government. The opponents Nos. 3 & 4 have also filed an affidavit of Babulal Patodi, another member of the council who was elected as its President on 17th January 1949. He was also one of the signatories to the joint resignation. He states that:

In connection with the Municipal affairs I had been usually meeting the then Health Minister Syed Hamid Ali and during these meetings on 25th January 1949 in Indore, on 10th February 1949 in Gwalior and in the third week of April 1949 in Indore, I had personally informed him that the alleged resignations have been revoked by the signatories to it; that the President of the City Congress Committee has been intimated by a letter about the revocation of the alleged resignation and that even if he were to receive a letter of the resignation he should not consider it or to regard it as having been revoked. The Hon'ble the Health Minister Syed Hamid Ali had told him that he had not received the alleged resignations and assured him personally that even if he would receive them he would not act on these resignations.

The allegations in the affidavit of Babulal Patodi have been challenged and disputed by the Petitioner in his affidavit in reply upon information said to have been received from the gentleman concerned.

6. On 13th February 1950, when a rule was issued by my learned brother, Mehta J. to the opponents to show cause, he considered that as the question raised in the petition appeared to be of constitutional importance, the petition should be heard and disposed of by a Bench rather than by him sitting singly. He, therefore, directed that the papers may be placed before the Hon'ble the Chief Justice. Accordingly this Bench was constituted by my Lord the Chief Justice to

hear and dispose of this petition, Many points were elaborately and ably argued before us by the learned Counsel for the Petitioner, the Advocate-General and the counsel for the opponents Nos. 3 & 4.

7. The learned Advocate-General has taken the preliminary objections that this Court has, under Article 226 of the Constitution of India, no power to issue any writ, that in the present case there is no invasion of any of the fundamental rights declared by the Constitution and that the powers conferred by Article 226 cannot be exercised with retrospective effect in respect of a substantive right. The objections were formulated by the learned Advocate-General as follows:

8. Article 226 does not by itself authorise this Court to issue directions, orders or writs "for any other purpose" than that specifically mentioned in the Article. All that it does is to enable the appropriate legislature to empower by law in future any High Court to issue the directions, orders or writs "for any other purpose" contemplated by Article 226. The argument is that while this Court has the power under Article 226 to issue directions, orders or writs for the enforcement of any of the rights conferred by part III, the expression "shall have power" implies futurity so far as "any other purpose" is concerned. It is suggested that any other interpretation would lead to the anomalous result of this Court having larger powers than the Supreme Court has under Article 32(2). The Advocate-General contends that the Petitioner, is not admittedly seeking the enforcement of any of the rights conferred by Part III of the Constitution but the enforcement of an alleged right under the Indore Municipal Act; and that the words "for any other purpose" in Article 226 are intended to be used in a sense limited to the purpose ejusdem generis with that which has been specifically mentioned before viz., the enforcement of the rights conferred by Part III. As regards the retrospective effect of Article 226, the argument is that the order passed on 4th July 1949 by the Madhya Bharat Government was a quasi judicial order which had become final before coming into force of the Constitution of India and that the rights acquired under that order could not be disturbed by any remedy under Article 226.

9. Before dealing with the preliminary objections raised by the learned Advocate-General, it seems to me necessary to state that the principles with regard to the interpretation of the Indian Constitution under the Government of India" Act, 1935, which were fully enunciated by Sir Maurice Gwyer in, In the matter of AIR 1939 1 (Privy Council) will apply equally in interpreting the new Indian Constitution. The principles are that the Constitution is to be interpreted in the same manner as any other Statute, viz. by reference to its terms and language and these alone. A Constitution is not to be construed in any narrow and pedantic sense. The ordinary rules of statutory construction apply though their application is conditioned by the subject matter of the enactment itself. A "broad and liberal spirit" should inspire those who interpret the Constitution, but they are not free "to stretch or pervert the language of the enactment in the interests of legal or constitutional theory. A Constitution of Government is a living organic

thing which of all instruments has the greatest claim to be construed "*Ut res magis valeat quam pereat*",

10. Reverting to the objection of the learned Advocate-General, in my opinion on the language of Article 226, it is impossible to uphold them. In order to see whether the words "shall have power" confer in praesenti any jurisdiction on this Court to issue an order, direction or a writ of the sort mentioned in the Article, one has to look not merely at Article 226 but also at Clause 3 of Article 32. This clause says:

Without prejudice to the powers conferred on the Supreme Court by Clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2).

This clause no doubt provides for the conferment in future on any Court other than the Supreme Court, the power to issue directions, orders or writs for the enforcement of any of the rights conferred by Part III. But the effect of this clause read with the non obstante opening words of Article 226(1) is to empower immediately every High Court with these powers. For, if notwithstanding the provisions in Article 32(3) that Parliament may by law empower any Court other than the Supreme Court to exercise these powers, it is provided that every High Court shall have the power then the words "shall have power" can only refer to the conferment in praesenti of the power. The fact that Clauses, (2) and (3) of Article 32 make no reference to the power to issue directions, orders or writs for any purpose other than the enforcement of any of the rights conferred by Part III, does not, in my opinion, any way indicate that the word "shall have power" in Article 226(1) though meaning immediate conferment of power in relation to the enforcement of any of the rights conferred by Part, III, imply futurity as regards the power to issue directions, orders or writs "for any other purpose". On the other hand in the absence of any article like Article 139 enabling Parliament to confer by law on any High Court the power to issue directions, orders or writs for any purpose other than those mentioned in Clause (2) of Article 32, the effect a fortiori of the non obstante clause in Article 26(1) is to confer the power on every High Court for "any other purpose", though the power has not been conferred on the Supreme Court by the Constitution. The fact that on this interpretation of Article 226 this Court would have larger powers than the Supreme Court cannot be given any weight specially when it is remembered that all other purposes for which directions, orders or writs could be issued by a High Court would be mostly local. It is note worthy that Article 32(2) also uses the words "the Supreme Court shall have power". It is not suggested by the learned Advocate-General that the Supreme Court has, in the absence of any law of Parliament, no power to issue directions, orders or writs for the purpose mentioned in Article 32(2). The learned Advocate General referred to item 95 of Union list, item 65 of the State list and item 46 of the Concurrent list in Schedule 7 of the Constitution to show that power has been given to the appropriate legislature to legislate with regard

to the jurisdiction and powers of the High Courts with respect to the matters in the lists and that, therefore, there was no necessity of the inclusion in the Constitution of an article similar to Article 189 for conferment on the High Courts the power to issue directions, orders or writs "for any other purpose". I confess that I have found it difficult to appreciate this argument of the learned Advocate-General. The meaning and scope of the Articles in the Constitution is not controlled by the various items in the lists of Schedule 7. On the contrary, the scope and meaning of these various items is controlled by the various Articles of the Constitution. This is made very clear by Article 245 of the Constitution which says that the power of the Parliament and the State Legislature to make laws is subject to the provisions of the Constitution. The Legislative power, therefore, of the Parliament or the State Legislature to make laws with regard to the items referred to by the learned Advocate-General is subject to the provisions of Article 226. The object of the inclusion in the Constitution itself of a specific Article 226 with regard to the powers of the High Courts is to secure that these powers of the High Courts shall not be in any way affected by any law, made by the Parliament or by the Legislatures of States. It seems to me that this Court has the power under Article 226 to issue directions, orders or writs not only for the enforcement of any of the rights conferred by part III but also "for any other purpose" and the words "shall have power" only emphasise the fact that the issue of these directions, orders or writs is entirely a matter for the discretion of the Court.

11. The contention of the learned Advocate-General that the words "any other purpose" in Article 226 should be read as ejusdem generis with the purpose specially mentioned before, does not appeal to me. I think on general principles the rule of ejusdem generis has no application in the present case. Firstly because as I have just stated the power to issue directions, orders or writs under Art: 226 is discretionary and the rule of ejusdem generis has but little, if any, value in construing a provision conferring discretionary powers on the judiciary (vide Stroud's Judicial Dictionary page 1867: 11th Edn.). Secondly the rule being one of mere construction and not an inflexible one it cannot be applied where its application would defeat the general intent of the instrument to be construed. The caution necessary in the application of the rule has been pointed out by a Full Bench of the Calcutta High Court in *Le Mesurier v. Wajid Hossain* 29 Cal. 890 : 6 C.W.N. 656, where reference has been made to several authorities of English Courts and it has been observed that:

Prima facie general words are to be taken in their ordinary sense and should be so read, unless it is plain from the Act itself that they were intended to be read in a more restrictive sense, and the fact that they follow a specific enumeration of cases is not enough to show this.

Applying this principle here, I think that there is nothing in Article 226 to suggest that the words "any other purpose" were intended to be used in any other than their ordinary and larger sense. The word "purpose" has no relation to the nature

or character of the rights mentioned in-Part III. Nor has it in connection with the rights conferred by Part III, obviously any reference to a purpose other than "enforcement". The object of the Article in giving to the High Court the discretionary jurisdiction to issue certain directions or writs is to secure the protection of the rights of the public and to amplify justice and redress grievances in any matter which the ordinary course of law is too defective to reach. Its purpose is not merely to prevent the infringement only of those rights mentioned in Part III. The incorporation in the Constitution itself of certain rights as fundamental, only means that they cannot be repealed or diminished except by means of the special process, prescribed for constitutional amendments. It does not imply that other rights not so contained in the Constitution are any less fundamental to human existence or to the protection of security, liberty or property. All rights conferred by law are fundamental as distinguished from non-fundamental rights which are created by agreement between the parties. In this sense the conception of fundamental rights is not static. It changes in accordance with the notions of public order, security, and social and economic welfare. The fundamental rights depend entirely on the law in force for the time being. But their protection on account of non-inclusion in the Constitution does not in any way become unnecessary or unimportant. On the contrary the enforcement of these other rights which may be called as auxiliary rights if necessary for protecting and maintaining inviolate the rights conferred by part III. Consistently, therefore, with the object of the article the words any other purpose" must be construed to refer to all purposes for which at "English Common law the high prerogative writs are issued to wit, for the protection of the rights of the individuals, to check excess or abuse of powers. The Petitioner is, in my opinion, entitled to invoke the jurisdiction of this Court under Article 226, to secure the enforcement of his alleged rights under the Indore Municipal Act.

12. As to the question of the retrospective operation of Article 226 I think it does not at all arise in this case. The cause of action of the present petitions the order of 4th July 1949. It has not been shown by the learned Advocate-General in what manner this cause of action in favour of the Petitioner did not survive on 26th January 1950 when the Indian Constitution came into force. The petition is a complaint of ultra vires which is the foundation of the writ prayed for. Unless there is express provision to the contrary an ultra vires order may be a cause of action at any time after the making of it and no rights can be acquired under it for it is void ab initio. I am therefore, unable to agree with the contention on behalf of the State that the Petitioner is not entitled to move this Court under Article 226 to test the vires of the order passed on 4th July 1949, i.e. before the Constitution of India came into force.

13. I now pass to consider the points made by the learned Advocate. General and Mr. Sam-vatsar, counsel for the opponents Nos. 3 and 4, with regard to the maintainability of the petition. Before dealing with them it is necessary to state that the jurisdiction and power of this Court to issue directions, orders or writs is

derived solely from Article 226. It is not subject to the limitations mentioned in Section 45, Specific Relief Act, which is not in force in Madhya Bharat State. Nor is there any law of the Madhya Bharat Government or of the former Indore Derbar, containing provisions analogous to Section 45 to 49, Specific Relief Act. The reference in Article 226, to English Common Law Writs, seems to me to indicate that in exercising its discretionary powers under the Article this Court ought to follow generally the principles on which prerogative writs are issued in England.

14. The first objection urged by the learned, Advocate General with regard to the maintainability of the application is that the Petitioner has no right to seek the relief of the issue of a writ in the nature of mandamus unless he first establishes that the demand of justice was made on the party against whom he is seeking the relief and that was refused to him by the party. In support of this contention Mr. Chitle, referred us to Halsbury's Laws of England (Hailsham edition) vol. 9, P. 771, Article 1307. He also relied on the decision of the Bombay High Court in *The Municipal Corporation for the City of Bombay Vs. Govind Laxman Savant*, and that of the Calcutta High Court in *Board of Examiners v. Probhash Chandra*, 40 Cal. 588 : 18 I.C. 527. The learned Counsel for the Petitioner admits that after the passing of the order on 4th July 1949, the Applicant did not approach the Government to get that order cancelled and did not ask the Government to perform what the Applicant thinks to be their imperative legal duty under the Indore Municipal Act to recognise him as a validly nominated member of the council. The counsel for the Petitioner however, contends that it would have been futile for the Petitioner to make a demand of justice on the Government for the Health Minister had no power to review the order of 4th July 1949 and that he was determined to adhere to his decision of that date. It was said that the rule of demand for performance and its refusal is not applicable in all cases. Relying on a Note (b) page 745, Vol. 9, Hals, bury's Laws of England, counsel for the Petitioner urged that this Court ought to take a liberal view in determining whether or not the writ should issue. In my view, the objection of the learned Advocate-General is well-founded. In Halsbury's Laws of England Vol. 9, P. 771, Article 1307, with regard to the issue of writ of mandamus it is stated as follows:

As a general rule the writ will not be granted unless the party complained of has known what it was that he was required to do, so that he had the means of considering whether or not he should comply and it must be shown by evidence that there was a distinct demand of that which the party seeking mandamus desires to enforce, and that such demand was met by a refusal. But the requirements that before the Court will issues a mandamus were must be a demand to perform the act sought to be enforced and refusal to perform it, cannot be applicable in all possible cases, and does not apply where a person has by inadvertence omitted to do some act, which he was under a duty to do and where, the time within which hit could do it has passed.

Here ex-concusses the Petitioner made no demand for justice on the Government

after the passing of the order on 4th July 1949. The Petitioner has not in the affidavit in support of his application averred this fact. He has also not stated the peculiar circumstances, making this case an exception to the general rule of demand for performance and its refusal. The argument of the learned Counsel for the Applicant that in view of the stubborn attitude of the Health Minister it was meaningless to approach him for justice does not lead to the conclusion that if a demand of justice had in fact been made and if an opportunity had been given to the Health Minister he would not have considered the demand for justice. The case in *The Municipal Corporation for the City of Bombay Vs. Govind Laxman Savant*, is relevant on the point under consideration. In the Bombay case, the Petitioner prayed that the Municipal Corporation be ordered from forbearing and executing a contract with regard to the building of new pipe lines, with the Hindustan Construction Co. Ltd., and the Municipal Corporation be ordered to invite fresh and proper tenders. The learned Single Judge to whom the petition was made, made an order prayed for; when the matter went up in appeal before a Division Bench of that High Court, it was argued on behalf of the Municipal Corporation that the Petitioner had failed to establish that there was a denial by the Municipal Corporation of the demand of justice and that certain letters which the Petitioner had addressed to the Municipal Commissioner and members of the Corporation were received just three days before the filing of the petition leaving insufficient time for the Corporation to consider the requisition made by the Petitioner. The observations of Chagla C.J. accepting the contentions of the Municipal Corporation seem singularly applicable to this case. He observed:

After all an order u/s 45 is in the nature of high prerogative writ and all conditions laid down by the statute must be strictly complied with. With very great respect to the learned Judge, we do not agree with his observation that in view of the subsequent attitude taken by the Municipal Commissioner and the Municipal Corporation it was legitimate to presume that the Commissioner and the Corporation would and in fact did deny the demand for justice of the Petitioner. Such a presumption cannot be drawn ex post facto even though the Respondents may ultimately resist any application made by the Petitioner u/s 45, Specific Relief Act.

Sir Lawrence Jenkins also held in *Board of Examiners v. Prohash Chandra* 40 Cal. 588 : 18 I.C. 627, that an application for the issue of a writ in the nature of a mandamus must be founded on the affidavit of the person injured stating his right, his demand of justice and denial thereof. In this case this necessary requirement has been completely ignored both in form and in substance. The learned Counsel for the Petitioner says that the Health Minister has no power to review the order of 4th July 1949. But then the Petitioner cannot say that the Indore Municipal Act, cast an imperative legal duty on the Government, in favour of the Petitioner and at the same time maintain that the Government had no power to do something without which the duty could not have been performed. The learned Counsel for the Petitioner also suggested that the act of the Petitioner in asking on 4th July 1949, the Health Minister, to give him an

opportunity of being heard by counsel in support of the order of 27th April 1949, was itself a demand of justice. There is no force in this contention. For so long as the order dated 27th April 1949 stood, there could have been no occasion for the Petitioner to make a demand on the Government for the performance of a legal, duty, which according to the Petitioner's own showing the Government was already doing. The principle laid down in Note (b) page 745 Halabury's Laws of England referred to by the counsel for the Petitioner can be taken into consideration only after the conditions precedent for making an application for the issue of the writ have been satisfied. In ray Judgment the Petitioner has failed to fulfil the essential requirement of a demand of justice before moving this petition and as such in so far as the petition is one for the issue of a writ of mandamus, it is not maintainable.

15. It is next urged by the learned Advocate General that the Applicant had another specific and adequate legal remedy of filing a suit of declaration and injunction against the State challenging the validity of the order dated 4th July 1949. But he did not do so. He filed a suit; against the opponents Nos. 3 & 4 only nearly 2 1/2 months after the passing of the order of 4th July 1949, i.e., after the lapse of a period within - which notice of suit could easily have been given-to the State. It is further stated that the Applicant has now obtained a decree from the Civil Judge, First Class, Indore substantially for the same relief's which he is now praying for and that the decree has been affirmed in appeal by the Court of the Additional District Judge. It is contended that in these circumstances the Applicant should get the decree executed and that the Applicant is prima facie not entitled to the relief of issue of a writ in the nature of mandamus or certiorari. To the same effect is the argument of Mr. Samvatsar, counsel for the opponents Nos. 8 & 4. The learned Counsel for the Petitioner admits that the Petitioner did not file any suit of declaration and injunction against the State and that he has obtained a decree against opponents, Nos. 3 & 4 from the Court of the Civil Judge, First Class, for the relief's which he is now asking in this petition. It is, however urged by the counsel for the Petitioner that even though the Applicant did not avail himself of the remedy of filing a suit against the State, he is on that account not debarred from resorting to a convenient and effective remedy which became available to him for the first time on 26th January 1950. In my opinion this objection of the opponents must be allowed. There is no doubt ample authority for saying that a Court would be loath to make an order of mandamus or certiorari where there is an alternative remedy which is equally appropriate and convenient, unless there has been a denial of natural justice Bex v. Justices of Wandsworth Exparte Bead (1942) 1 ALL E.R. 56 : 1942-1 K.B. 281. Khurshe Mody v. Rent Controller, Bombay ILR 1946 Bom. 940 : A.X.R. (34) 1947 Bom. 46 . In this case the question whether when the order of 4th July 1919 was made the remedy of suit was equally convenient and efficacious, does not arise at all for until 26th January 1950 the remedy of suit was the only remedy available to the Applicant. The precise question for determination in this case is whether a party who owing to his own

default did not avail himself of the only remedy given to him by law, is, when the remedy of the issue of a writ became subsequently available, entitled to that remedy. In other words, has the conduct of the Petitioner been such as to, disentitle him to the relief of the order of mandamus or certiorari. I think it is well settled that if the party aggrieved has by his conduct precluded himself from claiming the relief of the issue of the writ, it should not be granted (vide Halsbury's Laws of England Vol. 9 page 879 Article 1481). In the case reported in *Khurshed Mody Vs. Rent Controller*, the Petitioner sought a writ of certiorari against the Rent Controller and a tenant alleging that a certain order of the Controller was without jurisdiction. It was contended on behalf of the Petitioner in that case that his right of appeal against the order of the Rent Controller was not subsisting as the limitation for filing the appeal had expired. The Bombay High Court refused to accede to the contention and observed that:

But that hardly strikes us as a proper ground for issuing the writ of certiorari; if a party has a remedy given to him by law and if he does not avail himself of that opportunity owing to his own default this Court should not Interfere by means of this high prerogative writ.

Mr. Samvatsar has referred to a decision of the Madras High Court in *Lakshmaman Chettiar v. Commissioner, Corporation of Madras* 50 Mad. 130 : AIR 1927 Mad. 130, which I think supports his contention. In the Madras case the Petitioner applied for a writ of certiorari directed to the Commissioner of the corporation and the Chief Judge of the Small Causes for quashing their orders declaring the Petitioner to be disqualified as a candidate at the Municipal Election. A preliminary objection was taken in that case that certiorari will not lie as the Petitioner had put in a revision petition before the Chief Judge of the Small Causes and had by his conduct taken a chance of pronouncement in his favour by the lower Court on merits. A Full Bench of the Madras High Court held in that case that if the Petitioner had failed to take before the Commissioner and the Court of Small Causes an objection with regard to their jurisdiction, then considering the conduct of the Petitioner the Court will not exercise the discretionary jurisdiction of issue of a writ of certiorari in his favour. These authorities clearly show that the conduct of the Petitioner ought to be taken into consideration in determining whether the Court will exercise the discretionary jurisdiction to issue the writs. Here the Petitioner's default is not filing a suit against the State is inexcusable since that was the only remedy available to him until 26th January 1960. Having failed to file a suit against the State, the Petitioner cannot now say that during this long period between the passing of the order on 4th July 1949 and the date of the commencement of the Constitution the remedy of suit would not have been convenient and effective. It is to be noted that the suit against the opponents Nos. 3 & 4 was filed on 21st September 1949 i.e. nearly 2 1/2 months after the making of the order of 4th July 1949 and within this time the Petitioner could have served on the State a notice of his intention to file a suit. Again the Petitioner before us has already obtained a decree from the Civil Court granting to him the relief's which he is

claiming in this petition, He is entitled to execute his decree. The issue of the writ of mandamus in the above circumstances would virtually be for enforcing the decree which the Petitioner has obtained against the opponents Nos. 3 & 4. That a writ of mandamus cannot be issued for the execution of a decree is a well settled proposition. In this connection I may refer to the decision of the Calcutta High Court in *Keshavprasadsinyh v. Board of Revenue* 38 Cal. 553 : 10 I.C. 253. In that case the Plaintiff had obtained a decree for recovery of possession of an estate against an infant under the Court of Wards. After the suit was decreed by the trial Court, the Defendant, the Court of Wards, preferred an appeal to the High Court. Pending the appeal the Plaintiff made an application to the Court of Wards for the release of the estate and, for handing over possession of the estate to the Plaintiff in accordance with the decree of the trial Court. The Court of wards declined to comply with the Plaintiff's request. Thereupon the Plaintiff made an application to the Original Side of the Calcutta High Court u/s 45, Specific Relief Act and obtained a a rule calling upon the Court of wards to show cause why they should act release the estate and hand over its possession to the Plaintiff. In discharging the rule the learned Judge of the Calcutta High Court observed:

It is an elementary principle that recourse ought not to be allowed to an extraordinary remedy of this description when it is not really needed. In the case before us the Plaintiff is entitled to sue in ejectment; he has brought such a suit and has been successful, he is entitled to execute his decree, but has not yet taken any steps In that direction. It is well settled that a mandamus will never be granted to enforce the general law of the land which may be enforced by action; for instance where the Applicant has the ordinary legal remedy of an execution, mandamus does not lie.

I agree with this observation and in my judgment the Applicant has so conducted himself as to preclude this Court from exercising in his favour the discretionary jurisdiction.

16. In the view I take the preliminary objections on the maintainability of the petition, it is unnecessary to consider the merits of the petition. Nor do I think would it be proper for me to inquire into the merits of the petition as we are told from the Bar that the decree passed by the Civil Judge, First Class, Indore and affirmed by the Court of the Additional District Judge granting the Applicant the relief which he is now praying, may be the subject-matter of appeal in this Court. I will say for myself I naturally regret that for the above reason, I am constrained to refrain myself from expressing any opinion on the many points ably canvassed and controverted with considerable warmth and vehemence, perhaps justified on the facts, by the learned Counsel for the parties; but it may be and I hope is so, that their full discussion in open Court has not been fruitless.

17. For the above reasons I would reject the petition and leave each party to bear its own costs.

Mehta, J.

18. I agree with my learned brother Dixit J. that this application should be rejected.

19. One of the smain objections raised by the learned Advocate-General and Mr. Samvatsar, learned Counsel for non-Applicants 8 and 4 was that the Petitioner should have moved the Government before resorting to this application for a writ of mandamus. The writ of mandamus is directed against the order of the Health Minister dated 4th July 1949. It is imperatively necessary that the Petitioner who is aggrieved with this order should have approached the Government and demanded justice. If the Government had refused justice or evaded the demand of justice then certainly the Petitioner could move this Court for the prerogative writ of mandamus, because according to the Constitution of India no member of the Executive could interfere with the liberty or property of a citizen, except on condition that he could support the legality of his action before a Court of justice and the Judges should not shrink from deciding such issues in the face of the Executive.

20. But in this case the Petitioner before approaching the Government for a demand of justice moved this Court for a writ of mandamus.

21. It has been, held in *The Municipal Corporation for the City of Bombay Vs. Govind Laxman Savant*, ; AIR 1947 193 (Bom.) , and *Board of Examiners v. Probhash Ghandra* 40 Cal. 588 : 18 I.C. 527, that there should first be a demand for justice and a specific denial of that justice by the Government.

22. There is not a word in the petition and the affidavit filed by the Petitioner Harendranath Sharma that he had written to the Government complaining against the order dated 4th July 1949 passed by the Health Minister by which he was wrongly dispossessed of his office in the City Municipality and that the Government had not heeded his complaint. The petition and the affidavit should state in clear and unequivocal terms the demand for justice and the denial thereof. The Petitioner has failed to prove this and hence the application for a writ of mandamus is defective. In my opinion, the demand for justice must be independent of the motion for a writ of mandamus. In Halsbury's Laws of England, Vol. 9, page 771 Para 1307 it is observed that as a general rule a writ will not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply, and it was shown by evidence that there was a distinct demand of that which the party Booking the mandamus desires to enforce, and that such demand was met by a refusal. I, therefore, hold that there was not a formal and distinct demand to warrant this motion and therefore an application for a writ of mandamus would not lie.

23. The other objection urged by Mr. Samvatsar on behalf of non Applicants 3 and 4 and the learned Advocate-General was that Petitioner had already pursued the alternative remedy in a Court of law by filing a suit in the Court of Civil

Judge, First Class, Indore, and therefore he cannot now present this application for a writ of mandamus. It was argued that the Petitioner along with Mr. Shah had already filed a suit in September 1949 in the Court of civil Judge, First Class, Indore, for injunction and praying substantially for the same relief's which are sought for in this application for writ of mandamus. The Petitioner obtained a decree in the trial Court in the terms prayed for. The non-Applicant had preferred an appeal in the Court of the Additional District Judge, Indore, and that appeal also failed. Hence there is a decree standing in favour of the Applicant. If the Applicant had failed to impeach the Government in the suit filed by him with the result that he found it difficult to execute the decree, that is no reason why he should be allowed to move the High Court for a writ of mandamus. The conduct of the Applicant now disentitles him to bring an application for a writ of mandamus on the pretext of enforcing the decree by a writ of mandamus. In *Lakshmanan Chettiar v. Commissioner Corporation of Madras* AIR (14) 1027 Mad. 130 : 50 Mad. 130, it was held that where the Applicant armed with a point either of law or of fact which would oust the jurisdiction of the lower Court has allowed to argue the case on merits before the Court, he must be taken to have submitted himself to a jurisdiction which cannot be allowed after, wards to seek to repudiate by applying for a certiorari. It appears to me that an application for a writ of mandamus will not lie where the person who applies for that writ has by his conduct taken the chance of a pronouncement in his favour by the lower Court on merits. I am, therefore, of opinion that the Applicant had so conducted himself as to preclude this Court from exercising the discretionary jurisdiction in his favour.

24. The law in this respect is stated as follow is Halsbury's Laws of England, vol. 9, page 773, Para 1309. The Court will, as a general rule and in the exercise of its discretion, refuse a writ of mandamus when there is an alternative and specific remedy of law which is not less convenient, beneficial and effective. This is not a rule of law but a rule regulating the discretion of a Court in granting a writ of mandamus.

25. Here the Petitioner has followed his remedy by way of a suit. He has obtained a decree and now by" his conduct he has precluded himself from applying for a writ. The Petitioner cannot apply for writ merely for the enforcement of that decree. In *Lady Dinbai Petit Vs. M.S. Noronha*, , it was observed that the question which the Court has to consider in every case is whether the alternative remedy, whether it be a right of suit or a specific remedy given by Statute, is as convenient, as beneficial and as effectual as the remedy which the Court can grant u/s 45, Specific Relief Act. It was there held that the right of suit is a specific and adequate legal remedy as contemplated by Section 45 of the Act. In *Lady Dinbai Petit Vs. M.S. Noronha*, , reference was made to three English decisions, *The Queen v. Charity Commrs. for England and Wales* (1897) 1 Q.B. 407; *Beg v. Leicester Guardians* (1899) 2 Q.B. 682 : 60 L.J.Q.B. 945, and *Bex v. Dymock* (1915) 1 K.B. 147 : 84 L.J.K.B. 294, where it was held that the right of a suit was considered as an alternative remedy to the writ of mandamus.

Therefore the Court must refuse to make an order u/s 45, Specific Relief Act, if it was satisfied that the Applicant could obtain the same relief in the same convenient and efficacious manner by filing a suit. In this particular case the Petitioner had filed a suit which was equally efficacious and convenient remedy and now he cannot ask this Court to issue the alternative remedy of a writ of mandamus.

26. With regard to the interpretation of Section 226 of the Constitution of India, I am in complete agreement with the views expressed by my learned brother Dixit J. I am not prepared to accede to the contention of the learned Advocate-General that Section 226 of the Constitution of India empowers the High Courts only to exercise the empowers of issuing high prerogative writs only in cases where there has been invasion of fundamental rights. Section 226 clearly shows that the High Courts shall have power to issue the writs not only for the enforcement of fundamental rights referred to in part III but also for any other purpose. "For any other purpose" would mean "for purposes other than infringement of fundamental rights". In my opinion, the High Courts are armed with the same powers to issue writs as are exercised by the King's Bench Division for the infringement of common law rights. Any other purpose would involve questions affecting the rights of subjects and imposing liability or were the act complained of is based upon the fundamental breach of justice.

27. For the reasons aforesaid the objections must prevail and I am of opinion that this petition for a writ of mandamus should be rejected.

By the Court

28. The Rule is discharged and the petition is dismissed. Each party to bear its own costs. For the purposes of Article 132(1) of the Constitution of India we certify that the case involves a substantial question of law as to the interpretation of Article 226 of the Constitution.