

(1994) 04 MAD CK 0038

In the Madras High Court

Case No : Writ Petition No. 4167 of 1994 and W.M.P. No. 9612 of 1994

Ponnusamy

APPELLANT

Vs

State of Tamil Nadu and another

RESPONDENT

Date of Decision : 19-04-1994

Acts Referred:

Constitution of India, 1950 — Article 124(4), 157, 165, 217, 226

Citation : AIR 1995 Mad 78 : (1995) 2 LW 349 : (1995) WritLR 508

Hon'ble Judges : Kanakaraj, J

Bench : Single Bench

Advocate : V. Selvaraj, for the Appellant; K.K. Venugopal assisted by Mr. A.S. Venkatachalamoorthy, Govt. Pleader and K.V. Viswanathan, Santosh Hegde for C.S. Krishnamoorthy, for the Respondent

Judgement

1. At the outset I make it clear that I am dealing with only the preliminary objection, orally raised by the respondents regarding the maintainability

of the writ petition. I do not therefore propose to go into the merits of the case or the correctness of the allegations made in the affidavit of the

petitioner or whether those allegations, even if proved, would entitle the petitioner to have the relief sought for in this writ petition. Since the matter

has been argued elaborately, it is but proper, that I should set out the necessary pleadings and sequence of events which led to the raising of the

preliminary objection, orally.

2. The writ petition was filed on 9-3-1994 and the Rule Nisi was issued on 11-3-1994. In W.M.P. No. 6669 of 1994 seeking an injunction

restraining the second respondent from discharging his duties, notice was ordered on 11-3-1994. The prayer in the writ petition is for the issue of a

writ of mandamus to direct the first respondent to remove the second

respondent from the office of the Advocate-General for the State of Tamil Nadu. The writ petition has been filed by an Advocate enrolled in the year 1959 and who is today a Member of the Tamil Nadu Legislative Assembly. He also claims to be one of the General Secretaries of the Tamil Nadu Congress Committee. He professes to file the writ petition in the public interest. The second respondent was appointed as the Advocate-General for the State of Tamil Nadu and he assumed office on 3-7-1991.

It is not disputed that he was appointed by the Government in power, ruled by the A.I.A.D.M.K. party. The affidavit proceeds to say that the office of the Advocate-General is a very important public office and he has wide powers both under the Constitution of India as well as several enactments like the Civil Procedure Code, Contempt of Courts Act, and the Advocates Act. He is considered as the leader of the Bar and is given the utmost respect by the High Court. The Advocate-General is appointed under Art. 165 of the Constitution of India by the Governor of the State. He must be a person qualified to be appointed as a Judge of the High Court. His duties are to advise the Government upon such legal matters and perform such duties of a legal character as may from time to time be referred to or assigned to him by the Governor. He holds office during the pleasure of the Governor. Consequently, the petitioner says that only a person with good antecedent and background should be appointed as an Advocate-General. In the instant case, the petitioner refers to three circumstances as vitiating the appointment of the second respondent as Advocate-General. (1) In Contempt Application No. 69 of 1994 pending on the file of this Court, affidavits have been filed implicating the second respondent in the matter of printing and publishing wall-posters denigrating the judiciary. (2) On 2-11-1981, the second respondent was appointed as a Legal Adviser of the Tamil Nadu Industrial Investment Corporation Limited thereafter called (TIIC), a Government of Tamil Nadu under-taking. A written complaint was made by one Mr. Nalla Gounder, complaining about the second respondent's conduct in demanding a sum of Rs. 10,000/- for offering a legal opinion on the title of the property offered by the said Nalla Gounder as security for a loan sought for from the TIIC. The TIIC sought the opinion of the Government and the Government by a letter dated 31-1-1985 instructed

the TIIC to remove the second respondent from the panel of the legal Advisers.
(3) There were certain proceedings against the second respondent before the Bar Council of Tamil Nadu.

3. Of the three instances, the first and the third instances were admittedly, after the appointment of the second respondent. According to the petitioner, the appointment of the second respondent as Advocate-General without looking into his antecedents and background especially, with particular reference to the removal, as a panel advocate from the TIIC, vitiates his appointment. Therefore, according to the petitioner, the second respondent ""is not qualified to be appointed as a Judge of the High Court and cannot be the Advocate-General for the State of Tamil Nadu.

4. Counter affidavits have been filed both by the first as well as the second respondent. Both of them have been sworn to the affidavits, on 23-3-

1994. I will refer to the counter affidavit of the second respondent first, because the counter affidavit of the first respondent refers to and relies on

the counter affidavit of the second respondent. Here and now I must point out that neither of the counter affidavits raise any objection as to the

maintainability of the writ petition. The second respondent says that he is in no way concerned with the alleged printing and publishing wall-poster

giving rise to the Contempt Application No. 69 of 1994. On the second instance, he says, that he never demanded any amount from the said Nalla

Gounder and for the first time now, he has come to know about the complaint of Nalla Gounder. All that he is aware of is that the TIIC wrote a

letter on 1-3-1985 and he promptly accepted the removal from the post of the Legal Adviser to the TIIC. So far as the third instance is

concerned, he says that by proceedings dated 8-9-1993, the Bar Council of Tamil Nadu decided not to refer the matter to the disciplinary

committee because there was no prima facie case. The second respondent further says that the writ petition has been filed with political motives

and is not a bona fide action. In the counter affidavit of the first respondent, it is stated that the first instance is subjudice and that no notice of

contempt was issued to the second respondent. It is admitted that the affidavits have been filed in the said proceedings involving the second

respondent in the printing and publishing of wall-posters. It is categorically stated that the second respondent was appointed as Advocate-General

because of his merits, his ability and his integrity and his competence as a lawyer. It is however, stated that the Government was not aware of the

removal of the second respondent from the panel of the Legal Adviser to the TIIC. He proceeded to say that the TIIC files, were called for, and

examined by the Government. He proceeded to say that the allegation of Nalla Gounder, was not brought to the notice of the second respondent.

It is admitted that the Government wrote a letter directing the removal of the second respondent from the post of the Legal Adviser to the TIIC.

Therefore, it is contended that, in the absence of any opportunity, having been afforded to the second respondent, the allegation that he ""demanded

illegal gratification"" is not justified. They also refer to the fact that the second respondent has solemnly affirmed and stated on oath that he never

demanded any amount from Nalla Gounder. Therefore, the first respondent concludes ""The Government states that it has full confidence that in the

integrity, ability and competence of Thiru K. Subramanian and has no hesitation whatsoever in stating that the writ petition which has been filed by

the petitioner should be dismissed with costs of the respondents. The second respondent is and continues to be fully qualified under Art. 165

read with Art. 217 of the Constitution of India to hold the post of the Advocate-General of the State. No allegations regarding the absence of

Constitutional qualifications are made of, in which event, it is submitted that the allegations, in the affidavit filed in support of the writ petition do not

entitle the writ petitioner to a writ of mandamus as prayed for, as the incumbent of the Office would otherwise be entitled to continue to occupy the

Office.

5. When the Miscellaneous Petitions came up for orders on 25-3-1994, an earnest plea was made by the counsel for the respondents that the writ

petition itself should be disposed of at an early date having regard to the fact that a cloud was hanging on the Office of the Advocate-General and it

will not be in the interest of the public well as the Court, in prolonging the matter. Accordingly, I directed the writ petition to be posted on 6-4-

1994, on the understanding, it will be finally heard on that day.

6. On 5-4-1994, the petitioner has not only sworn to a reply affidavit meeting the allegations in the counter affidavits of the respondents, but has

also filed Miscellaneous Petition No. 9612 of 1994 seeking permission to file an

additional affidavit raising additional grounds in support of the writ petition. In the reply affidavit, it is stated that the Government was aware of the removal of the second respondent from the panel of Advocates to the TIIC. It is further stated that files relating to the removal of the second respondent are being buried by the respondents. It is also stated that the complaint of Nalla Gounder, in fact, discloses a cognizable offence against the second respondent. In the affidavit filed in support of W.M.P. No. 9612 of 1994, three more instances are quoted which happened subsequent to the appointment of the second respondent and which according to the petitioner makes the continuance of the second respondent as Advocate-General, injurious and contrary to the public interest.

These instances are as follows:--

(1) On 2-7-1993 while welcoming the Hon'ble the Chief Justice to the Madras High Court, the second respondent made certain remarks relating to, the judiciary. Serious objection was taken by the Honourable Judges about the said remarks and the respondent tendered an unconditional apology. The objectionable portions of the speech were directed to be removed from the official records. (2) There was an article in the Magazine India Today dated 15-3-1994 titled "uncourtly conduct". There is reference to the above incidents regarding the unconditional apology. The second respondent took objection to this article and by his letter dated 7-3-1994 stated that he did not tender any unconditional apology.

According to the petitioner, this action of the second respondent shows that he has no regard for truth. (3) The second respondent had presented a petition before the Central Government seeking the transfer of a few Judges of this Court. It is stated that the said action on the part of the second respondent was against the public interest and due to certain personal prejudices. There is also a reference to the enormous fee paid by the Government to the second respondent in disregard to the established norms relating to the payment of fees to the Advocate-General.

7. On 6-4-1994, when the writ petition was taken up for final disposal, Mr. K.K. Venugopal learned senior Counsel appearing for the first respondent, represented that the respondents have been served with the Miscellaneous Petition No. 9612 of 1994 containing new allegations and if the respondents were to file counter affidavits, it is likely to prolong the issue

further. According to the learned counsel it was not necessary for the respondents to file a return in respect of every such new allegations conjured up from time to time, because the writ petition itself was not maintainable. Learned counsel specifically says that even assuming that all the allegations are true, they do not warrant the issue of a writ of mandamus as prayed for because the court has no power to judicially review the conduct of the 2nd respondent or the confidence reposed on him by the 1st respondent. Therefore, without filing a counter-affidavit in W.M.P. No. 9612 of 1994, learned Senior Counsel says that he was raising a preliminary objection as to the maintainability of the writ petition. The writ petition relates to the office of the Advocate-General which is a constitutional post and inasmuch as the Advocate-General performs important statutory functions I was inclined to take up the writ petition for a decision on the preliminary issue regarding maintainability. It is for this reason I prefaced my judgment by stating that I am only concerned with the question of maintainability and not the merits of the case and that the question of maintainability has been raised only in an oral manner. On that account, however, I cannot overrule the objection regarding the maintainability because that goes to the root of the matter and certainly a person holding such a high constitutional office should not be allowed to face a litigation which is without jurisdiction.

8. Though the prayer in the writ petition is for the issue of a writ of mandamus to direct the first respondent to remove the second respondent from the office of the Advocate-General, it is pointed out by the counsel for the respondents that essentially it is a writ of quo warranto seeking information as to the basis on which the second respondent holds office as the Advocate-General. It is needless to point out that a writ of quo warranto cannot be issued unless the vital requirements as laid down by the apex court in *The University of Mysore and Another Vs. C.D.*

Govinda Rao and Another, are made out. The following observation is apposite:--

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.

9. Therefore, it is argued that so long as the second respondent is qualified for the post and he has been appointed by a competent authority and

the statutory procedure has been followed, there is no chance for the resort to Art. 226 of the Constitution of India. On this aspect of the case, I

cannot ignore the well accepted principle that when a person comes to the court seeking relief under Art. 226 of the Constitution of India, the

Court has every jurisdiction to mould the relief taking note of subsequent events and the balancing interest of the parties. In this connection, we

cannot ignore the fact that this is a public interest litigation relating to the high constitutional post of the Advocate-General. Nor can I ignore the fact

that the apex court has, on more than one occasion, circumscribed the jurisdiction of this Court under Art. 226 of the Constitution of India. Useful

reference can be made to *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R.*

Rudani and Others, . A few passages from this judgment are very relevant, as a background while dealing with the powers of this Court, before

considering the aspect of maintainability (paras 19 and 21 of AIR):

The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be

judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a

positive obligation exists mandamus cannot be denied.

Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the

way of granting that relief under Art. 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition.

10. The thrust of the argument advanced on behalf of the respondent is that based on Art. 165 read with Art. 217(2) of the Constitution of India,

the second respondent is fully qualified to hold the post of the Advocate-General. He has been duly appointed by the Governor of the State on the

aid and advice of the Government. Therefore, it is contended that there is no case for examining the allegations of the petitioner to find out whether

the second respondent is a competent person. In other words, judicial review into this aspect of the case is not permitted. The confidence imposed

by the Government on the Advocate-General is not judicially reviewable. Very many imponderable facts go into the choice of the person to hold the post. It is well known that whenever a new Government takes over, the Advocate-General resigns by convention. This is because the Government in power must have confidence in the person holding the office of the Advocate-General. Pleasure of the Governor under Art. 165(3) of the Constitution of India does not mean the pleasure of the court or the pleasure of every litigant who has grouse against the incumbent of the office. Is it necessary for the incumbent of the office to answer each and every person who questions his integrity or antecedents, and is it for the Court to examine such allegations and give directions to the Government? It is argued that an enlightened Government will only appoint a proper person in whom they have confidence and whose integrity is above board. The question is whether this Court can go into the issue whether the assessment of the Government on the integrity and antecedents of the incumbent of the office is proper or requires reconsideration.

11. The second aspect of the maintainability is projected in the following manner. There are several constitutional posts which cannot be brought to the litigating table of the court as to the correctness of the appointments or whether persons holding such office have subsequently become disqualified for some reason or other. In this case, the question of qualification is not at all disputed, and, therefore, there is absolutely no necessity to argue the writ petition on merits. Reference is made to the posts of a Judge of the High Court, a Governor of a State, the post of Election Commission, the post of Comptroller and Auditor General of India, the posts of Members of Public Service Commission and so on and so forth. In particular, reference is made to the post of a Judge of the High Court because the qualifications for the appointment of the Advocate-General and the post of a Judge are practically identical. It is argued that even in the case of an appointment of a Judge, the antecedents and the integrity of the person are taken note of. Would it mean that if an allegation is made against the integrity of a Judge of the High Court the court is called upon to direct the Government to consider the same and pass fresh orders. In my opinion, the parallel drawn from the other constitutional posts would not offer a solution to the case, because in respect of each such constitutional post, the Constitution of India has provided a different mode of

taking action against persons who cannot continue to hold the office. It is not necessary for me to refer to each and every one of the constitutional

posts and indicate the manner in which they can be removed from office. Suffice it to say that in the case of a Judge of the High Court, Art. 217 of

the Constitution of India, says that a Judge may be removed from the office by the President in the manner provided in Clause (4) of the Art. 124

of the Constitution of India, for the removal of a Judge of the Supreme Court. Article 124(4) says that a Judge shall not be removed from his office

except in the manner prescribed therein which necessitates the Parliament going into the question. In the case of the Advocate-General a different

procedure is prescribed namely, that he holds office during the pleasure of the Governor.

12. The other aspect of the case which is projected before me is that this is not a case of selection under the rules framed under Art. 309 of the

Constitution of India. In those cases, the rules provide for an objective criteria for the selection of the competent candidates. In other words, it is

argued that the post of the Advocate-General is an office of trust, unlike posts to which persons are selected on rival merits. In the latter case a

person can claim a right to be considered for the post. It is not so in the case of an office of trust.

13. Before referring to the citations placed before me by the learned counsel for the first respondent, I will advert to the arguments of the counsel

for the second respondent as well as the counsel for the petitioner. After adopting the arguments advanced on behalf of the first respondent Mr.

Santosh Hegde says that the case of the Advocate-General is similar to the case of a Governor in the sense that while the Advocate-General acts

during the pleasure of the Governor, the Governor holds office during the pleasure of the President. In two writ petitions challenging the holding of

office by the Governor of Tamil Nadu, this Court by judgment dated 9-11-1993 had dismissed them as not maintainable. Conversely it is argued

that if the Governor withdraws his pleasure in the incumbent of the office would it be possible for the incumbent to challenge the same in a Court of

law?. Learned counsel, however, says that if there are allegations about the incumbent being disqualified or incurring a disqualification subsequent

to his appointment, certainly there may be a case for the Court exercising powers under Art. 226 of the Constitution. It is reiterated that this is not

a case where the second respondent is alleged to be disqualified or alleged to have subsequently incurred a disqualification. The constitutional requirements are satisfied even as on date and the allegations contained in the affidavit of the petitioner do not form the basis for interference by the High Court.

14. I will now briefly outline the arguments of Mr. Selvaraj for the petitioner on the question of maintainability. His first endeavour is to suggest that

the qualifications for the appointment of an Advocate-General is no doubt referable to the qualifications prescribed for the Judge of the High

Court under Article 217(2) of the Constitution of India, but includes the requirements of perfect integrity on the part of the invitee. In fact it is not

disputed by the learned counsel for the respondents that only persons of high integrity should be chosen for the post of the Advocate-General. But

their argument is that the question of integrity is not judicially reviewable. On this aspect of the case, it is the argument of the petitioner, that an

Advocate-General has a higher accountability in respect of his conduct because he has several statutory duties and above all he is bound by the

disciplinary rules governing an Advocate. Various enactments like Civil Procedure Code, the Insurance Act, Contempt of Courts Act, the

Advocates Act and the Bar Council Rules are referred to show the respect and the regard that the statutory enactments and the Courts have for an

Advocate-General. It is not necessary for me to refer to all the enactments to prove the importance of the post. In fact, this importance and

responsibility of the office is not disputed. One passage from the judgment of the Supreme Court in Periyar and Pareekanni Rubbers Ltd. v. State

of Kerala, ATR 1990 SC 2192 will illustrate the difference between an ordinary Law Officer and an Advocate-General. Says the apex Court (at

pp. 2199-2200):

Any concession made by the Government Pleader in the trial Court cannot bind the Government as it is obviously always unsafe to rely on the

wrong or erroneous or wanton concession made by the counsel appearing for the State unless it is in writing on instructions from the responsible

officer. Otherwise it would place undue and needless heavy burden on the public exchequer. But the same yardstick cannot be applied when the

Advocate-General has made a statement across the bar since the Advocate-

General makes the statement with all responsibility. In those circumstances we have no hesitation to accept the statement of learned Advocate-General and hold that the market value of the lands would be fixed at Rs. 18 percent.

Learned counsel then refers to the recent judgment of the Supreme Court of India in Supreme Court Advocates-on-Record Association and another Vs. Union of India, and cites various passages from the judgment, of almost all the learned Judges to the effect that integrity is part of the qualifications. I will only quote one passage from the judgment which reflects the majority view and with which no dissenting note has been given by any of the other Judges (para 452 of AIR):

The collective wisdom of the constitutional functionaries involved in the process of appointing superior Judges is expected to ensure that persons of unimpeachable integrity alone are appointed to these high offices and no doubtful persons gain entry. It is not unlikely that the care and attention expected from them in the discharge of this obligation has not been bestowed in all cases. It is, therefore, time that all the constitutional functionaries involved in the process of appointment of superior Judges should be fully alive to the serious implications of their constitutional obligation and be zealous in its discharge in order to ensure that no doubtful appointment can be made. This is not difficult to achieve.

Even in the earlier Judge's case namely, in S.P. Gupta Vs. President of India and Others, the same view had been expressed. " According to Mr.

Selvaraj, even at the time of appointment of the second respondent, the TIIC files relating to the removal of the second respondent from the panel

of Advocates was available with the Government and the present stand that the Government had not looked into that matter is false. The specific

allegation is that the concerned records are being burked. The argument is that at least to this extent the writ petition is maintainable and the

petitioner is entitled to have the records produced before this Court for a proper decision. This argument is hardly answered by the respondent. He

also says that the subsequent grounds raised in W.M.P. No. 9612 of 1994 do require an investigation and they cannot be brushed aside by the

mere counter-affidavit of the Government sworn to by the Chief Secretary, that they have confidence in the second respondent. He then refers to

the judgment of the Supreme Court in *S. R. Bommai v. Union of India*, JT 1994 SC 215 : AIR 1994 SCW 2946 and says that the judicial review

has now been extended even to the satisfaction of the President under Article 356 of the Constitution of India. If that is so, argues Mr. Selvaraj,

the power of the High Court to judicially review the aid and advice of the first respondent based on which the Governor of the State exercises

power cannot be denied. Rejecting the argument of the Union of India the apex Court observed, in that case, (at p. 3009, para 54 of AIR):

We are afraid that this contention is too broad to be accepted. The implication of this contention, among others, is that even if the Constitution

provides pre-conditions for exercise of power by the constitutional authorities, the Courts cannot examine whether the pre-conditions have been

satisfied. Secondly, if the powers are entrusted to a constitutional authority for achieving a particular purpose and if the concerned authority under

the guise of attaining the said purpose, uses the powers to attain an impermissible object, such use of power cannot be questioned. We have not

been pointed out any authority in support of these propositions. We also find that many of the parameters of judicial review developed in the field

of administrative law are not antithetical to the field of constitutional law, and they can equally apply to the domain covered by the constitutional

law. That is also true of the doctrine of proportionality.

15. In answer to the above argument of Mr. Selvaraj, it is pointed out by the first respondent that only persons of integrity should be appointed as

Advocate-Generals. But it cannot be contended that the integrity is part of the qualification prescribed by the Constitution of India, and in any

event it is not judicially reviewable. In any event, it is argued that the allegations contained in the affidavit of the petitioner can, if at all, give rise to a

political process and not a judicial review. Equally, the second respondent says that the case of the second respondent cannot be reviewed on the

touchstone of the code of the conduct projected by the petitioner. It is, however, conceded that if a person appointed as an Advocate-General is

subsequently disqualified having lost the basic qualifications prescribed by the Constitution of India, then it will certainly be open to the Court to

entertain a writ petition and call for a return. But this will not apply to a case of lack of integrity because it is not a constitutional requirement.

Reliance is also placed on Mallikarjuna Rao and Others Vs. State of Andhra Pradesh and Others, :--

It is neither legal nor proper for the High Courts or the Administrative Tribunals to issue directions or advisory sermons to the executive in respect

of the sphere which is exclusively within the domain of the executive under the Constitution. Imagine the executive advising the judiciary in respect

of its power of judicial review under the Constitution. We are bound to react scowlingly to any such advice.

16. Among the other citations placed before me, my own judgment in Dr. T. A. Pandian v. Union of India (W. P. No. 19852 of 1993 and W. P.

SR. No. 95317 of 1993 dated 9-11-1993) is strongly relied upon by the second respondent. It is pertinent to point out that the said judgment

turned upon the interpretation of Article 361 of the Constitution of India. Even there, I did recognise the right of a party to question the validity of

the appointment of the Governor under the second proviso to Article 361 of the Constitution of India. Even on the question of the impleading of it

Governor of a State I had observed,

In a fit and proper case I do visualise the situation where the Governor of a State can be called upon to answer a writ of quo warranto.

Certain other observations contained in the said judgment are referred to suggest that the present writ petition is not maintainable.

Therefore, in my opinion, it is futile on the part of the petitioner to imagine other circumstances or acts as constituting disqualifications for the

appointment of a Governor. The popular notions of the sanctity of the office cannot lead one to imagine that a person should pass certain tests of

qualifications before he is appointed as the Governor of a State. So far as the post of the Governor, the founding fathers of the Constitution of

India had thought it fit to impose only two eligibility conditions in Article 157 of the Constitution of India.

Among the two writ petitions, I dismissed one as not maintainable because the Governor of State had been impleaded and the other on merits as

not containing sufficient allegations for the issue of Rule Nisi. A writ petition can be dismissed in limine on two grounds, either because there are no

merits or because it is not maintainable. In view of the judgment of the Supreme Court in Supreme Court Advocates-on-Record Association and

another Vs. Union of India, , it will not be possible to hold that lack of integrity on vital aspects cannot form the ground of challenge by way of

Article 226 of the Constitution of India, at least in respect of a Judge of the High Court. May be, if it is shown by counter-affidavits that the

allegations are totally without any basis, certainly the Court can dismiss the writ petition. But would it be proper for the Court to dismiss the writ

petition in limine even without investigating into the matter. On this aspect there are some more decisions which give a guidance to the Court. In

Shri Kumar Padma Prasad Vs. Union of India and others, the Supreme Court was faced with the lack of qualifications of a person who had been

appointed as a Judge of the Gauhati High Court. Even a warrant had been issued and it is at this stage that certain proceedings came to be

instituted which were transferred to the apex Court for decision. It is not in dispute that the apex Court held that the appointee lacked the basic

qualifications prescribed by Article 217(2) of the Constitution of India and invalidated the appointment, and prevented the appointee from taking

oath of office. This judgment is sought to be distinguished on the same line, namely, that it refers to qualifications prescribed by the Constitution of

India. According to Mr. Selvaraj, since integrity has been found to be part of the qualifications by the Supreme Court, it follows that lack of

integrity should also give rise to a judicial review. The following passage has some relevance to the present case (para 28).

We make it clear that ordinarily the domain in such matters lies wholly with the constitutional authorities mentioned in Article 217 of the

Constitution, but in exceptional circumstances like the present, where the incumbent considered for appointment as a Judge of a High Court does

not fulfil the qualification as laid down expressly under the provisions of the Constitution itself, it becomes our bounden duty to see that no person

ineligible or unqualified is appointed to a high constitutional and august office of a Judge of a High Court.

Two other decisions Maharshi Avadhesh Vs. State of U.P., and K.C. Chandy Vs. R. Balakrishna Pillai, were cited on the side of the respondents.

Those decisions do not relate to the issue relating to the maintainability. They were decided on a consideration of the merits of the case. I am

aware of the fact that the Allahabad case was dismissed in limine, but on merits. There is one other interesting judgment which is very close to the

facts of the present case, That is G. D. Karkare v. T. L. Shevde, AIR 1952 Nag 330. A Division Bench of the Nagpur High Court was dealing with a writ of quo warranto against a person who was appointed as an Advocate-General of the State of Madhya Pradesh. Though the decision turned upon the question of qualification prescribed in the Constitution of India, certain arguments relating to the maintainability of the writ petition was considered by the Court. The very argument addressed before me, namely, that the office of the Advocate-General being one held during the pleasure of the Governor, no writ of quo warrant could issue. Rejecting the said preliminary objection the Division Bench observed ""(at p. 334, para 17 of AIR).

An applicant invoking the power of the Court under Art. 226 is not entitled to any order, direction or writ as a matter of course. Whether the Court should exercise the power in a particular case would necessarily depend upon the question whether the circumstances of the case call for the grant of any of the special speedy remedies under An. 226. But that consideration can have no bearing on the scope of the power which is conferred upon the Court.

In S. Dharmalingam Vs. His Excellency Governor of the State of Tamil Nadu and Another, Mohan, J. as he then was observed as follows (at pp. 50-51 of AIR):--

From the above provisions, it is clear that there are three kinds of power exercised by the Governor-- (i) the executive power in accordance with the provisions of Constitution. (ii) powers exercised by him on the aid and advice of the Council of Ministers headed by the Chief Minister and (iii) sole discretion. In so far as the power that has come to be exercised by the Governor is wholly in his discretion, I do not think, this Court can interfere at all in matters relating to discretion.

The above summary indicates that except while the Governor exercises the power of discretion, in the other two cases, there is scope for judicial review. Lastly, an argument was made that the Constitution of India comprises of three separate organs namely, the judiciary, the executive and the legislature, and the necessity for each of the authority not to trespass into the territory of the other is stressed to suggest that the writ petition should be dismissed as ""not maintainable.

17. This is a sound principle which I have always been advocating while exercising my power under Article 226 of the Constitution of India. But equally there is another aspect of the case which is pointed out in K.A. Mathialagan Vs. P. Srinivasan and Others, . In that case the Full Bench of the Madras High Court was called upon to enter the sanctus sanctorum of the legislative Assembly and resolve a dispute between the high priests of the Assembly. They refused to do so after an elaborate argument, but observed (para 26):

Before parting with this case we are constrained to point out that though the first respondent claimed privilege that he would not submit himself to the jurisdiction of this Court, yet as the person who was piloting the affairs of the Legislature on that date could have certainly given the best of assistance to the Court if he gave some hypothesis or material on the facts of the case. Immunity from appearance in Courts is certainly the highest privilege which could be availed of by a citizen or a person in authority. But when events in a particular situation compel him to assist the Court by affording such material which is exclusively to his knowledge, it would be in the best interests of the society at large and the Government in particular to render such assistance. Unfortunately this has not been done.

18. Today, we talk of an open Government where information is very well exchanged, so that nothing is done secretly. Therefore, in a case where serious allegations are made against a high constitutional office, it is in the interest of everybody to disclose all the informations and have a judicial quietus over the same. An Advocate-General has a triangular responsibility. He has at once, the confidence of the Government which appointed him and necessarily has to protect the interest of the Government. He is the leader of the Bar and has to protect the interest of the entire congregation of Advocates. He has to assist the Court on very many matters and the Court can call upon him to act as amicus curiae in cases involving intricate questions of law. Even Mr. Venugopal points out that a famous Advocate-General of this Court had once intervened in a case and told the Court that a particular writ petition deserved admission and thereupon the Court duly admitted the writ petition. When such is the position, some of the grounds raised in W.M.P. No. 9612 of 1994 are quite disturbing. I wish the allegations contained, in the said miscellaneous

petition are not true. Since we are proceeding on the basis that even if the allegations are proved, the writ petition is not maintainable, I must refer

to the same. The first allegation relates to the remarks made by the second respondent against the judiciary while welcoming the new Chief Justice.

The fact remains that these remarks were directed to be deleted and the second respondent had tendered an apology. I am not aware of nor am I

deciding the actual manner in which the incident took place, but it cannot be disputed that such an incident took place. Secondly, there is an

allegation that the second respondent presented a petition before the Central Government seeking transfer of some of the Judges of the High

Court. Again I wish that this allegation is not true. I am only referring to this allegation to impress upon the parties that if true, the same will

undermine the very relationship between Bar and the Bench. There is so much talk about the Bar and the Bench being the two sides of the same

coin and the two wheels of the chariot of the Justice. Can there be a smooth functioning of the Court if such allegations, are left undecided? In the

beginning of my judgment, I have referred to the fact that the Court can always mould the relief and give appropriate directions. It is well known

that the Court never directs the Government to promote an Officer or to grant a licence. They always direct the Government to consider the claim

for promotion and the claim for the grant of a licence. Therefore, even if the petitioner makes out a case by establishing the allegations made in the

affidavit, the Court rarely ever directs the first respondent to remove the second respondent from office. On this aspect of the case, learned

counsel for the second respondent says that supposing the Government after considering the directions of the Court rejects the request for

removal, can the Court again interfere in the matter? It is a hypothetical question which I do not prefer to answer now. As already stated, each

organ of the Constitution of India respects the other and there is nothing wrong if information is sought for on certain allegations, so that it can be

decided with certainty that there is no case for granting any relief or directions under Article 226 of the Constitution of India. In the interest of

everybody, I am clearly of the opinion that it is better to thrash out the allegations one way or the other, so that at the end we will know the final

outcome, instead of trying to run away from the issue under the cloak of maintainability. In this view of the matter, and having regard to the several

recent judgments of the apex Court I hold that the writ petition is maintainable. Consequently, W.M.P. No. 9612 of 1994 seeking permission to

file an additional affidavit is allowed. The respondents are given four weeks time to file an additional counter-affidavit meeting the new points raised

in W.M.P. No. 9612 of 1994. The writ petition will be posted for final disposal on 15-6-1994.

19. Order accordingly.