

**(1967) 05 GUJ CK 0009**

**In the Gujarat High Court**

**Case No : Special Criminal Application No. 90 of 1996**

Sabuddin Sheikh Mansur

APPELLANT

Vs

J.S. Thakar and Another

RESPONDENT

**Date of Decision : 04-05-1967**

**Acts Referred:**

Bombay General Clauses Act, 1904 — Section 15, 16, 17, 17(1), 18  
Bombay Police Act, 1951 — Section 55, 56, 57  
Bombay Prevention of Gambling Act, 1887 — Section 6(1)  
Criminal Procedure Code, 1898 (CrPC) — Section 245, 39  
Land Acquisition Act, 1894 — Section 3  
Opium Act, 1878 — Section 3  
Penal Code, 1860 (IPC) — Section 39, 39(1)  
Suppression of Immoral Traffic in Womemand Girls Act, 1956 — Section 2

**Citation : AIR 1969 Guj 1 : (1969) CriLJ 50 : (1968) GLR 142**

**Hon'ble Judges : N.M. Miabhoy, C.J.;J.B. Mehta, J;A.D. Desai, J**

**Bench : Full Bench**

**Advocate : H.K. Thakore, for the Appellant; K.H. Kaji, Actg. A.G. and G.T. Nanavati, Asst. Govt. Pleader, for the Respondent**

## Judgement

Miabhoy, C.J.—The following two points have been referred to this Full Bench by a Division Bench consisting of two of us :--

(1) What is the correct interpretation of the expression ""the Sub Divisional Magistrate specially empowered by the State Government in that

behalf"" as used in Section 56 of the Bombay Police Act; and

(2) Is respondent No. 1 specially appointed within the meaning of the above expression by the notification No. 6304/6 Home Department dated

1st August 1961, of the State of Bombay?

The main point which arises for determination in this case is a short one. It is, what is the correct interpretation of the word ""specially"" used in

Section 56 of the Bombay Police Act, 1951 (hereafter: called the Act).

2. In this case, petitioner challenges the externment order, Exhibit "F", dated 21st August 1966, passed by one Shri Thakar, Sub Divisional

Magistrate, Baroda. The order was passed u/s 56 of the Act, directing petitioner to remove himself outside the district of Baroda by a certain route

within three days from the date of the receipt of the order and prohibiting him from entering or returning to the said district for a period of two

years from the date of the order without his permission in writing or that of the District Magistrate, Baroda. The externment proceedings were

started as a result of a notice, dated 21st August 1965, given to petitioner by one Shri Dhruv, the Sub Divisional Magistrate in charge of the city of

Baroda, on whose transfer subsequently, Thakar probably took charge. One of the grounds on which petitioner attacks the above order is the

competence of the Sub Divisional Magistrate to pass the impugned order u/s 56 of the Act. Therefore, it is first necessary to read that section,

which is as follows:--

56. -- Whenever it shall appear in areas for which a Commissioner has been appointed u/s 1 to the Commissioner and in other area or areas to

which State Government may, by notification in the Official Gazette, extend the provisions of this section, to the District Magistrate, or the Sub

Divisional Magistrate specially empowered by the State Government in that behalf (a) that the movements or acts of any person are causing or

calculated to cause alarm, danger or harm to person or property, or (b) that there are reasonable grounds for believing that such person is engaged

or is about to be engaged in the commission of an offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII of

the Indian Penal Code, or in the abetment of any such offence, and when in the opinion of such officer witnesses are not willing to come forward to

give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property, or (c) that an

outbreak of epidemic disease is likely to result from the continued residence of an immigrant, the said officer may, by an order in writing duly

served on him or by beat of drum or otherwise as he thinks fit, direct such person or immigrant so to conduct himself as shall seem necessary in

order to prevent violence and alarm or the outbreak or spread of such disease or

to remove himself outside the area within the local limits of his jurisdiction or such area and any district or districts, or any part thereof contiguous thereto by such route and within such time as the said officer may prescribe and not to enter or return to the said area or the area and such contiguous district, or part thereof as the case may be, from which he was directed to remove himself,

A plain reading of the section shows that the first part of the section mentions the officers who are competent to act under the section. The officers

mentioned are (1) the Police Commissioner, (2) the District Magistrate and (3) the Sub Divisional Magistrate. The powers of externment are not

automatically conferred upon all these three officers. It is only the Police Commissioner who has been invested with the power under the section by

the statute itself. The District Magistrate also has been invested with the same power, but his power is dependent upon the determination of the

State Government as to whether the provisions of Section 56 should or should not be applied to the district in which the District Magistrate

presides. If and when the provisions of Section 56 happen to be extended by the State Government, then the District Magistrate, by the impact of

the notification concerned, will get the power under the section. However, the Sub Divisional Magistrate does not get the power under the section

by virtue of either the statute or by virtue of the notification which the State Government is empowered to issue for extending the provisions of the

section to a district or a part thereof. In order that the Sub Divisional Magistrate may get the power under the section, it is necessary that he should

further be specially empowered by the State Government in that behalf. Therefore, so far as a Sub Divisional Magistrate is concerned, it is quite

clear that, before he can get the power to act u/s 56, Firstly, there must be a notification by the State Government extending the provisions of the

section over the Sub Division over which the Sub Divisional Magistrate presides, and secondly, that, he must be specially empowered by the State

Government to act under the section. It is only when these two conditions are satisfied that the Sub Divisional Magistrate would be competent to

act under the section. Therefore, in order to decide the question, it is necessary to ascertain whether Shri Dhruv, the Sub Divisional Magistrate

who passed the impugned order, was or was not specially empowered within the

meaning of Section 56 aforesaid. Now, there is no dispute in the present case that the State of Bombay, which was the relevant authority then, issued a notification in its Home Department, No. 6304/6, dated 1st August 1951, extending the provisions of Section 56 to a number of areas specified in a schedule appended thereto, in which was included the district of Baroda. There is also no dispute that, on the same date, by another notification bearing the same number and date and published at page 5272 in the Bombay Government Gazette dated August, 16, 1951, Part I, powers were conferred u/s 56, inter alia, upon the Sub Divisional Magistrates in charge of the Sub Divisions specified in column 1 of the schedule appended thereto in the districts specified against them in column 2 thereof. Amongst the places mentioned in this notification are the four Sub Divisions of the district of Baroda named (1) Baroda City, (2) Baroda (3) Dabhoi, and (4) Chhota Udepur. The relevant part of the notification reads as follows:--

In exercise of the powers conferred by sections 55, 56 and 57 of the Bombay Police Act, 1951 (Bom. XXII of 1951) the Government of Bombay is pleased to empower the Sub Divisional Magistrates in charge of the Sub Divisions specified in column 1 of the Schedule appended hereto in the Districts specified against them in column 2 thereof for the purpose of the said sections 55, 56 and 57:

#### SCHEDULE

Sub Division District

1 2

1 Baroda City

2 Baroda

3 Dabhoi Baroda

4 Chhota Udepur

The rival contentions are based upon the language used in this notification. According to respondents' contention, Shri Dhruv, the Sub Divisional Magistrate concerned, has been "specially empowered" within the meaning of Section 56 under this notification and, therefore, the entrustment of the power is good. According to petitioner, Shri Dhruv has not been specially empowered under that notification. According to him, the

entrustment of the power is general and, therefore, it is void.

3. Therefore, the first question which arises for determination in the case is, what is the connotation of the word "specially" as used in Section 56.

Mr. Thakore's contentions are two in number. His first contention is that, a special entrustment connotes an entrustment by name. His second

contention is that, even if a special entrustment connotes an entrustment in virtue of one's office, an entrustment to a class of officials in virtue of

their title is not a special entrustment but a general one. On the other hand, the learned acting Advocate General contends that, a special

entrustment does not need an entrustment by name and that, an entrustment in virtue of office is also a special entrustment. He, therefore, contends

that, a special entrustment is not necessarily confined to a particular individual, but that, an entrustment to an officer working in a particular office so

as to enure not only for the benefit of the officer for the time being working at the date of the notification but his successor. in office, will also be a

special entrustment.

4. Before we undertake a detailed discussion of the rival contentions, it will be useful to indicate broadly the interpretation which the learned acting

Advocate General places upon the notification in question, which is the second point which has been referred to this Full Bench,

5. Now, it is conceded that the above notification does not confer power under Sec, 56 by name on the Sub Divisional Magistrate, Baroda City,

from which this case comes. The power is conferred upon that officer in virtue of his office. u/s 15 of the Bombay General Clauses Act, 1904

(hereafter called the Clauses Act), where, by any Bombay enactment, a power to appoint any person to fill any office or execute any function is

conferred, then, unless it is otherwise expressly provided, any such appointment may be made either by name or by virtue of office. According to

the learned acting Advocate General, therefore, the above notification is valid u/s 15 of the Clauses Act, u/s 17(1) of the Clauses Act, it is sufficient

for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, to

mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed.

According to the learned acting Advocate General, under this section, for the

purpose of indicating that the Sub Divisional Magistrate, . Baroda City, is to exercise the functions of a Sub Divisional Magistrate u/s 56, it is enough for the State of Bombay to mention the official title and that a notification so issued would have the effect of conferring power upon the Sub Divisional Magistrate to execute the functions assigned to a Sub Divisional Magistrate u/s 56. u/s 18 of the Clauses Act, it shall be sufficient ""for the purpose of indicating the relation of a law to the successors of any functionaries. ... to express its relation to the functionaries ....."". Therefore, according to the learned acting Advocate General, the aforesaid notification under the above section not only confers power upon the Sub Divisional Magistrate who occupied that position on the date of the notification, but, all his successors in office. Therefore, according to the learned acting Advocate General, the proper interpretation of the notification in the light of the provisions contained in sections 15, 17 and 18 of the Clauses Act, is that, it confers power, not only on the Sub Divisional Magistrate who occupied that position on the date of the notification, but also all his successors who happen to be appointed Sub Divisional Magistrates in the Sub Division of the city of Baroda,

6. According to the learned acting Advocate General, the entrustment of power to the Sub Divisional Magistrate in the above manner is still a special entrustment. According to Mr. Thakore, the entrustment is not special but is general. It is in the context of these two rival contentions that the question has to be answered as to what is a special empowerment within the meaning of Section 56 of the Act.

7. The expression which requires to be construed is, ""the Sub Divisional Magistrate specially empowered by the State Government in that behalf. The key word in this expression appears to be the adverb ""specially"". The expression, when amplified, would read, according to the rules of grammar, as follows: ""the Sub Divisional Magistrate who is specially empowered by the State Government in that behalf."" It may be noticed that, the adverb ""specially"" qualifies the verb ""empowered"" and the expression ""Sub Divisional Magistrate"" is qualified by the adjectival clause ""(who is) specially empowered by the State Government in that behalf."" Therefore, reading, the expression apart from any authority, according to rules of grammar, the result is that, the Sub Divisional Magistrate contemplated by the

expression is the one who is specially empowered by the State

Government concerned. Reading the expression from a different angle, it is quite clear that, the authority which can entrust power is the State

Government. The authority on which power can be conferred is the Sub Divisional Magistrate. But, in order that power may be so conferred, the

Legislature requires that the power must be specially conferred. Therefore, in order that the expression may be satisfied, it is not merely enough

that the State Government must entrust the power to the Sub Divisional Magistrate. It is necessary that the same should be done specially. Now,

according to the ordinary canons of construction, the Legislature must be taken to have used the word ""specially"" advisedly. One cannot proceed

on the assumption that the expression ""specially"" is superfluous. If that was the intention, then, the Legislature would have carried out its meaning by

merely using the expression ""the Sub Divisional Magistrate empowered by the State Government in that behalf."" Having regard to the fact that the

Legislature has qualified the entrustment of the power by the adverb ""specially"", there is no doubt whatsoever that the Legislature does intend to

convey that the entrustment of the power must be done specially and not otherwise. It is true that, the word ""specially"" may have a different

connotation in different contexts. But, from the context in which the word appears in the above expression, the Legislature appears to have used

the word. ""specially"" in contradistinction to the word ""generally"". In other words, in order that the expression may be satisfied what the State

Government must do is to entrust the power specially and not generally. If the entrustment is general, then, it does not satisfy the expression. But,

the above approach leads only to a negative conclusion. It does not convey clearly the ideas as to what exactly is special and what is general. The

idea may have to be ascertained with the aid of dictionary or other aids which are usually adopted for construing statutes. But before we undertake

this task, in our judgment, it is easy to dispose of the contention of Mr. Thakore that, in order that an entrustment may be special, it must be by

name and in no other way. In support of this argument, Mr. Thakore brings to aid the fact that Section 56 confers wide power upon the officers

named therein. The power is to restrict the movements of a citizen. He contends that, the legislative policy appears to be that the enjoyment of such

wide power must necessarily be restricted to the hands of a highly placed officer like the Commissioner or the District Magistrate and that, if the same is to be placed in the hands of an officer of a lower rank like a Sub Divisional Magistrate, then, the entrustment thereof must be done by the State Government by an exercise of its special discretion and that this restriction is placed on the State Government in order that the Government may bear in mind not merely the official position of a Sub Divisional Magistrate, but, it must also satisfy itself that the person concerned has also the special experience and equipment which would ensure it that the power will be enjoyed with propriety and justice. Mr. Thakore contends that, the latter result can be obtained only if the expression is construed to mean that, in each case, the State Government must consider the name of the Sub Divisional Magistrate concerned and if it is satisfied that the officer has the necessary experience and equipment, it should name the officer accordingly so as to ensure that the power will not be abused. Now, in our judgment, there is considerable force in the argument of Mr. Thakore that the Legislature intends that the power conferred by the State Government must be exercised by a special choice. But, in our judgment, it does not follow therefrom that the power can be conferred only on the officer concerned by name and not in any other manner. It is true, as we shall presently point out, that the main idea is that the officer who is to be the repository of the power, must be selected and chosen by the State Government and that this process can be done only if the identity and individuality of the officer concerned is clearly borne in mind by the State Government. But, in our judgment, that does not mean that if once the identity and individuality is established, the officer must necessarily be named and cannot be entrusted with the power by virtue of his office. It is true that, if the State Government has confidence in a particular person, who is a Sub Divisional Magistrate for the time being, and the State Government has the authority to confer power by name on him. But, if that is not the intention of the Government, and the Government wants that a particular person occupying the position of a Sub Divisional Magistrate at a place to exercise the power whilst he is occupying the office at a particular place, there does not appear to be any restriction inherent in the aforesaid expression, which would oblige the Government not to entrust the power to him by official designation. Moreover, such a limited construction of

the above expression is not justified by the wide language used in Section 15 of the Clauses Act. Under that section, the State Government has the authority to appoint any person to execute any function by name or by virtue of his office, unless it is otherwise expressly provided. In our judgment, the word "specially" as used in the aforesaid expression cannot be regarded as a special provision to the contrary, excluding the conferment of power on a person by virtue of his office. In our judgment, Section 15 of the Clauses Act is applicable both when the State Government has the authority to confer power specially or generally. In order that the State Government may be restricted in the aforesaid manner, in our judgment, the statute must clearly state that the conferment of power was intended to be by name and not by virtue of office. Mr. Thakore derives support for his above contention from the judgment of the Sind Court in *Emperor v. Udho* AIR 1943 Sind 107. In that case, the Sind Court was called upon to construe the expression "by an Assistant or Deputy Superintendent especially empowered by Government in this behalf. In that case, Davis C.J., after observing that the above expression implies the exercise by Government of a certain selection or discrimination as regards an individual on whom power is to be conferred, goes on to consider the objection raised on behalf of the Government, on administrative grounds, and goes on further to observe that no such difficulty is likely to arise if the officer is to be empowered by name. However, the learned judge has not given any special reason for this conclusion of his that the entrustment of power should be by name. In our judgment, the learned Judge has omitted to consider the effect of Section 15 of the General Clauses Act. The above interpretation of the above expression was definitely differed from by a Division Bench of the Bombay High Court in *Emperor v. Savlaram Kashinath Joshi* 49 BLR 798 (AIR 1948 Bom 156) on the basis of Section 39, Sub-section (1) of the Code and Section 15 of the Clauses Act. As we shall presently point out, there is a sharp cleavage of judicial opinion on the correct interpretation of the expression that we are called upon to construe as used in various statutes. But, the Sind Court is the solitary Court which holds that the expression requires entrustment of power by name. None of the other Courts have gone to that extent. For the above reasons, we are not in agreement with the first part of Mr. Thakore's contention that the expression aforesaid requires conferment of

power by name and in no other way. We hold that if power is conferred upon the Sub Divisional Magistrate by virtue of his office, then, it does not

cease to be a special conferment of power.

8. That brings us to the question about the concept of special conferment of power. The learned acting Advocate General contends that the term

“specially” is intended to emphasise the fact that the power which is to be conferred by the State Government is the special power mentioned in

Section 56. We are unable to agree with this interpretation. In our judgment, the power which is intended to be conferred u/s 58 is only one

power, namely, the power of externment. Therefore, it is hardly probable that the Legislature intends, by the use of the expression, “specially,” to

designate the power of externment. Such an interpretation must be rejected on more than one ground. In the first instance, the same result can be

obtained by the omission of the word “specially” and, in that view, the word “specially” would be superfluous. Moreover, the idea of the power is

contained in the expression “in that behalf.” There can be no reason for the Legislature to use that expression “in that behalf” if the same was

intended to be conveyed by the use of the word “specially.” Moreover, the above interpretation would conflict with the grammatical reading of the

expression as a whole. In our judgment, the expression “specially” as used in the adjectival clause “(who is] specially empowered by the State

Government in that behalf” has reference to the Sub Divisional Magistrate, and the reference is made in order to emphasise that the Sub Divisional

Magistrate on whom the power is to be conferred must be selected or chosen by the State Government and that, such officers must not be

generally selected for the conferment of the power. Whether the officer is selected by name or by virtue of his office, the person who is so selected

must be an individual in whom the State Government has faith that he will be able, by virtue of his experience and equipment and similar other

considerations, to discharge the responsibility or duty cast upon him by the section. This is the interpretation which was placed by the Madras High

Court which had to construe a similar expression used in the Indian Opium Act, in the case of Mahomad Kasim v. Emperor AIR 1915 Mad 1159.

The same interpretation is placed by the Sind Court in Udho's case AIR 1943 Sind 107, already referred to. The Bombay High Court in

Savlaram's case 49 BLR 798 ; (AIR 1948 Bom 156) already referred to, adopted the same interpretation. We are respectfully in agreement with

the above interpretation placed in the above three authorities. In the cases of Mahomad Kasim AIR 1915 Mad 1159, and Savlaram 49 BLR 798 ;

(AIR 1948 Bom 156) support is derived from the language used in Sub-section (1) of Section 39 of the Code. In Udho's case AIR 1943 Sind

107 however, the same result is obtained on a consideration of the language of the expression without reference to the latter section. Spencer, J. in

Mahomad Kasim's case AIR 1915 Mad 1159 has expressed himself as follows at page 1160:

Section 39, Criminal F, C. throws light on what is meant by specially empowering persons.

It declares that the local Government may empower classes of officials generally by their official titles or persons specially by name or in virtue of

their office. When therefore a class of officials is invested with powers to try certain offences, it would appear that they are "generally"

empowered. The word "generally" is in contrast to the word "specially" which is used in speaking of individuals.

Seshagiri Aiyar J., who concurred with Spencer J., has given two more reasons for reaching the above conclusion. One reason is that, if the above

expression were to be construed in a general way, then, it would be enlarging the definition of the word "Magistrate" as defined in the Opium Act

The second and, in our judgment, very weighty reason which is given by the same learned Judge, is that, the word "special" excludes the concept

of the conferment of power on the successors of the person selected for the entrustment of the power. The same idea is forcefully expressed by

Davis C.J. in Udho's case AIR 1943 Sind 107 as follows:--

Apart from all other considerations the very wording of the sub-section "or by an Assistant or Deputy Superintendent especially empowered by

Government in this behalf clearly to our minds implies the exercise by Government of a certain selection or discrimination as regards an individual

on whom special power is to be conferred; and to authorise the deputy Superintendent of Police of Bohri, whoever he may be, however numerous

the successors to this office may be, would be to go against the principle of selection embodied in this sub-section and to be something in the form

or nature of a general and not a special power.

Sub-section (1) of Section 39 of the Code reads as follows:

39. (1) In conferring powers under this Code the State Government may, by order, empower persons specially by, name or in virtue of their office, or classes of officials generally by, their official titles"".

This is an enabling sub-section. It indicates the modes in which the State Government may confer powers under the Code. The modes indicated

are two in number. One may be called, the special mode and the second, the general mode, of conferment of power. The special mode is shown

as conferment of power on persons ""by name or in virtue of their office."" The general mode is the conferment of power on classes of officials ""by

their official titles."" Therefore, according to the above sub-section, if power is conferred on a person or persons by name or by virtue of his or their

office, then, it is a special conferment of power. If, on the other hand, power is conferred, not on persons or individuals, but, upon classes of

officials, then, the power is conferred ""by official titles."" The first part of the first mode is very simple. Whenever a person is empowered by name,

it is a special mode of conferment of power. But whenever power is conferred, not by name, but by virtue of office occupied by a person, then, the

conferment would be special or general according as the conferment is on a person by virtue of his office or on a class of officers by official title. It

is to be noticed that, in the second part of the first mode, the selection is of a person or individual and the office which he occupies is mentioned but

not his name. In the second mode, power is conferred, not on one individual but a class of officials and when power is so conferred, the office

which the officials occupy is not mentioned but the official title. The sub-section contemplates a clear distinction between the office of an official

and his title. Broadly speaking, the distinction appears to be that, when a person belonging to a certain class of office occupies a particular office,

then, power can be conferred upon him in virtue of the office occupied by him. But, if power is conferred upon the whole class to which the officer

belongs, then, it is done by virtue of his official title. Probably, a Sub Divisional Magistrate is an official title. But, if a Sub Divisional Magistrate is

posted in a particular Sub Division to discharge the duties of his office, then, though holding the title of a Sub Divisional Magistrate, he would be

occupying the office of the Sub Divisional Magistrate at that particular place. Therefore, if power is conferred upon Sub Divisional Magistrates, then, it will be a general power. But, if power is conferred upon a Sub Divisional Magistrate occupying a particular office at any given time and place then, it would be a special conferment of power on him. The distinction between the two modes will still persist. Whether an officer is empowered by name or by virtue of his office, he is all the same a particular officer. If, on the other hand, if an officer alone is not given power but the whole class, of which he is one, then, it will be a general conferment of power. The learned acting Advocate General is right that it is not proper to take the aid of the aforesaid sub-section for the purpose of construing other statutes. It may be that, one may be justified in taking the aid of the aforesaid subsection when construing statutes in *pari materia* or statutes dealing with criminal matters. But, at the same time, in our judgment, Courts must remember, whenever they are called upon to interpret an expression of the aforesaid type in a different statute, that, the primary duty is to construe the expression according to the ordinary canons of construction in the context in which the expression is used in that particular statute. But, all the same, in the absence of any indication in the statute to be construed, if the legislative mind is sought to be understood with the aid of the aforesaid sub-section, we do not see any flaw in that approach, although, while taking the aid of the sub-section, one must bear in mind that it cannot be regarded as a definition, clause or as conclusive, overriding all other considerations. Approaching Sub-section (1) in the above manner, in our judgment. the same result is obtained that we have arrived, at originally on a construction of the expression used in Section 56 of the Act, In our judgment, the emphasis, in the case of special conferment of power, is on the individual or individuals and, in the case of general conferment, the emphasis is solely on the class of officers by their official title, Therefore, whenever we get a case where power is conferred on an officer, either by name or *ex officio*, then, it is a special conferment of power on him, whereas, if power is conferred on a class of officials by official title, then, it is a general conferment of power on the class. In that view of the matter, in our judgment, the conclusion arrived at by the learned Judges of the Madras High Court in Mahomad Kasim's case AIR 1915 Mad 1159 and the conclusion of the learned Judges of the Sind

Court in Udho's case AIR 1943 Sind 107 except its conclusion about naming the officer, appear to be correct. In Savlaram's case 49 BLR 798 :

(AIR 1948 Bom 156) the learned Judges of the Bombay High Court appear to have, accepted the same view in one part of the judgment which,

as two of us have stated in the referring judgment, represents the ratio of the case. The passage which occurs after the quotation of Sub-section (1)

of Section 39 of the Code which represents the ratio, is as follows, at page 801:

This throws a flood of light on what is meant by "specially empowering" persons. It emphasises the distinction between "specially empowering"

and "generally empowering." When a class of officials is invested with powers to try certain, offences or to do certain functions, it would appear

that, they are "generally empowered", but if any persons are so empowered by name or in virtue of their office, they are said to be "specially

empowered". This distinction was clearly pointed out in AIR 1915 Mad 1159, where Section 3 of the Opium Act, 1878, had to be interpreted,

However, so far as Savlaram's case 49 BLR 798 : (AIR 1948 Bom 156) is concerned, although the above passage, in our judgment, clearly

represents the law on the subject, the difficulty arises because the learned Judges did not accept the proposition laid down in Udho's case AIR

1943 Sind 107 wherein the learned Judges emphasise the concept of selection and discrimination in the matter of conferment of power. The

second difficulty in Savlaram's case 49 BLR 798 : (AIR 1948 Bom 156) arises, on account of the actual application of the law on the subject to

the notification which their Lordships had to apply on the facts of that case. From the facts narrated in the case it is quite clear that, Mr. Crone who

had issued the search warrant in that case, was not the person occupying the position of an Assistant Superintendent at Poona when the notification

was issued. The notification was issued as far back as 1928 and the special search warrant was issued in 1944. In spite of this, their Lordships

held that, Mr. Crone was specially empowered, and the reason which Lokur J., speaking for the Court, gives is to be found in the following

passage at page 801;

I respectfully think that when a particular place was selected by Governor, It is conceivable that Government intended to post there only such

assistant or Deputy Superintendent as was competent to exercise the power u/s

6 of the Act. This would be covered by the words "in virtue of their office" used in Section 39 of the Criminal Procedure Code.

In support of this conclusion, Lokur J, has relied upon the Madras case of Alaga Pillai v. Emperor AIR 1924 Mad 256. As we shall presently

point out, it is by no means clear that the facts in Alaga Pillai's case AIR 1924 Mad 256 were on all fours with the facts in Savlaram's case 49

BLR 798 : (AIR 1948 Bom 156) but, apart from this, in our judgment, the above reasoning which has been adopted by their Lordships of the

Bombay High Court in Savlaram's case 49 BLR 798 : (AIR 1948 Bom 156) does not represent correct test. It jettisons the rule which is to be

obtained on a proper construction of Sub-section (1) of Section 39 of the Code. In our judgment, if a notification empowers, not a person holding

a particular office at a particular point of time, but, empowers all his successors in office, then, the Government does not select any particular

person, an individual or an officer, for the conferment of power, but it selects a place and confers power upon all officers who may happen to be

transferred at that place, including an officer who may not have been in service at the time when the notification was issued and about whose

capacity or experience the Government may not have the slightest idea at the time when the notification is issued. In our judgment, it is wrong to

regard such a notification as a special conferment of power and not general. Therefore, though we accept the ratio as embodied in Savlaram's

case 49 BLR 798 : (AIR 1948 Bom 156) as having been correctly laid down, we cannot hold that the application of that ratio to the facts of the

case which the learned Judges had to deal with is correct. Several of the Judges who have differed from Mohamed Kasim's case, have had

occasion to refer to Alaga Pillai's case. Some of the learned Judges have construed the latter case as being inconsistent with the former case and

some others have explained the latter case on the basis that the Second Class Magistrates were mentioned in the notification relevant in that case

by names. The notification relevant in that case is not to be found in the judgment. Therefore, it is difficult to explain the latter case on one or the

other ground. All that one can say is that, their Lordships did not differ from the ratio laid down in Mohamed Kasim's case, but, on the notification

before them, they held that the ratio in that case was satisfied. In our judgment,

it will not be proper to hold that the Division Bench in Alaga Pillai's

case intended to by-pass Mohamed Kasim's case in reality, though conceding lip sympathy towards it. We are not prepared to hold that Alaga

Pillai's case is inconsistent with Mohamed Kasim's case. In our judgment, the Madras view, in view of the special reasoning given in Mohamed

Kasim's case, must be taken to be one which we have extracted from the judgment of Spencer, J. and which we have reproduced from the judg-

ment of Seshagiri Aiyar, J.

9. Therefore, on the whole, we have come to the conclusion that, the correct interpretation of the expression which we have to construe is that, in

order that there may be a special conferment of power u/s 56 aforesaid in regard to a Sub Divisional Magistrate, power must be conferred upon

that officer either by his name or by virtue of his office. In either case, Government must have definitely before its mind's eye the particular

individual or person who is being selected for the conferment of power. If that is not so, then, the officer is not specially empowered. On the other

hand, in our judgment, if power is conferred upon the classes of Sub Divisional Magistrates, which will be the case in more than one particular

individual is intended by the Government -- and specially so if the Government intends to empower the successors in office of the Sub Divisional

Magistrates concerned--(then, it is a general conferment of power,

10. Before we part with the above topic, it is necessary to mention one more judgment, in which the same view has been taken, which case was

fairly pointed out to us by the learned acting Advocate General, and some other cases in which according to the learned acting Advocate General,

a different view has been taken. The same view has been taken by the Saurashtra High Court in Polubha Vajubha v. Tapu Ruda AIR 1956 Sau 73

. The cases which, according to the learned acting Advocate General, take a different view, are The State Vs. Judhabir Chetri, , K.N. Vijayan v.

The State AIR 1953 T C. 402 ; Public Prosecutor (Andhra Pradesh) Vs. Narkidimilli Srirambhadrappa and Others, , Ashiq Hasan Khan and

Others Vs. Sub Divisional Officer and Others, ; and State of Mysore Vs. Kashambi and Another, , In view of the strong reliance placed by the

learned Acting Advocate General on those cases, it is necessary to consider them now. In all these cases, except Gram Panchayat, Godawas Vs.

Municipal Board, Neemka Thana and Another, the challenge to the notifications was grounded on the fact that the conferment of power on the officer concerned should have been by name and not by official designation. The challenge so made was negatived. With respect, we agree with this particular view of the interpretation of the expression "specially empowered". But, in negating the above contention, the view taken in Mahomed Kasim's case has been dissented from in the above cases. In so far as the Madras case takes the view that when power is to be conferred by official designation, the power must be conferred on an individual or person and not on a class of officials. Thadani C.J. has differed from it in the State v. Judhabir Chetri. The main reason which the learned Chief Justice has given in support of his conclusion is grounded on a distinction between an officer and an official. According to the learned Chief Justice, a first class Magistrate is not an official, but, an office being synonymous with the Court of the First Class Magistrate. In that case, the learned Chief Justice was concerned with a notification Issued u/s 16 of the Assam Opium Prohibition Act, which required special conferment of power under that section. The officer on whom the power Was conferred was a First Class Magistrate. The learned Chief Justice did not disagree with the view that, if a class of officials is invested with powers to try offences by their official title, the empowerment is a general empowerment. But, according to the learned Chief Justice, the expression "class of officials" must not be confused with First Class Magistrates who, according to him, are Courts or offices, in the same way as Judges are but are not a class of officials. Now, this distinction has been doubted in State of Mysore v. Koshambi. Hegde J., after referring to the above distinction, has pointed out that he was unable to subscribe to the view expressed by Thadani, C.J. that Magistrates are not a class of officials within the meaning of that expression as used in Section 39 of the Criminal Procedure Code. This view has also not been accepted by the Saurashtra High Court in AIR 1956 Sau 73. Shah C.J., after referring to the reasons given by Thadani C.J. for his above view, makes the following observations at page 74 a

With all respect, we are unable to agree with this view of the Assam High Court. It is true that the heading of Chapter II of the Criminal P. C. is

"The constitution of powers of Criminal Courts and officers" and the word "office" in the heading means the office of a Judge or a Magistrate.

Even so, it does not necessarily exclude the concept of a Judge or a Magistrate being an official; and this view is fortified by the heading of Chapter

III of the Code, which is "Power of Courts".

Part A of the Chapter speaks of description of offences cognizable by each Court; Part B deals with sentences which may be passed by Courts of

various Classes; Part C speaks of Ordinary and Additional Powers; and Part D speaks of conferment, continuance and cancellation of powers.

Now these powers are all powers of the Courts and in fact Chapter III deals with that subject itself.

In spite of it, we find in Section 39 of the Code the words "classes of officials generally by their official titles." "Officials" in the sense in which that

expression is interpreted by *The State Vs. Judhabir Chetri*, have really no place in the scheme of Chapter III of the Code, and with all respect to

the learned Chief Justice we are unable to agree with that interpretation, which refers to Secretaries, Under Secretaries and Deputy Secretaries to

Government or to other Heads of Government Departments.

Chapter 111 of the Code does not envisage empowering such officials with powers under the Code. Considering that this Chapter is concerned

with powers of Courts and that the powers conferred thereby are on the Courts, we think the proper construction of the expression "officials" in

Section 39 would be to equate it with Courts and not to interpret it as meaning officials of Government. "Officials" should rather be given its normal

meaning viz., persons holding an office) and that office here is the office of a Judge or a Magistrate.

The contrast in Section 39 is really between empowering persons on the one hand and empowering classes (of officials) on the other hand, the

underlying idea being that it is Courts which are to be empowered. What the section provides is that where persons (that is to say Magistrates or

Judges) are to be empowered the empowering shall be by name or in virtue of their office and this empowering will be special, empowering as

against general empowering which empowering is to be of the whole class of officials (who would also be Magistrates or Judges) by their official

titles.

With great respect, we agree with the above views of Shah C.J. in regard to the observations made by The State Vs. Judhabir Chetri, . One of the reasons given by Thadani C. J. for not relying upon Mohamad Kasim's case ( AIR 1915 Mad 1159 ) is the case of Allaga Pillai Vs. Emperor, , which according to the learned Chief Justice, ""sought to reconcile the previous decision of the same court to which I have referred (Mohammad Kasim's case AIR 1915 Mad 1159 ), the reconciliation is I think only apparent and not real. In my view it makes no difference that in the notification involved In the later decision of the Madras High Court the names of the Magistrates were also mentioned"". We have already mentioned in this judgment that, the above explanation, of Allaga Pillai Vs. Emperor, is not correct. Moreover, there is no warrant for the observation made by the learned Chief Justice that, in Allaga Pillai Vs. Emperor, the names of the Magistrates were also mentioned. AIR 1953 TC 402 merely follows The State Vs. Judhabir Chetri, and does not contain any, independent reasons in support of its conclusion. Both the Assam High Court and the Travancore Cochin High Court also rely upon the case of Sundar LaL and Others Vs. Emperor in support of their view. That case however, also does not contain any independent reasoning, but merely follows a previous Allahabad decision which, unfortunately, not being quoted in the judgment, is not available to us. In Public Prosecutor (Andhra Pradesh) Vs. Narkidimilli Srirambhadrayya and Others, , the question for consideration was whether Sanitary Inspectors can be appointed by virtue of their office u/s 9 of the Prevention of Food Adulteration Act, as Food Inspectors. The question for decision is formulated in paragraph 10 at page 284 of the report as follows:

The whole contention involves the ascertainment of the power vested by Section 20 of the Act. When, the legislature authorised a person appointed in that behalf by State Government or Local authority to lodge complaints in respect of prosecution for an offence under the Act, should that person be signified by name or can he be appointed by virtue of his office? It is contended by the learned Advocate for the accused that the appointment does not conform to the rules made under the Act, and that in any case, Sanitary Inspectors as a class were not under the contemplation of the powers vested in Section 20 of the Act.

It does not appear from the report that the relevant rule required any special appointment of such Sanitary Inspectors in contradistinction to general appointment. In *Ashiq Hasan Khan and Others Vs. Sub Divisional Officer and Others*, Misra J. has construed Section 39 of the Code as follows at page 448:

In my opinion, the Legislature in that section has not used the word "specially" by itself but in conjunction with the two words, "by name" so that the legislature contemplated conferment of power upon the official by name or by virtue of the office or classes to which he belonged in general terms. There is no dichotomy between special power and general power, but special power by name and general power by official title. That section cannot be construed to mean that whenever the legislature or, for the matter of that, any rule-making authority has used the expression that certain classes of officials may be empowered that would necessarily cannot be authorisation by name.

Whilst we agree with the conclusion that, when empowerment is by name, it is special empowerment, we cannot agree with Misra J., for the reasons already given, that the word "specially" goes with the words "by name" only and that it does not refer to "in virtue of their office." In

(1963) 2 Cri LJ 226 (Mys) Hegde J., (as he then was) who was concerned with a notification issued under the, Suppression of Immoral Traffic in

Women and Girls Act, 1956, has dealt with the question about the correct interpretation of the expression "specially empowered" more in detail.

The learned Judge has agreed with the interpretation of Section 39 of the Criminal Procedure Code, as given by Shah C. J. in *Polubha Vajubha's*

case AIR 1956 Sau 73 upto a certain extent, but, has disagreed with the observations made by Shah C.J. in the following passage at page 228:

Agreeing with Mahomad Kasim's case AIR 1915 Mad 1159, therefore, we hold that the powers conferred by the notification in the present

case on all Taluka Magistrates does not amount to specially empowering them within the meaning of Section 39 Cr.P.C. and therefore the Taluka

Magistrate of Talaja was not empowered to hold proceedings u/s 245 Cr.P.C. and that the order made by him was without jurisdiction."

With respect, the above passage does not constitute the main reason for the conclusion arrived at by Shah C. J. The main reason is to be found in

the passage with which Hegde J. has agreed. Another reason which Hegde J. has given is that, in the expression ""Magistrates of first Class

specially empowered"" used in Section 2(c) of the Suppression of Immoral Traffic in Women and Girls Act, the word ""specially"" is an adjective to

the word ""empowered"" and not to the noun ""Magistrates."" With due respect, the learned Judge is grammatically wrong. As we have pointed out,

the word ""specially"" is an adverb to the verb ""empowered"" and the whole clause is an adjectival clause qualifying the expression ""Magistrates of

First Class."" For all these reasons, we are unable to see any good reason in any of the decisions on which the learned acting Advocate General

relies for taking a different view which, for the reasons already recorded, has appealed to us as the correct view.

11. For the above reasons, we answer the first question formulated by the Division Bench by holding that, the correct Interpretation of the

expression is that. In order that there may be a special conferment of power u/s 56 aforesaid in regard to a Sub Divisional Magistrate, the power

must be conferred upon that officer either by his name or by virtue of his office. In either case. Government must have definitely before its mind's

eye the particular individual or person who is being selected for, the conferment of power.

12. That takes us to the second question formulated by the Division Bench. We have already indicated in a previous part of this judgment the

interpretation which the learned acting Advocate General places upon the notification in question. In our judgment, that interpretation is the correct

interpretation having regard to the provisions contained in sections 15, 16 and 18 of the Clauses Act. In so far as this notification confers power on

the officer who actually occupied at the date of its publication the post of a Sub Divisional Magistrate, the notification may be valid. But, in so far

as that notification purports to confer powers on the successors of the Sub Divisional Magistrate who may happen to be appointed at some future

date, the entrustment of power being general, is invalid. The learned acting Advocate General contends that, such interpretation of the notification is

inconsistent with the findings which were given by a Division Bench of this High Court in Special Civil Appln. No. 1475 of 1965 (Guj) and the

group of other special civil applications, of which I was one of the Members and in which the question for consideration was whether one Master,

a Special Land Acquisition Officer, was specially appointed to perform the functions of a Collector within the meaning of Section 3, Clause (c) of

the Land Acquisition Act. The judgment in those applications was delivered on 15th October 1966. We cannot agree with the submission of the

learned acting Advocate General. In that case, the Court had to deal with not one single notification but the combined effect of two notifications. In

the first notification, Master was appointed as a Special Land Acquisition Officer by name and in the second notification, all Special Land

Acquisition Officers were empowered with the powers of a Collector within the meaning of Section 3, Clause (c) of the Land Acquisition Act. The

Division Bench considered the combined effect of the aforesaid two notifications, and came to the conclusion that, the proper interpretation of the

two notifications was that Master was specially appointed a Collector within the meaning of Section 3, Clause (c) of the Land Acquisition Act. We

fail to see how that interpretation can help the prosecution in the present case. In the present case, there is one single notification and the Sub

Divisional Magistrates who have acted under the notification are not mentioned therein either by name or by virtue of their office in the sense that

we have interpreted the Clause ""specially empowered"" in this judgment. In the judgment delivered on 15th October 1966, we do not find anything

which militates against the view which we have taken as to the correct interpretation of the expression ""specially empowered.

13. The next argument of the learned acting Advocate General is that, though the impugned notification takes within its purview not only officers

who were Sub Divisional Magistrates at the time when the notification was published but all Sub Divisional Magistrates who happen to be

appointed in the sub-divisions mentioned in future, the general effect of the above notification is that, at any given time, there would be only one

single Sub Divisional Magistrate who will be exercising the power u/s 56 and that this would, in law, amount to special empowerment and not

general. We cannot agree with this submission. In our judgment, for the purpose of considering the validity of a notification, the test is not whether

it confers, at one given time, power on one particular officer, but the test is as to whether, under that notification, power is conferred on one

Individual or a class of officials. In the present case, in our judgment, having regard to the submissions made by the learned acting Advocate

General based upon Sections 15, 16 and 18 of the Clauses Act, the correct interpretation is that, not only the Sub Divisional Magistrate who was working in the respective sub-division at the time when the notification was issued, but, all his successors are also intended to be included. Not only the successors who were holding the offices of Sub Divisional Magistrates in their subdivisions then, but, also the persons who were not borne in the cadre on the date on which the notification was published. Under the circumstances, in our judgment the proper interpretation of the above notification is that, it confers a general power on the Sub Divisional Magistrates concerned and, as such, does not satisfy the requirement of Section 56 of the Act.

14. Therefore, the finding on the second query of the Division Bench will be that, respondent No. 1 is not specially appointed under the impugned notification within the meaning of the expression ""specially empowered"" used in Section 56 of the Act.

15. The case will go back with the aforesaid two findings to the Division Bench concerned for disposal according to law.

16. The case referred to this Full Bench has been set down today for delivery of judgment. The learned Acting Advocate General today draws our

attention to the judgment of their Lordships of the Supreme Court in *Sindhi Lohana Choithram v. State of Gujarat*, Criminal Appeal No. 13 of

1964= (AIR 1967 Guj 1532), in which, according to the submission of the learned acting Advocate General, the same point which was referred to

this Full Bench has been decided. Mr. Thakore, on the other hand, contends that, though the Supreme Court resolves the conflict between the

Sind case of *Udho* AIR 1943 Sind 107 and the Bombay case of *Savlaram* 49 BLR 798 : (AIR 1948 Bom 156) it does not touch the point which

he has raised for the decision of the Full Bench. Now, the question which directly arose for decision before their Lordships of the Supreme Court

in the above case was whether, in order that a person may be specially empowered within the meaning of Section 6(1)(i) of the Bombay

Prevention of Gambling Act, it is necessary that he should be designated by name only and that a designation by his official title is not sufficient.

Now, on that point, their Lordships have definitely held that a person, though he may be appointed by virtue of his office, still, he would be

pecially empowered within meaning of the aforesaid Section 6(l)(i) of the Bombay Prevention of Gambling Act. After referring to the two cases of

Udho AIR 1943 Sind 107 and Savlaram 49 BLR 798 : (AIR 1948 Bom 156) their Lordships have expressed their conclusion in the following

words:

We think that where power is conferred on a person by name or by virtue of his office, the individual designated by name or as the holder of the

office for the time being is empowered specially. Judged by this test, the notification dated January 22, 1955, specially empowered Shri Pandya as

the holder of the office of the Deputy Superintendent of Police, Porbandar, to issue the search warrant u/s 6.

On the one hand, Mr. Thakore emphasises this aspect of the case, namely, that, it is the individual who becomes designated by name or by holding

the office, on the other hand, the learned acting Advocate General contends that the above passage does not emphasise the individual to be

empowered, but, emphasises that, a holder of an office can be specially empowered without naming him. In support of his submission, the learned

acting Advocate General relies specially upon a later passage in the judgment which is as follows:

For the purpose of this case, it is sufficient to hold that a notification conferring power on the Deputy Superintendent of Police of Porbandar to

issue a search warrant specially empowers the holder of that office by virtue of his office to issue the warrant.

Now, so far as their Lordships have laid down that a person can be specially empowered even though he may be named by his official title, we

have not taken a different view. We have agreed with the ratio in Savlaram's case 49 BLR 798 : (AIR 1948 Bom 156) and definitely disagreed

with the ratio in Udho's case AIR 1943 Sind 107 on that particular subject. But, in our judgment, the further question as to whether the successor

in office of a person designated by his official title, when intended to be included, is specially or generally empowered, their Lordships have not

expressed any view in the above case. That question did not directly arise for decision of their Lordships. It was not raised before them, nor do we

find anything in the above observations, on which reliance is being placed by the learned acting Advocate General, to justify the submission that the

successor in office of an office-holder is also specially empowered when he is intended to be included. ,In this respect, it is important to notice that

the two allied questions which usually arise in connection with a question of this type have been definitely and expressly kept open by their

Lordships of the Supreme Court. Their Lordships have definitely stated that they were not called upon to resolve the controversy which has arisen

between different High Courts as to whether, when all Magistrates of a certain class are empowered to try certain cases, they can be said to be

specially empowered or generally empowered. They have also not expressed any opinion on the question as to whether the office which a

Magistrate holds is an office and whether a Magistrate is an official or not. Whereas, these two questions, in our judgment, have no bearing on the

above question when the : controversy is only as to whether the person should be designated by name or by official title, they have some bearing

on the question as to whether a person can be said to be specially empowered when he is not the person on whom power is conferred either by

name or by official title but happens to be the successor-in-office of the person on whom the power is so conferred. In our opinion, the judgment,

which ,we are delivering today and which was prepared before Sindhi Lohana Chaithram Vs. The State of Gujarat, was decided, is not affected

by the latter judgment. It is noteworthy that, the view which we have expressed in this judgment that, a Sub Divisional Magistrate is specially

empowered even though the power may have been so conferred on him by virtue of his office, stands confirmed by the decision in Sindhi Lohana

Chaithram Vs. The State of Gujarat, . The learned acting Advocate General states that, as their Lordships of the Supreme Court have, in terms,

approved of Savlaram's case 49 BLR 798 : (AIR 1948 Bom 156 ), they must be taken to have also approved of the test of the place which was

laid down therein. We cannot agree. In our judgment, the further question about the successor in office of the person being said to be specially

empowered was not before their Lordships, nor is there anything in the judgment to show that their Lordships were called upon to decide the

correctness of the test of place, In our judgment, the question whether, in order that a person designated by virtue of his office may be said to be

specially empowered, the empowering authority must have definitely before its mind's eye the particular individual or person who is being selected

for the conferment of power, was not before their Lordships of the Supreme Court and the question is still res integra and, therefore, our judgment

on the latter question does not militate against the decision in Sindhi Lohana Chaithram Vs. The State of Gujarat, .

17. For the above reasons, we direct that the two points referred to this Full Bench by the Division Bench should be answered as already

indicated. The case will go back to the Division Bench for disposal according to law and in the light of this judgment.