

Bombay High Court

Maha Seedmen Association, ... vs Union Of India, Ministry Of ... on 9 April, 2018

Bench: Ravi K. Deshpande

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
NAGPUR BENCH, NAGPUR

WRIT PETITION NO.6590 of 2015

1. Maha Seedmen Association,  
a Society/Trust registered under  
the Societies Registration Act &  
the Bombay Public Trusts Act,  
having its Regd. Office at Ishika  
Complex, Near Madhuban Hotel,  
Jalna, through its Authorized  
Representative  
Mr. Anish Navneetlal Mehta.
2. Mr. Anish Navneetala Mehta,  
Aged about 49 years,  
Occupation - Business,  
R/o D-8/1, M.I.D.C. Amravati.
3. Shiv Agro Seeds,  
through its Proprietor  
Rajesh Gokuldas Shukla,  
Aged about 49 years,  
Occupation - Business,  
R/o Camp Road, Pulgaon,  
Tq. Deoli, Distt. Wardha.
4. M/s. Haritkranti Seeds Company,  
through its Partner,  
Ravindra Sumastisa Khadakpurkar,  
Aged about 59 years,  
Occupation - Business,  
R/o Aahinsa Marg,  
Deulgaon Raja,  
Tq. Deulgaon Raja,  
Dist. Buldana.

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through its Director,  
National Highway No.6,  
Murtizapur Road,  
Akola.

... Respondents

Shri Sunil Manohar, Senior Advocate, assisted by  
Shri Shantanu Khedkar, Advocate, for Petitioners.  
Shri Ulhas Aurangabadkar, Assistant Solicitor General of India,  
with Ms M.R. Chandurkar, Advocate, for Respondent No.1.  
Shri J.Y. Ghurde, Assistant Government Pleader for Respondent  
Nos.2 and 3.

CORAM : R.K. DESHPANDE & M.G. GIRATKAR, JJ.

DATE OF RESERVING THE ORDER : 20TH FEBRUARY, 2018

DATE OF PRONOUNCING THE ORDER : 9TH APRIL, 2018

ORDER (PER R.K. DESHPANDE, J.) :

1. The challenge in this petition is to the validity of Rule 6(b) of the Seeds Rules, 1968 empowering the Certification Agency to prescribe the outline procedure for submission of applications and wp6590.15.odt for growing, harvesting, processing, storage and labeling of seeds intended for certification till the end, to ensure that seed lots finally approved for certification are true variety and meet prescribed standards for certification under the Seeds Act, 1966 or the Rules framed thereunder.

Challenge to the validity of Rule 6(b) of the Seeds Rules :

2. Shri Sunil Manohar, the learned Senior Advocate, assisted by Shri Shantanu Khedkar, Advocate, appearing for the petitioners, submits that the provision of Rule 6(b) of the Seeds Rules is ultra vires the provision of Section 25(2)(f) of the Seeds Act, which empowers the Central Government to make rules to be published in the official gazette by issuing notification in respect of the form of application for grant of a certificate under Section 9, the particulars, it may contain, the fees which should accompany it, the form of certificate and the conditions subject to which the certificate may be granted. According to him, the requirement contained in Rule 6(b) of the Seeds Rules can only be prescribed by the Central Government in exercise of its rule-making power conferred by Section 25(2)(f) of the Seeds Act and it cannot be the wp6590.15.odt subject-matter of delegation to the Certification Agency, as has been done by Rule 6(b) of the said Rules.

Prima facie consideration :

3. We find that prima facie case is made out in respect of challenge to the validity of Rule 6(b) of the Seeds Rules being ultra vires the provision of Section 25(2)(f) of the Seeds Act.

4. Hence, Admit.

5. Shri Aurangabadkar, the learned Assistant Solicitor General of India, waives service of notice for the respondent No.1; and Shri Ghurde, the learned Assistant Government Pleader, waives service of notice for the respondent Nos.2 and 3. Objection to grant declaration as to invalidity :

6. The first question, which arises for consideration, is whether notice to the Attorney-General is required to be issued to consider the challenge to the validity of Rule 6(b) of the Seeds Rules, 1968. Though on the last occasion we passed an order that wp6590.15.odt the matter shall be decided finally at the stage of admission, no notice was issued to the Attorney-General. Shri Aurangabadkar, the learned Assistant Solicitor General of India, submits that this notice is mandatory. We put a specific question to Shri Aurangabadkar and the Senior Advocate Shri Sunil Manohar to point out to us any provision under the Constitution of India or any other law for the time being in force, requiring this Court to issue notice of challenge to the provision in the Central enactment or the Rules, Regulations, Control Order, Manual, etc., issued therein to the Attorney-General of India or in case of any State enactment or Rules, Regulations, Control Order, Manual, etc., issued therein to the Advocate-General of the State. Provision requiring notice to be issued to the Attorney-General or the Advocate-General :

7. It is conceded by the learned counsels appearing for the parties that there is no provision either in the Constitution of India or in any other law for the time being in force, except Order XXVII-A of the Code of Civil Procedure containing the requirement of issuance of notice in a case where the question as is wp6590.15.odt referred to in Clause (1) of Article 132 read with Article 147 of the Constitution of India is involved to issue notice of challenge either to the Attorney-General in case of the Central enactment or to the Advocate-General of the State in case of the State enactment. We have no hesitation to accept this position.

Questions posed by the Court :

8. We then put up the following questions to both the learned counsels :

(1) Whether the requirement of Order XXVII-A of the Code of Civil Procedure is so mandatory that the Court becomes incompetent to grant declaration of constitutional invalidity of such provision in the absence of such notice being issued to the Attorney-General of India or the Advocate-General of the State, as the case may be?

(2) Whether the provision of Order XXVII-A of the Code of Civil Procedure also applies to the proceedings of writ petition under Article 226 or 227 of the Constitution of India, in the light of Section 141 of the Code?

wp6590.15.odt We granted one week's time to the learned counsels to address us on these questions.

Decisions relied upon or referred to :

9. On return after a week, Shri Manohar invited our attention to the Division Bench decision of the Bombay High Court in the case of Heman Santlal v. State of Bombay, reported in AIR 1951 Bombay 121, wherein the provision of Section 6(4)(a) of the Bombay Land Requisition Act, 1948 was challenged as contravening the provision of the Constitution, more particularly Articles 19(1)(f), 31 and 32, and, therefore, a declaration was sought that the said provision became void under Article 13 of the Constitution of India.

10. In the aforesaid case, the State of Bombay was a party-respondent, but the question was considered in para 7 of the said decision as to whether it was incumbent upon the Court to give notice to the Advocate-General of the proposed challenge which involved the question as to the interpretation of the Constitution. It is held in the said decision that in every case, wp6590.15.odt which involves a question referred to in Rule 1 of Order XXVII-A of the Code of Civil Procedure, notice must be given by the Court to the Advocate-General or the Attorney-General, as the case may be. It was not the question raised and decided in the said decision as to whether the provision of Order XXVII-A of the Code of Civil Procedure would be attracted even in a case where writ jurisdiction of the High Court is invoked under Article 226 or 227 of the Constitution of India.

11. In another decision of the Division Bench of the Bombay High Court in the case of Samarth Transport Co. Private Ltd. v. Y.B. Chavan, Chief Minister, Government of Bombay and others, reported in AIR 1961 Bombay 80, it was held that if the Court is not prima facie satisfied about the challenge raised, it may not be necessary to issue such notice.

12. In the decision of the Apex Court in the case of Basant Lal v. State of U.P. and another, reported in (1998) 8 SCC 589, the High Court had granted a declaration that the provision of Section 125(2) of the Code of Criminal Procedure, 1973 was wp6590.15.odt ultra vires Article 14 of the Constitution of India without notice to the Advocate-General. In para 3 of the said decision, it is held as under :

"3. It apparently needs to be stated that statutory provisions are to be assumed to be constitutional, that constitutionality is to be considered only where absolutely necessary, that a statute cannot be struck down unless notice has been given to the Attorney-General in the case of a Central statute, as here, or the Advocate-General in the case of a State statute. According to learned counsel for the husband-appellant, the contention that Section 125(2) was unconstitutional had not even been raised in the pleadings. There is no doubt that the judgment must be set aside insofar as it holds that Section 125(2) is unconstitutional."

The Apex Court set aside the declaration granted by the High Court and the matter was remanded back to the High Court for consideration afresh.

13. In another decision of the Apex Court in the case of State of Gujarat v. K.V. Joseph, reported in (2001) 2 SCC 156, it is held in para 9 as under :

wp6590.15.odt "9. Be it noted that the judgment under appeal was delivered by the Appellate Bench of the High Court on the basis of the letter written by the then

in-charge Anti-Corruption Bureau and the resultant effect of which is the declaration of para 4 of the Vigilance Manual as ultra vires by reason of the same being said to be in direct conflict with the statutory provisions of Section 7, 13, 17 and 19 of the Prevention of Corruption Act. No notice, however was sent to the Advocate-General of the State before such a declaration was effected and the same thus cannot but be termed to be not sustainable."

The Apex Court held that while considering the question of grant of declaration of para 4 of the Vigilance Manual as ultra vires by reason of the same being said to be in direct conflict with the statutory provisions of Sections 7, 13, 17 and 19 of the Prevention of Corruption Act, no notice was sent to the Advocate-General of the State and, therefore, the judgment delivered by the Appellate Bench of the High Court was not sustainable.

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14. In another decision of the Apex Court in the case of People's Union for Civil Liberties (PUCL) and another v. Union of India and another, reported in (2003) 4 SCC 399, the challenge considered was to the constitutionality of the provision of Section 33-B of the Representation of the People Act, 1951, which was held to be ultra vires the provision of Article 19(1)(a) of the Constitution of India regarding freedom of expression. It was the specific contention raised that the notice was required to be issued to the Attorney-General, as the vires of the Act was challenged. In para 75 of the said decision, the issue is dealt with as under :

"75. The contention that notice is required to be issued to the Attorney-General as vires of the Act is challenged, is of no substance because "Union of India" is the party-respondent and on its behalf learned Solicitor-General is appearing before the Court. He has forcefully raised the contentions which were required to be raised at the time of hearing of the matter. So, service of notice to the learned Attorney-General would be nothing but empty formality and the contention is raised for the sake of raising such contention."

wp6590.15.odt The Apex Court held that the Union of India is a party-respondent and on its behalf, the learned Solicitor General appeared before the Court and, therefore, the service of notice to the Attorney-General would be nothing but empty formality.

15. In the decision of the Division Bench of the Bombay High Court in the case of Vinayak Hari Kulkarni and others v. State of Maharashtra and another, reported in 2009(4) Mh.L.J. 242, it is held in para 9 that if the Court desires to consider the constitutional validity of the proviso to Rule 2 of Chapter XVII of the Bombay High Court Appellate Side Rules, 1960 as ultra vires Article 348(1)(a) of the Constitution of India, then it is obligatory for the Court to issue notice to the Advocate-General. Position emerging from the aforesaid decisions :

16. The learned counsels appearing for the parties have not only accepted the position but have urged as under :

(1) Except the decision of the Division Bench of this Court in the case of Heman Santlal, cited supra, in none of wp6590.15.odt the decisions, there is reference or reliance is placed upon the provision of Order XXVII-A of the Code of Civil Procedure to hold that notice of challenge to the Attorney-General in case of the provision in the Central enactment, or to the Advocate-General of the State in respect of challenge to the State enactment is must.

(2) In none of the decisions, except the decision in Heman Santlal's case, there is any reason as to why and under what provision of law it becomes mandatory to issue such notice.

(3) In Heman Santlal's case, it was neither a question raised nor decided as to whether the provision contained in Order XXVII-A of the Code of Civil Procedure would also apply in case where such challenge is raised or required to be considered on merits in a writ petition under Article 226 or 227 of the Constitution of India where normally the Central Government in case of challenge to the Central enactment, or the State Government in case of challenge to the State enactment, is made a party-respondent.

17. In the light of the aforesaid position, Shri Sunil Manohar, who happens to be the former Advocate-General of the State of Maharashtra, has urged that the questions posed by this Court are of great significance and none of the decisions either of the Apex Court or of this Court is expounding on it. He submits that though this Court has always been mechanically issuing such notices, at no point of time there was exposition on this topic. He submits that no attempts are made to understand the reason, purpose or spirit behind such exercise, at least by any authoritative pronouncement. The field is vergine. He, therefore, submits that the exact role of the Attorney-General and the Advocate-General under the Constitution of India needs to be highlighted particularly with reference to the requirement of giving them notice of hearing before granting a declaration about invalidity or unconstitutionality of any provision contained either in the Constitution or in the Central or State enactment or of any subordinate legislation, including that of any statutory instrument. Contention :

18. The argument of Shri Manohar, the learned Senior Advocate, is that even in the absence of the provision of Order XXVII-A of the Code of Civil Procedure, it is considered to be wp6590.15.odt the wholesome mandatory requirement by way of practice or convention adopted by the Courts and, therefore, it would be applicable to the proceedings of a writ petition under Article 226 or 227 of the Constitution of India involving such challenge. Shri Aurangabadkar, the learned Assistant Solicitor General of India, adopts the same view.

The decision on one aspect :

19. In the absence of any direct pronouncement to the contrary by the Apex Court, we are bound by the decision of the Division Bench of this Court in Heman Santlal's case where the challenge to the provision of Section 6(4)(a) of the Bombay Land Requisition Act, 1948 was considered and it was held to be void under Article 13 of the Constitution of India, as contravening the provision of Articles 19(1)(f), 31 and 32 therein. The Division Bench specifically considered the fact that it was a State legislation and the State Government was a party-respondent in the said writ petition. Placing reliance upon the provision of Rule 1 of Order XXVII-A of the Code of Civil Procedure, it was held that giving of such notice of challenge to the Attorney-General or the Advocate-General, as the case may be, is must. We have, therefore, no hesitation to hold that the requirement of Order XXVII-A, Rule 1 of the Code of Civil Procedure is mandatory and that the High Court cannot declare any provision in the Central or the State enactment as unconstitutional without issuing a notice of its challenge to the Attorney-General or the Advocate-General, as the case may be. This does not mean that there is a bar to uphold the constitutionality of the provision in such enactments without such notice.

The questions required to be considered :

20. The questions still remain - (1) whether such requirement is mandatory when such challenge is considered in a writ petition under Article 226 or 227 of the Constitution of India, where normally the Central or the State Government is party-respondent through concerned Department, and (2) whether such notice is also required to be given to consider the constitutionality or the otherwise validity of any subordinate legislation in the form of any statutory instrument, as is referred to in Order XXVII-A, Rule 1-A of the Code of Civil Procedure.

wp6590.15.odt Relevant provisions in the Constitution and other laws :

Code of Civil Procedure, 1908 :

21. Section 113 of the Code of Civil Procedure deals with the reference to the High Court and it runs as under :

"113. Reference to High Court.-- Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit:

Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of the High Court."



wp6590.15.odt If any Civil Court subordinate to the High Court is of the view that the provision under any Act, ordinance or regulation or of any provision contained in it, found to be necessary for the disposal of the case before it and is required to be declared as invalid or inoperative, it has to state its reasons and refer the matter for the opinion of the High Court in terms of Section 113, reproduced above. Such requirement is mandatory and takes away the jurisdiction of any Civil Court to deal and finally adjudicate upon this aspect. Such jurisdiction is vested in the High Court.

22. The provision of Order XXVII-A of the Code of Civil Procedure dealing with the suits involving a substantial question of law as to the interpretation of the Constitution or as to the validity of any statutory instrument, being relevant, is reproduced below :

"1. Notice to the Attorney-General or the Advocate-General.-- In any suit in which it appears to the Court that any such question as is referred to in clause (1) of article 132, read with article 147, of the Constitution, is wp6590.15.odt Order XXVII-A involved, the Court shall not proceed to determine that Suits involving a question until after notice has been given to the Substantial question of law Attorney-General for India, if the question of law concerns as to the interpretation of the Central Government and to the Advocate-General of the The Constitution or as to the State if the question of law concerns a State Government.

validity of any Statutory Instrument.

1-A. Procedure in suits involving validity of any statutory instrument.-- In any suit in which it appears to the Court that any question as to the validity of any statutory instrument, not being a question of the nature mentioned in rule 1, is involved, the Court shall not proceed to determine that question except after giving notice--

(a) to the Government pleader, if the question concerns the Government, or

(b) to the authority which issued the statutory instrument, if the question concerns an authority other than Government.

2. Court may add Government as party.-- The Court may at any stage of the proceedings order that the Central Government or a State Government shall be added as a defendant in any suit involving any such question as it referred to in clause (1) of article 132 read with article 147, of the Constitution, if the Attorney-General for wp6590.15.odt India or the Advocate-General of the State, as the case may be, whether upon receipt of notice under rule 1, or otherwise, applies for such addition and the Court is satisfied that such addition is necessary or desirable for the satisfactory determination of the question of law involved. 2-A. Power of Court to add Government or other authority as a defendant in a suit relating to the validity of any statutory instrument.-- The Court may, at any stage of the proceedings in any suit involving any such question as is referred to in rule 1-A, order that the Government or other authority shall be added as a defendant if the Government pleader or the pleader appearing in the case for the authority which issued the instrument, as the

case may be, whether upon receipt of notice under rule 1-A or otherwise, applies for such addition, and the Court is satisfied that such addition is necessary or desirable for the satisfactory determination of the question.

3. Costs.-- Where, under rule 2 or rule 2-A, the Government or any other authority is added as a defendant in a suit, the Attorney-General, Advocate-General, or Government pleader or Government or other authority shall not be entitled to, or liable for, costs in the Court which ordered the addition unless the Court, having regard to all the circumstances of the case for any special reason, wp6590.15.odt otherwise orders.

4. Application of Order to appeals.-- In the application of this Order to appeals the word "defendant" shall be held to include a respondent and the word "suit" an appeal.

[Explanation.-- In this Order, "statutory instrument" means a rule, notification, bye-law, order, scheme or form made as specified under any enactment.]"

Report of Law Commission and the provisions in Canadian Statute :

23. Shri Manohar, the learned Senior Advocate, has placed before us the Forty-fourth Report of the Law Commission of India on the Code of Civil Procedure, 1908 in February, 1973. The question considered by the Law Commission was regarding amendment to be introduced under the Code of Civil Procedure providing for issuance of notice to the Advocate-General of India or of the Province, as the case may require. It shows that the requirement under Order XXVII-A was borrowed from a Canadian Statute, i.e. the Judicature Act in Ontario, and Section 33 contained therein reads as under :

wp6590.15.odt Notice to be given "33. (1) Where in an action or other proceeding the before Act constitutional validity of any Act or enactment of the declared invalid.

Parliament of Canada or of the Legislature is brought in question, it shall not be adjusted to be invalid until after notice has been given to the Attorney-General for Canada and to the Attorney-General for Ontario.

(2) The notice shall state what Act or part of an Act is in question and the day on which the question is to be argued, and shall give such other particulars as are necessary to show the constitutional point proposed to be argued.

(3) Subject to the rules, the notice shall be served six days before the day named for the argument.

(4) The Attorney-General for Canada and the Attorney-General for Ontario are entitled as of right to be heard either in person or by counsel notwithstanding that the Crown is not a party to the action or proceeding. R.S.O. 1950, c. 190, s. 33.

(5) Where in an action or proceeding to which this section applies the Attorney-General for Canada or the Attorney-General for Ontario appears in person or by counsel, each shall be deemed to be a party to the action or proceeding for the purpose of an appeal from any adjudication as to the constitutional validity of any Act or enactment in question in the action or proceeding and each has the same rights with respect to an appeal as any other party to the action or proceeding. 1959, c. 47, s. 1." Provisions in the Ministry of the Attorney-General Act, Canada :

24. The statutory responsibilities of the Attorney-General in Canada are prescribed under Section 5 of the Ministry of the Attorney-General Act dealing with the functions, and it runs as under :

"5. The Attorney-General,

(a) is the Law Officer of the Executive Council;

(b) shall see that the administration of public affairs is in accordance with the law;

(c) shall superintend all matters connected with the administration of justice in Ontario;

(d) shall perform the duties and have the powers that belong to the Attorney-General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario, and also shall perform the duties and have the powers that, until the Constitution Act, 1867 came into effect, belonged to the offices of the Attorney-General and Solicitor General in the provinces of Canada and Upper Canada and which, under the provisions of that Act, are within the scope of the powers of the Legislature;

(e) shall advise the Government upon all matters of law connected with legislative enactments and upon all matters of law referred to him or her by the Government;

(f) shall advise the Government upon all matters of a legislative nature and superintend all Government measures of a legislative nature;

(g) shall advise the heads of the ministries and agencies of Government upon all matters of law connected with such ministries and agencies;

(h) shall conduct and regulate all litigation for and against the Crown or any ministry or agency of Government in respect of any subject within the authority or jurisdiction of the Legislature;

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(i) shall superintend all matters connected with judicial offices;

(j) shall perform such other functions as are assigned to him or her by the Legislature or by the Lieutenant Governor in Council. R.S.O. 1990, c. M.17, s.5."

25. The role of the Attorney-General in Canada is that of a Cabinet Minister. He is the Chief Law Officer of the Executive Council, but his responsibilities stemming from his role are unlike those of any other Cabinet member. His role has been referred to as "judicial-like" and as the "guardian of the public interest". He has unique responsibilities to the Crown, the courts, the Legislature and the executive branch of the government, and those are beyond that of a political minister. His role in advising the Cabinet is to ensure that the rule of law is maintained and that the Cabinet actions are legal and constitutionally valid and his advice is not to be lightly disregarded and it has the same weight as that of other Cabinet Ministers. As Chief Law Officer, the Attorney-General, has a special responsibility to be the guardian of that most elusive concept - the rule of law. It is the rule of law that protects individuals, and society as a whole, from arbitrary measures and safeguards personal liberties. On the legislative matters, he is an adviser to the Cabinet.

26. The function of the Attorney-General prescribed in clause

(d) of Section 5 of the Ministry of the Attorney-General Act is based on the Crown's *parens patriae* (parental) authority. He performs the duties and have the powers that belong to the Attorney-General and Solicitor General of England by law or usage and those which are conferred upon him under the Constitution. He is not only to conduct litigation in cases directly affecting the government or its agencies but also to litigate cases where there is a clear matter of public interest or public rights at stake. This has been characterized as a constitutional responsibility to ensure that the public interest is well and independently represented. One of the responsibilities of the Attorney-General is to ensure administration of justice in the province and as a result the responsibility for maintaining liaison with the judiciary. He is empowered to superintend all the matters connected with judicial offices.

wp6590.15.odt Federal structure of Indian Constitution :

27. Before dealing with the provisions relating to the role of the Attorney-General or Advocate-General under the Indian Constitution, the structure of the Constitution in brief need to be seen. The Constitution of India gives a federal structure to the democratic Republic of India, consisting of Union of India and States. It lays down a parallel independent system of legislature, executive and administration for Union of India and States. The provisions are made in the Constitution for distribution of legislative, executive and administrative powers between the Union of India and the States. The provisions are also made with regard to the legislative and administrative relations between the Union of India and the States. The Legislatures at both the levels are empowered to make the laws and exercise control over all the actions, decision-making and laying down the policies by the executives. Article 375 of the Constitution of India casts a duty upon all the authorities and all officers, executive and ministerial, throughout the territory of India to continue to exercise their respective functions subject to the provisions of the Constitution of India. The executives at both the levels are responsible for implementation of laws, administration of Government and maintenance of law and order situation, for which they are

answerable in the Houses of Legislature. The Legislature has a power to remove the executive.

28. The President of India is the Chief of the Union of India and the States. He is empowered to appoint the Prime Minister of India and Council of Ministers to run and administer the Union of India. The President acts on the aid and advice of the Prime Minister and the Council of Ministers. The President has the power to appoint the Governor in each State as the Head of the Legislature, executives and administration. The Governor in the State exercises all such powers and performs functions in the State, which resemble with the powers and functions of the President of India in relation to the Union of India. The Governor of the State appoints the Chief Minister of the State and the Council of Ministers to whom he represents in the State. The Governor acts on the aid and advice of the Chief Minister and the Council of Ministers in the State. The Governor holds the office during the pleasure of the President, who is empowered to remove him. Indian Judiciary :

29. There is a single integrated judicial system in India. The Supreme Court of India is at the apex to administer the justice, and the High Court at the State level having subordinate Courts and Tribunal below it. The President of India is the head of the Indian judiciary and appoints the Chief Justice of India and other Judges of the Supreme Court of India. The Chief Justice and other Judges of the High Court are also appointed by the President in consultation with the Governor of the respective State. A Judge of the Supreme Court or of the High Court is removable by an order of the President on the basis of motion of impeachment supported by a majority of not less than two-third of the members of the House present and voting.

30. The High Courts of the States and the Supreme Court of India are empowered to declare any constitutional provision or the provision under any of the Central or State enactments to be constitutionally invalid either on the ground of violation of fundamental rights or in conflict with the other constitutional provisions and laws made by the Parliament of the State Legislature or on the ground of violation of the basic structure of the Constitution of India. The only rider on all the Courts of civil, criminal and revenue jurisdiction, all judicial officers throughout the territory of India under Article 375 of the Constitution of India, is to exercise their respective functions subject to the provisions of the Constitution of India.

Provisions of the Attorney-General and Advocate-General under Indian Constitution :

31. Now we turn to the provisions of the Attorney-General for India and the Advocate-General for the State, contained in Articles 76 and 165 of the Constitution of India. Article 76 regarding Attorney-General for India runs as under :

"76. Attorney-General for India.--(1) The President shall appoint a person who is qualified to be appointed a Judge of the Supreme Court to be Attorney-General for India.

(2) It shall be the duty of the Attorney-General to give advice to the Government of India upon such legal matters, and to perform such other duties of a

legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) In the performance of his duties the Attorney-General shall have right of audience in all Courts in the territory of India.

(4) The Attorney-General shall hold office during the pleasure of the President, and shall receive such remuneration as the President may determine."

Article 165 regarding Advocate-General for the State reads as under :

"165. Advocate-General for the State.--(1) The Governor of each State shall appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate-General for the State.

(2) It shall be the duty of the Advocate-General to give advice to the Government of the State upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.

(3) The Advocate-General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine."

The difference in the provisions of clauses (1) and (3) of Article 76 and clauses (1) and (3) of Article 165 is that the Attorney-General is appointed by the President and it is of a person who is qualified to be appointed as a Judge of the Supreme Court of India, whereas the Advocate-General of the State is appointed by the Governor of the State and person to be appointed should be qualified to be appointed as a Judge of the High Court. The Attorney-General and the Advocate-General hold their office during the pleasure of the President and the Governor of the State respectively and get such remuneration as may be determined by the President and the Governor, as the case may be. The powers and functions of the Attorney-General and the Advocate-General are the same in relation to the Government of India and the Government of State respectively, as is apparent from clause (2) of Article 76 and clause (2) of Article 165, which include tendering of legal advice on legal matters, performing such other duties of legal character, as are referred or assigned by the President or the Governor, and to discharge the functions, as are conferred by the Constitution and the laws. The salient feature of being the Attorney-General, is to have right of audience in all courts in the territory of India, as provided under clause (3) of Article 76, which is absent in case of the Advocate-General of the State under Article 165.

Rules by the President of India prescribing duties of and restrictions on Attorney-General :

32. In exercise of clause (2) of Article 76, the President of India has made rules as to the remuneration and duties of the Attorney-General (as well as the other Law Officers) called as The Law Officers (Conditions of Service) Rules, 1972. Rule 5 therein prescribing the duties of the Attorney-General is reproduced below :

wp6590.15.odt Art. 76. "(5) Duties.-- It shall be the duty of a Law Officer-- Attorney-General for India.

(a) to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may, from time-to-time, be referred or assigned to him by the Government of India;

(b) to appear, whenever required, in the Supreme Court or in any High Court on behalf of the Government of India in cases (including suits, writ petitions, appeal and other proceedings) in which the Government of India is concerned as a party or is otherwise interested;

(c) to represent the Government of India in any reference made by the President to the Supreme Court under Art. 143 of the Constitution; and

(d) to discharge such other functions as are conferred on a Law Officer by or under the Constitution or any other Law for the time being in force.

Explanation.-- For the purpose of this rule and sub-rule (1) of Rule 7, the expression "Government of wp6590.15.odt India" includes the Government of a Union Territory." It is the duty of the Attorney-General to give advice to the Government of India upon such legal matters and perform such other duties of legal character, as may, from time to time be referred or assigned to him by the Government of India. In addition to it, he is to appear for the Government of India in the Supreme Court of India and the High Court in which the Government of India is party or is otherwise interested. He has to present the case of reference before the Supreme Court of India on any question of law made by the President under Article 143 of the Constitution of India.

33. Rule 7 of the aforesaid Rules deals with the restrictions imposed upon the Law Officer, which include in the definition under Rule 2(b) means the Attorney-General for India or the Solicitor-General for India or the Additional Solicitor-General for India, and it is reproduced below :

wp6590.15.odt "7. Restrictions.-- (1) A Law Officer shall not--

(a) hold briefs in court for any party except the Government of India or the Government of a State or any University, Government School or College, local authority, Public Service Commission, Port Trust, Port Commissioners, Government aided or Government managed hospitals, a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956), any corporation owned or controlled by the State, any body or institution in which the Government has a preponderating interest;

(b) advise any party against the Government of India or in case which he is likely to be called upon to advise, or appear for the Government of India;

(c) defend an accused person in a criminal prosecution, without the permission of the Government of India; or

(d) accept appointment to any office in any company or corporation without the permission of the Government of India.

(2) Where a Law Officer appears or does other work on behalf of Union organs such as the Election Commission, the Union Public Service Commission he shall only be entitled to fees on the scales mentioned in Clauses (c) and

(d) of sub-rule (1) of Rule 6."

The aforesaid Rule puts restrictions upon the Attorney-General and prohibits him from appearing or advising in any matter against the Government of India or any instrumentality or agency of the Government of India or defending the accused in any criminal prosecution.

Rules by the Governor of Maharashtra prescribing duties and functions of Advocate-General :

34. In exercise of the powers conferred by the proviso to Article 309 read with Article 165 of the Constitution, the Governor of Maharashtra has made the rules regulating the appointments, conditions of service and remunerations of Law Officers of the Government of Maharashtra called as "The Maharashtra Law Officers (Appointment, Conditions of Service and Remuneration) Rules, 1984. Rule 2(a) defines the "Advocate-General" means a person appointed as an Advocate-General by the Governor of Maharashtra for the State under Article 165 of the Constitution of India, and Rule 2(l) defines the "Law Officer" means an Advocate appointed by Government in the Law and Judiciary Department, under these Rules, to conduct cases on behalf of the State or its officers before any Court or the Maharashtra Revenue Tribunal and includes an Advocate-General, a Government Pleader and Public Prosecutor. Rule 3 states that these Rules shall apply to the officers named therein including (a) the Advocate-General, Maharashtra State, Bombay; (b) the Government Pleader and Public Prosecutors in the High Court and (c) the Public Prosecutors in the Court of Session.

35. Rule 6 of the said Rules deals with the duties of the Advocate-General, and it is divided in seven parts, which are classified as under :

(1) As an adviser to Government, he has to advise upon such legal matters, including propositions of legislation, on which he may be consulted, and perform such other duties of a legal character, as may, from time to time, be specified in these Rules or as may, from time to time, be referred to or assigned to him by the Remembrancer of Legal Affairs. He has to advise the Government in respect of proceedings, whether civil or criminal, which may be required to conduct on behalf of the



State or its Officers.

(2) As an adviser to the officers, when consulted by them directly on any matters by the Remembrancer of Legal Affairs and Secretary to the Government in the Law and Judiciary Department, the Government Pleaders and the Public Prosecutors in the High Courts.

(3) The statutory duties to discharge such functions and perform such duties as are imposed on him by or under the Constitution or imposed upon him by any law for the time being in force.

(4) As an Advocate-General, he has to attend the meetings of the Maharashtra Legislative Assembly and the Maharashtra Legislative Council and of the Committees of these Houses, when so required by the Government.

(5) As an Advocate-General, he has to perform several duties as are mentioned in clauses (a) to (m), which include clauses (j) and (k), reproduced below :

(i) to appear in any case, whether civil or criminal, in pursuance of a notice served on him either by the High Court or the Supreme Court or wp6590.15.odt he himself has applied to the said Courts for being heard. In such cases, he shall report the matter immediately to the Remembrancer of Legal Affairs for instructions to appear;

(ii) to appear in any case, whether civil or criminal, in which the High Court or the Supreme Court desires him to appear or express its opinion that he ought to appear.

(6) To deal with the duties for other Governments, including the Central Government and the State Governments of a legal character, as may be directed to perform by the Government.

(7) It prescribes general duties of the Advocate-General which includes item (iii) as under :

(iii) to bring to the notice of the administrative departments and the Remembrancer of Legal Affairs any observation or indication made by the said Court regarding the imposition of any tax, cess, levy, penalty etc., or if the said court has declared any law or statutory rule to be ultra vires or in which it has observed that the said law or statutory rule has been causing inconvenience or wp6590.15.odt anomaly.

Rights of Attorney-General and Advocate-General to speak and participate in the proceedings of Houses under the Constitution :

36. Under Article 88 in relation to the Attorney-General, and Article 177 in relation to the Advocate-General are also relevant, and hence the same are reproduced below :

"88. Rights of Ministers and Attorney-General as respects Houses.-- Every Minister and the Attorney-General of India shall have the right to speak in, and otherwise to take part in the proceedings of, either House, any joint sitting of the Houses, and any committee of Parliament of which he may be named a member, but shall not by virtue of this article be entitled to vote."

"177. Rights of Ministers and Advocate-General as respects the Houses.-- Every Minister and the Advocate-General for a State shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly of the State or, in the case of a State having a Legislative Council, both Houses, and to speak in, and otherwise to take part in the proceedings of, any committee of the Legislature of which he may be named a member, but shall not, by virtue of this article, be entitled to vote."

The aforesaid provisions confer a valuable right upon the Attorney-General and the Advocate-General to speak in and otherwise take part in the proceedings of both the Houses of Parliament or Legislative Assembly of State, or any joint sitting of the Houses of Parliament and also of any Committee of Parliament or of the Legislature of which may be named as a member. However, he is not entitled to vote. By virtue of clause (4) of Article 105, the Attorney-General enjoys powers, privileges and immunities of Parliament and its members. Similar is the provision in relation to the Advocate-General of the State, contained in clause (4) of Article 194 of the Constitution of India, in respect of Legislature of a State.

Duties of the Attorney-General or the Advocate-General under the enactments other than Constitution :

37. In addition to above, the Attorney-General or the Advocate-General in India are required to perform such other duties of legal character, as are conferred upon him under various enactments, and the reference to some of it can be made as under :

(A) Section 91 of the Code of Civil Procedure reads as under :

"91. Public nuisances.-- (1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,--

(a) by the Advocate-General, or

(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions."

wp6590.15.odt This provision makes the Advocate-General, a person aggrieved at whose instance, a suit for declaration and injunction can be instituted to complain about a public nuisance or other wrongful act affecting or likely to affect the public.

(B) Sub-sections (1) and (2) of Section 92 of the Code of Civil Procedure are as under :

"92. Public charities.-- (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the leave of the Court, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree--

(a) removing any trustee;

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(b) appointing a new trustee;

(c) vesting any property in a trustee;

(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;

(d) directing accounts and inquiries;

(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged;

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863 (20 of 1863), or by any corresponding law in force in the territories which, immediately before the wp6590.15.odt 1st November, 1956, were comprised in Part B States, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section."

In case of breach of any trust created for public purposes of charitable or religious nature or where any direction is deemed necessary for the administration of any such trust, the Advocate-General is held competent to institute the proceedings to obtain a decree for one or more reliefs under clauses (a) to (h) under Section 92(1) above.

(C) Section 15 of the Contempt of Courts Act, 1971 reads as under :

"15. Cognizance of criminal contempt in other cases.-- (1) In the case of a criminal contempt, other than a contempt referred to in section 14, the Supreme Court or the High Court may take action on its own motion or on a motion made by -

(a) the Advocate-General, or wp6590.15.odt

(b) any other person, with the consent in writing of the Advocate-General, or

(c) in relation to the High Court for the Union territory of Delhi, such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf, or any other person, with the consent in writing of such Law Officer.

(2) In the case of any criminal contempt of a subordinate Court, the High Court may take action on a reference made to it by the subordinate Court or on a motion made by the Advocate-General or, in relation to a Union territory, by such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf.

(3) Every motion or reference made under this section shall specify the contempt of which the person charged is alleged to be guilty.

Explanation.-- In this section, the expression "Advocate-General" means--

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(a) in relation to the Supreme Court, the Attorney-General or the Solicitor-General;

(b) in relation to the High Court, the Advocate-General of the State or any of the States for which the High Court has been established;

(c) in relation to the Court of a Judicial Commissioner, such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf."

In case of criminal contempt in relation to the Supreme Court of India and in relation to the High Court, the Attorney-General of India and the Advocate-General of the State respectively are held competent either to institute or to grant sanction to institute the proceedings. Even in case of contempt of any subordinate Court also, the Advocate-General of a State is held competent to move such a motion to the High Court of a State.

(D) Sub-sections (1), (2) and (3) of Section 2 of the Maharashtra Vexatious Litigation (Prevention) Act, 1971 runs as under :

wp6590.15.odt "2. (1) If, on an application made by the Leave of Court necessary for Advocate-General, the High Court is satisfied that vexatious litigant to any person has habitually and without any institute or continue any civil or criminal reasonable ground instituted vexatious proceedings, proceedings.

civil or criminal, in any Court or Courts, whether against the same person or against different persons, the High Court may, after hearing that person or giving him an opportunity of being heard, order that no proceedings, civil or criminal, shall be instituted by him in any Court (and that any legal proceedings instituted by him in any Court before the order shall not be continued by him),--

(a) in Greater Bombay, without the leave of the High Court; and

(b) elsewhere in the State, without the leave of the District and Sessions Judge.

At the hearing of any such application, the Advocate-General may appear through a pleader.

(2) Such leave shall not be given unless the High Court or the Judge, as the case may be, is satisfied that the proceedings are not an abuse of the process wp6590.15.odt of the Court and that there is prima facie ground for the proceedings.

(3) No appeal shall lie against an order refusing leave for the institution or continuance of any proceedings by a person who is the subject of an order for the time being in force under sub-section (1). Nothing in this sub-section shall apply to any appeal which may lie to or any proceeding before the Supreme Court."

Under the aforesaid provision, the High Court is empowered to direct any person that no proceedings of civil or criminal nature shall be instituted in any Court, if it is satisfied upon an application made by the Advocate-General that such person is habitually and without any

reasonable ground institutes vexatious proceedings in any Court or Courts, without leave of the High Court or the District and Sessions Judge, as the case may be.

wp6590.15.odt (E) Sub-sections (1) and (2) of Section 8-A of the Advocates Act, 1961 reads as under :

"8-A. Constitution of Special Committee in the absence of election.-- (1) Where a State Bar Council fails to provide for the election of its members before the expiry of the term of five years or the extended term, as the case may be, referred to in section 8, the Bar Council of India shall, on and from the date immediately following the day of such expiry, constitute a Special Committee consisting of--

(i) the ex-officio member of the State Bar Council referred to in clause (a) of sub-section (2) of section 3 to be the Chairman:

Provided that where there are more than one ex officio members, the senior-most amongst them shall be the Chairman; and

(ii) two members to be nominated by the Bar Council of India from amongst advocates on the electoral roll of the State Bar Council, to discharge the functions of the State Bar Council until the Bar Council is constituted under this Act.

wp6590.15.odt (2) On the constitution of the Special Committee and until the State Boar Council is constituted--

(a) all properties and assets vesting in the State Bar Council shall vest in the Special Committee;

(b) all rights, liabilities and obligations of the State Bar Council, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Special Committee;

(c) all proceedings pending before the State Bar Council in respect of any disciplinary matter or otherwise, shall stand transferred to the Special Committee."

Under clause (a) of sub-section (2) of Section 3 of the Advocates Act, 1961, it is the Advocate-General of the concerned State, who becomes an ex officio member of a State Bar Council. It is the Advocate-General of the State, who becomes a Chairman of a Special Committee constituted to administer the affairs of State Bar Council in the event if the term of elected members of such Bar Council expires, even after extension.

wp6590.15.odt Position of the Attorney-General - Advocate-General, their role, powers, functions, duties and obligations emerging from the aforesaid provisions of law :

38. Though the President and the Governor have an authority to appoint and remove the Attorney-General and the Advocate-General respectively, such authority is required to be exercised on the aid and advice of the Council of Ministers as per the provisions of Articles 74 and 163 of the Constitution of India. The appointees are supposed to be the eminent legal luminaries possessing the eligibility criteria prescribed for their appointment under the relevant rules and they hold their office during the pleasure of the President or the Governor, as the case may be. The remuneration payable to the Attorney-General or the Advocate-General is neither voted out nor is determined by the Central or the State Government, but by the President or the Governor, as the case may be, in exercise of the powers under clause (4) of Article 76, and clause (4) of Article 165 of the Constitution of India.

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39. Neither the Attorney-General nor the Advocate-General becomes a member of any of the Houses of the Parliament or the State Legislature, but the provisions of clause (4) of Article 105 and clause (4) of Article 194 make them entitled to enjoy the powers, privileges and immunities of the Parliament or the State Legislature or its members. This, however, does not include a right to vote in the Houses of the Parliament or the State Legislature or in any Committee of the Parliament or the State Legislature of which any of the appointees may be a member. The provisions of Articles 88 and 177 of the Constitution confer upon the appointees a valuable right to speak in and otherwise take part in such proceedings. Unlike the position of the Legal Adviser to the Governments in U.K., U.S.A., France, erstwhile Soviet Union and Republic of China, the Attorney-General or the Advocate-General neither does occupy any position under the Ministry or the Department under the Government nor does hold an elective office.

40. In terms of clause (2) of Article 76 and clause (2) of Article 165 of the Constitution, it is the legal duty of the wp6590.15.odt Attorney-General or the Advocate-General respectively to give his real, fair, genuine, impartial or unbiased opinion to the Government of India or the State Government, as the case may be, though he is not administered any such oath while entering in the office. In the American States, opinions of Attorney-General have the force of law unless they are overruled by a Court. Though the Government of India or the State Government is not bound by the opinion given by such appointees, it cannot lightly be brushed aside. Normally, therefore, the political party in power has a tendency of appointing the persons of its choice to occupy such position so that it gets the coloured opinion of its choice. Consequently, such appointment sometime becomes politically motivated, though the appointee is not a political person. Consequently, a practice is developed to resign from such position as soon as the Government, on whose aid and advice the position is occupied, loses the power or going out of power, in spite of the fact that the period of appointment has not expired.

41. Article 375 of the Constitution of India creates a statutory obligation upon all Courts of civil, criminal and revenue wp6590.15.odt jurisdiction, all authorities and all officers - judicial, executive and ministerial, throughout the territory of India to continue to exercise their respective functions subject to the provisions of the Constitution. Consequently, as the Chief Legal Adviser to all these authorities and persons, the Attorney-General or the Advocate-General, as the case may be, has to

see that the legal advice tendered by him is always directed to attain the goals of the Constitution and subservient to it, are the laws enacted by the Parliament or the State Legislature.

42. Apart from giving legal advice, the Attorney-General and the Advocate-General has to perform such other duties of a legal character as may from time to time be referred or assigned to him by the President or the Governor, as the case may be. Both these appointees are, therefore, entrusted with the duty of appearing, whenever required, in the Supreme Court or in any High Court in all sorts of matters for and on behalf of the Government of India and the State Government, as the case may be, in which the Government of India or the State Government is concerned party or is otherwise interested. The separate rules framed by the wp6590.15.odt President and the Governor prescribe all such duties, functions, powers and responsibilities. The special feature of being Attorney-General for India is to have a right of audience in all the Courts in territory of India, as provided under clause (3) of Article 76 of the Constitution of India and to represent the Government of India in any reference made by the President to the Supreme Court of India under Article 143 of the Constitution of India. Though in respect of Advocate-General, there is no provision analogous to one under clause (3) of Article 76, there is a long-standing convention or practice of the Advocate-General to have a right of audience in all the Courts in India, where the State Government to which he represents is concerned or is otherwise interested. Obviously, the Advocate-General cannot appear as a matter of duty in the reference made by the President to the Supreme Court under Article 143 of the Constitution of India.

43. The right to speak and otherwise take part in the proceedings of the Houses of the Parliament or the State Legislature or any Committee of it, would include tendering his opinion on constitutional or otherwise validity or invalidity of any wp6590.15.odt provision under the Constitution or any law made or to be made, including the proposed amendment to it. However, this has no binding force. But when such an issue or question arises in respect of the same provision before the Supreme Court or the High Court, it becomes the constitutional right and prerogative of the Attorney-General or the Advocate-General to perform dual functions - (i) to represent the Central or the State Government, as the case may be, to defend such challenge, and (ii) to see that such provision conforms to the norms and principles prescribed under the Constitution. It may become a case of conflict of interest without any scope for balancing and the situation may compel the Attorney-General or the Advocate-General, as the case may be, to resign from his position.

44. The Attorney-General and the Advocate-General are basically and essentially concerned with the system of administration of justice. When they appear before the Supreme Court or the High Court to defend the action of Parliament or State Legislature or Central or State Government, they acquire the role of a friend, philosopher and guide of the Court, being the wp6590.15.odt Advocates, Officers of the Court and the independent constitutional functionaries, whose legal opinion is not controlled either by the Parliamentarians, Legislators or Executives. It is their duty to express their real, free, fair, impartial, genuine and unbiased opinion to attain the goal of the Constitution while supporting the competency of the Parliament or of the State Legislature, as the case may be, or while protecting the rights of citizens, who are either the beneficiaries of the provision or likely to be adversely affected by its introduction. Such duty stems from the right of audience provided to them before the Courts by the Constitution. Rule 6(5)(ii) of the Maharashtra Law Officers Rules casts a duty upon



the Advocate-General to appear in any case, whether civil or criminal, in which the High Court or the Supreme Court desires him to appear or express its opinion that he ought to appear.

45. The Attorney-General and the Advocate-General are the eminent legal luminaries. Neither of them can be considered to be a political personality, in the sense that they are neither the political leaders nor the elected members of either House of the Parliament or of the State Legislature. Both are the separate and independent constitutional functionaries, occupying the unique position, performing the multiple roles, and considered to be the multi-faceted personalities. They have definite duties to perform and functions to discharge towards the President or the Governor, the Houses of Parliament or the State Legislature, all the officers and authorities, the Supreme Court and the High Court, and the citizens. Both of them are supposed to possess the qualities of liaisoning officer to abridge the gap between the Legislature, Executive and Judiciary in the system of administration of justice.

46. The nature of confidence reposed in the Attorney-General and the Advocate-General by the Constitution is apparent from the increase in the discharge of their functions, as are conferred upon them under the various provisions of the Central or the State enactments, as pointed out below :

(1) The Advocate-General acts as a caretaker of the public nuisance or other wrongful acts affecting or likely to affect the public, as specified in Section 91 of the Code of Civil Procedure and can take further steps to prevent it.

wp6590.15.odt (2) The Advocate-General is treated as a person interested in any express or constructive trust created for public purposes of a charitable or religious nature at whose instance the Trustees of such Trust can be removed or new Trustees can be appointed in whom the property of Trust can be vested, to institute the proceedings for recovery of Trust's properties, settle the claims and all such other things, which are deemed necessary for the administration of such Trust, as specified under Section 92 of the Code of Civil Procedure.

(3) In case of criminal contempt in relation to the Supreme Court or in relation to the High Court, the Attorney-General or the Advocate-General of a State is competent either to institute or to grant sanction to institute such proceedings. Even in case of contempt of any subordinate Court, the Advocate-General of a State is competent to move such a motion to the High Court.

(4) The Advocate-General is also a caretaker of any vexatious civil or criminal proceedings, which are being instituted by any person habitually or without reasonable ground and can make an application to the High Court to prevent institution of such proceedings, which constitute a abuse of process of the Court under the provisions of sub-sections (1), (2) and (3) of Section 2 of the wp6590.15.odt Maharashtra Vexatious Litigation (Prevention) Act, 1971.

(5) The Advocate-General is the ex officio Chairman of a Special Committee to be constituted under Section 8-A of the Advocates Act, 1961 for the purposes of administration of the Bar Council of State, in the event if the term of the elected member of such Bar Council expires even after extension.

47. The Advocate-General of a State, who occupies a position similar to one of the Attorney-General is the caretaker of the wrongful acts affecting or likely to affect the public at large, including the public nuisance. He is the caretaker of the trusts created for public purposes of charitable and religious nature. He is also an interested person in the welfare and the discipline of the lawyers' community. He has also to see that the process and the valuable time of the Court is not consumed in institution and prosecution of vexatious and frivolous litigation and that it is curbed. The most important duty of the Attorney-General and the Advocate-General is to see that the lawyers and litigants maintain decorum while in Courts and that the authority, image and dignity of the Courts is maintained by one and all and it is not undermined or lowered down. If the Advocate-General is appointed as the Public Prosecutor under Section 24(1) of the Code of Criminal Procedure, he gets power to withdraw from the prosecution of criminal cases in terms of Section 321 of the Code of Criminal Procedure. Thus, the role of the Attorney-General and the Advocate-General under the Indian Constitution can be described as *parens patriae* (parental authority) with further authority of bringing an end to a trial of an indictment by entering a *nolle prosequi* (do not pursue or prosecute), i.e. an entry made on the court record, when a plaintiff in a civil suit or a prosecutor in a criminal prosecution undertakes not to continue the action or prosecution.

48. From the position occupied by the Attorney-General and the Advocate-General under the Indian Constitution, their role, powers, functions, duties and obligations, it becomes very clear that there exists a constitutional right of being heard in favour of the Attorney-General for India in a case or the cases before the High Court under Article 226 or 227 of the Constitution of India, wherein it is proposed to declare any provision in the Constitution or any Central enactment or any provision made thereunder as constitutionally invalid. Similar right exists in favour of the Advocate-General in case of any such challenge to the State enactment or any provision made thereunder. The High Court cannot, therefore, proceed to declare the constitutional invalidity of such provision in exercise of its jurisdiction under Article 226 or 227 of the Constitution of India without serving a sufficient advance notice of its proposed declaration upon the Attorney-General or the Advocate-General, as the case may be. The requirement is mandatory and in the absence of such service of notice, the High Court becomes incompetent to grant such declaration. In the decision of the Apex Court in the case of *Basantlal v. State of U.P.*, cited supra, the decision of the High Court granting declaration of constitutional invalidity of Section 125(2) of the Code of Criminal Procedure, 1973 on the ground of it being *ultra vires* Article 14 of the Constitution of India without notice to the Attorney-General. The decision supports the view which we have taken.

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49. The Attorney-General or the Advocate-General, as the case may be, upon receipt of such notice can exercise such right and avail the opportunity by appearing either personally or through the Additional or Assistant Government Pleader or a Special Counsel be appointed for that purpose. It is

his option to avail or not such an opportunity, and the right stands exhausted accordingly. The Court is not thereafter bound to wait for his appearance, if he fails to avail an opportunity provided. Upon compliance of requirement of service of notice, the High Court becomes competent to grant declaration about invalidity of such provision.

50. Though in the Canadian statute the role of the Attorney- General in Canada is that of a Cabinet Minister, he is the Chief Law Officer of the Executive Council, but his responsibilities from his role are unlike those of any other Cabinet Member. It describes his role as "judicial-like" and the "guardian of the public interest". He has unique responsibilities to the Crown, the Courts, the Legislature, the executive branch of the Government, and those are beyond as that of a political minister. He has to ensure that the rule of law is maintained and that the Cabinet actions are legally and constitutionally valid. The Attorney-General has a special responsibility to be the guardian of that most elusive concept - the rule of law. It is the rule of law which protects individuals and society as a whole from arbitrary measures and safeguards personal liberties. The role of the Attorney-General in Canada is described as *parens patriae* (parental authority) with further authority of bringing an end to a trial of an indictment by entering a *nolle prosequi* (do not pursue or prosecute), i.e. an entry made on the court record, when a plaintiff in a civil suit or a prosecutor in a criminal prosecution undertakes not to continue the action or prosecution. All these concepts are built in or inherent in the system under the Indian Constitution.

51. Though the provision of Order XXVII-A, Rule 1 of the Code of Civil Procedure is modelled on the lines of the Canadian statute, in India, it stems from - (i) the right of the Attorney- General or the Advocate-General to speak in and otherwise take part in the proceedings of the Houses of the Parliament or the State Legislature or any Committee of it, and (ii) the right of audience conferred upon them in the Supreme Court and the High Courts. Such rights are inbuilt or inherent under the Constitution of India. The necessity was felt by the Legislature to confer such a legal right of audience upon both these authorities where such questions arise in the civil suit instituted in the Courts subordinate to the High Court, for instance, any dispute under the provisions of the Hindu Succession Act, the Mohammedan Law, the Transfer of Property Act, the Specific Relief Act, etc., which is purely between the two private parties, who may join themselves on the issue of unconstitutionality or invalidity of any provision under the Constitution or the law made by the Parliament or the State Legislature. In view of this, even if the provisions of the Code of Civil Procedure are not applicable to writ proceedings under Articles 226 and 227 of the Constitution of India by virtue of Section 141 of the Code of Civil Procedure, it hardly makes any difference.

Question No.(2) :

52. We now turn to question No.(2) as to whether such notice is also required to be given to the Attorney-General or the Advocate-General, as the case may be, to consider the constitutionality or otherwise validity of any subordinate legislation in the form of any "statutory instrument", as is referred to in Order XXVII-A, Rule 1-A of the Code of Civil Procedure, by the High Court in exercise of its jurisdiction under Article 226 or 227 of the Constitution of India. The provision of Order XXVII-A, Rule 1-A states that in any suit in which it appears to the Court that any question as to the validity of any statutory instrument not being a question of the nature mentioned

in Rule 1 is involved, the Court shall not proceed to determine the question except after giving notice - (a) to the Government Pleader, if the question concerns the Government, or (b) to the authority, which issued the statutory instrument, if the question concerns the authority other than the Government.

53. The provision under Order XXVII-A, Rule 1-A of the Code of Civil Procedure does not require issuance of notice to the Attorney-General, if the challenge is to the constitutional validity of the subordinate legislation in the form of rules, regulations, bye-laws, order or control order, scheme, manual, etc., issued in exercise of the statutory power conferred by the Central or the State legislation, described as "statutory instrument". The reason is obvious, that the statutory instruments are brought into force by issuing notification in the official gazette. Though under certain enactments such instruments are required to be placed on the table of the House, there is no requirement of getting approval of the Parliament or the State Legislature, and consequently the Attorney-General or the Advocate-General has hardly any role in framing or bringing into force the subordinate legislation. The placement in the House is merely the mode and manner in which the subordinate legislation is brought into force. Normally, the procedural aspects are dealt with by the subordinate legislation, which may affect the rights of individuals or a section of people, but not of public at large.

54. In the proceedings under Article 226 or 227 of the Constitution of India, invariably, the Central or the State Government, through its concerned Department, which has framed the "statutory instrument", or the statutory bodies bringing into force the subordinate legislation, are the party-respondents, and consequently, the notice of the proposed challenge is issued to the party likely to be affected by grant of declaration regarding its invalidity. There is no further requirement and the High Court can proceed to declare any statutory instrument or any provision therein as invalid.

55. In the decision of the Apex Court in the case of State of Gujarat v. K.V. Joseph, cited supra, the Apex Court set aside the decision of the High Court granting declaration of para 4 of the Vigilance Manual as ultra vires by reason of the same being said to be in direct conflict with the statutory provisions of Sections 7, 13, 17 and 19 of the Prevention of Corruption Act. The Apex Court has held that no notice was sent to the Advocate General of the State and, therefore, the judgment delivered by the Appellate Bench of the High Court was not sustainable. It is difficult for us to hold that this decision is an authority for the proposition that in case of challenge to the constitutional validity of the rules in the form of subordinate legislation, a notice, either to the Attorney General or to the Advocate General, is required to be issued. In the facts and circumstances of the case before the Apex Court, the decision of the High Court was set aside on the ground that no notice was sent to the Advocate General of the State before granting declaration as to invalidity of para 4 of the Vigilance Manual. No reasons are recorded in the said judgment, which can be termed as "the ratio of the decision". It is not the ultimate decision of the Apex Court which is to be seen as a binding precedent, but it is the reasoning behind the decision on the question of law which constitutes "the ratio of the decision".

56. In our view, therefore, in case of a challenge to the subordinate legislation in the form of a "statutory instrument", as is referred to in Rule 1-A of Order XXVII-A of the Code of Civil Procedure, no notice is required to be issued either to the Attorney General or to the Advocate-General, as the case may be, before granting a declaration about its invalidity by the High Court in exercise of its jurisdiction under Article 226 or 227 of the Constitution of India. The question No.(2) is, therefore, answered accordingly.

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57. In view of the aforesaid discussion, the challenge in the present petition being to the validity of Rule 6(b) of the Seeds Rules, framed in exercise of the power conferred by the provision of Section 25(2)(f) of the Seeds Act, which is the Central legislation, it is not necessary to issue notice to the Attorney-General for India to declare the provision as unconstitutional or invalid. The authority, which has issued the Seeds Rules in exercise of its statutory power, is the party- respondent in this petition, apart from the Central Government, through its concerned Department, to whom a notice has already been issued and the appearance is put in by the Assistant Solicitor General of India, and the Assistant Government Pleader, who has been assigned this matter by the Government Pleader in the High Court.

(M.G. Giratkar, J.)

(R.K. Deshpande, J.)

Lanjewar, PS