

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.8951 OF 2015

01 Kishor M. Gadhave Patil,
age: 56 years, Occ: Law Officer,
Working as Addl. Govt. Pleader/
Additional Public Prosecutor,
Government Pleader's Office,
High Court of Bombay, Bench at
Aurangabad.

02 Keshav M. Suryawanshi,
age: 46 years, Occ: Law Officer,
as above.

03 Kishor J. Ghute Patil,
age: 51 years, Occ: Law Officer,
as above.

04 Vinod D. Godbharle,
age: 38 years, Occ: Law Officer,
as above.

05 Smt. Vaishali A. More/Shinde,
age: 40 years, Occ: Law Officer,
as above.

06 P.P.More,
age: 39 years, Occ: Law Officer,
as above.

07 Rajendra P. Phatke,
age: 47 years, Occ: Law Officer,
as above.

08 Smt.Y.M.Kshirsagar/Thorat,
age: 40 years, Occ: Law Officer,
as above.

09 Sunil P. Daund,
age: 50 years, Occ: Law Officer,
as above.

10 Smt.Pratibha J. Bharad,
age: 40 years, Occ: Law Officer,
as above.

11 S.G.Nandedkar,
age: 42 years, Occ: Law Officer,
as above.

12 Shrinivas Ambad,
age: 34 years, Occ: Law Officer,
as above.

13 Govind R. Ingole Patil,
age: 36 years, Occ: Law Officer,
as above.

14 Sambhaji S. Tope,
age: 36 years, Occ: Law Officer,
working as Addl. Govt.Pleader/
Additional Public Prosecutor,
Government Pleader's Office,
High Court of Bombay,
Bench at Aurangabad.

15 Smt.S.D.Shelke,
age: 43 years, Occ: Law Officer,
as above.

Petitioners

Versus

01 The State of Maharashtra,
through its Principal Secretary & RLA,
Law & Judiciary Department,
Mantralaya, Mumbai-32.

02 Joint Secretary,
Law and Judiciary Department,
Old High Court Building,
Jalna Road, Aurangabad.

Respondents

Mr.V.D.Sapkal, advocate for petitioners

Mr.V.J.Dixit, Senior Counsel i/by Mr.A.B.Girase, Government
Pleader for Respondents.

CORAM : R.M.BORDE &

P.R.BORA, JJ.

Reserved on : 14th October, 2015

Pronounced on : 16th December, 2015.

JUDGMENT (Per R.M.Borde, J.):

1 Heard. Rule. Rule made returnable forthwith and heard finally by consent of learned Counsel for respective parties.

2 Petitioners are functioning as Additional Government Pleaders / Additional Public Prosecutors / Assistant Government Pleaders/Assistant Public Prosecutors in the High Court, Bench at Aurangabad. According to petitioners, tenure prescribed under their appointment orders has not expired and would come to an end in June 2016 and thereafter, but for the reason mentioned in the order impugned in this matter, issued by the State Government in exercise of powers under Rule 30(5) of the Maharashtra Law Officers (Appointment, Conditions of Service and Remuneration) Rules, 1984, (for short, "Rules of 1984"), their appointment came to be terminated before completion of prescribed tenure.

3 Petitioners claim that they have been appointed in observance of the procedure prescribed under the Rules of 1984 by the Respondents and Notifications, in that regard, have been issued in respect of 14 Law Officers on various dates i.e. 05.10.2013, 09.02.2013, 20.10.2013, 09.06.2014, 05.06.2014, 16.08.2014, etc.. According to petitioners, on 13.10.2014, 14 posts of Additional Government Pleaders/Assistant Public Prosecutors

had fallen vacant and as such, Government took a decision to continue the Law Officers until further orders. In the meanwhile, an advertisement came to be issued for making appointment of Law Officers on 13.10.2014, but the process initiated for selecting Law Officers in pursuance to the said advertisement was not pursued.

4 It is contended by petitioners that elections to the Maharashtra Legislative Assembly took place in the month of October 2014 and there is change in the ruling party, which assumed power. According to petitioners, the newly formed Government has an intention to install Law Officers of their choice by removing present Law Officers enmass working in the High Court as well as in the subordinate Courts. With a view to replace the Law Officers enmass, a notification came to be issued on 13.03.2015, inviting applications from lawyers for making appointments to the posts of Additional Government Pleader/Assistant Government Pleader, Additional Public Prosecutor/Assistant Public Prosecutor, etc. There was no specific order issued before issuance of advertisement terminating appointments of Law Officers who were holding the posts and were yet to complete their tenure prescribed under the appointment orders issued to them.

5 In the advertisement issued on 13.03.2015, a clause was inserted, which has an effect of terminating engagement of Law Officers automatically from the date of issuance of fresh appointment orders in pursuance to the advertisement issued by the Government. Clause 7 contained in the said advertisement

reads thus:

उभेदवारांसाठी महत्वाच्या सूचना :

१.. प्रस्तावित नवीन नियुक्त्या ज्या दिनांकास अमलात येतील त्या दिनांकापासून सद्यस्थितीत त्या त्या पदावर कार्यरत असलेल्या विधि अधिका-यांच्या नियुक्त्या आपोआप संपुष्टात येतील. त्यामुळे कार्यरत असलेल्या विधि अधिका-यांनी प्रस्तावित नियुक्त्यांसाठी नव्याने अर्ज सादर करणे आवश्यक आहे.

6 Similar clause is included in the advertisement issued for the purposes of making appointment to the posts of Government Pleaders / Public Prosecutors, Assistant Government Pleaders / Additional Public Prosecutors in the District and Sessions Courts throughout the State. Important instructions for the candidates are enumerated in clause 7(1), which reads thus:

7 Important instructions for the candidates: -

(1) The existing appointments on the respective posts of Law Officers will come to an end automatically on the date of issue of the proposed fresh appointment orders. Hence, the present Law Officers need to apply freshly for the said posts.

7 Petitioners, along with others, who were affected and aggrieved by the advertisement issued by the State Government and more particularly, clause 7(1), which has an effect of automatic termination of engagement of holders of the posts, approached this Court by way of presenting Writ Petition No.3258 of 2015, which petition, together with other similar petitions, came to be disposed of by the Division Bench of this Court on 05.05.2015. It was the

contention of petitioners, in the aforesaid petitions, that since the Law Officers have been appointed in observance of the procedure prescribed under the Rules and the tenure, prescribed under the appointment orders issued in their favour, is yet to come to an end, it is impermissible for the State Government to terminate engagement of the Government advocates / petitioners enmass. It was the specific contention of the petitioners that clause 7 contained in the advertisement, which provides that existing appointments of Law Officers will come to an end automatically on the date of issue of the proposed fresh appointment orders, is contrary to Rule 30 of the Rules and the intention of the Government to remove all the Law Officers is writ large. It was contended that it is impermissible for the State Government to discontinue engagement of the existing Law Officers without observing the procedure prescribed under Rule 30.

8 It was contended on behalf of the State Government, in the aforesaid writ petition, that nature of relationship between the State Government and Government Advocate is akin to a litigant and advocate and it is open for the State Government to discontinue engagement of their advocates at any time. Though there was no return filed in the aforesaid writ petition, it was tried to be canvassed that the State Government has powers to discontinue engagement of Government Advocates and that there is no right in the Law Officers of the State to claim protection of tenure. Though it was denied that the State Government has any intention to terminate appointment of Law Officers in the State enmass, clause 7 contained in the advertisement was vehemently supported by the State, on bare perusal of which, it is clear that, it

has an impact of terminating appointment of existing Law Officers in the State. It was also emphasized on behalf of the State that, even for completion of their tenure, they have to appear before Interview Panel after tendering an application, as required in the advertisement. While dealing with the matter, this Court has observed in paragraphs 14, 17, 18, 34 and 37 of the judgment, thus:

14 When the matter was taken up for consideration on 31.03.2015, 06.04.2015, 08.04.2015 and 09.04.2015, the State Government was specifically asked, as to whether the Government intends to file return controverting the contentions raised by the petitioners in the petition. It is surprising to note that in spite of repeatedly calling upon the Respondent-State to file reply and clarify stand of the State Government, learned Special Counsel has expressed his inability to file return. It was also suggested to the learned Special Counsel to clarify the stand in respect of averments made by the petitioners in the petition and the apprehension expressed as regards enmass termination of appointments of all the existing Law Officers in the State. Except denying orally, the learned Special Counsel failed to file affidavit-in-reply. It was also asked as to what is the reason for failure of the State Government to file return in the matter, however, no explanation has been tendered. After persistently calling upon the State to place its stand in writing on record and to clarify as to whether in the event, the Law Officers, presently holding office and whose tenure has not yet come to an end, appear before the Interview Panel and if the Interview Panel find such Law Officer suitable, whether orders of continuation for enabling such Law Officer to complete the tenure would be issued; or whether fresh appointment of such Law Officer would be made, a written instruction dated 19.04.2015 was placed on record (which is marked as "X" for identification), informing that the existing Law Officers, pursuant to the

selection process, if selected, shall be appointed afresh. Thus, from the written instruction placed on record on behalf of the State Government, intention of the State Government to terminate appointments of all the existing Law Officers enmass and issue fresh appointment orders, if selected during selection process, is writ large. Thus, from the failure of the State Government to file reply and in view of the communication referred to above, marked "X" for identification, no other inference can be drawn and the contention raised by the petitioners, in the petition, that the State Government proposes to terminate appointments of all the existing Law Officers enmass, whose term has not come to an end as yet, without assigning any reason and without observing the procedure prescribed under Rule 30 of the Law Officers Rules, shall have to be accepted.

17 It is, thus, required to be noted that the State Government does have the power to terminate the appointment. However, such termination cannot be *de hors* the Rules. The State Government may not communicate the reasons, but existence of reasons for terminating the appointment, is a precondition.

18 In the instant matter, though it is denied by the State orally that it does not propose to terminate the appointments of Law Officers enmass, bare perusal of clause 7(1) of the advertisement together with communication produced on record, marked "X", it is clear that engagement of all the Law Officers in the State, whose tenure is yet to come to an end, is being terminated without assigning any reasons and without observing the procedure prescribed under Law Officers Rules. The failure of the State Government to file affidavit-in-reply controverting the contentions, together with the circumstances pointed out above, persuade us to accept the contentions raised by the petitioners, in that behalf.

34 In the instant matter, as has been stated above, the State Government was called upon to file an affidavit controverting the contentions of the

Respondents that the State does not propose to replace the Law Officers whose tenure has not come to an end enblock and that they would be replaced by observing the procedure prescribed under Rule 30 of the Law Officers Rule. However, in spite of insistence, the State Government refused to file such affidavit. The State Government was also asked about the propriety of calling upon the existing Law Officers, whose tenure has not come to an end, to appear before the Interview Panel if the State Government does not intend to discontinue their engagement abruptly before completion of their tenure. It is contended that in order to examine their suitability, they are required to appear before the Interview Panel although tenure of their engagement has not come to an end. It was logical that if they fail to satisfy Interview Panel, their engagement shall come to an end. This procedure itself would be obviously in contradiction with the procedure prescribed under Rule 30 of Law Officers Rules. It is open for the State to discontinue the engagement even without assigning any reason, however, existence of reasons is a necessity. If at all, engagement of the Law Officers, who are presently functioning, is to be brought to an end, there is no propriety in asking them to appear before the Interview Panel. Moreover, the procedure prescribed of holding interviews post decision of the Division Bench at Nagpur, shall apply to the future appointments and cannot be made applicable as a precondition for continuance of tenure of the Law Officers who are presently holding the office. The amendment to the relevant Rules prescribing modalities of selection of Law Officers shall obviously be prospective in nature and the Law Officers already holding office and whose term is yet to come to an end, cannot be made subject to the amended Rule and cannot be asked to appear before the Interview Panel. It is clarified at the cost of repetition that the State Government does have the power to terminate the engagement of the Law Officers. However, such termination shall be in observance of Rule 30 of the Law Officers Rules. The power of the State Government to appoint Law Officers of its choice, obviously, cannot be disputed but the enblock

discontinuance of engagement of all the Law Officers whose tenure is yet to come to an end shall have to be branded as arbitrary. The State Government failed to file affidavit-in-reply in spite of insistence nor has disclosed its stand before the Court. However, at the concluding stage of the hearing, in reply to a query, as to whether the Law Officers, who would be appearing before the Selection Panel, would be issued with the orders of continuation with a view to enable them to complete their existing tenure or would be appointed afresh, it was replied that the existing Law Officers, pursuant to the selection process, if selected, shall be appointed afresh. The communication dated 19.04.2015 signed by the Joint Secretary-cum-Legal Advisor is placed on record. It is, thus, clear that engagement of the existing Law Officers, who do not appear before the Interview panel, although they were selected in observance of the procedure prescribed at the time of their selection and whose tenure is yet to come to an end, would be discontinued. Such of those Law Officers who would appear before the Interview Panel would be issued appointment orders afresh meaning thereby tenure of their existing engagement, although has not come to an end and is likely to come to an end in 2016. would be terminated.

37 The State Government was called upon to explain that if it is not its intention to bring to an end engagement of the existing Law Officers holding the posts and whose tenure continues for further period, however, the State Government refused to to clarify its stand and make a statement either orally or in writing that engagement of the existing Law Officers would not be brought to an end without observing the procedure prescribed under Rule 30. The reluctance of the State Government either to place in writing before the Court that there shall be adherence to Rule 30 while discontinuing engagement of the existing Law Officers, leads us to draw an irresistible conclusion that the State Government proposes to bring to an end engagement of the existing Law Officers enblock. Had it not been the intention of the State Government, there was no reason for calling upon all existing Law Officers, whose tenure has not

come to an end, to apply freshly for the concerned posts.

9 Writ Petition No.3258 of 2015 came to be allowed by this Court with a direction to quash the condition contained in clause 7 of the advertisement. The judgment and order passed by this Court in the said writ petition was a matter of challenge in the Supreme Court in the petition for Special Leave to Appeal bearing Nos.22623-22627 of 2015. However, a request was made by the State Government seeking permission to withdraw the Special Leave Petitions, which was granted and SLPs were dismissed as withdrawn.

10 Logically, post decision of the High Court and after dismissal of the SLPs presented by the State to the Supreme Court, if at all engagement of the Government Advocates / Public Prosecutors was to be brought to an end, it was open for the State Government to take recourse to provisions of Section 30(6) of the Rules of 1984, as has been observed by this Court in the judgment delivered in W.P. No.3258 of 2015. However, the State Government preferred to take recourse to Rule 30(5) of the Rules for terminating appointment of the petitioners. An order came to be issued by the State Government on 28.08.2015 thereby terminating appointments of the petitioners as Additional Government Pleaders/ Assistant Government Pleaders, Additional Public Prosecutors, Assistant Public Prosecutors before completion of their tenure prescribed under the appointment orders. It would be appropriate to quote Rule 30(5) and 30(6) of the Rules of 1984, which read thus:

30 Period of Appointment -

(5) A Law Officer shall be liable to be removed be removed from his office at any time, if he is guilty of any act or conduct which, in the opinion of Government, in the Law and Judiciary Department, is incompatible with his duties as such Law Officer. The decision of Government in the Law and Judiciary Department in such cases shall be final.

(6) Notwithstanding anything contained in sub-rules (2) and (3), but save as otherwise provided in sub-rule (5), the appointment of any Law Officer, which is at the pleasure of the Government may at any time, be terminated by Government in the Law and Judiciary Department by giving him one month's notice or, where any retainer is payable to such Law Officer, be terminated forthwith by paying him one month's retainer in lieu of such notice.

11 Sub-rule (5) of Rule 30 empowers the State Government to remove Law Officer from his office at any time if he is found “guilty of any act or conduct”, which, in the opinion of the Government in the Law and Judiciary Department, is incompatible with his duties as Law Officer. The prerequisite for removal of Law Officer under Rule 30(5) is that, (i) he shall be guilty of such act or conduct; and (ii) in the opinion of the Government in the Law and Judiciary Department, such act or conduct is incompatible with his duties as such Law Officer.

12 It is contended on behalf of petitioners that firstly, there is no material to conclude that the petitioners are “guilty of any act or conduct” and secondly, the said act or conduct is not

demonstrated to be incompatible with their duties as Law Officers. It is contended that branding a Law Officer guilty of any act or conduct, which is incompatible with his duties as a Law Officer, puts a stigma on his character, which may interfere or would be an impediment for the petitioners to pursue career in Law. It is contended that since the order issued by the State Government puts a stigma on the petitioners, it is not permissible for the State to issue such orders without observing principles of natural justice or holding an inquiry. Petitioners contend that the order has been issued *mala fide* and the legal *mala fides*, which are attributable or evident on the face of the order, shall have to be presumed to exist. It is contended that since the petitioners have objected to the orders of the Law and Judiciary Department in terminating engagement of the Law Officers enmass by issuing an advertisement, which was a subject matter of challenge in earlier writ petitions, they have been picked and chosen for differential treatment and their engagement is terminated by putting a stigma on them without observing principles of natural justice.

13 An affidavit-in-reply has been presented on behalf of Respondents No.1 & 2 by the Joint Secretary, Law & Judiciary Department, wherein it has been emphasized that petitioners shall be put to strict proof of the facts as regards their appointments made in adherence to the procedure prescribed by law. It has not been specifically stated that the appointments are in contravention of the Rules or that their disengagement is on that count. It is contended that the action has been taken only against those petitioners who were party to Writ Petition No.3258/2015 and who have presented Contempt Petition No.394 of 2015, without any

justifiable reason in wanton disregard to the trust and confidence reposed in the Government Pleaders by the Government. It is contended that petitioners herein, without any justifiable reason, presented Contempt Petition against the Officers of the Law and Judiciary Department and prayed for taking criminal action against them and such act of the petitioners of presentation of Contempt Petition and seeking criminal action against officers of the Law & Judiciary Department, in the opinion of the Government, is incompatible with their duties as Law Officers.

14 According to the Respondents, Rule 30(5) gives power to the State Government to remove the Law Officers, whose act or conduct, in the opinion of the Government, is incompatible with their duties as Law Officers and that the State cannot be compelled to take action only under Rule 30(6) of the Rules. According to Respondents, action taken under Rule 30(5) is purely administrative and no hearing or adjudication is required prior to invoking powers under the aforesaid Rules. According to the State Government, the Contempt Petition was intentionally filed by the petitioners to bring the State Government in jeopardy, disrepute and such act of the petitioners, manifests lack of trust and confidence between petitioners and the State Government. According to the State Government, reckless action of the petitioners forfeited the trust and confidence of the State Government and there was no other alternative except to remove them by exercising powers under Rule 30(5) of the Rules of 1984. It is further contended that in view of Rule 46 of the Rules, decision of the State Government is final and is not liable to be questioned and cannot be subjected to judicial scrutiny.

15 It is not a matter of denial that petitioners, after the decision rendered by this Court in Writ Petition No.3258 of 2015, proceeded to present Contempt Petition No.394 of 2015. Petitioners objected to the act of the State Government in calling upon them to appear for the interview. According to petitioners, their entitlement to continue as Law Officers until completion of their tenure without compelling them to undergo fresh process of selection has been approved by the High Court and in such circumstances, it was not permissible for the State Government to compel them to appear for interview as a matter of precondition for their continuation. This Court, however, was not satisfied with the interpretation put by the petitioners and did not find any ground to call upon the respondents to show cause and as such, the contempt petition came to be dismissed by an order dated 20th July, 2015. It was observed by this Court that there is no violation of the order passed by the Division Bench in Writ Petition No.3258 of 2015 and that the petitioners were called upon to appear before the interview panel in pursuance to the applications tendered by them. It is a matter of record that during pendency of Writ Petition No.3258 of 2015, without prejudice to the rights and contentions of the petitioners therein, including petitioners in the instant petition, they were permitted to tender applications and participate in the process of selection initiated by the State Government and in pursuance thereto, petitioners tendered applications and were called upon to appear before the interview panel. This Court did not find any reason to interfere and as such, contempt petition was dismissed.

16 This Court, however, has observed in the judgment delivered in Writ Petition No.3258 of 2015, that:

“... If at all, engagement of the Law Officers, who are presently functioning, is to be brought to an end, there is no propriety in asking them to appear before the Interview Panel. Moreover, the procedure prescribed of holding interviews post decision of the Division Bench at Nagpur, shall apply to the future appointments and cannot be made applicable as a precondition for continuance of tenure of the Law Officers who are presently holding the office.”

17 Presumably, interpreting the observations made by this Court, as quoted above, petitioners approached this Court by presenting Contempt Petition. The moot question is, as to whether action of merely presenting a Contempt Petition can be construed so as to attribute “guilt” (of any act or conduct) to the petitioners, which is claimed to be incompatible with their duties as such Law Officers. The duties of the Public Prosecutors in the High Court are enumerated in Rule 14 of the Rules and sub-rules (3) and (4) are relevant for the purpose, which are quoted as below:

14(3) Duties as Government Pleader:- Unless otherwise provided in these rules, the Government Pleader shall act for the State or its officers in respect of the judicial proceedings filed in the court and shall be the recognised agent of the State or its officers within the meaning of Order XXVII, rules 2, 4 and 8 read with Order III, rule 1 of the Code of Civil Procedure; and it shall be the duty of the Government Pleader,-

(a) to appear in the court in any civil suit or appeal or application for review or revision or

reference, petition of a civil nature, including petition for exercise of powers under articles 226 and 227 of the Constitution or any other civil proceeding, as the case may be, to which the State or its officers are parties and the institution or defence of which is undertaken by Government in the Law and Judiciary Department and in all interlocutory or other proceedings arising therefrom and filed in the court:

(b) to appear on behalf of the State or its officers in the court at the stage of admission of appeals;

(c) to appear in the court on behalf of the State or its officers in which urgent applications like granting, opposing or vacating stay or injunction or both are moved. Whenever stay or injunction is granted or refused and the same is likely to affect the interests of the Government, to apply immediately for an order of the court to direct the plaintiffs or defendants or appellants or opponents or petitioners or respondents, as the case may be, to furnish security to the extent necessary;

(d) to appear in any case in the court in which he is directed to appear by any District Judge in support of an order imposing a fine on, or directing the arrest of, a witness under the provisions of the Code of Civil Procedure;

(e) to appear on behalf of the State or its officers in any other case filed in the court when required to do so by the Remembrancer of Legal Affairs or the Joint Secretary or the Deputy Secretary to Government, Law and Judiciary Department at Nagpur or Aurangabad, as the case may be:

(f) to appear in any civil suit or any other proceeding filed in the court in which the Government or its officers are concerned or interested and in which the Remembrancer of Legal Affairs or the Joint Secretary or the Deputy Secretary to Government, Law and Judiciary

Department at Nagpur or Aurangabad, as the case may be, requires him to appear, whoever the nominal party may be on whose behalf he is called upon to appear.

4 Duties as Public Prosecutor in the High Court:-

Unless otherwise provided in these rules, it shall be the duty of the Public Prosecutor in the High Court,-

(a) to appear on behalf of the State or its officers or any other Public Servant when so directed by the Remembrancer of Legal Affairs, in the High Court-

(i) in every application for the issuance of writs of Habeas Corpus;

(ii) in every case submitted to the High Court under section 366 of the Code of Criminal Procedure for confirmation of a sentence of death;

(iii) in every appeal for enhancement of sentence under section 377 of the Code of Criminal Procedure;

(iv) in every appeal under section 378 of the Code of Criminal Procedure;

(v) in every appeal against a conviction heard by the High Court under section 386 of the Code of Criminal Procedure, if in such appeal the accused person (or when there are several accused persons, any one of them) is represented by a counsel;

(vi) in all cases for transfer and bail applications;

(vii) in every application in criminal case filed in the High Court on behalf of the State for the exercise by the High Court of its powers of reference and revision;

(viii) in every criminal matter in which he may specifically be instructed to appear by a District and Sessions Judge, a District Magistrate or the Remembrancer of Legal Affairs or the Joint Secretary or the Deputy Secretary to Government, Law and Judiciary Department at Nagpur or Aurangabad, as the case may be;

(ix) in all cases of contempt of court in which he is required to appear;

(x) in any proceeding conducted on behalf of the State before a full or larger Bench of the High Court or any Special Bench of the High Court constituted under any law for the time being in force or before a Third Judge;

(xi) in any other case in which he is required to do so by the Remembrancer of Legal Affairs or the Joint Secretary to the Deputy Secretary to Government, Law and Judiciary Department at Nagpur or Aurangabad, as the case may be;

(b) to present, as soon as possible, an appeal in the High Court against the order of acquittal or against the sentence on the ground of its inadequacy passed in any case, in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (XXV of 1946) or by any other agency empowered under any Central Act, other than the Code of Criminal Procedure, and in which the Central Government have issued a direction to him to do so, without waiting for further instructions from the Remembrancer of Legal Affairs or the Joint Secretary or the Deputy Secretary to Government, Law and Judiciary Department at Nagpur or Aurangabad, as the case may be;

(c) If, in any criminal case heard before the High Court, a question arises as to any property in which

Government in the administrative department may be interested, to inform the District Magistrate of the district in which the case was tried and also the Remembrancer of Legal Affairs or the Joint Secretary or the Deputy Secretary to Government, Law and Judiciary Department at Nagpur or Aurangabad, as the case may be, and, when necessary to apply for an adjournment of the case, in order to enable those officers to furnish him with all information on such question before the case is finally heard by the High Court.

18 The general duties of the Government Pleader and Public Prosecutor are specified in sub-rule (9) of Rule 14. which reads thus:

9 General Duties,- Unless otherwise provided in these rules, it shall be the duty of the Government Pleader or Public Prosecutor,-

(a) to discharge all the duties of the Government Pleader towards the Government or its officers in regard to matters which are likely to lead to litigation in the court;

(b) to prepare and settle pleadings or memoranda of appeals or replies or applications or affidavits or counter affidavits or other documents in the proceedings filed in the court or the proceedings filed in the court of other States or in the Supreme Court, as the case may be;

(c) to ensure that no case is heard by the court without filing the necessary pleadings or submissions or replies or affidavits or counter affidavits or other documents indicating clearly the contentions of the Government both on questions of law and facts;

(d) to see that no case is conceded before the court, such as granting of bail to any accused or any question of fact not considered in the affidavit or counter affidavit or any claim against the State without obtaining previous permission, oral or written, of the competent officer of the department concerned or the Remembrancer of Legal Affairs or the Joint Secretary or the Deputy Secretary to Government, Law and Judiciary Department at Nagpur or Aurangabad, as the case may be;

Provided that, all oral permissions obtained shall be confirmed in writing within seven days from the date of obtaining such permission;

(e) to appear in any case, whether civil or criminal, in which the court desires him to appear or expresses its opinion that he ought to appear;

(f) to assist the Advocate-General in civil or criminal cases of special importance, whenever such assistance is required by him;

(g) to report to the Remembrancer of Legal Affairs or the Joint Secretary or the Deputy Secretary to Government, Law and Judiciary Department at Nagpur or Aurangabad, as the case may be, periodically about the progress of the proceedings in the court to which the State or its officers are parties;

(h) as soon as a matter to which the State or its officers are parties is decided by the court,-

(i) to communicate the nature of the decision to the administrative department and to the Collector or the District Magistrate or the Commissioner of Police or the Government Officer concerned, as the case may be, with a copy to the

Remembrancer of Legal Affairs or the Joint Secretary or the Deputy Secretary to Government, Law and Judiciary Department at Nagpur or Aurangabad, as the case may be, giving in important cases a brief statement of the grounds on which the decision is based;

(ii) to apply on the very day of the decision for a certified copy of the judgment and order or decree and take all the necessary steps as provided for in the Rules for the Conduct of the Legal Affairs of Government, 1984;

(i)(A) where the order or decree has been passed under which any amount is due to the Government or its officers, to take all the necessary steps, with all possible expedition, to realise the moneys and cost so awarded; and

(B) where the order or decree has been passed against the State or its officers, to see that the order or decree is fully satisfied, within the time fixed for its satisfaction under section 82 of the Code of Civil Procedure;

(j) to perform duties as specified in clause (h) (ii) and clause (i) in the cases in which the Advocate General appears on behalf of the State or its officers;

(k) to report to the Remembrancer of Legal Affairs or the Joint Secretary or the Deputy Secretary to Government, Law and Judiciary Department at Nagpur or Aurangabad, as the case may be, any of the following matters arising out of any civil or criminal case decided by the Court:-

(i) any case in which the court in confirming or imposing the minimum legal penalty expresses or indicates an opinion that a lesser penalty would serve the ends of justice;

(ii) any case in which the court has observed or expressed or indicated that imposition of any tax, cess, levy, penalty, fine or royalty under any of the enactments is unjust and would not serve the ends of justice; and also when any such observation or indication is made in relation to service matters, agrarian reforms undertaken by the Government, distribution of surplus lands, acquisition of lands or in any other matter in which action has been taken by the Government in furtherance of the Directive Principles of State Policy;

(iii) any case in which the action of the lower Court or the conduct of investigation or prosecution or the conduct of the Law Officer or a State employee, has been considered to be gravely irregular or has been severely criticised by the court;

(iv) any case in which the court has declared any law or statutory rule to be *ultra vires* or in which it has observed that a law or statutory rule has been causing inconvenience or anomaly;

(v) any defect or lacuna in any enactment or statutory rule, the removal of which he considers it necessary;

(vi) any pronouncement of the court on a question of law which is likely to affect other cases in the State;

(vii) any other matter or circumstance which he himself or the court desires or considers it necessary to be brought to the notice of the Government;

(viii) in any case in which any important question of law is likely to affect the policy of the Government or the conduct of the Government or its employees has been the subject of comment by the court;

(l) to assist the Government Pleader, or Public Prosecutor in the High Court in an appeal or other proceeding relating to case which he has conducted in the subordinate court, when the Remembrancer of Legal Affairs or the Joint Secretary or the Deputy Secretary to Government, Law and Judiciary Department at Nagpur or Aurangabad, as the case may be, requires him to do so;

(m) where a District Government Pleader or Additional or Assistant Government Pleader or Subordinate Government Pleader is so appointed by Government in the Law and Judiciary Department, by general or special order in that behalf, issued under Order XXVII, rule 1 of the Code of Civil Procedure, to sign and verify the plaint or written statement in any suit by or against the State;

(n) to appear when instructed to do so by a District or Sessions Judge or District Magistrate or Commissioner of Police, as the case may be, in any proceeding before a civil, criminal or revenue court under section 340 or 345 of the Code of Criminal Procedure;

(o) to appear when so directed by the Collector in applications made by the Collector under section 10 of the Guardian and Wards Act, 1890 (VIII of 1890) or section 10 of the Bombay Court of Wards Act, 1905 (Bom. I of 1905);

(p) where the District Government Pleader so directs the Subordinate Government Pleader, to appear in the execution of any commission for the examination of a witness or in any other civil proceeding;

(q) where the District Magistrate so requires the Subordinate Government Pleader, under section 25 of the Code of Criminal Procedure, to appear before the Court of Judicial Magistrate,

First Class, at or near the headquarters of the court for which he is appointed.

19 On perusal of the duties specified in the sub-rule quoted above, it is a matter of surprise as to how the act of presenting Contempt Petition against officers of the State Government for ventilating grievance of the petitioners would interfere with their duties as a Law Officer, which are codified. Thus, the contention of the State Government that the act of presentation of Contempt Petition against the State would be incompatible with their duties as Law Officers, cannot be accepted. Whether petitioners can be held guilty for any act or conduct on account of presentation of contempt petition has to be construed on consideration of the facts leading to such an action. The background history of the litigation leading to presentation of contempt petition by the petitioners is a relevant factor for consideration. The proposed action of the State Government of terminating engagement of Government Advocates enmass, after installation of new Government controlled by different political party, has been struck down by this Court while dealing with earlier Writ Petition, which facilitated the Law Officers, whose tenure was yet to come to an end, to continue in the office. While disposing of Writ Petition No.3258 of 2015, it was made clear that the State Government does have the power of terminating Law Officers, however, such termination shall be in observance of Rule 30(6) of the Rules of 1984. If at all there existed any reason for terminating engagement of Law Officers, it was open for the State Government to take recourse to Rule 30(6) of the Rules and in observance of the procedure, could have discontinued their engagement. It was also not necessary for the State Government

to disclose the reasons to the concerned Law Officer, however, existence of reasons was a necessity. It does appear that the State Government, instead of taking recourse to Rule 30(6), preferred to invoke powers under Rule 30(5).

20 As has been recorded above, the act of presentation of contempt petition by the petitioners cannot be construed to be an act incompatible with their duties as Law Officer since duties have been prescribed under the Rules and it has not been demonstrated that the act of the petitioners is violative of any of the duties prescribed under Rule 14.

21 It has been canvassed on behalf of the State Government that since the order issued by the State Government is an order of simpliciter termination and no stigma is attached, petitioners do not have any right to claim reversal of such order. Reliance is placed on the judgment in the matter of **Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. Of Medical Sciences and another**, reported in AIR 2002 SC 23. The Supreme Court, referring to the Constitution Bench judgment in the matter of **Benjamin A.G. Vs. Union of India**, reported in (1967) 1 Lab LJ 718, explained the decision in the matter of **Parshottam Lal Dhingra Vs. Union of India**, AIR 1958 SC 36, wherein two tests are followed:

- (i) Whether the temporary Government servant had a right to the post or the rank, or
- (ii) Whether he has been visited with evil consequences.

22 In paragraph no.14 of the judgment in **Pavanendra** (*supra*), it is observed thus:

“14 If 'punishment' were restricted to “evil consequences”, the Court's task in deciding the nature of an order of termination would have been easier. Courts would only have to scan the termination order to see whether it *ex facie* contains the stigma or refers to a document which stigmatises the officer, in which case the termination order would have to be set aside on the ground that it is punitive. In these cases the 'evil consequence' must be assessed in relation to the blemish on the employee's reputation so as to render him unfit for service elsewhere and not in relation to the post temporarily occupied by him. This perhaps is the underlying rationale of several of the decisions on the issue.

23 Reliance is also placed on the judgment in the matter of **State of U.P. and others Vs. Vijay Shankar Tripathi**, reported in 2005 AIR SCW 3816, wherein, in paragraph 4, it is observed thus:

“.....From a long line of decisions it appears to us that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simpliciter or on motive on the ground of unsuitability to continue in service.”

24 It is further contended that although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order, which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic.

25 Relying upon the judgment in the matter of **Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta**, reported in 1999 AIR SC 983;, it is contended that (i) it depends upon facts and circumstances of each case and language and words employed in the order of termination of the probationer to judge whether the words amount to stigma or not; and (ii) the words amounting to stigma need not be contained in the order of termination, but may also be contained in the order or proceeding referred to in the order of termination or in an annexure thereto and would vitiate the order of termination.

26 It would be relevant to refer to the decision in the matter of **Radhey Shyam Gupta Vs. U.P. State Agro Industries Corporation Ltd.**, reported in AIR 1999 SC 609. In paragraph no.18 thereof, it is observed thus:

“18 The first decision of the Constitution bench was in Parshottam Lal Dhingra Vs. Union of India. There a twin test was laid down – whether the order in terms of the appointment gave a right to terminate and whether the order was punitive in nature. If misconduct was the motive, the order was not punitive but if it was the foundation, it was punitive. In that case, the employee was working in a higher post in an officiating capacity and that appointment was terminated and he was reduced in

rank. S.R.Das, C.J. Stated (para 28, p. 49) that misconduct, negligence, inefficiency or other disqualification might be the motive or the inducing factor which influenced the government to take action under the terms of the contract of employment or the specific service rule, and the motive was irrelevant. But if the termination was “founded” on misconduct, negligence, inefficiency or other disqualification, it would have to be treated as a punishment. It was also held that the use of the word “termination” or “discharge” was not conclusive. In spite of the use of such innocuous expressions, the court could still hold it to be punitive. On the facts of the case, the termination of the officiating appointment was based upon certain adverse remarks and it was held that it was not by way of punishment.”

27 In the instant matter, we are afraid, as to whether principles referable to the probationers can be applied in respect of engagement of an Government Advocate. The question relating to engagement of District Government Counsel was considered in the matter of **State of U.P. and another Vs. Johri Mal**, reported in AIR 2004 SC 3800. In paragraphs no.76, 77, 78 and 79, it is observed thus:

“76 In the matter of engagement of a District Government Counsel, however, a concept of public office does not come into play. However, it is true that in the matter of Counsel, the choice is that of the Government and none can claim a right to be appointed. That must necessarily be so because it is a position of great trust and confidence. The provision of Article 14, however, will be attracted to a limited extent as the functionaries named in the Code of Criminal Procedure are public functionaries. They also have a public duty to perform. If the State fails to discharge its public duty or act in

defiance, deviation and departure of the principles of law, the Court may interfere. The Court may also interfere when the legal policy laid down by the Government for the purpose of such appointments is departed from or mandatory provisions of law are not complied with. Judicial review can also be resorted to, if a holder of a public office is sought to be removed for reason *de hors* the statute.

77 The appointment in such a post must not be political one. The Manual states that a political activity by the District Government Counsel shall be a disqualification to hold the post.

78 We cannot but express our anguish over the fact that in certain cases recommendations are made by the District Magistrate having regard to the political affinity of the lawyers to the party in power. Those who do not have such political affinity although competent are not appointed. Legal Remembrancers Manual clearly forbids appointment of such a lawyer and/or if appointed, removal from his office. The District Judge and the District Magistrate, therefore, are duty bound to see that before any recommendation is not made, or any political affinity. They must also bear in mind that the Manual postulates that any lawyer who is guilty of approaching the authorities would not be entitled to be considered for such appointment.

79 The State, therefore, is not expected to rescind the appointments with the change in the Government. The existing panel of the district Government Counsel may not be disturbed and a fresh panel come into being only because a new party has taken over charge of the Government.

28 In the instant matter, termination of engagement of the petitioners is founded on the alleged guilt or act of presenting

contempt petition, which, according to the State, is incompatible with their duties. In the order, though only rule 30(5) is referred, upon reading the relevant rule, it does appear that it puts a stigma on the Law Officer. Although expression contained in the order is innocuous, still it can be considered as a punitive. Lack of confidence or lack of trust is attributed to the petitioners on account of their action of presentation of contempt petition. Contempt Petition was filed under the *bona fide* belief that the State or the Officers of Law & Judiciary Department have violated order of the Court. The Officers of the Law & Judiciary Department or the State Government need not be so touchy on account of presentation of contempt petition by the petitioners. It is a right of an individual to adopt and take recourse to legal remedies for redressal of his/her grievance. If petitioners, under *bona fide* belief, feel that the Law & Judiciary Department has not observed directions of the Court, issued in earlier judgment (W.P. No.3258 of 2015), and availed of legal remedies available in law by presenting contempt petition, it cannot be said that such act of the petitioners is incompatible with their duties. It is an extreme action on behalf of the State to brand them as guilty of committing any act or conduct, which is claimed to be incompatible with their duties. The nature of contempt proceedings can be understood by taking recourse to the judgment in the matter of **Om Prakash Jaiswal Vs. D.K.Mittal & another**, reported in AIR 2000 SC 1136. In paragraph no.17 of the judgment, the Supreme Court has observed thus:

“17 The jurisdiction to punish for contempt is summary but the consequences are serious. That is why the jurisdiction to initiate proceedings in

contempt as also the jurisdiction to punish for contempt in spite of a case of contempt having been made out are both discretionary with the Court. Contempt generally and criminal contempt certainly is a matter between the Court and the alleged Contemnor. No one can compel or demand as of right initiation of proceedings for contempt. Certain principles have emerged. A jurisdiction in contempt shall be exercised only on a clear case having been made out. Mere technical contempt may not be taken note of. It is not personal glorification of a Judge in his office but an anxiety to maintain the efficacy of justice administration system effectively which dictates the conscience of a Judge to move or not to move in contempt jurisdiction. Often an apology is accepted and the felony condoned if the Judge feels convinced of the genuineness of the apology and the prestige of the Court having been restored. Source of initiation of contempt proceedings may be suo motu, on a Reference being made by the Advocate General or any other person with the consent in writing of the Advocate General or on Reference made by a Subordinate Court in case of criminal contempt. A private party or a litigant may also invite the attention of the Court to such facts as may persuade the Court in initiating proceedings for contempt. However, such person filing an application or petition before the Court does not become a complainant or petitioner in the proceedings. He is just an informer or relator. His duty ends with the facts being brought to the notice of the Court. It is thereafter for the Court to act on such information or not to act though the private party or litigant moving the Court may at the discretion of the Court continue to render its assistance during the course of proceedings. That is why it has been held that an informant does not have a right of filing an appeal under Section 19 of the Act against an order refusing to initiate the contempt proceedings or disposing the application or petition filed for initiating such proceedings. He cannot be called an aggrieved party."

29 As has been observed by the Supreme Court in the matter of **Muthu Karuppan Vs. Parithi Ilamvazhuthi & another**, reported in 2011 ALL SCR 1126, the contempt generally and criminal contempt certainly is a matter between the Court and alleged contemnor. No one can compel or demand as of right initiation of proceedings for contempt. The person filing an application or petition before the Court does not become a complainant or petitioner in the proceedings. He is just an informer or relator. His duty ends with the facts being brought to the notice of the Court. It is thereafter for the Court to act on such information or not.

30 In the instant matter, petitioners merely made a complaint to this Court in respect of non observance of the directions and requested for initiation of the proceedings. Petitioners were, thus, merely informants and since this Court did not find any reason to take cognizance of the complaint, dismissed the contempt petition. The act of petitioners in informing the Court regarding non observance of the directions by the officers of the Law & Judiciary Department cannot be construed to be an act of guilt or conduct of such nature which is incompatible with their duties.

31 In the matter of **Vijay Shankar Pandey Vs. Union of India and another**, reported in AIR 2015 SC 326, charge against the petitioner was that, he, by way of an additional affidavit, criticised Senior Officers of the Government of India and since, in view of Rule 7 of All India Conduct Rules, members of All India Service are prohibited from criticizing Senior Officers in the media

or in the press, charge of misconduct was levied. Under Rule 8 of the All India Service Rules, members of All India Service are not allowed to depose in the inquiry wherein the Central or the State Government may be criticised. Filing of an affidavit by the petitioner therein was construed to be an act of indiscipline falling within the aforesaid Rule. Dealing with the matter, the Supreme Court has observed in paragraphs no.42, 43 and 44 thus:

“42 The Constitution declares that India is a sovereign democratic Republic. The requirement of such democratic republic is that every action of the State is to be informed with reason. State is not a hierarchy of regressively genuflecting coterie of bureaucracy.

43 The right to judicial remedies for the redressal of either personal or public grievances is a constitutional right of the subjects (both citizens and non-citizens) of this Country. Employees of the State cannot become members of a different and inferior class to whom such right is not available.

44 The respondents consider that a complaint to this Court of executive malfeasance causing debilitating economic and security concerns for the country amounts to inappropriate conduct for a civil servant is astounding. There is another factor which brings the respondent virtually within the ambit of legal malice, to say the least Mr.Jasveer Singh, another employee of the respondent was also a co-petitioner in the Civil Writ filed in this Court. However, no action is taken against him. This leaves much to be desired and makes bona fides of the respondents suspect.

32 Applying the same analogy to the instant case, it must be construed that the right to judicial remedies for redressal of either personal or public grievance is a constitutional right and the Law Officers, who have fixed tenure of engagement, cannot be considered to be a different or inferior class, to whom such right is unavailable. The action of the State Government shall have to be branded as excessive and cannot be construed to be *bona fide* looking to the history and antecedents which gave rise to such an action. A reasonable inference shall have to be drawn that the adverse action was intended and is taken.

33 For the reasons recorded above, reasonable inference has to be drawn as regards existence of legal *mala fides*. We may again reiterate that holding of post by the petitioners as Additional Government Pleader/Additional Public Prosecutor, Assistant Government Pleader/Assistant Public Prosecutor, is a professional engagement and the State does have powers to terminate the engagement. However, such termination shall have to be in observance of the Rules prescribed under the Rules framed in that behalf. The power of the State Government to appoint Law Officers of their choice cannot be disputed, but discontinuation of engagement of Law Officers in such manner, as in the instant case, cannot be supported and shall have to be branded as arbitrary and illegal.

34 The arguments advanced on behalf of the State Government, that in view of Rule 46 of the Rules, action of the State Government is not available for judicial scrutiny, is required to be noted merely for the purpose of its rejection.

35 In the result, writ petition deserves to be allowed and same is accordingly allowed. The order dated 28.08.2015, passed by the Respondents, discontinuing engagement of petitioners, is quashed and set aside.

36 Rule is accordingly made absolute. There shall be no order as to costs. Pending Civil Applications, if any, do not survive and stand disposed of.

37 At this stage, learned Senior Counsel appearing for Respondent-State, seeks stay to the implementation and operation of this judgment and order. Learned Counsel appearing for the petitioner vehemently opposes the prayer contending that the balance period of appointment in respect of Law Officers is only up to June 2016 and about four months are lost in the litigation. Considering contentions of the respective parties, we feel that ends of justice would be met if implementation of the order is suspended up to 31.01.2016.

P.R.BORA
JUDGE

adb/wp895115

R.M.BORDE
JUDGE