

SHANTI BHUSHAN AND ANR.

v.

UNION OF INDIA AND ANR.

(Writ Petition (Civil) No. 375 of 2007)

DECEMBER 17, 2008

**[DR. ARIJIT PASAYAT AND DR. MUKUNDKAM
SHARMA, JJ.]**

Superior Judiciary – High Court Judge – Appointment of Additional Judge as Permanent Judge – Without consultation with collegium of Judges – Challenged in public interest – Extension of the term of the Judge concerned as Additional Judge on various occasions whereas not found suitable for appointment as Permanent Judge – Held: Appointment of Additional Judge as Permanent Judge without consultation with the collegium is not illegal – Such consultation has been resorted to at the time of initial appointment as Additional Judge – The rigor of the scrutiny and the process of selection initially as an Additional Judge and a Permanent Judge are not different – However, person not found suitable for appointment as Permanent Judge cannot be given extension as Additional Judge unless the same is occasioned by non-availability of vacancy – But the belated challenge to such extension not to be interfered with – Even when an additional Judge is appointed as a Permanent Judge, he does not become immune from action – Whenever materials are brought to the notice about lack of mental and physical capacity, character and integrity of such Judge, the Chief Justice of India can take appropriate action.

The present writ petition was filed under Article 32 of the Constitution of India, in public interest. Petitioners sought declaration and issuance of writ of *quo warranto* or any other direction quashing the appointment of respondent No.2 as a Judge of Madras High Court. Petitioners contended that while appointing the

- A respondent-Judge as Permanent Judge, the required norms for appointment of Permanent Judge as laid down in Judgment in *Supreme Court Advocates on-Record Association & Ors. Vs. Union of India* 1993 (4) SCC 441 and in Special Reference No.1 of 1998 1998 (7) SCC 739, have not been followed; and that the term of the respondent-Judge was extended twice as an Additional Judge, as he was not found suitable for appointment as Permanent Judge by the Collegium including Chief Justice of India and thus when the respondent-Judge was not found suitable to be made Permanent Judge, his tenure as Additional Judge could not have been extended.

- Respondent-State contended that there was no infirmity in his appointment as Permanent Judge; that 350 Judges had been appointed as Permanent Judges during the period from 1.1.1999 to 31.7.2007 without consulting the collegium, as the collegium was consulted at the stage of initial appointment as Additional Judge and thus in view of this practice, elaborate consultation as required for forming opinion for appointment of Additional Judge might not have been considered necessary by the State, for appointment as Permanent Judge, while implementing Office Memorandum of Procedure for appointment of Permanent Judges.

Disposing of the petition, the Court

- HELD: 1.1. So far as the scope of judicial review in matters as in the instant case is concerned, it is extremely limited and is permitted to the extent indicated in *Supreme Court Advocates-on-Record* case. [Para 8] [815-E]

- 1.2. The concept of plurality and the limited scope of judicial review because a number of constitutional functionaries are involved, are certainly important factors. But where the constitutional functionaries have already expressed their opinion regarding the suitability of the person as an Additional Judge, the parameters as stated in para 13 have to be considered differently from the

parameters of para 12. Having regard to the fact that there is already a full fledged participative consultation in the backdrop of pluralistic view at the time of initial appointment as Additional Judge or Permanent Judge, repetition of the same process does not appear to be the intention. [Para 11] [817-C-E]

1.3. The rigor of the scrutiny and the process of selection initially as an Additional Judge and a Permanent Judge are not different. The yardsticks are the same. Whether a person is appointed as an Additional Judge or a Permanent Judge on the same date, he has to satisfy the high standards expected to be maintained as a Judge. Additionally, on being made permanent, the effect of such permanency relates back to the date of initial appointment as an Additional Judge. The parameters of para 12 of the Memorandum of Procedure cannot be transported in its entirety to para 13. While making the recommendations for appointment of an Additional Judge as a permanent Judge, Chief Justice of the High Court is not required to consult the collegium of the High Court. Additionally, there is no requirement of enquiry by the Intelligence Bureau. Further, the consultation with members of the collegium and other Judges is not expressly provided in para 13. the details which are required to be given in the format in Annexure I in para 12 are not required to be given in a case relatable to para 13. [Para 10] [815-G-H; 816-F-G]

1.4. Unless the circumstances or events arise subsequent to the appointment as an Additional Judge, which bear adversely on the mental and physical capacity, character and integrity or other matters the appointment as a permanent Judge has to be considered in the background of what has been stated in *S.P. Gupta's* case. Though there is no right of automatic extension or appointment as a Permanent Judge, the same has to be decided on the touchstone of fitness and suitability (physical, intellectual and moral). [Para 11] [816-H; 817-A]

1.5. Union of India is the ultimate authority to approve

A the recommendation for appointment as a Judge. The
Central Government has stated that in view of the
practice followed in implementing the memorandum,
once the Government on being satisfied that a suitable
candidate who was earlier appointed as an Additional
B Judge is suitable for appointment as a permanent Judge,
the elaborate consultation has not been considered
necessary. It is of significance to note that some of the
Judges who were parties to the judgments relied on by
the petitioners while functioning as a Chief Justice of
C India have not thought it necessary to consult the
Collegium as is evident from the fact that from 1.1.1999
to 31.7.2007 in more than 350 cases the Collegium was
not consulted. It means that they were also of the view
that the practice/procedure was being followed rightly.
Therefore, it cannot be said that without consultation with
D the collegium, the opinion of the Chief Justice of India is
not legal. [Para 12] [817-F-H; 818-A-B]

*Supreme Court Advocates on-Record Association & Ors.
Vs. Union of India 1993 (4) SCC 441, relied on*

E *Special Reference No.1 of 1998 1998 (7) SCC 739 and
S.P. Gupta vs. Union of India 1981 Suppl. SCC 87, referred
to*

2.1. However, a person who is not found suitable for
being appointed as a permanent Judge, should not be
given extension as an Additional Judge unless the same
F is occasioned because of non availability of the vacancy.
If a person is unsuitable to be considered for
appointment as a permanent Judge because of
circumstances and events which bear adversely on the
mental and physical capacity, character and integrity or
G other relevant matters rendering it unwise for appointing
him as a permanent Judge, same yardstick has to be
followed while considering whether any extension is to
be given to him as an Additional Judge. A person who is
functioning as an Additional Judge cannot be considered
H in such circumstances for re-appointment as an

Additional Judge. If the factors which render him unsuitable for appointment as a permanent Judge exist, it would not only be improper but also undesirable to continue him as an Additional Judge. At various points of time, when the term of appointment as an Additional Judge of respondent No.2 as extended, there was no challenge. The situation prevailed for more than two years. The belated challenge as has been done in the present writ petition to such extensions cannot put the clock back. [Paras 13, 14 and 16] [818-C-E-G]

2.2. In the peculiar circumstances of the case, the prayer of the petitioners is not acceptable. But a person who is not suitable to be appointed as a permanent Judge on the ground of unsuitability due to adverse factors on account of mental and physical capacity, adverse materials relating to character and integrity and other relevant matters, which are so paramount and sacrosanct for the functioning as a Judge, should not be continued as an Additional Judge. Even when an additional Judge is appointed as a permanent Judge, he does not become immune from action, if circumstances so warrant. Whenever materials are brought to the notice of the Chief Justice of India about lack of mental and physical capacity, character and integrity, it is for him to adopt such modalities which according to him would be relevant for taking a decision in the matter. If, it comes to the notice of the Chief Justice of India that action needs to be taken in respect of him for any aberration while functioning as a Judge, appropriate action as deemed proper shall be taken. [Paras 17 and 18] [820-F-H; 821-C]

Case Law Reference:

1998 (7) SCC 739	Referred to	Para 2	G
1993 (4) SCC 441	Relied on	Para 8	
1981 Suppl. SCC 87	Referred to	Para 11	

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 375 of 2007.

Under Article 32 of the Constitution of India.

A Anil B. Divan, Prashant Bhushan, Rohit Kr. Singh, Sumeet Sharma, Ranvir Singh and Gayatri Devis for the Petitioners.

Gopal Subramonium, A.S.G., Satyakam and B. Krishna Prasad for the Respondents.

The Judgment of the Court was delivered by

B **DR. ARIJIT PASAYAT, J.** 1. Judges, like Caesar's wife, should be above suspicion is the focal point in this petition under Article 32 of the Constitution of India, 1950 (in short the 'Constitution') filed by Mr. Shanti Bhushan, a senior lawyer of eminence and former Law Minister and Ms. Kamini Jaiswal, an Advocate. The writ petition is stated to have been filed in public interest litigation seeking appropriate declaration and issuance of a writ of quo warranto or any other writ or direction quashing the appointment of respondent No.2 as a Judge of the Madras High Court. The prayers read as follows:

- D (a) restrain respondent No.2 from functioning as a Judge of the Madras High Court.
- (b) Direct respondent No.1 to produce all the records regarding the appointment/re-appointment of respondent No.2 as Additional Judge and also as the permanent Judge; and
- E (c) pass any other or further orders, as this Hon'ble Court may deem fit and proper.

2. The grievances center around the appointment of respondent No.2 as a permanent Judge by the Union of India (Department of Justice, Ministry of Law and Justice). It is stated that required norms have not been followed while appointing him as a permanent Judge and such appointment is in violation of the law as declared by this Court in *Supreme Court Advocates-on-Record Association & Ors. v. Union of India* (1993 (4) SCC 441) and *Special Reference No.1 of 1998* (1998 (7) SCC 739). The primary ground urged is that the opinion of the Chief Justice of India has to be formed collectively after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of opinion and no appointment can be made unless

it is in conformity with the final opinion of the Chief Justice of India formed in the aforesaid manner. In the oral arguments and the written submissions, reference has been made to various paragraphs of the aforesaid judgments and the memorandum dated 30th June, 1999 issued by the Minister of Law, Justice and Company Affairs, Union of India, laying down procedure to be followed in connection with the appointment and transfer of Judges of High Courts. It is submitted that while forming the opinion, the Chief Justice of India has to consult two senior-most Judges and some other Judges of the Supreme Court who are conversant with the affairs of the High Court concerned. The latter category includes the serving Supreme Court Judges who were either puisne Judges or Chief Justice of the concerned High Court though the concerned High Court may not be their parent High Court and they may have been transferred to the said High Court. It is, therefore, submitted that the appointment of respondent No.2 as a permanent Judge as notified on 2.2.2007 has no sanctity in law. He was sworn as a permanent Judge on 3.2.2007.

3. The following paragraphs in the judgments referred to above have been relied upon.

1998 (7) SCC 739 (Special Reference No.1 of 1998)

"12. The majority view in the Second Judges case (1993 (4) SCC 441) is that in the matter of appointments to the Supreme Court and the High Courts, the opinion of the Chief Justice of India has primacy. The opinion of the Chief Justice of India is "reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation". It is to be formed "after taking into account the view of some other Judges who are traditionally associated with this function". The opinion of the Chief Justice of India "so given has primacy in the matter of all appointments". For an appointment to be made, it has to be "in conformity with the final opinion of the Chief Justice of India formed in the manner indicated". It must follow that an opinion formed by the Chief Justice of India in any manner other than that indicated has no

A primacy in the matter of appointments to the Supreme Court and the High Courts and the Government is not obliged to act thereon.

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B 29. The majority judgment in the *Second Judges case* requires the Chief Justice of a High Court to consult his two seniormost puisne Judges before recommending a name for appointment to the High Court. In forming his opinion in relation to such appointment, the Chief Justice of India is expected (SCC p. 702, para 478)

C "to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one or more senior Judges of that High Court...."

D The Chief Justice of India should, therefore, form his opinion in regard to a person to be recommended for appointment to a High Court in the same manner as he forms it in regard to a recommendation for appointment to the Supreme Court, that is to say, in consultation with his seniormost puisne Judges. They would in making their decision take into account the opinion of the Chief Justice of the High Court which "would be entitled to the greatest weight", the views of other Judges of the High Court who may have been consulted and the views of colleagues on the Supreme Court Bench "who are conversant with the affairs of the High Court concerned". Into that last category would fall Judges of the Supreme Court who were puisne Judges of the High Court or Chief Justices thereof, and it is of no consequence that the High Court is not their parent High Court and they were transferred there. The objective being to gain reliable information about the proposed appointee, such Supreme Court Judge as may be in a position to give it should be asked to do so. All these views should be expressed in writing and conveyed to the Government of India along with the recommendation.

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30. Having regard to the fact that information about a proposed appointee to a High Court would best come from the Chief Justice and Judges of that High Court and from Supreme Court Judges conversant with it, we are not persuaded to alter the strength of the decision-making collegium's size; where appointments to the High Courts are concerned, it should remain as it is, constituted of the Chief Justice of India and the two seniormost puisne Judges of the Supreme Court.

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32. Judicial review in the case of an appointment or a recommended appointment, to the Supreme Court or a High Court is, therefore, available if the recommendation concerned is not a decision of the Chief Justice of India and his seniormost colleagues, which is constitutionally requisite. They number four in the case of a recommendation for appointment to the Supreme Court and two in the case of a recommendation for appointment to a High Court. Judicial review is also available if, in making the decision, the views of the seniormost Supreme Court Judge who comes from the High Court of the proposed appointee to the Supreme Court have not been taken into account. Similarly, if in connection with an appointment or a recommended appointment to a High Court, the views of the Chief Justice and senior Judges of the High Court, as aforesaid, and of Supreme Court Judges knowledgeable about that High Court have not been sought or considered by the Chief Justice of India and his two seniormost puisne Judges, judicial review is available. Judicial review is also available when the appointee is found to lack eligibility.

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41. We have heard with some dismay the dire apprehensions expressed by some of the counsel appearing before us. We do not share them. We take the optimistic view that successive Chief Justices of India shall

- A henceforth act in accordance with the *Second Judges case* and this opinion.

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- B 44 (8) The Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforestated, in making his recommendations to the Government of India."

1993 (4) SCC 441 Supreme Court Advocates-on-Record Assn. v. Union of India

- C "460. The question of primacy of the role of the Chief Justice of India has to be examined not merely with reference to the fact that an appointment is an executive act, or with reference only to the comparative constitutional status of the different consultees involved in the process, but with reference also to the constitutional purpose sought to be achieved by these provisions, and the manner in which that purpose can be best achieved.

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- E 466. It has to be borne in mind that the principle of non-arbitrariness which is an essential attribute of the rule of law is all pervasive throughout the Constitution; and an adjunct of this principle is the absence of absolute power in one individual in any sphere of constitutional activity. The possibility of intrusion of arbitrariness has to be kept in view, and eschewed, in constitutional interpretation and, therefore, the meaning of the opinion of the Chief Justice of India, in the context of primacy, must be ascertained. A homogenous mixture, which accords with the constitutional purpose and its ethos, indicates that it is the opinion of the judiciary 'symbolised by the view of the Chief Justice of India' which is given greater significance or primacy in the matter of appointments. In other words, the view of the Chief Justice of India is to be expressed in the consultative process as truly reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation. In actual practice, this is how the
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Chief Justice of India does, and is expected to function so that the final opinion expressed by him is not merely his individual opinion, but the collective opinion formed after taking into account the views of some other Judges who are traditionally associated with this function. A

467. In view of the primacy of judiciary in this process, the question next, is of the modality for achieving this purpose. The indication in the constitutional provisions is found from the reference to the office of the Chief Justice of India, which has been named for achieving this object in a pragmatic manner. The opinion of the judiciary 'symbolised by the view of the Chief Justice of India', is to be obtained by consultation with the Chief Justice of India; and it is this opinion which has primacy. B C

468. The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and integrated, to make the system workable in a satisfactory manner. Entrustment of the task of appointment of superior judges to high constitutional functionaries; the greatest significance attached to the view of the Chief Justice of India, who is best equipped to assess the true worth of the candidates for adjudging their suitability; the opinion of the Chief Justice of India being the collective opinion formed after taking into account the views of some of his colleagues; and the executive being permitted to prevent an appointment considered to be unsuitable, for strong reasons disclosed to the Chief Justice of India, provide the best method, in the constitutional scheme, to achieve the constitutional purpose without conferring absolute discretion or veto upon either the judiciary or the executive, much less in any D E F G H

A individual, be it the Chief Justice of India or the Prime Minister.

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B 478(5)- The opinion of the Chief Justice of India, for the purpose of Articles 124(2) and 217(1), so given, has primacy in the matter of all appointments; and no appointment can be made by the President under these provisions to the Supreme Court and the High Courts, unless it is in conformity with the final opinion of the Chief Justice of India, formed in the manner indicated.

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D 482. This is also in accord with the public interest of excluding these appointments and transfers from litigative debate, to avoid any erosion in the credibility of the decisions, and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision. The growing tendency of needless intrusion by strangers and busybodies in the functioning of the judiciary under the garb of public interest litigation, in spite of the caution in *S.P. Gupta* while expanding the concept of *locus standi*, was adverted to recently by a Constitution Bench in *Krishna Swami v. Union of India* (1992 (4) SCC 605). It is, therefore, necessary to spell out clearly the limited scope of judicial review in such matters, to avoid similar situations in future. Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making."

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H 4. Learned counsel for the Union of India on the other hand with reference to Office Memorandum and decisions referred to above submitted that a total number of more than 350

Additional Judges have been appointed as permanent Judges during the period from 1.1.1999 to 31.7.2007 by successive Chief Justice of India who had not consulted the Collegium while considering the cases of appointment of Additional Judges as Permanent Judges of the High Courts although the collegium was consulted at the stage of initial appointment as Additional Judge. It is, therefore, submitted that in view of the practice followed while implementing the memorandum the Government being once satisfied that a suitable candidate was in fact appointed as an Additional Judge of the High Court, elaborate consultations as required for forming the opinion for appointment of an Additional Judge may not have considered necessary while considering the case for appointment as permanent Judge. Additionally, it is submitted that in *Advocates-on-Records Association's* case (supra) in paras 466, 467 and 468 this Court had observed that though some aspects in *S.P. Gupta v. Union of India and Anr.* (1981 (Supp) SCC 87) have the approval of the larger Bench, yet the Executive itself has understood the correct procedure notwithstanding *S.P. Gupta's* case and there is no reason to depart from it when it is in consonance with the concept of the independence of the judiciary. Consequent to the judgment in *Advocates-on-Record Association's* case (supra) the memorandum of procedure was revised vide D.O. No.K-11017/9/93-US.11 dated 9.6.1994. Subsequently, on the basis of the opinion in Special Reference No.1/1998 the revised procedure was prescribed by Reference No.K-110017/13/98-U.S II dated 30.6.1999. Paras 11, 12, 13, 14, 15, 16, 17, 18 and 19 pertain to appointment of permanent Judges. It is therefore submitted that there is no infirmity in the appointment of respondent No.2 as a Permanent Judge.

5. Reliance is placed on certain paragraphs of *S.P. Gupta's* case (supra). They read as follows:

1981 Supp SCC 87 (S.P. Gupta v. Union of India)

“39. It is clear on a plain reading of Article 217, clause (1) that when an Additional Judge is to be appointed, the procedure set out in that article is to be followed. Clause

A (1) of Article 217 provides that "Every Judge" of a High
Court shall be appointed after consultation with the Chief
Justice of India, the Governor of the State and the Chief
Justice of the High Court. The expression "Every Judge"
B must on a plain natural construction include not only a
permanent Judge but also an Additional Judge. It is
significant to note that whenever the Constitution-makers
intended to make a reference to a permanent Judge, they
did so in clear and explicit terms as in clause (2) of Article
224. Moreover, there is inherent evidence in Article 217,
C clause (1) itself which shows that the expression "Every
Judge" is intended to take in an Additional Judge as well.
Clause (1) of Article 217 says that: "Every Judge ... shall
hold office, in the case of an Additional Judge . . . as
provided in Article 224. . .", which clearly suggests that the
D case of an Additional Judge is covered by the opening
words "Every Judge". We may also consider what would
be the consequence of construing the words "Every
Judge" as meaning only a permanent Judge. On that
construction, clause (1) of Article 217 will not apply in
relation to appointment of an Additional Judge and it would
E be open to the Central Government under Article 224,
clause (1) to appoint an Additional Judge without
consulting any of the constitutional functionaries specified
in clause (1) of Article 217. This could never have been
intended by the Constitution-makers, who made such
F elaborate provisions in the Constitution for safeguarding
the independence of the judiciary. We must therefore, hold
that no Additional Judge can be appointed without
complying with the requirement of clause (1) of Article 217.

G 40. Now, when the term of an Additional Judge expires he
ceases to be a Judge and therefore, if he is to continue
as a Judge, he must be either reappointed as an
Additional Judge or appointed as a permanent Judge. In
either case, clause (1) of Article 217 would operate and
no reappointment as an Additional Judge or appointment
as a permanent Judge can be made without going through
H the procedure set out in Article 217, clause (1). Of course,

an Additional Judge has a right to be considered for such A
reappointment or appointment, as the case may be, and
the Central Government cannot be heard to say that the
Additional Judge need not be considered. The Additional
Judge cannot just be dropped without consideration. The B
name of the Additional Judge would have to go through
the procedure of clause (1) of Article 217 and after
consultation with the Chief Justice of India, the Governor
of the State and the Chief Justice of the High Court, the
Central Government would have to decide whether or not
to reappoint him as an Additional Judge or to appoint him C
as a permanent Judge. If the procedure for appointment
of a Judge followed as a result of a practice memorandum
issued by the Central Government is that the proposal for
appointment of a Judge may ordinarily originate from the
Chief Justice of the High Court and may then be sent to D
the Governor of the State and thereafter to the Chief
Justice of India through the Justice Ministry for their
respective opinions before a decision can be taken by the
Central Government whether or not to appoint the person
proposed the name of the Additional Judge must be sent E
up by the Chief Justice of the High Court with his
recommendation whether he should be reappointed as an
Additional Judge or appointed as a permanent Judge or
not and it must go up to the Central Government with the
opinions of the Chief Justice of India, the Governor of the
State and the Chief Justice of the High Court, so that the F
Central Government may, after considering such opinions,
make up its mind on the question of reappointment or
appointment as the case may be. But this is the only right
possessed by the Additional Judge. The Additional Judge
is not entitled to contend that he must automatically and G
without any further consideration be appointed as an
Additional Judge for a further term or as a permanent
Judge. He has to go through the process of clause (1) of
Article 217 and to concede to him the right to be appointed
either as an Additional Judge for a further term or as a
permanent Judge would be to fly in the face of Article 217, H

A clause (1). If the Additional Judge is entitled to be
appointed without anything more, why should the process
of consultation be gone through in regard to his
B appointment? Would consultation with the Chief Justice of
India, the Governor of the State and the Chief Justice of
the High Court not be reduced to a farce? It would be a
mockery of consultation with such high constitutional
dignitaries. There can, therefore, be no doubt that an
Additional Judge is not entitled as a matter of right to be
appointed as an Additional Judge for a further term on the
C expiration of his original term or as a permanent Judge.
The only right he has is to be considered for such
appointment and this right also belongs to him not
because clause (1) of Article 224 confers such right upon
him, but because of the peculiar manner in which clause
(1) of Article 224 has been operated all these years.

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88.....It would have been most improper for the Chief
Justice of Delhi to ask the Central Government to
investigate into complaints or doubts against a sitting
Judge of his Court. This Court has in unhesitating terms
E condemned the adoption of such a course by the High
Court in the case of subordinate judiciary and much more
so would it be reprehensible in the case of sitting Judge
of a High Court. Moreover, leaving the investigation of
complaints and doubts against a sitting Judge in the hands
F of an investigative agency under the control of a political
Government would not be desirable because, apart from
exposing the sitting Judge to unhealthy political pressures,
it may not yield satisfactory result in all cases, because
such an investigation would not have the benefit of the
G guidance of a mature and experienced person like the
Chief Justice who has lived a whole lifetime in the courts
and who is closely and intimately connected with lawyers
and Judges in the court over which he presides. It would
indeed be impossible for any one unfamiliar with the legal
H profession and the functioning of the courts to Judge the

genuineness or veracity of the sources from which A
information might be obtained in regard to a sitting Judge.
It must, therefore, necessarily be left to the Chief Justice
of the High Court to give his opinion in regard to the
suitability of an Additional Judge for further appointment B
on the basis of such information as he may gather by
making his own inquiries. The Chief Justice of the High
Court would have sufficient opportunities for judging the
suitability of an Additional Judge for further appointment,
because the Additional Judge would be working with him
in the same court and he would be in close contact with C
the members of the Bar and his own colleagues and if
there is anything wrong with the functioning of the court or
the Judges, he would be best in a position to know about
it. If an Additional Judge does not enjoy good reputation
for integrity, the Chief Justice of the High Court would
ordinarily come to know about it. Of course, the possibility D
cannot be ruled out that the information received by the
Chief Justice of the High Court may at times be motivated
or prejudiced, because the Additional Judge has offended
some member of the Bar or decided some case against
a litigant. These occupational hazards which beset the life E
of an Additional Judge – in fact, even of a permanent
Judge whether in the High Court or in the Supreme Court
have unfortunately increased in recent times, because there
has been a steady erosion of values and not only some
interested politicians but also a few – and fortunately their F
tribe is still small – lawyers and members of the public are
prone to make wild and reckless allegations against
Judges and impute motives for the decisions given by
them. It is not realised by many that very often the
judgments given by the High Courts and the Supreme G
Court are value judgments, because there are conflicting
values competing for recognition by the Judge and the
choice made by the Judge is largely dictated by his social
philosophy and it is not possible to emphatically assert that
a particular view taken by one Judge is wrong and a
different view taken by another Judge is right. The nature H

A of the judicial process being what it is, it is inevitable that
the view taken by a Judge, perfectly bona fide though it
B may be, may not accord with the expectations of a section
or group of persons believing in a particular social or
political philosophy, but that cannot be a ground affording
justification for making imputation against the Judge or
C accusing him of lack of *bona fides* or charging him with
surrender or subservience to the executive or to any other
interest. Those who indulge in such personal attacks
against Judges for the decisions given by them do not
realise what incalculable damage they are doing to the
judicial institution by destroying the confidence of the public
D in the integrity and inviolability of administration of justice.
Unfortunately, it is the easiest thing to make false, reckless
and irresponsible allegations against Judges in regard to
their honesty and integrity and in recent times the tendency
has grown to make such allegations against Judges
E because they have decided the case in a particular
manner either against a dissatisfied litigant or contrary to
the view held by a group or section of politicians or lawyers
or members of the public. The Judge against whom such
allegations are made is defenceless because, having
F regard to the peculiar nature of the office held by him, he
cannot enter the arena of conflict and raise or join a public
controversy. This pernicious tendency of attributing
motives to Judges has to be curbed, if the judicial
G institution is to survive as an effective instrument for
maintenance of the rule of law in the country and this can
happen only if politicians, lawyers and members of the
public accept the judgments rendered by the Judges as
H bona fide expressions of their views and do not impute
motives to Judges for the judgments given by them, even
though they be adverse to the views held by them. But
unfortunately, the situation being what it is, we must
emphasise with all the strength and earnestness at our
command that the Chief Justice of the High Court should
exercise the greatest care and circumspection in judging
the veracity of the information which he may receive from

time to time in regard to the conduct or behaviour or integrity of an Additional Judge of his court. The Constitution has entrusted to him the task of giving his opinion in regard to the suitability of an Additional Judge for further appointment and on the basis of the information received by him or gathered as a result of inquiries made by him, he has to decide wisely and with responsibility whether or not he should recommend the appointment of an Additional Judge for a further term.

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102. ...There are occasions when persons holding high constitutional offices are called upon to perform an unpleasant duty and this duty they have to perform, whatever be the consequences. If necessary, let the heavens fall but what is right and just shall be done without fear or favour, affection or goodwill. Long years ago that great common law Judge, Lord Mansfield spoke of the judicial office in majestic tones and said:

"I will not do that which my conscience tells me is wrong, upon his occasion; to gain the huzzas of thousands, or the daily praise of all the papers which come from the Press; I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow.... Once for all, let it be understood, that no endeavours of this kind will influence any man who at present sits here."

What the learned Chief Justice said in regard to judicial function must apply with equal validity where a Judge is called upon to discharge any other function entrusted to him by the Constitution and he must boldly and fearlessly do that which Constitution commands. But merely because the Chief Justice of Delhi flinched and faltered out of a sense of apprehension that the Chief Justice of India might feel offended by his writing the letter dated May 7, 1981, it does not follow that the facts set out in that letter were not

A personally discussed by him with the Chief Justice of India
at the meeting held on March 26, 1981. We are clearly of
the view that the "full and identical facts" on which the
decision of the Central Government was based were
placed before the Chief Justice of India and there was full
B and effective consultation with him before the Central
Government reached the decision that S.N. Kumar should
not be continued as an Additional Judge. We may also
point out that this decision of the Central Government was
not based on any irrelevant considerations, since, as we
C have already pointed out earlier, lack of reputation for
integrity is certainly a most relevant consideration in
deciding whether a person should be appointed a Judge.

103. We may make it clear that in taking this view we do
not for a moment wish to suggest that S.N. Kumar was
lacking in integrity. That is not a matter into which we are
D called upon to enquire and nothing that is stated by us
should be regarded as expression of any opinion on this
question. We may observe in fairness to S.N. Kumar that
the Chief Justice of India clearly stated it to be his opinion
that the integrity of S.N. Kumar was unquestionable. What
E happened here was that there were two conflicting opinions
given by the two constitutional authorities required to be
consulted, namely, the Chief Justice of Delhi and the Chief
Justice of India. Both were perfectly bona fide opinions
and the Central Government had to choose between them
F and come to its own decision. The Central Government
preferred the opinion of the Chief Justice of Delhi for the
reasons mentioned in the note of the Law Minister dated
May 27, 1981 and decided not to appoint S.N. Kumar as
an Additional Judge for a further term. We do not think this
decision suffers from any constitutional infirmity."

G 6. It is the further stand of the Union of India that on true
interpretation of Article 224(1) of the Constitution it can be said
that Additional Judges are not intended to be re-appointed out
of turn. Reliance is placed on the observations to that effect
H made by Bhagwati, J (as the Hon'ble Judge then was) in *S.P.*

Gupta's case (supra). It is submitted that on expiry of the term as an Additional Judge, he or she is entitled to be considered for appointment as a Permanent Judge. But in either case the procedure under Article 217(1) of the Constitution has to be repeated. An additional Judge who had worked for a period of his tenure has a weightage in his favour compared to a fresh appointee and any process of appointment while filling in a vacancy must commence with an Additional Judge whose tenure has come to an end and has led to the vacancy. Pathak, J (as the Hon'ble Judge then was) had expressed similar opinion by observing that in following the procedure of Article 217(1) while appointing an Additional Judge as a Permanent Judge there would be reduced emphasis with which the consideration would be exercised though the process involves the consideration of all the concomitant elements and factors which entered into the process of consultation at the time of appointment earlier as an additional Judge. The position was succinctly stated by observing that there is a presumption that a person found suitable for appointment as an Additional Judge continues to be suitable for appointment as a Permanent Judge, except when circumstances or events arise which bear adversely on the mental and physical capacity, character and integrity or other matters rendering it unwise to appoint him as a permanent Judge. There must be relevant and pertinent material to sufficiently convince a reasonable mind that the person is no longer suitable to fill the high office of a Judge and has forfeited his right to be considered for appointment. Venkataramaiah, J (as the Hon'ble Judge then was) observed that a Judge appointed under Article 224 (1) of the Constitution had a well founded expectation that he would be made permanent. The test which applied to the appointment of an Additional Judge under Article 217(1) would apply when an Additional Judge is to be appointed as a permanent Judge.

7. Before dealing with the case of respondent No.2, the memorandum of procedure needs to be extracted so far as relevant. Paragraphs 11 to 18 and 20 read as follows:

"11. The Chief Justice and Judges of High Courts are to

A be appointed by the President under Clause (1) of the
Article 217 of the Constitution. The Judges of the Jammu
and Kashmir High Court are to be appointed by the
President under Section 95 of the Constitution of Jammu
and Kashmir. Appointments to the High Court should be
B made on a time bound schedule so that the appointments
are made well in advance preferably a month before the
occurrence of the anticipated vacancy.

12. When a permanent vacancy is expected to arise in any
year in the office of a Judge, the Chief Justice will as early
as possible but at least 6 months before the date of
C occurrence of the vacancy, communicate to the Chief
Minister of the State his views as to the persons to be
selected for appointment. Full details of the persons
recommended, in the format given in Annexure-1 should
invariably be sent. Before forwarding the recommendation,
D the Chief Justice must consult two of his senior most
colleagues on the Bench regarding the suitability of the
names proposed. All consultation must be in writing and
these opinions must be sent to the Chief Minister along
with the recommendations.

E 13. The Chief Justice while sending the recommendation
for appointing an additional Judge as a permanent Judge
must along with his recommendation furnish statistics of
month wise disposal of cases and judgments rendered by
the Judge concerned as well as the number of cases
F reported in the Law Journal duly certified by him. The
information would also be furnished regarding the total
number of working days, the number of days he actually
attended the Court and the days of his absence from the
Court during the period for which the disposal statistics are
sent.

G 14. The proposal for appointment of a Judge of a High
Court shall be initiated by the Chief Justice of the High
Court. However, if the Chief Minister desires to recommend
the name of any person he should forward the same to the
H Chief Justice for his consideration. Since the Governor is

bound by the advice of the Chief Minister heading the Council of Ministers, a copy of the Chief Justice's proposal, with full set of papers should simultaneously be sent to the Governor to avoid delay. Similarly, a copy thereof may also be endorsed to the Chief Justice of India and the Union Minister of Law, Justice and Company Affairs to expedite consideration. The Governor as advised by the Chief Minister should forward his recommendation along with the entire set of papers to the Union Minister of Law, Justice and Company Affairs as early as possible but not later than six weeks from the date of receipt of the proposal from the Chief Justice of the High Court. If the comments are not received within the said time frame, it should be presumed by the Union Minister of Law, Justice and Company Affairs that the Governor (i.e. Chief Minister) has nothing to add to the proposal and proceed accordingly.

15. The Union Minister of Law, Justice and Company Affairs would consider the recommendations in the light of such other reports as may be available to the Government in respect of the names under consideration. The complete material would then be forwarded to the Chief Justice of India for his advice. The Chief Justice of India would in consultation with the two senior most judges of the Supreme Court form his opinion in regard to a person to be recommended for appointment to the High Court. The Chief Justice of India and the collegium of two Judges of the Supreme Court would take into account the views of the Chief Justice of the High Court and of those Judges of the High Court who have been consulted by the Chief Justice as well as views of those Judges in the Supreme Court who are conversant with the affairs of that High Court. It is of no consequence whether that High Court is their parent High Court or they have functioned in that High Court on transfer.

15.1. After their consultation the Chief Justice of India will in course of 4 weeks send his recommendation to the Union Minister of Law, Justice and Company Affairs.

A Consultation by the Chief Justice of India with his
colleagues should be in writing and all such exchange of
correspondence with his colleagues would be sent by the
Chief Justice of India to the Union Minister of Law, Justice
and Company Affairs. Once the names have been
B considered and recommended by the Chief Justice of
India they should not be referred back to the State
constitutional authorities even if a change takes place in
the incumbency of any post. However, where it is
C considered expedient to refer back the names, the opinion
of Chief Justice of India should be obtained. The Union
Minister of Law, Justice and Company Affairs would then
put up as early as possible preferably within 3 weeks the
recommendation of the Chief Justice of India to the Prime
Minister who will advise the President in the matter of
appointment.

D 16. The correspondence between the Chief Justice and
the Chief Minister and the correspondence between the
Chief Minister and the Governor, if any should be in writing
and copies of the correspondence should invariably be
forwarded along with the Chief Minister's
E recommendations.

17. As soon as the appointment is approved by the
President the Secretary to the Government of India in the
Department of Justice will inform the Chief Justice of the
High Court who will obtain from the person selected (i) a
F certificate of physical fitness as in Annexure II signed by a
Civil Surgeon or District Medical Officer and, (ii) a
certificate of date of birth as in Annexure III. A copy of the
communication will also be sent simultaneously to the Chief
Minister of the State. The medical certificate should be
G obtained from all persons selected for appointment
whether they are at the time of appointment in the service
of the State or not. When these documents are obtained
the Chief Justice will intimate the fact to the Secretary to
the Government of India in the Department of Justice and
H also forward these documents to him.

18. As soon as the warrant of appointment is signed by the President the Secretary to the Government of India in the Department of Justice will inform the Chief Justice and a copy of such communication will be sent to the Chief Minister. He will also announce the appointment and issue necessary notification in the Gazette of India.

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20. Additional Judges can be appointed by the President under Clause (1) of Article 224 of the Constitution. When the need for this arises, the State Government should first obtain the sanction of the Central Government for the creation of such additional posts. The correspondence relating to this should be in the normal official form. After the post is sanctioned the procedure to be followed for making the appointment will be the same as given in paragraph 12 to 18 for the appointment of a permanent Judge, except that a medical certificate will not be necessary from the person being appointed as an Additional Judge."

8. So far as the scope of judicial review in such matters is concerned, it is extremely limited and is permitted to the extent indicated in para 482 of the *Supreme Court Advocates-on-Record* case (supra).

9. Essentially the decision in this case would depend upon the combined reading of paras 12 and 13.

10. It is to be noted that an Additional Judge cannot be said to be on probation for the purpose of appointment as a Permanent Judge. This position is clear from the fact that when an Additional Judge is appointed there may not be vacancy for a Permanent Judge. The moment a vacancy arises, the Chief Justice of the concerned High Court is required to send a proposal for appointment of the Additional Judge as a Permanent Judge along with material as indicated in para 13. The rigor of the scrutiny and the process of selection initially as an Additional Judge and a Permanent Judge are not different. The yardsticks are the same. Whether a person is

- A appointed as an Additional Judge or a Permanent Judge on the same date, he has to satisfy the high standards expected to be maintained as a Judge. Additionally, on being made permanent, the effect of such permanency relates back to the date of initial appointment as an Additional Judge. The parameters of paragraph 12 of the memorandum cannot be transported in its entirety to paragraph 13. To begin with, while making the recommendations for appointment of an Additional Judge as a permanent Judge, Chief Justice of the High Court is not required to consult the collegium of the High Court. Additionally, there is no requirement of enquiry by the Intelligence Bureau. The Chief Justice while sending his recommendation has to furnish statistics of month-wise disposal of cases and judgments rendered by a Judge concerned as well as the number of cases reported in the Law Journals duly certified by him. Further information required to be furnished regarding the total number of working days, the number of days the concerned Judge attended the Court and the days of his absence from Court during the period for which the disposal statistics are sent. It is also clear from para 15 that at the stage of appointment of either as an Additional Judge or a Permanent Judge, the Union Minister of Law, Justice and Company Affairs is required to consider the recommendation in the light of such other reports as may be available to the Government in respect of the names under consideration. The complete material would then be forwarded to the Chief Justice of India for his advice. This procedure is not required to be followed when an Additional Judge is appointed as a Permanent Judge. Further, the consultation with members of the Collegium and other Judges, as noted above, is not expressly provided in para 13. The details which are required to be given in the format in Annexure I in para 12 are not required to be given in a case relatable to para 13.

11. As rightly submitted by learned counsel for the Union of India unless the circumstances or events arise subsequent to the appointment as an Additional Judge, which bear adversely on the mental and physical capacity, character and integrity or other matters the appointment as a permanent

Judge has to be considered in the background of what has been stated in *S.P. Gupta's* case (supra). Though there is no right of automatic extension or appointment as a permanent Judge, the same has to be decided on the touchstone of fitness and suitability (physical, intellectual and moral). The weightage required to be given cannot be lost sight of. As Justice Pathak J, had succinctly put it there would be reduced emphasis with which the consideration would be exercised though the process involves the consideration of all the concomitant elements and factors which entered into the process of consultation at the time of appointment earlier as an additional Judge. The concept of plurality and the limited scope of judicial review because a number of constitutional functionaries are involved, are certainly important factors. But where the constitutional functionaries have already expressed their opinion regarding the suitability of the person as an Additional Judge, according to us, the parameters as stated in para 13 have to be considered differently from the parameters of para 12. The primacy in the case of the Chief Justice of India was shifted because of the safeguards of plurality. But that is not the only factor. There are certain other factors which would render the exercise suggested by the petitioners impracticable. Having regard to the fact that there is already a full fledged participative consultation in the backdrop of pluralistic view at the time of initial appointment as Additional Judge or Permanent Judge, repetition of the same process does not appear to be the intention.

12. It is not in dispute that Union of India is the ultimate authority to approve the recommendation for appointment as a Judge. The Central Government, as noted above, has stated that in view of the practice followed in implementing the memorandum, once the Government on being satisfied that a suitable candidate who was earlier appointed as an Additional Judge is suitable for appointment as a permanent Judge, the elaborate consultation has not been considered necessary. It is of significance to note that some of the Hon'ble Judges who were parties to the judgments relied on by the petitioners while

- A functioning as a Chief Justice of India have not thought it necessary to consult the Collegium as is evident from the fact that from 1.1.1999 to 31.7.2007 in more than 350 cases the Collegium was not consulted. It means that they were also of the view that the practice/procedure was being followed rightly.
- B Therefore, the plea that without consultation with the Collegium, the opinion of the Chief Justice of India is not legal, cannot be sustained.

13. But at the same time we find considerable substance in the plea of the petitioners that a person who is not found suitable for being appointed as a permanent Judge, should not be given extension as an Additional Judge unless the same is occasioned because of non availability of the vacancy. If a person, as rightly contended by the petitioners, is unsuitable to be considered for appointment as a permanent Judge because of circumstances and events which bear adversely on the mental and physical capacity, character and integrity or other relevant matters rendering it unwise for appointing him as a permanent Judge, same yardstick has to be followed while considering whether any extension is to be given to him as an Additional Judge. A person who is functioning as an Additional
- E Judge cannot be considered in such circumstances for re-appointment as an Additional Judge. If the factors which render him unsuitable for appointment as a permanent Judge exist, it would not only be improper but also undesirable to continue him as an Additional Judge.

- F 14. Coming to the factual scenario it appears that eight Additional Judges including respondent No.2 were appointed on 3.4.2003 and respondent No.2 was second in the order of seniority. On 1.4.2005 the term of the aforesaid Additional Judges was extended for a period of four months. On
- G 27.7.2005, seven of the eight Additional Judges (except respondent No.2) were appointed as permanent Judges and the term of respondent No.2 was extended by one year w.e.f. 3.8.2005. Again on 3.8.2006 the term of respondent No.2 was extended for a period of six months. The aforesaid scenario
- H according to the petitioners shows that respondent No.2 was

found to be unsuitable to be appointed as a permanent Judge. A
It is emphasized that all the three members of the collegium
including the then Chief Justice of India opposed the
appointment of respondent No.2 as a permanent Judge. A
grievance is made that for the reasons best known, all the 8
Judges were appointed as Additional Judges, with a view to
draw smokescreen over the factual scenario. After the expiry
of the four months period, 7 Additional Judges were made
permanent and not respondent No.2. A plea is taken that when
he was not found suitable to be made as a permanent Judge,
why his tenure as an Additional Judge was extended, and that
too, for a period of one year? Again, his term was extended
for a period of 6 months. Such extensions for short periods
obviously, according to the petitioners, were intended to
continue him as a Judge notwithstanding his unsuitability to be
appointed as a permanent Judge. But the belated challenge
as has been done in the present writ petition to such extensions
cannot put the clock back. The position is almost undisputed
that on 17.3.2005 the then Chief Justice of India recommended
for extension of term of 8 out of 9 persons named as additional
Judges for a further period of four months w.e.f. 3rd April, 2005.
On 29.4.2005 the collegium including the then Chief Justice of
India was of the view that name of respondent No.2 cannot be
recommended alongwith another Judge for confirmation as
permanent Judge. Since it is crystal clear that the Judges are
not concerned with any political angle if there be any in the
matter of appointment as Additional Judge or Permanent
Judge; the then Chief Justice should have stuck to the view
expressed by the collegium and should not have been swayed
by the views of the government to recommend extension of the
term of respondent No.2 for one year; as it amounts to
surrender of primacy by jugglery of words.

15. Again on 3.8.2006, the then Chief Justice of India who
was earlier of the view about unsuitability of respondent No.2,
alongwith his senior colleagues, extended the term for six
months on the ground that the time was inadequate to obtain
views of then Chief Justice of the Madras High Court. It is to
be noted that at different points of time, starting from the point

A of initial appointment, the successive Chief Justices have recommended for respondent No.2 to be made permanent. That situation continued till 3.2.2007 when the recommendation of the then Chief Justice of the Madras High Court for appointing respondent No.2 as a permanent Judge was accepted. The grievance of the petitioners as noted above is that collegium was not consulted. We have dealt with the legal position so far as this plea is concerned in detail above. Before the Chief Justice of India, at the time of accepting the recommendation for respondent No.2 being made permanent, the details required to be furnished in terms of para 13 of the memorandum were there. There was also the recommendation of the then Chief Justice of Madras High Court who re-iterated the view of his predecessor in this regard.

16. The matter can be looked at from another angle. Supposing instead of accepting the recommendation for appointment as a permanent Judge, the Chief Justice of India would have extended the period of Additional Judgeship for two years which is maximum time permissible, there would not have been any requirement for taking the views of the collegium (as contended by the petitioners) and the result ultimately would have been the same i.e. respondent No.2 would have continued as a Judge. It is to be noted that he is due to retire on 9.7.2009. As noted above, at various points of time, when the term of appointment as an Additional Judge of respondent No.2 was extended, there was no challenge. The situation prevailed for more than two years. As noted above, the clock cannot be put back.

17. In the peculiar circumstances of the case, we are not inclined to accept the prayer of the petitioners. But as indicated above, we have no hesitation in saying that a person who is not suitable to be appointed as a permanent Judge on the ground of unsuitability due to adverse factors on account of mental and physical capacity, adverse materials relating to character and integrity and other relevant matters, which are so paramount and sacrosanct for the functioning as a Judge, should not be continued as an Additional Judge. Even when

an additional Judge is appointed as a permanent Judge, he A
does not become immune from action, if circumstances so
warrant. Whenever materials are brought to the notice of the
Chief Justice of India about lack of mental and physical capacity,
character and integrity, it is for him to adopt such modalities B
which according to him would be relevant for taking a decision
in the matter.

18. So far as respondent No.2 is concerned, it appears
that he has been transferred to some other High Court in public
interest. If, it comes to the notice of the Hon'ble Chief Justice
of India that action needs to be taken in respect of him for any C
aberration while functioning as a Judge, it goes without saying
appropriate action as deemed proper shall be taken.

19. Before saying "omega" it needs to be emphasized
what Shakespeare wrote in Othello (Act III, Scene 3, 155)

"Good name in man and woman, dear my lord, D
Is the immediate jewel of their souls.
Who steals my purse steals trash; 'tis something, nothing;
'T was mine, 'tis his, and has been slave to thousands:
But he that filches from me my good name E
Robs me of that which not enriches him
And makes me poor indeed."

Again in "Richard II", Act I, Sc. 1 said Shakespeare wrote:

"The purest treasure moral times afford F
Is spotless reputation; that away,
Men are but gilded loam or painted clay."

20. The writ petition is disposed of accordingly.

K.K.T.

Writ Petition disposed of.