

# MADHYA PRADESH HIGH COURT

Girja Shankar Shukla

Vs.

Sub-Divisional Officer

Misc. Petn. No. 418 of 1971  
(R.J. Bhave, S.M.N. Raina and J.S. Verma, JJ.)

22.01.1973

## JUDGMENT

**Verma, J.**

1. This whole case has been referred to this Full Bench for decision in view of the fact that on the main question for decision herein, there appears to be a conflict between two Division Bench decisions of this Court. The correctness of the construction made of the expression 'current charge of the duties of a post' by a Division Bench of this Court in *Ramratan v. State of M. P.*, <sup>1</sup> was doubted by another Division Bench in *State of M. P. v. Gokul Prasad*, <sup>2</sup> Hence this reference.

2. The petitioner, as a voter, has challenged the election of respondent No. 2 as President and of respondents Nos. 3 and 4 as Vice-Presidents of the Municipal Council, Itarsi, at a meeting held for the purpose on 10-7-1971. This council was constituted after the general elections in April 1969 and the impugned elections were for these offices after expiry of the terms of their first incumbents. The notice (Annexure 'G') convening the meeting held on 10-7-1971 was issued by Sri Anand Mohan, Collector of the district. However, Sri Anand Mohan having proceeded on leave was absent on 10-7-1971 and the meeting was presided over by Sri Arun Kumar Kshetrapal, Sub-Divisional Officer, Harda, who was also placed in current charge of the duties of Collector during that period by an order of the State Government.

3. The respondent No. 2 is a lawyer and was engaged by the Municipal Council to appear on its behalf as a counsel in some class of cases. However, prior to his contesting the election he had intimated the council on 8-7-1971 that he would thereafter not appear as a counsel for the Municipal Council.

4. Sri K. P. Munshi, learned counsel for the petitioner has made two submissions. Firstly, he contends that the meeting of 10-7-1971 should have been presided over by the Collector and since it was actually presided over by the Sub-Divisional Officer, there were no valid elections held to these offices. Secondly, he urges that the respondent No. 2, being a standing counsel of the Municipal Council, held an office of profit under the council and as such was disqualified by virtue of clause (c) of Section 35 of the Madhya Pradesh Municipalities Act, 1961 (hereafter called the Act).

5. I shall first deal with the second ground before I take up the first one which is actually the main ground urged by the petitioner.

6. In order to incur the disqualification specified in clause (c) of Section 35 of the Act it is necessary that the person 'holds any office of profit under the council .....'. It is clear that there must be first an office under the council and then profit attached to it. Sri Munshi could not show us any provision in the Act which even contemplates the so-called office of standing counsel. It is difficult to visualize an office under the council for which there is no foundation in the Act. A statutory body like the council cannot create an office for which the statute does not provide. It is significant to notice that clause (m) of Section 35 of the Act provides disqualification in case of a Government Pleader. If the legislature intended to disqualify a lawyer engaged by the council, there is no reason why a specific provision to that effect would not be made as in the case of Government Pleader.

7. The respondent No. 2 had terminated his engagement as a lawyer for the Municipal Council on 8-7-1971. As such, whatever relationship was created earlier between him and the council ended on 8-7-1971, prior to his candidature in the election. For this reason alone there could be no disqualification incurred by respondent No. 2 on 10-7-1971 when he became a candidate for the office of President of the council. Even otherwise, I am of the view that a lawyer engaged by the Municipal Council does not hold an office of profit under the Council and does not suffer from the disqualification provided in clause (c) of Section 35 of the Act.

8. I now come to the main question for decision in the case, which has been argued with great vehemence from both sides. I will first state a few more facts which are necessary in this connection.

9. The appointment of Sub-Divisional Officer, Harda placing him in the current charge of duties of Collector, Hoshangabad, as notified in the Gazette was as follows :-

While so functioning, Sri Arun Kumar Kshetrapal presided over the meeting held on 10-7-1971 at which respondent No. 2 was elected President and respondents Nos. 3 and 4 were elected Vice-Presidents of the Council. This election was, according to Section 43 (2) (b) of the Act, for the unexpired term of the council. By virtue of clause (c) of sub-section (2) of Section 43 it is the provisions of sub-sections (2) and (3) of Section 55 of the Act which applied to the meeting as they apply to the first meeting. This council being of Class II, it was the Collector who had to call the meeting according to sub-section (2) of Section 55 and also to preside over it according to sub-section (3) thereof. Admittedly, the meeting was called by Sri Anand Mohan who was then the Collector, and no non-compliance of sub-section (2) of Section 55 is alleged. Thus, the only question is whether there was proper compliance of sub-section (3) of Section 55 of the Act.

10. It is in this context that the controversy arises with respect to the meaning attached to the expression 'current charge of the duties of a post'. I shall first examine the decisions which have occasioned this reference.

11. In Ramratan's case, 1964 MPLJ 86 : AIR 1964 Madhya Pradesh 114 (supra) the question for decision was whether the order of dismissal, passed by the Deputy Inspector-General of Police who had been appointed to be in charge of the current duties of the office of the Inspector-General of Police in addition to his own, was valid. The competent authority to pass such an order was the Inspector-General of Police. The question for determination in that case was formulated by Pandey, J., who delivered the judgment of the Division Bench, as follows :-

'The crucial question is whether a subordinate authority, who is not formally appointed to the post of the appointing authority either permanently or in an officiating capacity, can be validly appointed to exercise his powers of dismissal in view of the inhibition contained in Article 311 (1) of the Constitution.'

The judgment further proceeds as follows :-

"..... These authorities clearly lay down that a protection like the one given by Article 311 (1) cannot be taken away even by rules framed either under Article 309 or under any relevant statute. The reason is that, by such rules, the subordinate authority is entrusted with the functions of the appointing authority without giving him the rank of that authority. In clause (1) of Article 311, the word 'subordinate' has reference to the rank and not functions..... In the instant case, Sri I. J. Johar was appointed and authorised to perform the current duties of the Inspector-General of Police without being clothed with his rank. That being so, the impugned order of dismissal, which he purported to pass in disregard of Article 311 (2), is bad and inoperative."

(All underlining is by me).

It was also pointed out in the judgment that there is a difference between a person who is appointed to officiate on a higher post and a person who is appointed to be in charge of the current duties of that post in addition to his own.

12. Thus, in Ramratan's case, 1964 MPLJ 86 : AIR 1964 Madhya Pradesh 114 the distinction between the higher rank and functions of the higher rank was clearly pointed out and kept in view. In that case it was also clearly stated that holding the rank of appointing authority was necessary for the purpose of Article 311 (1) of the Constitution. Since it could not be said that the Deputy Inspector-General of Police was clothed with the rank of Inspector-General of Police, which was decisive of the question in that case, the impugned order was quashed. In that judgment as a whole the emphasis throughout is on rank, in view of the Constitutional guarantee contained in clause (1) of Article 311.

13. In my view, there is nothing in Ramratan's case, 1964 MPLJ 86 : AIR 1964 Madhya Pradesh 114 which is of doubtful authority. That view was taken on the basis of certain Privy Council decisions mentioned therein, which continue to be good law. Moreover, as I shall presently show, the view expressed therein finds support from later decisions of the Supreme Court, at least indirectly.

14. In *Ajaib Singh v. Gurbachan Singh*,<sup>3</sup> an order of detention passed under Rule 30 (1) (b) of the Defence of India Rules, 1962, was challenged. That order was passed by Sri Lall Singh as District Magistrate of Amritsar. At that time Sri Lall Singh was the Additional District Magistrate of Amritsar and had been, inter alia, invested under

Section 10 (2) of the Code of Criminal Procedure with all the powers of a District Magistrate under the Code or under any other law for the time being in force. Further, when order of transfer of Sri Bhalla, the District Magistrate, was made, instructions were issued that Sri Bhalla should hand over charge to Sri Lall Singh, who would hold the current charge of the post of District Magistrate, Amritsar, till further orders. No order was passed under Section 10 (1) of the Code appointing either Sri Lall Singh or any other officer as District Magistrate of Amritsar. The impugned order of detention was passed by Sri Lall Singh while he was so functioning. In order to support the order of detention it was contended on behalf of the State that as Sri Lall Singh was holding charge of the current duties of the office of District Magistrate and as no one else had been posted to that office, he was in fact and in law the District Magistrate. While rejecting this contention, their Lordships of the Supreme Court held as follows :-

".....As Section 3 (2) (15) of the Act provides that the power of detention cannot be exercised by any officer below the rank of the District Magistrate, such power cannot be exercised by an Additional District Magistrate who is in our opinion an officer below the rank of a District Magistrate. The order of detention passed by Sri Lall Singh on June 30, 1964 when he was not the District Magistrate of Amritsar but only an Additional District Magistrate is not in accordance with the Act and the rules and must be set aside." This conclusion was reached by their Lordships in view of the prohibition contained in Section 3 (2) (15) of the Defence of India Act, 1962, which clearly provided that the authority to detain could not be lower in rank than that of a District Magistrate. This was so, notwithstanding the fact that Sri Lall Singh as Additional District Magistrate was entrusted under Section 10 (2) of the Code of Criminal Procedure with all the powers under the Code and also under any other law for the time being in force; and by virtue of Section 11 of the Code he was entitled to exercise the powers of the District Magistrate during the temporary vacancy occasioned by the transfer of Sri Bhalla. This case clearly lays down that where the holding of a particular rank is necessary to confer authority under the enabling provision, that power can be exercised only by the holder of that rank and none else.

15. Another decision of the Supreme Court is *Hari Chand v. Batala Engineering Co.*,<sup>4</sup> There a requisitioning order passed under Section 29 of the Defence of India Act,

1962, by the Additional District Magistrate was challenged on the ground that District Magistrate alone was empowered to pass such an order and he did not hold the rank of District Magistrate. In that case also the Additional District Magistrate was empowered under Section 10 (2) of the Code of Criminal Procedure to exercise the powers of a District Magistrate. One distinction between that case and Ajaib Singh's case, AIR 1965 Supreme Court 1619 was that there was no express prohibition against delegation to an officer below the rank of District Magistrate. However, in both the cases, the authority primarily was the Government but delegation was permitted to certain specified authorities only, one of whom was District Magistrate. Their Lordships reaffirmed the view taken in Ajaib Singh's case and quashed the order of requisition. It was held as follows :-

".....One rule, however, emerges quite clearly which is even otherwise unexceptionable that unless a person has been appointed under Section 10 (1) of the Code he cannot be called a District Magistrate and that an Additional District Magistrate is below the rank of a District Magistrate." Their Lordships of the Supreme Court, while reaching this conclusion, also expressly approved the view taken on this point by a Division Bench of Nagpur High Court in *Prabhulal Ramlal Kabra v. Emperor*, 5 wherein an order of detention was held to be invalid on a similar ground. The reasons given by the High Court, which have been approved by their Lordships of the Supreme Court, are :

"These reasons may be summarised as follows :

(i) ..... (ii) .....

(iii) the Additional District Magistrate does not thereby attain the status of a District Magistrate as there can be only one person in the district who can be a District Magistrate, and (iv) the Government when it conferred the power on the District Magistrate conferred it on the officer actually holding the office of the District Magistrate and no one else."

16. The above cited decisions of the Supreme Court clearly show that the authority of Ramratan's case, 1964 MPLJ 86 : AIR 1964 Madhya Pradesh 114 is in no way impaired; rather the view taken therein stands reinforced. However, that decision applies only to situations like those under Article 311 (1) of the Constitution or the Defense of India Act or Rules where the delegate is named and further delegation is prohibited, expressly or impliedly. In all such cases, emphasis is on rank, and the power can be exercised only by the holder of that rank. However, there are other

categories of cases, like the present, where emphasis is not on rank but only on the authority to discharge a certain function. In this latter class of cases, all that has to be examined is whether the person discharging the impugned function is so empowered or not, there being no prohibition, express or implied, against delegation and there being no such emphasis on rank. The category to which a case belongs will depend on the nature of the function and the context in which the power is given. Thus, in every case the purpose and nature of the function, the provision conferring power and the context or setting in which it appears, have all to be seen in order to determine whether the power can be exercised only by the holder of a particular rank and none else.

17. From the decisions of the Supreme Court it follows that a person appointed permanently or to officiate on a post holds that rank, whereas a person who is placed only in current charge of duties of a post does not hold that rank. Accordingly, those functions or powers of the post which depend on the rank cannot be discharged by a person who is placed only in current charge of the duties of that post.

18. In view of the above position of law, I would now examine the other Division Bench decision in *State of M. P. v. Gokul Prasad*,<sup>6</sup> In that case the question for decision was whether a Deputy Inspector-General of Police, who held the current charge of the duties of the office of Inspector-General of Police, was competent to accept the resignation or to pass orders of retirement of a public prosecutor who was appointed by the Inspector-General of Police. This question was to be answered with reference to the Civil Service Regulations or those Regulations read with the New Pension Rules and it was not a case to which clause (1) of Article 311 of the Constitution applied.

19. The Division Bench deciding Gokul Prasad's case, 1971 MPLJ 609 (supra) was alive to the distinction on facts between that case and the earlier Ramratan's case, 1964 MPLJ 86 : AIR 1964 Madhya Pradesh 114. It was expressly stated by Naik, J. who delivered the judgment of the Division Bench, that in Ramratan's case the emphasis was placed on the rank as contradistinguished from functions of an office. It was also pointed out therein that the ruling in Ramratan's case was in the context of Article 311 of the Constitution and was thus distinguishable and had no application to the facts of Gokul Prasad's case. It was further found by the Division Bench in Gokul Prasad's case that the plaintiff in that case had voluntarily sought retirement and all

that was done by the Deputy Inspector-General of Police holding the current charge of duties of the Inspector-General of Police was to permit the plaintiff to retire voluntarily from service. It was also held that the action of permitting the plaintiff to retire voluntarily was in no way a measure of punishment and it did not cast any aspersion or stigma on the Government servant concerned. In permitting voluntary retirement of the Government servant the authority was not faced with any prohibition as is contained in clause (1) of Article 311 of the Constitution. Thus, in Gokul Prasad's case there was no emphasis on the rank of the officer who permitted the Government servant to retire and all that was necessary was that the officer concerned should have had the authority to discharge such a function of the appointing authority. The conclusion reached in Gokul Prasad's case was thus correct in view of the nature of function discharged by the officer concerned. This being so, the criticism levelled in Gokul Prasad's case against the decision in Ramratan's case was, in our opinion, unjustified as no further question arose for decision therein. We have already pointed out above, and it was also noticed by the Division Bench deciding Gokul Prasad's case, that emphasis in Ramratan's case was placed on rank as contradistinguished from functions of an office in view of the inhibition contained in clause (1) of Article 311 of the Constitution. Even if Ramratan's case throws no light on the question why a person who holds the current charge of the duties of an office, while so discharging the function of an office, is not clothed with the rank of that office, this position is fully borne out from the decisions of their Lordships of the Supreme Court which I have already discussed above. In para 22 of the judgment of Naik J. in Gokul Prasad's case it was observed as follows :-

"No doubt, the aforesaid decision in Ramratan's case also says that the person holding the current charge of the duties of a post can perform only the administrative functions but not the statutory functions pertaining to the post; but the observations, besides being obiter, may require reconsideration in an appropriate case because it is a bit difficult to understand that if such person cannot perform the statutory functions of the office, what else he can do. All the functions which the holder of post performs and all the duties which he discharges, whether administrative, executive, judicial or otherwise, owe their origin to some Act, statutory rule or order, and there is no function which he can legitimately perform for which there is no sanction in some statute or statutory rule or regulation."

In view of the distinction already pointed out by me between the various functions attached to an office or post and the further fact that the holding of a particular rank is decisive of the validity of the exercise of some of them only, I would like only to add that such wide observations in Gokul Prasad's case were not justified. There is a clear distinction between the several functions that may be performed by an incumbent of a post and the origin and nature of the power in each case has to be examined before deciding whether it can be exercised only by a person holding that rank or it could be exercised even by a person holding the current charge of the duties of that post. The aforesaid wide observations in Gokul Prasad's case, besides being obiter, are also not in conformity with the position in law as already discussed above. For these reasons I am of the view that the decision of the Division Bench in Ramratan's case is correct and continues to be good authority in respect of those cases where holding a particular rank is necessary for exercise of the power, and that the doubt expressed against the same in Gokul Prasad's case is unfounded to this extent.

20. In view of the above position, the general agreement expressed by Sen J. in *Satna Central Co-op. and Land Mortgage Bank Ltd. v. Puralal Agrawal*,<sup>7</sup> with the law enunciated in Ramratan's case, 1964 MPLJ 86 : AIR 1964 Madhya Pradesh 114 was correct. However, this question did not arise therein as was expressly stated by Sen J. and Singh J. who delivered a separate though concurring judgment did not express any opinion therein.

21. I have therefore to apply the aforesaid principles in deciding this case. Sri J. P. Bajpai, Deputy Advocate-General, appearing on behalf of the respondents, has contended that the function dealt with in sub-section (3) of Section 55 of the Madhya Pradesh Municipalities Act, 1961 is of such a nature that it could be exercised by an officer who was placed in the current charge of the duties of Collector of the district. In support of this argument Sri Bajpai urges that there is no prohibition, express or implied, against delegation of such a function of the Collector; that the nature of function is such that there is no emphasis on the rank; and that what matters is that the officer concerned should be empowered to discharge such a function of the Collector. His argument further is that there is no definition of the word 'Collector' in the Madhya Pradesh Municipalities Act, 1961; as such, we have to construe it in the light of the definition of that word given in sub-section (6) of Section 2 of the Madhya Pradesh General Clauses Act, 1957, along with the provisions relating to the appointment, power and discharge of functions of the Collector as provided in the Madhya Pradesh

Land Revenue Code, 1959.

22. It is true that the function of presiding over such a meeting as was held in this case on 10-7-1971 as provided in sub-section (3) of Section 55 of the M. P. Municipalities Act is such that it could be performed by an officer empowered to discharge generally the functions of the office of the Collector. There is no prohibition, either express or implied, contained in the Act to suggest that such a function can be discharged only by an officer holding the rank of Collector and none else. The context in which this function is prescribed also leads us to this conclusion. Therefore, the only question to be determined is whether Sri Arun Kumar Kshetrapal, who held the rank of Sub-Divisional Officer, Harda, while placed in the current charge of the duties of the office of Collector, Hoshangabad, could validly perform the function of presiding over the meeting held on 10-7-1971.

23. Sub-section (6) of Section 2 of the M. P. General Clauses Act, 1957, reads as under :-

"'Collector' means the chief officer in charge of the revenue administration of a district."

The relevant provisions of the M. P. Land Revenue Code, 1959, for our purpose are these :

"16. Power to appoint Collector. - The State Government shall appoint in each district a Collector who shall exercise therein the powers and discharge the duties conferred and imposed on a Collector by or under this Code or any other enactment for the time being in force."

"17. Power to appoint Additional Collectors. -

(1) The State Government may appoint one or more Additional Collectors in a district.

(2) An Additional Collector shall exercise such powers and discharge such duties conferred and imposed on a Collector by or under this Code or by or under any other enactment for the time being in force, in such cases or class of cases as the State Government may, by a general order, notify or as the Collector of the district may, subject to any general or special restrictions

imposed by the State Government, by an order in writing direct.

(3) This Code and every other enactment for the time being in force and any rule made under this Code or any such other enactment shall, except where expressly directed otherwise, apply to the Additional Collector, when exercising any powers or discharging any duties under sub-section (2), as if he were the Collector of the district."

"22. Sub-Divisional Officer. - (1) The Collector may place any Assistant Collector or Deputy Collector in charge of one or more sub-divisions of a district

(2) Such Assistant Collector or Deputy Collector shall be called a Sub-Divisional Officer and shall exercise such powers of a Collector as the State Government may, by notification, direct."

"26. Collector in case of temporary vacancy. - If the Collector dies or is disabled from performing his duties, the officer who is temporarily placed in charge of the current duties of the Collector shall be held to be the Collector under this Code until the State Government appoints a successor to the Collector so dying or disabled and such successor takes charge of his appointment."

24. The scheme of the M. P. Land Revenue Code, 1959, shows that an Additional Collector appointed according to Section 17 'shall exercise such powers and discharge such duties conferred and imposed on a Collector by or under this Code or by or under any other enactment for the time being in force' as may be specified. Sub-section (3) of Section 17 further provides that an Additional Collector, when exercising any powers or discharging any duties under sub-section (2), would do so as if he were the Collector of the district under this Code and every other enactment for the time being in force, etc., except where expressly directed otherwise. Similarly, Section 22 of the Code permits delegation of the powers of a Collector to a Sub-Divisional Officer. Section 26 of the Code provides for the performance of the duties and functions of the Collector in case of a temporary vacancy. Thus, all these provisions clearly show that unless there is a prohibition, express or implied, the functions of a Collector can be performed by an Additional Collector or a Sub-Divisional Officer where a proper delegation is made, and in case of a temporary vacancy Section 26 clearly provides that the officer who is temporarily placed in charge of the current duties of the Collector shall be held to be the Collector under this Code'. All these provisions in the Code read with sub-section (6) of Section 2 of the M. P. General Clauses Act, 1957, clearly show that the function of presiding over a meeting in accordance with the

provisions of sub-section (3) of Section 55 is not that of a persona designate but of an officer who is empowered to perform the duties of the Collector of the district.

25. Sri K. P. Munshi on behalf of the petitioner contends that Section 26 of the M. P. Land Revenue Code, 1959, is inapplicable to this case where Sri Anand Mohan, Collector of the district, was absent on leave. His contention is that Section 26 applies only when there is a temporary vacancy if the Collector 'dies or is disabled'. We are unable to put such a narrow construction on Section 26 for the reasons hereinafter stated.

26. It would be pertinent in this context to also refer to Sections 10 and 11 of the Code of Criminal Procedure, which are as under :-

"10. District Magistrate. - (1) In every district outside the presidency towns the State Government shall appoint a Magistrate of the first class, who shall be called the District Magistrate.

(2) The State Government may appoint any Magistrate of the first class to be an Additional District Magistrate and such Additional District Magistrate shall have all or any of the powers of a District Magistrate under this Code, or under any other law for the time being in force, as the State Government may direct.

(3) For the purposes of the Section 192, sub-section (1), and Section 528, sub-sections (2) and (3) such Additional District Magistrate shall be deemed to be subordinate to the District Magistrate."

"11. Officers temporarily succeeding to vacancies in office of District Magistrate. - Whenever in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the chief executive administration of the district, such officer shall, pending the orders of the State Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate."

These provisions of the Code of Criminal Procedure, which are substantially similar to those contained in Sections 16, 17 and 26 of the M. P. Land Revenue Code, 1959, were elaborately considered by their Lordships of the Supreme Court in the aforesaid two decisions, viz., *Ajaib Singh v. Gurbachan Singh*,<sup>8</sup> and *Hari Chand v. Batala Engineering Co.*,<sup>9</sup> In the cases before their Lordships there was a prohibition, either express or implied, against an officer below the rank of a District Magistrate in

making the impugned order. As such, on the settled view that an officer empowered under sub-section (2) of Section 10 and Section 11 of the Code of Criminal Procedure does not hold the rank of a District Magistrate and the holding of such a rank being decisive in those cases, it was held that the impugned orders could not be passed by a person deriving authority under these provisions and not holding the rank of a District Magistrate. However, the clear distinction between the rank and the power to perform the functions of that office was specifically stated. The process of reasoning by which their Lordships of the Supreme Court leached the conclusion clearly supports the view that holding of the rank of District Magistrate is not essential to discharge every function of that office. These provisions of the Code of Criminal Procedure are sufficient to empower an officer to perform the duties of the District Magistrate except those already indicated. In our view, this reasoning clearly applies to this case also.

27. The enacting part in Section 26 of the M. P. Land Revenue Code, 1959, shows that it applies to all cases where the person holding the rank of the Collector in the district is unable to perform his duties for any reason whatsoever until the State Government appoints a successor in accordance with the provisions of Section 16 of the Code and such successor takes charge of his appointment. There is no reason to construe the word 'disabled' in Section 26 narrowly so as to cover within its ambit only such disability as may be occasioned due to an act independent of the volition of the person holding the rank of Collector. The words in the enacting part of the Section as also the general scheme of Chapter III of the Code in which this section occurs do not suggest such narrow construction as is suggested by Sri Munshi. However, if there be any ambiguity, it is permissible to read the Act as a whole and to take the heading of Section 26 into account as an aid to construction. The heading suggests that the section intends to provide for all cases of temporary vacancy without any reservation. The doubt, if any, in construing the enacting part of Section 26 is thus dispelled by the heading. We are conscious that the heading of a section can be used only to a limited extent as an aid to construction as laid down by the House of Lords in *Director of Public Prosecutions v. Schildkamp*,<sup>10</sup> In the speech of Lord Upjohn at page 1656 the principle is laid down as follows :-

"My Lords, in this somewhat fluctuating state of the authorities what role do cross-headings play in the construction of the Act ? In my opinion, it is, wrong to confine their role to the resolution of ambiguities in the body of the Act. When the court construing the Act is reading it through, to understand it, it must

read the cross-headings as well as the body of the Act and that will always be a useful pointer as to the intention of Parliament in enacting the immediately following sections. Whether the cross-heading is no more than a pointer or label or is helpful in assisting to construe or even in some cases to control the meaning or ambit of those sections must necessarily depend on the circumstances of each case, and I do not think it is possible to lay down any rules." I have relied on the heading of Section 26 only to this limited extent while arriving at the conclusion that I have reached.

28. Sri Munshi suggests that the Memo. No. 213/2475/63 dated 1st February 1964 (Annexure 'I') issued by the State Government containing some instructions to all the departments is decisive to show the extent of power available to an officer holding current charge of the duties of a post. I am unable to accept this argument. The memo, is only in the nature of an executive instruction and has no legal force. In any view, it does not have the effect of superseding the legal consequences which flow from the statutory provision already mentioned by us. The legal position as understood by the State Government does not decide the question before us.

29. I am, therefore, of the view that in this case Sri Arun Kumar Kshetrapal was competent to preside over the meeting held on 10-7-1971 and he was the Collector of the district within the meaning of that expression as used in sub-section (3) of Section 55 of the Madhya Pradesh Municipalities Act, 1961. Accordingly, the election of respondents 2 to 4 held in that meeting was valid and suffered from no infirmity. I accordingly reject the only remaining contention of the petitioner.

30. In the result, I dismiss the petition. However, in the circumstances of the case, I direct that the parties shall bear their own costs. The outstanding amount of the security deposited by the petitioner in this shall be refunded to him.

**Raina, J.**

31. I have carefully perused the judgment proposed by my learned brother J. S. Verma, J. Although I agree with him that petition must be dismissed, I must say with great respect that I am unable to agree with some of the observations made in the judgment and my line of approach is also slightly different as indicated below.

32. It is not disputed that the respondent No. 2 was a standing counsel of the Municipal Council and, in my view, in that capacity he held an office of profit under the Council within the meaning of clause (c) of Section 35 of the Madhya Pradesh Municipalities Act, 1961 (hereinafter referred to as 'the Act'). Under Section 94 of the Act a Council is empowered to appoint officers besides those specified there under as may be necessary and proper for the efficient discharge of its duties. Under Section 312 of the Act, the Chief Municipal Officer is empowered to institute legal proceedings under the Act and to obtain legal advice. Similarly the Council may institute prosecutions under the Act under Section 313 of the Act. It is, therefore, clear that it is one of the duties of the Council to institute and defend both civil and criminal proceedings in the discharge of its function under the Act. For the proper and efficient discharge of this duty, it is necessary for the council to appoint a standing counsel under Section 94 of the Act. It cannot, therefore, be said that the statute does not contemplate or provide for such an office or that there is no foundation for such an office under the Act.

33. It is no doubt true that in clause (m) of Section 35 of the Act, there is an express provision regarding a government pleader but, in my view, such a provision was necessary because a Government pleader does not appear to fall within any of the other categories specified in Section 35 of the Act. He is not a servant of Government and does not hold any office of profit under the Council. He does not, therefore, fall within the purview of either clause (b) or clause (c) of Section 35 of the Act. Therefore, in my view, the fact that there is a separate provision for a Government pleader in clause (m) of Section 35 of the Act cannot give rise to an inference that a standing counsel of the Council is not disqualified from being a candidate under Section 35. All that we have to see is whether he held any office of profit under the Council.

34. The dictionary meaning of the word 'office' is "a function or duty assigned to someone."- vide Webster's New World Dictionary; Page 987; Second College Edition. There can be no doubt that a standing counsel has a special function or duty assigned to him by the Council and as such holds an office under the Council. It was also not disputed that as standing counsel the respondent No. 2 was remunerated for it. There can, therefore, be no doubt that he held an office of profit under the Council in his capacity as a standing counsel. In order that there should be an "office of profit" it is not necessary that regular Income should be attached to it. Profit connotes the idea of

pecuniary gain. If the holder of the office is in a position to make profit, this will be sufficient to make it an office of profit. It is, therefore, clear that as standing counsel of the Municipal Council, Itarsi, the respondent No. 2 was disqualified for election as a councillor under clause (c) of Section 35 of the Act. However, it appears from Annexure R-II that respondent No. 2 had relinquished his office by letter dated 8-7-1971 vide Annexure R-I. Since the election took place on 10-7-1971, the respondent No. 2 was eligible for the said office on the said date and, therefore, his election cannot be challenged on this ground.

35. The next question, which is the main question in this case for the decision of which this case was referred to the Full Bench, is whether the Sub-Divisional Officer who was placed in current charge of the duties of the Collector could preside over the election meeting for the election of the President and Vice-President, under Section 55 of the Act. This question has been referred because of conflicting views expressed by Division Benches of this Court regarding the meaning of the words "current charge" in 1971 MPLJ 609 and 1964 MPLJ 86 : AIR 1964 Madhya Pradesh 114. In 1969 MPLJ 879 another Division Bench of this Court followed Ramratan's case, 1971 MPLJ 609 (supra) and treated the decision of this question therein as good law. All these decisions have been examined in detail by my learned brother Verma, J. and I propose to deal with them only briefly just to indicate my line of approach.

36. In 1964 MPLJ 86 : AIR 1964 Madhya Pradesh 114 the question for consideration was whether a Sub-Inspector of Police could be dismissed by the Deputy Inspector-General of Police who was appointed to hold the charge of the current duties of the Inspector-General of Police in addition to his own duties in view of Article 311 (1) of the Constitution. Clause (1) of Article 311 of the Constitution lays down that no civil servant shall be dismissed or removed by an authority subordinate to that by which he was appointed. It was held in that case that the word "subordinate" in the aforesaid clause has reference to the rank and not to functions and since Deputy Inspector-General of Police, who holds charge of the current duties of the Inspector-General of Police, does not hold the rank of Inspector-General of Police, he was not competent to exercise the power of dismissal vested in the Inspector-General of Police. This decision was followed by a Division Bench of this Court in 1969 MPLJ 879 (supra). The aforesaid decisions clearly bring out the difference between a person who is appointed to officiate on a higher post and a person who is appointed to be in charge of the current duties of that post in addition to his own. These decisions no doubt proceeded upon the consideration that an officer holding current charge of the duties

of a higher post does not hold the rank of that post. But even apart from the question of rank, in the context of Article 311 of the Constitution, the distinction between an officer appointed to officiate on a post and one merely placed in charge of the current duties of the post, in my view, is real and substantial whenever the question of competence to exercise statutory powers conferred on a particular officer arises.

37. In AIR 1969 Supreme Court 483 their Lordships were required to consider whether the Additional District Magistrate empowered under sub-section (2) of Section 10 of the Code of Criminal Procedure was competent to exercise the powers of requisitioning immovable property which was delegated to District Magistrate by the Central Government under Section 40 of the Defense of India Act. The Additional District Magistrate had been invested with all the powers of the District Magistrate under Section 10 (2) of the Code of Criminal Procedure. Their Lordships emphasized the distinction between the District Magistrate and Additional District Magistrate exercising the powers of the District Magistrate and made the following pertinent observations in paragraph 7 of the judgment.

"The scheme of Section 10 of the Code leaves no room for doubt that the District Magistrate and the Additional District Magistrate are two different and distinct authorities and even though the latter may be empowered under sub-section (2) to exercise all or any of the powers of a District Magistrate but by no stretch of reasoning can an Additional District Magistrate be called the District Magistrate which are the words employed in sub-section (1) of Section 10."

Their Lordships thus pointed out the distinction between District Magistrate and Additional District Magistrate exercising the powers of a District Magistrate and held that by no stretch of reasoning an Additional District Magistrate could be equated with a District Magistrate and quashed the order passed by the Additional District Magistrate.

38. In my view, the distinction between an officer holding a particular post and an officer holding the current charge of that post is much greater than that between an officer holding a particular post and another officer invested with all the powers attached to that post. An order appointing a particular officer to hold current charge of the duties is an administrative order intended to clothe such an officer with all

administrative powers which have no statutory basis. An officer appointed to hold the current charge of the duties of a higher post cannot exercise the statutory powers attached to that post unless there is a statutory provision to this effect.

39. In the instant case such a statutory provision exists and, therefore, the Sub-Divisional Officer who was placed in current charge of the duties of the Collector was competent to function as Collector within the meaning of Section 55 of the Act. The word "Collector" has not been defined in the Act. We may, therefore, refer to the definition of the 'Collector' in the Madhya Pradesh General Clauses Act as also the provisions of the Madhya Pradesh Land Revenue Code. In sub-section (6) of Section 2 of the Madhya Pradesh General Clauses Act, the Collector has been defined to mean the Chief Officer in charge of the revenue administration of the district. Where a Sub-Divisional Officer is placed in current charge of the duties of the Collector, he is, in my view, for the time being the Chief Officer in charge of the revenue administration of the District and as such a Collector within the meaning of the aforesaid provision in the General Clauses Act. As such he would be competent to function as a Collector under Section 55 of the Act I may also here refer to Section 26 of the Madhya Pradesh Land Revenue Code. The said section provides that if the Collector is disabled from performing his duties the officer who is temporarily placed in charge of the current duties of the Collector shall be held to be the Collector under this Code until the State Government appoints a successor. In my view the disability contemplated by this section must be construed liberally as inability to perform the duties for any reason whatsoever. Therefore, if the Collector is for the time being on leave and is, therefore, unable to perform the duties of his office the officer appointed to hold current charge of the duties of the Collector in his absence shall be the Collector for the purpose of the Code. In this case it appears that the Collector being on leave the Sub-Divisional Officer was appointed to hold current charge of the duties vide order dated 15th July, 1971 (Annexure H). He was, therefore, competent to perform the functions of the Collector under Section 55 of the Act.

40. I would like to make it clear that but for the aforesaid statutory provisions the Sub-Divisional Officer placed in charge of the duties would not be competent to exercise the statutory powers conferred on the Collector under Section 55 of the Act. I am of the opinion that where statutory powers are conferred on a particular officer those powers cannot be exercised by an officer holding current charge of the duties of such

office and the distinction between rank and functions is not of much consequence in this connection. In other words officer holding current charge of the duties of a post can merely perform the administrative functions but not the statutory functions pertaining to the post. With great respect. I am unable to agree with the contrary view expressed in 1971 MP LJ 609 . There are numerous administrative functions attached to each post which require no statutory sanction. An officer holding the current charge of the duties of the post is competent to exercise only such functions.

41. When a particular officer is mentioned in a particular statutory provision, it is that officer alone who can exercise the statutory powers or functions conferred on him. An officer who is placed merely in charge of the current duties of the post cannot be equated with an officer holding that post in the absence of any other statutory provision to this effect.

**Bhave, J.**

42. I have had the privilege of reading the Orders of Brother Verma, J. and Brother Raina, J. As is clear from the Order of Verma, J., the two points that came for our consideration were as to whether the second respondent being a standing counsel of the Municipal Council. Itarsi, held an "office of profit" under the Council and, as such, was disqualified by virtue of clause (c) of Section 35 of the Madhya Pradesh Municipalities Act, 1961 (hereinafter called the 'Municipalities Act') for election as a councilor; and whether the meeting of 10th July, 1971 should have been presided over by the Collector, and as it was actually presided over by the Sub-Divisional Officer the election was rendered invalid.

43. Clause (c) of Section 35 of the Municipalities Act disqualifies a person who "holds any office of profit under the Council or is in the service of any other local authority". The only allegation made by the petitioner against the second respondent was that he was engaged as a Standing Counsel of the Municipal Council to appear in Courts as an Advocate representing the Municipal Council in all cases wherein the Municipal Council was a party and that he used to file his power in each case wherein he appeared as a lawyer on behalf of the Municipal Council. There is no averment to the effect that any office of the Standing Counsel was created by the Municipal Council, acting under any provision of the statute. The question, therefore, is whether on the basis that the second respondent appeared in all cases of the Municipal Council

because of an arrangement between the Municipal Council and the second respondent it could be held that the second respondent held an "office of profit under the Council". The expression "office of profit" has not been defined. In *Carpenter and Bristol Corporation. In re* (1907) 2, KB 617 the question for decision was whether a solicitor engaged by a Rural District Council to do such legal work as was required to be done by the counsel and who received by way of remuneration for that work the usual professional fees payable to solicitors for such work and during that period no other solicitor being employed by the District Council could be said to be an officer under the Council. Vaughan Williams L. J. ruled :

"In my opinion the term 'office' does not extend to an employment which, like that in the present case, is casual in its nature. If the employment is of such a nature that the person employed is employed on such occasion as it occurs, for the particular matter that may arise on that, occasion in my opinion it does not come within the term 'office' or the term 'employment' ....." (p. 622)

44. The expression "office of profit" also occurs in Article 191 (1) (a) of the Constitution of India. In *Kanta Kathuria v. Manak Chand*.<sup>11</sup> Sikri, J. (as he then was), who delivered the majority judgment, held :

"The word 'office' has various meanings and we have to see which is the appropriate meaning to be ascribed to this word in the context. It seems to us that the words 'its holder' occurring in Article 191 (1) (a) indicate that there must be an office which exists independently of the holder of the office." His Lordship found support from the observations of Lord Atkin and Lord Wright in *Mcmillan v. Guest (H. M. Inspector of Taxes)*<sup>12</sup> to the following effect : Lord Atkin at p. 201 :

"There is no statutory definition of 'office'. Without adopting the sentence as a complete definition, one may treat the following expression of Rowlatt, J. in *Great Western Rly. Co. v. Bater*.<sup>13</sup> adopted by Lord Atkinson in that case. (1922) 2 AC 1 at p. 15, as a generally sufficient statement of the meaning of the word : 'an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, which went on and was' filled in succession by successive holders," Lord Wright at p. 202 :

"The word 'office' is of indefinite content, its various meanings cover four

columns of the New English Dictionary, but I take as the most relevant for purposes of this case the following : 'A position or place to which certain duties are attached especially one of a more or less public character' ....."

Chief Justice Hidayatullah, who delivered the minority judgment, also referred to the observations of Lord Wright, with approval, as also the observations of Justice Rowlatt in *Great Western Rly. Co. v. Bater* (supra) which are to the following effect :

"Now it is argued, and to my mind argued most forcibly, that that shows that what those who use the language of the Act of 1942 meant, when they spoke of an office or employment which was a subsisting, permanent, substantive position which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders, and if you merely had any man who was engaged on whatever terms, to do duties which were assigned to him, his employment to do those duties did not create an office to which those duties were attached. He merely was employed to do certain things and that is an end of it, and if there was no office or employment existing in the case as a thing, the so-called office or employment was merely an aggregate of the activities of the particular man for the time being." The difference between the Chief Justice and Justice Sikri was on the fact as to whether, in fact, any post of Special Government Pleader was created in that particular case. The observations in the abovesaid case clearly show that before any person is said to have held any office, it must be shown that the office was, in fact, created anterior to the appointment of the person to the office or at least simultaneously. I have already referred to the pleadings of the petitioner on the matter. There is no averment that any such office or post was created by the Municipal Council to which the second respondent was appointed. Nor is there anything to show that simultaneously this was done.

45. Brother Verma, J. has observed :

"Sri Munshi could not show us any provision in the Act which even contemplated the so-called office of standing counsel. It is difficult to visualise an officer under the Council for which there is no foundation in the Act." Brother Raina, J., on the other hand, felt that Section 94 of the Municipalities Act empowers the Council to appoint officers as may be necessary for the

efficient discharge of its duties : and inasmuch as the Chief Municipal Officer is empowered to institute legal proceedings and to obtain legal advice and the Council is authorised to institute prosecutions under the Act. the power to create an office of Standing Counsel was implicit in the provisions of Section 94. Brother Raina, J., therefore, agreed with Brother Verma, J. in his decision that the petition should be dismissed not because an office of Standing Counsel could not be created but because the, second respondent had already resigned before he stood for election and was thus not disqualified on the date he filed his nomination paper. I have already referred to the decision of the Supreme Court from which it would appear that there should be an office in existence before any person can be said to have held it. A person merely discharging special functions assigned to him by a Council cannot be said to hold any office because that can be done even under a contract without holding any particular office.

46. In this connection I may refer to the provisions of Section 94 of the Municipalities Act. It deals with 'Appointment of Staff in Chapter IV which provides for 'Chief Municipal Officer and Staff of Municipality'. Sub-sections (1) and (2) of Section 94 give power to a Council to appoint 'such other officers and servants as may be necessary' in addition to the officers specified therein. The entire scheme of Section 94 indicates that the section relates to appointment of persons who are servants of the Municipality and are subject to its disciplinary control. Sub-section (5) of Section 94 provides for suspension of any officer mentioned in or specified under sub-section (1). Sub-section (7) gives power to the State Government to transfer any officer or servant of a Council mentioned in sub-sections (1) and (2) of Section 94 to any other Council. Similarly, sub-sections (8) and (9) also relate to provisions concerning disciplinary control over the staff of the Council appointed under sub-sections (1) and (2) of Section 94. The entire contents of Section 94 and the setting in which the power of appointment of the Council appears leave no room for any doubt that the words 'officer' and 'servant' are inter-changeable and the appointment of officers contemplated is only of those who are servants of the Council and subject to its disciplinary control. Therefore, in order to bring the appointment of a practicing advocate as a Standing Counsel of the Municipal Council within the ambit of Section 94 it must be held that the advocate while he holds that engagement, is actually a servant of the Municipal Council and subject to its disciplinary control. Thus, if it is held that the second respondent, who is an Advocate, held an office of profit under the

Municipal Council, it would follow that he would be under the disciplinary control of the Municipal Council and shall also be liable to transfer by the State Government from place to place. Such a far-reaching conclusion cannot be reached on the scanty material put by the petitioner before us. I am, therefore, of the opinion that without going into the controversy as to whether an office of Standing Counsel under the Municipal Council can be created or not. it is enough to observe that the necessary material is not available to justify a conclusion that any such office was created by the Municipal Council in question. I am also of the opinion that a practicing Advocate who by the terms of his employment agrees to appear in all cases on behalf of the Municipal Council while continuing as an Advocate and when nothing else is known about his terms of employment to indicate that he is under the disciplinary control of the Council cannot be said to hold an office of profit under the Council by the mere fact of his being a Standing Counsel of the Municipal Council. In my opinion, therefore, there was nothing to prevent the second respondent from contesting the election. In any case, as the second respondent had already resigned his post, it follows that he was not under any disability.

47. As to the question whether the Sub-Divisional Officer holding current charge of the office of the Collector could have presided over the meeting. I agree with the interpretation put by Verma, J. on the provisions of the Madhya Pradesh Land Revenue Code and his conclusion that he could do so. I am further of the opinion that it is not necessary to decide in this case as to whether an officer, who is placed merely in charge of current duties of the post, could be equated with an officer holding that post in all circumstances irrespective of the provisions of the statute requiring the named officer to discharge certain functions or to act under it. I agree with Brother Verma, J. that the authority of the decision in 1964 MPLJ 86 : AIR 1964 Madhya Pradesh 114 so far as it lays down the law that where any action is to be taken or an order is to be passed by an officer of a particular rank, that act cannot be validly performed or the order can be validly passed by an officer of subordinate rank discharging current duties of that post, is still unshaken and that the decision enunciates correctly the legal position. I also agree with Verma, J. that certain observations made in 1971 MPLJ 609 are obiter in nature. I further agree that the petition should be dismissed as proposed by Verma, J. and that the parties should bear their own costs.

BY THE COURT

48. As per separate Orders delivered by us. we have agreed that the petition should be dismissed. The petition thus stands dismissed with a direction that the parties shall bear their own costs and that the security amount shall be refunded to the petitioner.  
Petition dismissed.

#### Cases Referred.

1. 1964 MPLJ 86: AIR 1964 Mad Prad114
2. 1971 MPLJ 609
3. AIR 1965 SC 1619
4. AIR 1969 SC 483
5. AIR 1944 Nag 84
6. 1971 MPLJ 609
7. 1969 MPLJ 879
8. AIR 1965 SC 1619
9. AIR 1969 SC 483
10. (1969) 3 All England Reporter 1640
11. AIR 1970 SC 694
12. (1943) 24 Tax Cas 190
13. (1920) 3 KB 266 at p. 274