IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/LETTERS PATENT APPEAL NO. 911 of 2016

In R/SPECIAL CIVIL APPLICATION NO. 1693 of 2015
With
CIVIL APPLICATION (FOR STAY) NO. 2 of 2016
In R/LETTERS PATENT APPEAL NO. 911 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA
and
HONOURABLE MR.JUSTICE VIRESHKUMAR B. MAYANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2	To be referred to the Reporter or not ?	**YES**
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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STATE OF GUJARAT
Versus
KARIMBHAI DADAMIYA PIRZADA & 1 other(s)

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Appearance:
MR KAMAL TRIVEDI, ADVOCATE GENERAL WITH MR RAKESH PATEL WITH MR VINAY VISHEN AGPs(1) for the Appellant(s) No. 1
MR VISHWAS K SHAH(5364) for the Respondent(s) No. 2
MR MEHUL S SHAH, SENIOR ADVOCATE WITH MR. JAY M THAKKAR(6677) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR.JUSTICE VIRESHKUMAR B. MAYANI

Date : 13/11/2019

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1 This appeal under clause 15 of the Letters Patent Act is at the instance of the State of Gujarat (original respondent No.1) in the Special Civil Application No.1693 of 2015 filed by the respondent No.1 herein (original petitioner) challenging the order passed by the State Government dated 3rd December 2014 whereby his certificate to practice as a Notary Public came to be cancelled and he was permanently debarred from practicing as a Notary Public and is directed against the judgement and order dated 12th February 2016 passed by a learned Single Judge of this Court in the above referred writ application by which the learned Single Judge allowed the writ application preferred by the original petitioner.

2 The facts giving rise to this appeal may be summarised as under:

2.1 The respondent No.1 herein (original petitioner) entered into the roll of the Bar Council of Gujarat in December 1984. Later, he came to be appointed as a Notary Public by the Government of Gujarat, and in this regard, a certificate to practice dated 5th July 2002 was granted in favour of the original petitioner. A complaint came to be lodged against the original petitioner dated 24th March 2014 in which it was alleged that the petitioner notarized a fraudulent power of attorney dated 28th January 2008 of one Maniben in favour of one Ramdevbhai Sukabhai Modhvadiya. The complainant alleged that the said Maniben impersonated his mother who had died on 8th March 1989 and even the succession of entry of heirs was certified on 7th July 2002. A notice dated 3rd May 2014 came to be thereupon issued to the petitioner by the Deputy Secretary, Legal Department calling upon the petitioner for his

explanation. The petitioner filed his written reply dated 12th May 2014. The inquiry officer, in his inquiry report dated 21st November 2014, concluded that the petitioner had committed a serious misconduct under Section 10(d) of the Notaries Act, 1952 (for short, "the Act, 1952"), which warranted imposition of any of the penalties stipulated in the sub-rule (12) of Rule 13 of the Notaries Rules, 1956 (for short, "the Rules, 1956"). The competent authority, accordingly, remitted the matter with his report to the appropriate government namely the State Government for passing appropriate order. The State Government passed the following order dated 3rd December 2014:

"Government of Gujarat
Legal Department
Sr. No. NTR – 102014-413-1215-A
Sachivalay, Gandhinagar.
Date: 03 – Dec – 2014

Notification :-

Under the provisions of the Notary Act – 1952 and the rules framed thereunder, Shri Karimbhai D. Peerzada, Advocate has been appointed as the Notary Public for the Taluka and District Porbandar vide the Notary Registration number 412/2002 dated 05/07/2002.

The Complainant viz. Shri Rajan Damodar Killakare had filed a complaint, alleging misconducts pertaining to the profession of the Notary under Rule – 13 of the Notary Rules – 1956, against the Notary Shri Karimbhai D. Peerzada. With regard to the complaint, the government had handed over the investigation to the competent authority. After considering the oral as well as written evidences submitted by the complainant and the Notary, the competent authority has submitted report to the government dated 21/11/2014, which is to be considered as part of this notification.

As per the report submitted to the government by the competent authority,

it has been established on the basis of the documentary evidences that though the complainant's mother Maniben Prabhudas (Maniben Damodar) had died on 19/02/1989, Maniben Prabhudas had remained present before the Notary on 28/01/2008 and executed the disputed power of attorney. Such a general power of attorney had been prepared fraudulent and the notary did not obtain proper identification proofs of Maniben Prabhudas and the witness Kamleshbhai Bhadrecha while preparing the power of attorney. As per the police report, the signature of Maniben Prabhudas was forged by Vijyaben, wife of Chhagangiri Shankargiri and the signature of witness Kamleshbhai Bhadrecha was forged by the recipient of the power viz. Ramde Suka Modhvadiya in the disputed power of attorney. The notary falsely notarized (executed) the document before him and by doing so, the Notary Shri Karimbhai D. Pirzada, resident of Ranavav, Dist.- Porbandar has breached the provisions of the Notary Act and Notary Rules and has committed serious type of misconduct and indiscipline under section-10(d) of the Notary act. Thus, in this case, as the serious type of misconduct and indiscipline conducted by Notary Shri Karimbhai D. Pirzada, resident of Porbandar has been proved clearly, the Government has decided to permanently debar him as a notary by cancelling his certificate. Hence, the certificate of notary of Notary Shri Karimbhai D. Pirzada, being notary registration no. 412/2002 is cancelled and he is permanently debarred from practicing as a notary.

Through an order and in the name of the Governor of Gujarat.

SD/- Illegible
(D. M. Bhabhar)
Under Secretary to the Govt.
Legal Department"

3 The petitioner being dissatisfied and aggrieved by the impugned order referred to above challenged the same by filing the Special Civil

Application No.1693 of 2015 before this Court.

4 Two fold contentions were raised by the petitioner before the learned Single Judge. The first contention raised before the learned Single Judge was with regard to the validity of the Rule 13(12)(b)(i) of the Rules, 1956. It was argued before the learned Single Judge that Rule 13(12)(b)(i) of the Rules, 1956 is invalid insofar as it provides for the punishment of permanently debarring a Notary Public from practice on the ground that the said rule travels beyond the scope of Section 10 of the Parent Act which does not empower to impose such penalty of permanent debarment.

5 The second contention canvassed before the learned Single Judge was with regard to the violation of the principles of natural justice. It was argued on behalf of the petitioner before the learned Single Judge that the State Government ought to have given him an opportunity of hearing before cancellling the certificate and imposing the penalty. It was argued that the petitioner had no opportunity to represent his case as regards the findings recorded in the reported and the penalty, and in such circumstances, the final order could be said to have stood vitiated in law.

6 The petitioner succeeded before the learned Single Judge on both the counts referred to above. The first contention as regards the validity of the Rule 13(12)(b) of the Rules, 1956, came to be answered by the learned Single Judge as under:

> *"5.2 In the present case, the penal order against the petitioner came to be passed under sub-clause (d) of Section 10 on the ground that the petitioner was guilty of misconduct. For imposing penalty, Rule 13(12)(b)(I) of the Rule is put into play.*
>
> *6. The first submission of learned advocate for the petitioner was that*

the impugned order is bad in law insofar as it imposes the penalty of permanently debarring the petitioner from practicing as a Notary, could be accepted at the outset. In support of this, decision of the Allahabad High Court in Shri Kashi Prasad Saksena Vs State of U.P. [AIR 1967 All. 173] was relied on in which the Allahabad High Court interpreted Rule 13(12) (b) of the Notaries Rules, 1956 vis-à-vis the provision of Section 10 of the Act and held Rule 13(12)(b) as invalid insofar as it provides for the punishment of permanently debarring a Notary from practice, on the ground that the said Rule travels beyond the scope of Section 10 of the Act which does not empower to impose such penalty of permanent debarment.

6.1 The High Court stated as under,

> *"……. It would appear that the Central Government could frame a rule either under the general power conferred upon it by the opening words of sub-section (2) or by any of the clauses mentioned in that provision. It is well settled that a rule cannot militate against a provision contained in the statute under which the rules have been framed. Section 10 or any other section of the /Act did not confer on the State Government any bigger power than to remove the name of a Notary from the register maintained under S.4 of the Act. Therefore even the general powers conferred by sub-section (2) of S. 15 of the Act cannot give the Central Government the jurisdiction to frame a rule which travels much beyond the scope of S. 10 of the Act. In other words when S. 10 of the Act does not give the appropriate Government the power of perpetually debarring a person from practicing as a Notary and confines that power to at most removing the name from the Register of Notaries, the power to perpetually debar cannot be conferred by the rules." (para 20)*

6.1.1 It reasoned further,

> *"If a person's name is removed from the Register of Notaries, there is no bar to his applying again. But once he is perpetually debarred, he can never apply again. Under S. 10 or any other provision of the Act, the Government has not power to inflict the extreme punishment of debarring perpetually. In our opinion, therefore, R 13(12) (b), so far as it authorizes the appropriate Government, to permanently debar a Notary from practice, is beyond the rule making power of the Central Government and for that reason invalid. The order of the State Government therefore so far as it perpetually debars the petitioner-appellant from practicing the profession of a Notary is without jurisdiction and liable to be quashed." (para 20) "We would also like to point out that Rule 13 is headed as "inquiry into the allegation of professional and other misconduct of a Notary". Consequently that rule has been framed*

not under the general powers contained in sub-section (2) of S. 15 of the Act, but under Cl. (g) of S. 15 (2) of the Act. That clause permits the Central Government to frame a rule providing "the manner in which inquiries into allegations of professional or other misconduct of notaries may be made". The power to perpetually debar is not comprehended in the expression "the manner in which enquiries……of notaries may be made."

6.1.2 The Court ruled that power to perpetually debar was not comprehended the main statutory provision, therefore by virtue of Rule, the said penalty could not be prescribed and imposed.

"The rule permitting an order of debarring a person perpetually would therefore be beyond the scope of S. 15(2) (g) of the Act and for that reason also void." (para 21)

7 As regards the second contention, the findings recorded by the learned Single Judgeare as under;

"6.3 It was submitted in the second place by learned advocate for the petitioner that the appropriate government, that is, the state government ought to have given a notice to the petitioner before imposing penalty. As the petitioner had no opportunity to represent his case about the penalty, the final order stood vitiated in law.

6.4 In furtherance, it was submitted that the penalty has to be commensurate to the gravity of the misconduct. Elaborating and developing this contention, it was submitted that it could hardly be said that the petitioner had committed a 'misconduct', much less a professional misconduct. Section 10(d) of the Act, submitted learned counsel further, speaks of professional or other misconduct. It was submitted that while deciding the penalty, the nature and degree of the misconduct alleged and proved is a relevant consideration. According to learned advocate for the petitioner, had a notice for the proposed penalty been given, the petitioner could have represented his case to convince that even if the allegations were held to be proved for the sake of acceptance without admission, it did not warrant a particular punishment.

6.5 It was next submitted that the petitioner acted with bona fide belief since the old lady had come with her photograph affixed on the document and that she was identified by the accompanying person one Mr.Kamleshbhai Bhadrecha. He submitted that the petitioner neither reaped any benefit, nor practiced anything corrupt, nor acted with such an intention; sympathizing with 80 years old lady who had come for power-of-attorney and was identified with photograph affixed, he did the notarization, which did not amount to any misconduct, submitted learned

advocate for the petitioner. It was further submitted that the conduct on part of the petitioner was at the best one of negligence or lack of care, but did not amount to misconduct stricto sensu. According to learned advocate, element of mens rea akin to the criminal proceedings is necessary for inflicting punishment of cancellation of Notary's licence. He submitted that the conduct was not a grave to be treated as moral turpitude to justify the punishment. It was therefore submitted that when no notice was issued before imposing penalty, the petitioner was deprived of the opportunity to defend his case by presenting aforesaid aspect for penalty.

6.6 All the aforesaid submissions were urged independently and also to buttress the contention that for the said very reasons the appropriate government was required to apply its mind on the aspect of the penalty to be imposed, therefore also, a notice prior to actual imposition of penalty was an indispensable requirement. It was submitted that in that way also the petitioner was deprived of opportunity to defend and he had no occasion to present his case on the aspect of penalty, it cause serious prejudice to him and the entire decision stood vitiated.

6.7 Objecting to the submission of the petitioner on the aforesaid count, learned Assistant Government Pleader was emphatic that issuance of notice before imposition of penalty was not necessary as the Rules nowhere provide for such notice. It was submitted that the petitioner had an opportunity to defend so as to answer the charges against him in course of the inquiry, and when the Rules did not contemplate giving of second show-cause notice at the stage of penalty, the submission cannot hold good. According to learned AGP, therefore such requirement could not be treated as part of natural justice and non giving of notice as to the proposed penalty could not amount to breach of natural justice."

8 The final conclusion drawn by the learned Single Judge in the impugned judgement reads as under:

"10.2 Having regard to the above, a delinquent Notary has to be given opportunity to defend on the proposed penalty. The Notary could legitimately claim a right to defence by pointing out the mitigating circumstances, and the attendant aspects and other relevant considerations to make them weigh with the appropriate government in considering the imposition and/or selection of one of the penalties contemplated.

10.3 In the aforesaid view it is held that even as the Rule 13 of the Notaries Rules, 1956, is silent for giving a notice to the Notary qua the proposed penalty, such requirement has to be read into as part of observance of natural justice without which, the Notary facing action is bound to suffer prejudice. Therefore a notice in respect of the proposed penalty shall have to be treated as an in-built requirement in the scheme

of Rule 13 for the purpose of conducting inquiry against Notary in respect of professional or other misconduct leading to passing of penal order against him.

11. For the foregoing discussion, the impugned order is unsustainable in law at least on two aforesaid grounds. Firstly that the penalty of permanent debarment imposed on the petitioner from practicing as a Notary was a penalty impermissible in law to be imposed. The law laid down by the Allahabad High Court in Kashi Prasad Saksena (supra) is a good law and would apply to render the order illegal on that score. Secondly, the impugned order against the petitioner stood vitiated for want of notice to the petitioner as to the proposed penalty thereby depriving the petitioner to defend and make representation on the said aspect resulting into a prejudice in law to him. The impugned order is set aside on the aforesaid considerations.

12. As the impugned order has been set aside on the pure legal grounds as above, it was not necessary to go into the various other submissions raised by learned advocate for the petitioner as to whether the conduct amounted to "professional misconduct" or "misconduct", as well as other attendant aspects in the submissions on behalf of the petitioner noted in paragraphs 6.4 and 6.5 and elsewhere hereinabove. These aspects are left open for consideration by the respondent authorities.

13. Apropos what is observed in paragraph 12 above, it is kept open to the appropriate government to take out proceedings against the petitioner afresh if the appropriate government is of the view that on facts a case exists for proceeding against the petitioner. However such fresh proceedings as may be decided to be initiated by the appropriate government, the same can only be done by adhering to what is observed and held in the present judgment."

9 Being dissatisfied with the judgment and order passed by the learned Single Judge, the State of Gujarat is here before this Court with the present appeal.

● **SUBMISSIONS ON BEHALF OF THE APPELLANT:**

10 Mr. Kamal Trivedi, the learned Advocate General appearing for the State of Gujarat vehemently submitted that the learned Single Judge committed a serious error in holding that Rule 13(12)(b)(i) is invalid as the same travels beyond the scope of Section 10 of the Act. According to Mr. Trivedi, the decision of the Allahabad High Court upon which

reliance has been placed by the learned Single Judge does not lay down the correct proposition of law. According to Mr. Trivedi, Section 15 of the Act confers power to the Central Government to make rules to carry out the purposes of the Act. Mr. Trivedi would submit that when the power is conferred in general and thereafter in respect of the enumerated matters, the particularisation in respect of the specified subject is construed as merely illustrative and does not limit the scope of the general power. According to Mr. Trivedi, the rules under the delegated legislation can be held to be *ultra vires* the statutory provision of the Act only if it is shown that it is beyond the scope of or in excess of the rule making power of the delegate conferred under the Act, or it is in conflict with or repugnant to any enactment in the Act. Mr. Trivedi would submit that there can be no dispute with the contention that the provision of the rules cannot go beyond the scope of the relevant provisions in the Act. However, according to Mr. Trivedi, the Rule 13(12) (b)(i), by any stretch of imagination, cannot be said to be beyond Section 10 of the Act. According to Mr. Trivedi, Section 10 of the Act only provides for removal of names of the Notary Public from the register maintained by the State Government under Section 4 of the Act. It is submitted that if the penalty, as prescribed in Rule 13(12)(b)(i) of the Rules, 1956, is imposed, then the consequence of the same would be the removal of the name of the Notary Public from the register. According to Mr. Trivedi, Section 10 of the Act does not deal with penalty or punishment that may be imposed upon a Notary Public for professional misconduct or any other misconduct.

11 Mr. Trivedi vehemently submitted that for the purpose of deciding whether a rule is *ultra vires* or travels beyond the scope of the parent Act should be decided, not only considering the power to make rule, as may be provided in the Act, by way of delegated legislation, but also keeping

in mind the objects and reasons of the enactment of the Act. Mr. Trivedi would submit that the object of the Act, 1952 is not only to empower the Central and State Governments to appoint Notaries for the limited purpose of the Negotiable Instruments Act, but also to regulate the profession of such Notaries. According to Mr. Trivedi, for the purpose of regulating the profession of the Notaries, it is always permissible to frame rules by way of delegated legislation providing for penalties like perpetually debarring the Notaries from practice. According to Mr. Trivedi, the generality for the purpose of carrying out of the Act includes the power to perpetually debar the Notary from practice. Mr. Trivedi would submit that Section 10 of the Act may be silent as regards the power to perpetually debar the Notary from practice, but, at the same time, if the rule framed under section 15 of the Act provides for perpetually debarring the Notary from practicing, the same cannot be said absolutely alien to Section 10 of the Act. As the same does not supplant the provision of the enabling Act, but at the most, it could be said to supplement it. Mr. Trivedi would submit that what is permitted is the delegation of ancillary or subordinate legislative function or what is functionally called a power to fill up the details.

12 Mr. Trivedi further submitted that if the rule perpetually debarring the Notary from practice is to be held as invalid, then the rule providing for suspending the Notary from practicing for a specific period or letting him off with a warning according to nature and gravity of the misconduct would also be rendered invalid. This, according to Mr. Trivedi, would lead to a very incongruous situation. Mr. Trivedi would submit that in a particular case, having regard to the nature and gravity of the misconduct, the State Government must deem fit to cancel the certificate of practice, but may deem fit to warn the Notary. According to Mr. Trivedi, if the entire Rule 13(12)(b)(i),(ii),(iii) is to be held as invalid, then it leads to an absurd situation wherein the Government is

left with only and only one option that is to cancel the certificate of practice or not to cancel the certificate of practice. This could not have been the intention of the legislation.

13 In such circumstances referred to above, Mr. Trivedi prays that there being merit in this appeal, the same may be allowed and the impugned order passed by the learned Single Judge be quashed and set aside.

14 Mr. Trivedi, in support of his submission as regards the validity of Rule 13(12)(b)(i) of the Rules, 1956 placed strong reliance on the following decisions:

[1] **State of Jammu and Kashmir vs. Lakhwinder Kumar** reported in **(2013) 6 SCC 333**

[2] **Assistant Collector of Central Excise vs. M/s. Ramakrishnan Kulwant Rai** reported in **1989 Supp (10 SCC 541**

[3] **Minerva Talkies, Bangalore vs. State of Karnataka** reported in **1988 (Supp) SCC 176**

[4] M/s. Patel Engineering Ltd vs. Union of India and Anr. Reported in **AIR 2012 SC 2342**

[5] **Y. Narayan Chetty vs. The Income Tax Officer, Nellore** reported in **AIR 1959 SC 213**

[6] Rohtak and Hissar Districts Electric Supply Co. Ltd. 2. Amitabh Textile Mills Ltd. vs. State of U.P. and others reported in **AIR 1966 SC 1471**

[7] Afzal Ullah vs. State of U.P. Reported in **AIR 1964 SC 264**

[8] **Emperor vs. Sibnath Banerji** reported in **AIR (32) 1945 Privy Council 156**

15 Mr. Trivedi further submitted that merely because Rule 13(12)(b) of the Rules, 1956 provides for imposition of three different kinds of punishments it does not mean that a second opportunity of hearing on the quantum of punishment must be given to the delinquent before the punishment is imposed on him.

16 Mr. Trivedi in context with the second questin placed strong reliance:

[1] **P. John Samuel vs. State of Tamil Nadu** reported in **AIR 2005 Madras 442**

[2] **Shadi Lal Gupta vs. State of Punjab** reported in **(1973) 1 SCC 680**

[3] **Haryana Financial Corporation vs. Kailash Chandra Ahuja** reported in **(2008) 9 SCC 31**

[4] **Chairman, Ganga Yamuna Gramin Bank vs. Devi Sahai** reported in **(2009) 11 SCC 266**

● **SUBMISSIONS ON BEHALF OF THE ORIGINAL PETITIONER (RESPONDENT NO.1 HEREIN):**

17 Mr. Mehul S. Shah, the learned senior counsel assisted by Mr. Jay M. Thakkar, the learned counsel appearing for the original petitioner

vehemently submitted that no error, not to speak of any error of law could be said to have been committed by the learned Single Judge in passing the impugned judgement and order. According to Mr. Shah, the learned Single Judge is right in taking the view that Rule 13(12)(b)(i) of the Rules is invalid as the same travels beyond the scope of Section 10 of the Act which does not empower to impose punishment of perpetually debarring a Notary from practice. According to Mr. Shah, the learned Single Judge was justified in placing reliance on the decision of the Allahabad High Court in the case of **Kashi Prasad Saksena (supra).** According to Mr. Shah, once a particular High Court declares a particular rule to be *ultra vires* the provisions of the Act, then it is as good as saying that such a rule did not exist in the statute. According to Mr. Shah, the State Government could not have passed the impugned order imposing punishment as provided in Rule 13(12)(b)(i) of the Rules. Mr. Shah would submit that Section 10 of the Act is very clear. It stipulates that if a Notary Public has been found to be guilty of professional or other misconduct as in the opinion of the Government renders him unfit to practice as a Notary, then his name can be removed from the register maintained by the State Government under Section 4 of the Act. According to Mr. Shah, except removal of the name from the register, no other penalty or punishment could have been imposed by the State Government. According to Mr. Shah, if the certificate of a Notary is cancelled, the Government, even if satisfied, may reissue the certificate and allow him to practice as a Notary. However, according to Mr. Shah, in the case where the Notary is perpetually debarred from practice, then for all times to come, the certificate came to be issued so as to allow him to practice as a Notary.

18 Mr. Shah submitted that even on the second point, the view taken by the learned Single Judge is just and proper. Mr. Shah would submit that on conclusion of the inquiry, the Notary must be given an

opportunity of making good his case that he had not committed any professional misconduct or any other misconduct. According to Mr. Shah, in the case on hand, on conclusion of the inquiry, straightway the State Government acted upon the inquiry report and passed the impugned order which came to be rightly set aside by the learned Single Judge on the ground of breach of the principles of natural justice.

19 In such circumstances referred to above, Mr. Shah, the learned senior counsel prays that there being no merit in this appeal, the same may be dismissed.

20 Mr. Shah, in support of his submissions, has placed strong reliance on the decision of the Allahabad High Court in the case of **Kashi Prasad Saksena (supra)**.

● **ANALYSIS:**

21 Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the learned Single Judge committed any error in passing the impugned order.

22 Before adverting to the rival submissions canvassed on either side, we must look into few relevant provisions of the Act as well as the Rules.

23 Section 2(d) of the Act defines the term “Notary”. It reads thus:

> *“2. Definitions.- In this Act, unless the context otherwise requires,-*
>
> *(d) "notary" means a person appointed as such under this Act:*
>
> *Provided that for a period of two years from the commencement of this Act it shall include also a person who, before such commencement, was appointed a notary public b [under] the Negotiable Instruments Act, 1881, and is, immediately before such commencement, in practice in any part of India :*

Provided further that in relation to the State of Jammu and Kashmir the said period of two years shall be computed from the e [date on which this Act comes into force in that State."

24 Section 2(f) defines the term "register". The same reads as under:

"(f) "Register" means a Register of Notaries maintained by the Government under section 4'

25 Section 3 of the Act confers power upon the Central Government for the whole or any part of India and any part of the State to appoint Notaries. Section 3 reads thus:

" 3. ***Power to appoint notaries***

The Central Government, for the whole or any part of India, and any State Government, for the whole or any part of the State, may appoint as notaries any legal practitioners or other persons who possess such qualifications a as may be prescribed."

26 Section 4 is with regard to "register". The term "register" has been defined and referred to above. Section 4 reads thus:

"4. ***Registers -*** *(1) The Central Government and every State Government shall maintain, in such form as may be prescribed, a Register of the notaries appointed by that Government and entitled to practice as such under this Act.*

(2) Every such Register shall include the following particulars about the notary whose name is entered therein, namely :-
(a) his full name, date of birth, residential and professional address;
(b) the date on which his name is entered in the Register;
(c) his qualifications; and
(d) any other particulars which may be prescribed."

27 Section 4A of the State Amendment (Gujarat) reads thus:

"STATE AMENDMENT

Gujarat:

After section 4 insert the following new section :-

"4-A. ***Special provision regarding registered Notaries of Gujarat.-*** *(1) Notwithstanding anything contained in this Act, the State Government of Gujarat shall prepare in the form prescribed for a Register required to be maintained under section 4. a Register of Notaries for the Slate of Gujarat as hereinafter provided.*

(2) The State Government of Gujarat shall, by an order published in the Official Gazette, enter in the Register the names of notaries and all particulars relating thereto appearing in the Register maintained immediately before the 1 st May, 1960 by the State Government of Bombay (hereinafter referred to as 'the Bombay Register') after excluding from such names, the name of any notary whose professional address as recorded in the Bombay Register falls outside the State of Gujarat.

(3) Before making any Order under sub-section (2), the State Government of Gujarat shall make such inquiry as it deems necessary, and give an opportunity to the person whose name is proposed to be excluded from the Register, to make his representation, if any.

(4) On preparation of the Register as aforesaid.-
(a) the Register as so prepared shall, for all purposes of this Act. be deemed to be the Register maintained for the State of Gujarat;
(b) all persons whose names have been entered in the Register shall, for the residue of the period for which they were appointed by the State Government of Bombay, be deemed to have been appointed by the State Government of Gujarat, and accordingly, the certificate of practice issued to them under section 5 shall be deemed to have been amended so as to restrict their area of practice to the State of Gujarat."--Notaries Act (Gujarat Adaptation) Order, 1961."

28 Section 10 provides for removal of names from register. Section 10 reads thus:

"10. ***Removal of names from Register-*** *The Government appointing any notary may, by order, remove from the Register maintained by it under section 4 the name of the notary if he-*

(a) makes a request to that effect; or

(b) has not paid any prescribed fee required to be paid by him; or

(c) is an undischarged insolvent; or

(d) has been found, upon inquiry in the prescribed manner, to be guilty of such professional or other misconduct as, in the opinion of the Government, renders him unfit to practice as a notary.

(e) is convicted by court for an offence involving moral turpitude, or

(f) does not get his certificate of practice renewed."

29 Section 15 provides for the power to make rules. Section 15 reads thus:

*"15. **Power to make rules -** (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.*

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :-

(a) the qualifications of a notary, the form and manner in which applications for appointment as a notary may be made and the disposal of such applications;
(b) the certificates, testimonials or proofs as to character, integrity, ability and competence which any person applying for appointment as a notary may be required to furnish;
(c) the fees payable for appointment as a notary and for the issue and renewal of a certificate of practice, and exemption, whether wholly or in part, from such fees in specified classes of cases;
(d) the fees payable to a notary for doing any notarial act;
(e) the form of Registers and the particulars to be entered therein;
(f) the form and design of the seal of a notary;
(g) the manner in which inquiries into allegations of professional or other misconduct of notaries may be made;
(h) the acts which a notary may do in addition to those specified in section 8 and the manner in which a notary may perform his functions;
(i) any other matter which has to be, or may be prescribed.

[(3) Every rule made by the Central Government under this Act shall be laid as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions and if before the expiry of the session immediately following the session or the successive

sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

30 Rule 7 is with regard to the recommendation of the competent authority. It reads as under:

*"7. **Recommendation of the competent authority.**- (1) The competent authority shall, after holding such inquiry as he thinks fit and after giving the applicant an opportunity of making his representations against the objections, if any, received within the time fixed under sub-rule(2) of rule 6, make a report to the appropriate Government recommending that the applicant may be allowed to appear before the interview Board.*

(2) The competent authority shall also make his recommendation in the report under sub-rule (1) regarding the persons by whom the whole or any part of the costs of the application including the cost of hearing, if any, shall be borne.

(3) In making his recommendation under sub-rule (1), the competent authority shall have due regard to the following matters, namely:- (a) whether the applicant ordinarily resides in the area in which he proposes to practise as a notary;

(b) whether, having regard to the commercial importance of the area in which the applicant proposes to practise and the number of existing notaries practising in the area, it is necessary to appoint any additional notaries for the area;

(c) whether, having regard to his knowledge and experience of commercial law and the nature of the objections, if any, raised in respect of his appointment as a notary, and in the case of a legal practitioner also to the extent of his practise, the applicant is fit to be appointed as a notary;

(d) where the applicant belongs to a firm of legal practitioners, whether, having regard to the number of existing notaries in that firm, it is proper and necessary to appoint any additional notary from that firm; and

(e) where applications from other applicants in respect of the area are pending, whether the applicant is more suitable than such other applicants."

Provided that in respect of categories (b) and (c) if the memorial in Form

II is found to be in order, the competent authority may issue certificate of practice as Notary directly by exempting appearance before the Interview Board."

31 Rule 13 of the Rules is with regard to the inquiry into the allegations of professional or other misconduct of a Notary. Rule 13(12) (a)and (b) of the Rules relevant for our purpose reads thus:

"[13. ***Inquiry into the allegations of professional or other misconduct of a notary.-***

(12) (a) The appropriate Government shall consider the report of the competent authority, and if in its opinion a further inquiry is necessary, may cause such further inquiry to be made and a further report submitted by the competent authority.

(b) If after considering the report of the competent authority, the appropriate Government is of the opinion that action should be taken against the notary the appropriate Government may make an order-

(i) Cancelling the certificate of practice and perpetually debarring the notary from practice; or

(ii) suspending him from practice for a specified period, or

(iii) letting him off with a warning, according to the nature and gravity of the misconduct of the notary proved."

32 At this stage, we also deem fit to look into the statement of objects and reasons of the Act, 1952. It reads as under:

"Under section 138 of the Negotiable Instruments Act, 1881, the Government of India have the power to appoint notaries public, but only for the limited purpose of performing functions under that Act. By virtue of an ancient English Statute, the Master of Faculties in England used to appoint notaries public in India for performing all recognized notarial functions, but it is no longer appropriate that persons in this country who wish to function as notaries should derive their authority from an institution in the United Kingdom.

The object of the present Bill is to empower the Central and State Governments to appoint notaries, not only for the limited purposes of the Negotiable Instruments Act, but generally for all recognized notarial purposes, and to regulate the profession of such notaries.

> *A Bill on the subject was accordingly introduced in the provisional Parliament on the 19th April, 1951 and referred to a Select Committee on the 18th August, 1951. The report of the Select Committee was presented on the 4th October, 1951, but the bill could not be proceeded with in the last session of Parliament for want of time and, therefore, lapsed. Apart from one or two minor drafting changes, the present Bill follows closely the Notaries Bill, 1951, as amended by the Select Committee.*"

33 Law takes judicial notice of seal of a notary. In ordinary course, an initial presumption may be made about genuineness of the notarised copy of the document. The underlying idea behind such presumption is that the notary is normally a responsible member of the legal profession and he is expected to take due care to satisfy himself about the identity of the party appearing before him. If the party appearing before the notary is not known to the notary, the notary must get the party identified by an Advocate known to him and take signature of both of them in token thereof. Notarised copies of power of attorney and other documents are filed with Banks, Courts and other public institutions. If documents are marked as true copy by the notary without taking due care and even making any entry in the notary register and without taking signature of an advocate identifying the executant or without taking other reasonable precaution, it cannot be said that the notary is discharging his' duty in accordance with law as expected of him. "Good faith" implies due care and caution.

34 On 9th August 1952, the President of India granted assent to the Notaries Act, 1952 passed by our Parliament. The said Act came into force on 14th December 1956 on issue of necessary notification and publication thereof in the Government Gazette. Prior to the passing of the said Act, the Government of India was empowered to appoint Notary Public under Sections 138 and 139 of the Negotiable Instruments Act for the limited purpose of functioning of Notaries under the said Act. Prior to the passing of the said Act, the Master of Faculties in England also

used to appoint Notaries Public in India for performing all notarial functions. Section 3 of the said Act empowers the Central Government to appoint any legal practitioner or any other person as a notary for the whole of India or part thereof. The said Section also empowers the State Government to appoint any legal practitioner or other person who possess prescribed qualifications as a notary for functioning as such within the State. The notarial functions include "certifying copies of documents" as true copies of the original. Section 15 of the Notaries Act, 1952 empowers the Central Government to make rules to carry out the purposes of the Act including prescribing of fees payable to a notary for doing any notarial act and prescribing of form of registers required to be maintained by a notary, and particulars to be entered therein. In exercise of the powers conferred by Section 15 of the Notaries Act, 1952, the Central Government has framed the necessary rules. Rule 10(1) of the Notaries Rules, 1956 prescribes that every notary shall charge a fees for certifying copies of documents as true copies of the original at the rate prescribed therein. Rule 11(9) of the said Rules provides that every notary shall grant a receipt for the fees and charges realised by him and maintain a register showing all the fees and charges realised for every single notarial act. Rule 12 of the said Rules prescribes for use of seal of notary. Rule 11(2) of the said Rules in terms provides that every notary shall maintain notarial register in prescribed Form No. 15. The prescribed form of the register provides for entry of every notarial act in the notarial register and taking of signature of the person concerned in the register and entry in respect of fees charged.

35 In **Phagu Ram vs. State** reported in **AIR 1965 Punjab 220,** H.R. Khanna, J. (as His Lordship then was) observed as under:

> *"4. The question as to what should be the true test to determine as to whether a person holds a civil post under the State or the Union was gone into by a Full Bench of Allahabad High Court in Mohammad Ahmad Kidwai v. Chairman, Improvement Trust, Lucknow, AIR 1958 All 353*

(FB), While deciding that an employee of Improvement Trust does not hold a civil post under the State, the Court held -

"The true test to determine whether a person held a civil post under the Crown as contemplated by S. 240 of the Government of India Act or was a member of a Civil service of the Union or the State or held a civil post under the Union or the State has primarily to be determined in relation to the functions which he performed. If his duties relate to activities which fell directly within the sphere of the Union or the State and his services were under the direction and control, as also his appointment was by either the Union of the State, then he could fall under those services which were contemplated by either S. 240 of the Government of India Act or by Art. 311 of the Constitution of India, but if the sphere of activity of the employee fell within the sphere of activity of a local authority constituted under some Statute having a separate legal existence, then the position of that employee, even though the State or the Union controlled some of his activity and gave him direction in the discharge of his functions fell outside the scope of either S. 240 of the Government of India Act or Art. 311 of the Constitution of India."

Keeping in view the criteria laid down above and also taking into consideration the function of a notary, he cannot, in my opinion, be deemed to hold a civil post. It is no doubt true that a notary is appointed under the Act and his name can be removed by the Government from the Register of notaries, the fact remains that the functions performed by him are such as do not relate to activities which fall directly within the sphere of the Union or the State. The essential function of a notary is to bestow an impress of authenticity upon certain acts performed by him under the Act and in order to afford facility to the general public for securing such authenticity, notaries are appointed. Such a facility can be availed of by the general public on payment of certain fees which have been specified in the Rules under the Act, and it is significant that the fees go to the pocket of the notary and not to the coffers of the Government. The Government only gets revenue in the shape of stamps which have to be affixed according to law for notarial acts. No doubt a notary is appointed by the Government but he gets no salary from the Government and the duties performed by him fire normally not such as keep him fully occupied. Taking into account all the factors I am of the opinion that it would be stretching the meaning of the words too far to hold that a notary holds a civil post to whom Art. 311 applies. The Act, as its preamble goes to show, has been acted to regulate the profession of notaries, and the different provisions, contained in the Act, do not warrant the inference that a notary holds a civil post."

36 We shall now go straight to the decision of the Allahabad High Court in the case of **Kashi Prasad Saksena (supra)**. Kashi Prasad

Saksena was a Notary practicing in the city of Lucknow. His name came to be removed from the register of Notaries as the State Government received certain complaints against him. Kashi Prasad Saksena was pertually debarred from practicing as a Notary Public. In such circumstances, Kashi Prasad Saksena preferred a writ application before the Allahabad High Court (Lucknow Bench) and challenged the order perpetually debarring him from practice as a Notary Public. It was argued on behalf of Kashi Prasad Saksena that the State Government could have removed the name of Kashi Prasad Saksena from the register of Notaries only if the conditions as stipulated under Section 10 of the Act were satisfied. It was further argued that under Section10 or any other provisions of the Act, the Government had no power to inflict punishment of debarring perpetually. Such contention canvassed by the learned counsel on behalf of Kashi Prasad Saksena found favour with the Division Bench of the Allahand High Court. The Allahabad High Court, ultimately, held as under:

> *"21 The next question to consider is whether in the circumstances of the present case it can be said that the order of the State Government removing the name of the petitioner-appellant from the register of Notaries is valid and within the jurisdiction of the State Government. Mr. Hajela has rightly submitted that the State Government could remove the petitioner only if the conditions of S. 10 of the Act have been satisfied. That provision reads :*
> *"The Government appointing any notary may, by order, remove from the Register maintained by it under S. 4 the name of the notary if he -*
> *(a) makes a request to that effect; or*
> *(b) had not paid any prescribed fee required to be paid by him, or*
> *(c) is an undischarged insolvent; or*
> *(d) has been found upon inquiry in the prescribed manner, to be guilty of such professional or other misconduct as, in the opinion of the Government, renders him unfit to practice as a notary."*
>
> *22 The impugned order, which was notified, reads :*
> *"In exercise of the powers conferred by S. 10 of the Notaries Act, 1962, read with Cl. (b) of sub-rule (12) and sub-rule (13) of R. 13 of the Notaries Rules, 1956 the Governor is pleased to cancel with effect from the date of this notification the certificate of practice granted, under Cl. (b) of sub-section (i) of S. 5 of the aforesaid Act,*

to Sri Kashi Prasad Saksena and to order the removal of his name from the register of Notaries with effect from the said date and to perpetually debar him from practising as such."

23 Apart from S. 10 of the Act there is no other provision which empowers the State Government to punish a Notary or to remove his name from the register maintained under S. 4 of the Act. We have already reproduced S. 10 of the Act earlier. There is nothing in it which empowers the State Government to "perpetually debar him from practising as such." It is true that R. 13 (12) gives the Government such powers and reads :

"13 (12) (a) The appropriate Government shall consider the report of the competent authority, and if in its opinion a further inquiry is necessary, may cause such further inquiry to be made and a further report submitted by the competent authority.
(b) If after considering the report of competent authority, the appropriate Government is of the opinion that action should be taken against the notary, the appropriate Government may make an order :
(i) cancelling the certificate of practice and perpetually debarring the notary from practice : or
(ii) suspending him from practice for a specified period; or
(iii) letting him off with a warning, according to the nature and gravity of the misconduct of the notary proved."

24 These rules have been framed under S. 16 of the Act. Actually the rules open with the words "in exercise of the powers conferred by S. 15 of the Notaries Act 1952 (53 of 1952) the Central Government hereby makes the following rules, namely : Section 15 of the Act reads :

"15. Powers to make rules.
(1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act;
(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :
(a) the qualifications of a notary, the form and manner in which applications for appointment as a notary may be made and the disposal of such applications;
(b) the certificate, testimonials or proofs as to character, integrity, ability and competence which any person applying for appointment as a notary may be required to furnish;
(c) the fees payable for appointment as a notary and for the issue and renewal of a certificate of practice, and exemption, whether wholly or in part, from such fees in specified classes of cases;
(d) the fees payable to a notary for doing any notarial act;
(e) the form of Registers and the particulars to be entered therein;

(f) the form and design of the seal of a Notary;
(g) the manner in which inquiries into allegations of professional or other misconduct of notaries may be made;
(h) the acts which a notary may do in addition to those specified in S. 8 and the manner in which a notary may perform his functions;
(i) any other matter which has to be, or may be, prescribed."

25 It would appear that the Central Government could frame a rule either under the general power conferred upon it by the opening words of sub-section (2) or by any of the clauses mentioned in that provision. It is well settled that a rule cannot militate against a provision contained in the statute under which the rules have been framed. Section 10 or any other section of the Act did not confer on the State Government any bigger power than to remove the name of a Notary from the register maintained under S. 4 of the Act. Therefore even the general powers conferred by sub-section (2) of S. 15 of the Act cannot give the Central Government the jurisdiction to frame a rule which travels much beyond the scope of S. 10 of the Act. In other words when S. 10 of the Act does not give the appropriate Government the power of perpetually debarring a person from practising as a Notary and confines that power to at most removing the name from the Register of Notaries, the power to perpetually debar cannot be conferred by the rules. If a person's name is removed from the Register of Notaries, there is no bar to his applying again. But once he is perpetually debarred, he can never apply again. Under S. 10, or any other provision of the Act, the Government has no power to inflict the extreme punishment of debarring perpetually. In our opinion, therefore, R. 13 (12) (b), so far as it authorises the appropriate Government to permanently debar a Notary from practise, is beyond the rule making power of the Central Government and for that reason invalid. The order of the State Government therefore, so far as it perpetually debars the petitioner-appellant from practising the profession of a Notary is without jurisdiction and liable to be quashed.

26 We would also like to point out that rule 13 is headed as "inquiry into the allegations of professional and other misconduct of a notary". Consequently that rule has been framed not under the general powers contained in sub-section (2) of S. 15 of the Act, but under Cl. (g) of S. 15 (2) of the Act. That clause permits the Central Government to frame a rule providing "the manner in which inquiries into allegations of professional or other misconduct of notaries may be made". The power to perpetually debar is not comprehended in the expression "the manner in which enquiries ..... of notaries may be made". The rule permitting an order of debarring a person perpetually would therefore be beyond the scope of S. 15 (2) (g) of the Act and for that reason also void."

37 Thus, the Allahabad High Court took the view that Rule 13 had

been framed not under the general powers contained in sub-section (2) of the Section 15 of the Act, but under clause (g) of Section 15(2) of the Act. The High Court took the view that the said clause empowers the Central Government to frame a rule providing "the manner in which inquiries into the allegations of professional or other misconduct of Notaries may be made". The Court took the view that the power to perpetually debar is not comprehended in the expression "the manner in which inquiries into the allegations of professional or other misconduct of Notaries may be made". Ultimately, the Allahabad High Court took the view that the rule permitting an order debarring a person would therefore be beyond the scope of Section 15(2)(g) of the Act and for that reason also void.

38 The learned Single Judge of this Court took the view that the principles of law have been rightly enunciated in the decision of the Allahabad High Court referred to above.

39 At this stage, we must look in the decisions relied upon by Mr. Trivedi, the learned Advocate General appearing for the State of Gujarat in support of his submission that the decision of the Allahabad High Court does not lay down the correct proposition of law.

40 In the case of **Minerva Talkies (supra),** the Supreme Court had observed as under:

> *" 7 Section 19 of the Act confers power on the State Government to frame rules for carrying out the purposes of the Act. The preamble and the provisions of the Act provide for the regulation of the exhibition of the cinematograph films, which is the primary object of the Act. The Act confers wide powers on the State Government for the regulation of the exhibition of the cinematograph films which include power to regulate hours during which cinematograph films may be exhibited, the seating arrangements for the members of the public, and any other allied matters pertaining to public safety, health, sanitation and incidental matters. Rule 41-A which limits the numbers of shows in a*

day, regulates the exhibition of the cinematograph films and carries out the purposes of the Act. It was, therefore, referable to the State Government's general power under section 19(1) of the Act. Rule 41-A was further referable to clauses (a) and (d) of section 19(2) of the Act. Clause (a) confers power on the State Government to frame rules prescribing terms, conditions and restrictions subject to which a licence may be granted. The State Government may lay down conditions and impose restrictions prescribing hours during which the films might be exhibited and also the number of shows in the licensed premises. Clause (d) confers power on the State Government to frame rules regulating the exhibition of cinematograph films for the purpose of securing public safety. Any rule regulating the exhibition of the cinematograph films if reasonably connected with public safety would be justified under the said provision. Rule 41-A adds a condition to the licence that exhibition of films would be limited to four shows in a day. No licensee could claim to have unrestricted right to exhibit cinematograph films for all the 24 hours of the day. Such a claim would be against public interest. The restriction to limit the number of shows to four in a day placed by rule 41-A was regulatory in nature which clearly carried out purposes of the Act."

41 In the case of **Assistant Collector of Central Excise (supra),** the Supreme Court observed in para 19 as under:

"We may now examine the contention that at the relevant time R. 10-A was not covered by the rule making power conferred on the Central Government by S. 37. Section 37 dealt with power of Central Government to make Rules. Sub-section (1) said: "The Central Government may make rules to carry into effect the purposes of this Act." Subsection (2) enumerated the matters the rules might provide for 'in particular' and "without prejudice to the generality of the foregoing power." Thus, the section did not require that the enumerated rules would be exhaustive. Any rule if it could be shown to have been made "to carry into effect the purposes of the Act" would be within the rule making power. Chapter II of the Act dealt with the levy and collection of duty. Section 3 as it stood at the relevant time provided that duties specified in the First Schedule were to be levied. We have quoted Sub-section (1)."

42 In the case of **Lakhwinder Kumar (supra),** the Supreme Court observed as under:

"20 We must answer here an ancillary submission. It is pointed out that the Rules made to give effect to the provisions of the Act has to be

consistent with it and if a rule goes beyond what the Act contemplates or is in conflict thereof, the rule must yield to the Act. It is emphasized that Section 80 of the Act confers discretion on the Officer within whose Command the accused person is serving the choice between Criminal Court and Security Force Court without any rider, whereas Rule 41 of the Rules specifies grounds for exercise of discretion. Accordingly, it is submitted that this rule must yield to Section 80 of the Act. We do not find any substance in this submission.

21 One of the most common mode adopted by the legislature conferring rule making power is first to provide in general terms i.e., for carrying into effect the provisions of the Act, and then to say that in particular, and without prejudice to the generality of the foregoing power, rules may provide for number of enumerated matters. Section 141 of the Act, with which we are concerned in the present appeal, confers on the Central Government the power to make rules is of such a nature.

22 Section 141 reads as follows:

"***141. Power to make rules.**-(1) The Central Government may, by notification, make rules for the purpose of carrying into effect the provisions of this Act.*

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for,-

(a) the constitution, governance, command and discipline of the Force;
(b) the enrolment of persons to the Force and the recruitment of other members of the Force;
(c) the conditions of service including deductions from pay and allowances of members of the Force;
(d) the rank, precedence, powers of command and authority of the officers, subordinate officers, under- officers and other persons subject to this Act;
(e) the removal, retirement, release or discharge from the service of persons subject to this Act;
(f) the purposes and other matters required to be prescribed under section 13;
(g) the convening, constitution, adjournment, dissolution and sittings of Security Force Courts, the procedure to be observed in trials by such courts, the persons by whom an accused may be defended in such trials and the appearance of such persons thereat;
(h) the confirmation, revision and annulment of, and petitions against, the findings and sentences of Security Force Courts;
(i) the forms of orders to be made under the provisions of this Act relating to Security Force Courts and the awards and infliction of death, imprisonment and detention;
(j) the carrying into effect of sentences of Security Force Courts;

(k) any matter necessary for the purpose of carrying this Act into execution, as far as it relates to the investigation, arrest, custody, trial and punishment of offences triable or punishable under this Act;
(l) the ceremonials to be observed and marks of respect to be paid in the Force;
(m) the convening of, the constitution, procedure and practice of, Courts of inquiry, the summoning of witnesses before them and the administration of oaths by such Courts;
(n) the recruitment and conditions of service of the Chief Law Officer and the Law Officers;
(o) any other matter which is to be, or may be prescribed or in respect of which this Act makes no provision or makes insufficient provision and provision is, in the opinion of the Central Government, necessary for the proper implementation of this Act.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

23 In our opinion, when the power is conferred in general and thereafter in respect of enumerated matters, as in the present case, the particularisation in respect of specified subject is construed as merely illustrative and does not limit the scope of general power. Reference in this connection can be made to a decision of this Court in the case of ***Rohtak and Hissar Districts Electric Supply Co. Ltd. v. State of U.P., AIR 1966 SC 1471****, in which it has been held as follows:*

> *"18.....Section 15(1) confers wide powers on the appropriate Government to make rules to carry out the purposes of the Act; and Section 15(2) specifies some of the matters enumerated by clauses (a) to (e), in respect of which rules may be framed. It is well-settled that the enumeration of the particular matters by sub-section (2) will not control or limit the width of the powers conferred on the appropriate Government by sub-section (1) of Section 15; and so, if it appears that the item added by the appropriate Government has relation to conditions of employment, its addition cannot be challenged as being invalid in law....." (Underlining ours)*

24 The Privy Council applied this principle in the case of ***Emperor v. Sibnath Banerji, AIR 1945 PC 156****, to uphold the validity of Rule 26 of*

the Defence of India Rules, which though was found in excess of the express power conferred under enumerated provision, but covered under general power. Relevant portion of the judgment reads as under:

> *"Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of sub-sections (1) and (2) of Section 2, Defence of India Act, and counsel for the respondents in the present appeal was unable to support that statement, or to maintain that R.26 was invalid. In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rulemaking power is conferred by sub-section (1), and "the rules" which are referred to in the opening sentence of sub-section (2) are the rules which are authorized by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (1)." There can be no doubt - as the learned Judge himself appears to have thought - that the general language of sub-section (1) amply justifies the terms of R.26, and avoids any of the criticisms which the learned Judge expressed in relation to sub-section (2).*
>
> *Their Lordships are therefore of opinion that Keshav Talpade v. Emperor, ILR (1944) Bom 183 : (AIR 1943 FC 1), was wrongly decided by the Federal Court, and that R. 26 was made in conformity with the powers conferred by sub-section (1) of Section 2, Defence of India Act...."*

25 A constitution Bench of this Court in the case of ***Afzal Ullah v. State of Uttar Pradesh, AIR 1964 SC 264****, quoted with approval the law laid down by the Privy Council in the case of Sibnath Banerji (supra) and held that enumerated provisions do not control the general terms as particularization of topics is illustrative in nature. It reads as follows:*

> *"13. Even if the said clauses did not justify the impugned bye-law, there can be little doubt that the said bye-laws would be justified by the general power conferred on the Boards by Section 298(1). It is now well-settled that the specific provisions such as are contained in the several clauses of Section 298(2) are merely illustrative and they cannot be read as restrictive of the generality of powers prescribed by Section 298(1), vide* ***Emperor v. Sibnath Banerji, AIR 1945 PC 156.*** *If the powers specified by Section 298(1) are very wide and they take in within their scope bye-laws like the ones with which we are concerned in the present appeal, it cannot be said that the powers enumerated under Section 298(2) control the general words used by Section 298(1). These latter clauses merely illustrate and do not exhaust all the powers conferred on the Board,*

so that any cases not falling within the powers specified by Section 298(2) may well be protected by Section 298(1), provided, of course, the impugned bye-law can be justified by-reference to the requirements of Section 298(1). There can be no doubt that the impugned bye-laws in regard to the markets framed by Respondent No. 2 are for the furtherance of municipal administration under the Act, and so, would attract the provisions of Section 298(1). Therefore, we are satisfied that the High Court was right in coming to the conclusion that the impugned bye-laws are valid."

26 In view of what we have observed above it is evident that Rule 41 of the Rules has been made to give effect to the provisions of the Act. In our opinion, it has not gone beyond what the Act has contemplated or is any way in conflict thereof. Hence, this has to be treated as if the same is contained in the Act. Wide discretion has been given to the specified officer under Section 80 of the Act to make a choice between a Criminal Court and a Security Force Court but Rule 41 made for the purposes of carrying into effect the provision of the Act had laid down guidelines for exercise of that discretion. Thus, in our opinion, Rule 41 has neither gone beyond what the Act has contemplated nor it has supplanted it in any way and, therefore, the Commanding Officer has to bear in mind the guidelines laid for the exercise of discretion."

43 In the case of **Sibnath Banerji (supra)**, the Privy Council observed as under:

"The present applications under Section 491 of the Criminal Procedure Code were filed on April 24, 1943, two days after the decision of the Federal Court in Keshav Talpade v. King Emperor [1943] F.C.R. 49: S.C. (1943) 46 Bom. L.R. 22 under which it was held", reversing the decision of the Bombay High Court refusing to make an order under Section 491 for release of the applicants, that Rule 26 of the Defence of India Rules was ultra vires, and was not warranted by the Defence of India Act, 1939.

10. On April 28, 1943, the Governor General made and promulgated Ordinance No. XIV of 1943 under Section 72 of the Ninth Schedule of the Government of India Act, 1935. By Section 2 of the Ordinance a new clause was substituted for Clause (x) of Section 2(2) of the Defence of India Act, 1939. Section 3 of the Ordinance provided:

"that no order heretofore made against any person under Rule 26 of the Defence of India Rules shall be deemed to be invalid or shall be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said rule was made be lawfully conferred by a rule made or deemed to have been made under Section 2 of the Defence of India Act, 1939."

The amendment effected by Section 2 of the Ordinance removed the grounds on which the Federal Court had pronounced Rule 26 to be ultra vires. The terms of Rule 26 were not altered by the Ordinance. In the present applications, ILR (1944) Bom 183 (Keshav Talpade vs. Emperor) was taken as binding on them by both the High Court and the Federal Court and the new Ordinance No. XIV was the main object of challenge by the applicants. But before this Board, the Crown has placed in the forefront a challenge of the correctness of the decision in Talpade's case, and success in that contention would vindicate the validity of Rule 26 and would supersede any consideration of Ordinance No. XIV. It is therefore necessary to dispose of this question first.

The material portions of Section 2 of the Defence of India Act. 1939 (Act XXXV of 1939), as amended by Section 2 of the Defence of India (Amendment) Act, 1940 (Act XIX of 1940), are as follows:-

> *"2. (i) The Central Government may, by notification in the official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.*
>
> *(2) Without prejudice to the generality of the powers conferred by subjection (i), the rules may provide for or may empower any authority to make orders providing for, all or any of the following matters, namely:-*
>
> * * * *
>
> *(v) preventing the spreading without lawful authority or excuse of false reports or the prosecution of any purpose likely to cause disaffection or alarm, or to prejudice His Majesty's relations with foreign powers or with States in India or to prejudice the maintenance of peaceful conditions in the tribal areas,, or to promote feelings of enmity and hatred between different classes of His Majesty's subjects;*
>
> * * * *
>
> *(x) the apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defence of British India, the prohibition of such person from entering or residing or remaining in any area, and the compelling of such person to reside and remain in any area, or to do, or abstain from doing anything.*
>
> *The material part of Rule 26, as it has stood since 1940, is as*

follows:-

26. (J) The Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to prevent him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of a public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the/ efficient prosecution of the war it is necessary so to do, may make an order;

(a) ...
(b) directing that he be detained;"

In ILR (1944) Bom 183 Keshav Talpmie's case the judgment of the Federal Court was delivered by Gwyer C.J. who first dealt with the main argument of the appellant, which had been rejected by the High Court, and proceeded (p. 61):

"We, therefore, reject the main argument addressed to us on behalf of the appellant, and, if there were nothing more in the appeal, we should dismiss it without further discussion. There) is however another aspect of the case, which was not argued until the Court itself drew the attention of counsel to it; for it seemed to us that it was open to question whether rule 26 itself in its present form was within the rule-making powers conferred by the Defence of India Act. If it is not within those powers, then it must be hold void arid inoperative, either in whole or in part; and orders made under it will be similarly open to challenge."

The learned Judge then proceeded to discuss paragraphs (v) and (x) of Section 2(2) of the Act, and for reasons fully stated by him, he came to the conclusion that Rule 26 was not within the powers conferred by Sub-section (2) of Section 2 and he stated (p. 68):

"The Legislature, having set out in plain and unambiguous language in paragraph (x) the scope of the rules which may be made providing for apprehension and detention in custody it is not permissible to pray in aid the more general words in Section 2(1) in order to justify a rule which so plainly goes beyond the limits of paragraph (x); though if paragraph (x) were not in the Act at all, perhaps different considerations might apply... We are compelled therefore to hold that rule 26 in its present form goes beyond the rule-making powers which the Legislature has thought fit to confer upon the Central Government and is for that reason invalid."

Their Lordships are unable to agree with the learned Chief Justice

of the Federal Court on his statement of the relative positions on Sub-sections (J) and (2) of Section 2 of the Defence of India Act, and counsel for the respondents in the present appeal was unable to support that statement, or to maintain that Rule 26 was invalid. In the opinion of their Lordships, the function of Sub-section (2) is merely an illustrative one; the rule-making power is conferred by Sub-section (1), and "the rules" which are referred to in the opening sentence of Sub-section (2) are the rules which are authorised by, and made under, Sub-section (1); the provisions of Sub-section (2) are not restrictive of Sub-section (1), as indeed is expressly stated by the words "without prejudice to the generality of the powers-conferred by Sub-section (1)." There can be no doubt-as the learned Judge himself appears to have thought-that the general language of Sub-section (J) amply justifies the terms of Rule 26, and avoids any of the criticisms which the learned Judge expressed in relation to Sub-section (2).

Their Lordships are therefore of opinion that ILR (1944) Bom 183 Keshav Talpade's case was wrongly decided by the Federal Court, and that Rule 26 was made in conformity with the powers conferred by Sub-section (J) of Section 2 of the Defence of India Act. It is, accordingly, unnecessary for their Lordships to consider whether Rule 26 was not also within paragraphs (v) and (x) of Sub-section (2) of Section 2, contrary to the opinion of the Federal Court, and their Lordships express no opinion on the matter."

44 In the case of **Afzal Ullah (supra)**, the Constitution Bench of the Supreme Court was called upon to decide the validity of bye-law No.3 and other relevant bye-laws framed by the respondent No.2 – Municipal Board of Tanda. We quote the facts as noted in the findings of the Supreme Court:

"The appellant Chaudhari Afzal Ullah is a resident of Tanda and owns a piece of land and super-structures standing on it along with the compound , in the town of Tanda. On his own land, within the compound he has established a market in which food-grains are sold. The Chairman of respondent No. 2 served a notice on the appellant calling upon him to obtain a licence for running the said market, and on the failure of the appellant to comply with the said notice respondent No. 2 initiated criminal proceedings against the appellant . The appellant was tried by the Tehsildar of Tanda (Cr. Case No. 141 of `1960). The case against the appellant was that he was running a market in which vegetables, fruits, fish and grains were sold. It was alleged that under the relevant bye-laws, the appellant was bound to take a licence and since he had failed to do so,

he had committed a breach of the said bye-laws and had thus rendered himself liable to be punished under section 299 (1) of the United Provinces Municipalities Act, 1916 (No. II of 1916) (hereinafter called the Act). The said Tehsildar held that the prosecution had failed to prove the fact that in the market established on the plot belonging to the appellant, vegetables, fruits and fish were sold; evidence showed that only grains were sold in the shops run in that market. The Tehsildar further held that there was nothing in the Act which empowered respondent No. 2 to make bye-laws for the running of a purely grain market, and so, his conclusion was that the relevant bye-laws which were alleged to have been contravened were ultra vires . That is why the Tehsildar acquitted the appellant.

2. Respondent No. 2 then preferred an appeal against the said order of acquittal in the High Court of Allahabad. It was urged on its behalf that though the shops situated on the plot belonging to the appellant sold only grains, they constituted a market within the meaning of the relevant bye-laws and it was obligatory upon the appellant to take a license under the said relevant bye-laws. Respondent No. 2 also contended that the Tehsildar was in error in holding that it had no power to make bye-laws even in regard to a purely grain market. These pleas have been upheld by the High Court, with the result that the order of acquittal passed in favour of the appellant has been set aside and he has been convicted under S. 299 (1) of the Act read with clauses 3 (a) of the relevant bye-laws. The High Court has sentenced the appellant to pay a fine of Rs. 20; in default, it has ordered that the appellant should undergo simple imprisonment for one week. It is against this order that the appellant has come to this Court, and in addition to respondent No. 2, the Board, he has impleaded the State of U. P. as respondent No. 1.

3. Mr. Misra for the appellant contends that the High Court was in error in coming to the conclusion that the relevant bye-laws are valid. He urges that the said bye-laws are invalid, because they are outside the authority conferred on respondent No. 2 to make bye-laws by S. 298 of the Act, and he further argues that they are invalid for the additional reason that they are inconsistent with S. 241 of the Act. Before dealing with these contentions, it would be relevant to consider the said bye-laws, indicate their scheme and refer to the specific bye-laws with which we are concerned. These bye-laws purport to have been framed under section 298A (a), (b), (c) and J, (d) of the Act. The preamble to the bye-laws avers that the said bye-laws had been sanctioned by the Commissioner as required by section 301 (2) of the Act. The bye-laws framed are seventeen in number and in addition, they contain a clause prescribing the penalty. Bye-law 3 (a) reads thus : --

> *"No person shall allow any land or building in his possession or control within the limits of the Tanda Municipality to be used as a market or shop for the sale of vegetables and grains unless a licence*

has previously been obtained from the Board in this behalf".

There is an explanation to this bye-law which shows that "market" means and includes any place or places for buying and selling, inter alia, grains where more than four stalls or shops are kept on any plot of land owned by the same owner or owners, or where wholesale transaction by way of auction or sale of more than twenty maunds is carried on. It is thus clear that if on any plot, more than four stalls or shops kept and they sell grains, they constitute a market within bye-law 3 (a). It has been found by both the courts below in the present case that on the plot belonging to the appellant, more than four shops are kept and they sell grains. Thus, there can be no doubt that these shops constitute a market within bye-laws 3 (a). It is not disputed that if bye-law 3 (a) is valid, the appellant would be under an obligation to obtain a licence as required by it."

Let us now look at the relevant sections of the Act before addressing ourselves to the question as to whether the impugned bye-law 3 (a) and the other bye-laws passed by it are ultra vires . There are only two sections of the Act which are relevant for our purpose in the present appeal; they are sections 241 and 298. Section 241 (1) reads thus :

> *"The right of any person to use any place, within the limits of a municipality, other than a municipal market, as a market or shop for the sale of animals, meat or fish intended for human food, or as a market for the sale of fruit or vegetables shall be subject to bye-laws (if any) made under heading F of S. 298."*

Section 298 confers power on the Board to make by-laws. Section 298 (1) reads thus:

> *"A board by special resolution may, and where required by the State Government shall, make bye-laws applicable to the whole or any part of the municipality, consistent with this Act and with any rule, for the purpose of promoting or maintaining the health, safety, and convenience of the inhabitants of the municipality and for the furtherance of municipal administration under this Act".*

Section 298 (2)-F which consists of six sub-clauses deals with bye-laws which can be made in respect of markets, slaughter-houses, sale of food, etc. The two sub-clauses of S. 298 (2) -F which are material read thus:

> *"(d) Providing for the establishment, and except so far as provision may be made by bye-laws under sub-head (c) for the regulation and inspection of markets and slaughter-houses, of livery stables, of encamping grounds, of sarais, of flour-mills, of bakeries, of place for the manufacture, preparation or sale of specified articles of food or drink, or for keeping or exhibiting animals for sale or hire or*

animals of which the produce is sold, and of places of public entertainment or resort, and for the proper and cleanly conduct of business therein;

(dd) Prescribing the conditions subject to which, and the circumstances in which, and the areas or locality in respect of which, licences for the purposes of sub-head (d) may be granted, refused, suspended, or withdrawn, and fixing the fees payable for such licences, and prohibiting the establishment of business places mentioned in sub-head (d) in default of licence granted by the board or otherwise than in accordance with the conditions of a licence so granted".

"Even if the said clauses did not justify the impugned bye-law, there can be little doubt that the said bye-laws would be justified by the general power conferred on the Boards by S. 298 (1). It is now well settled that the specific provisions such as are contained in the several clauses of S. 298 (2) are merely illustrative and they cannot be read as restrictive of the generality of powers prescribed by S. 298 (1), vide Emperor v. Sibnath Banerji, AIR 1945 PC 156. If the powers specified by S. 298 (1) are very wide and they take in within their scope bye-laws like the ones with which we are concerned in the present appeal, it cannot be said that the powers enumerated under S. 298 (2) control the general words used by S. 298 (1). These latter clauses merely illustrate and do not exhaust all the powers conferred on the Board, so that any cases not falling within the powers specified by section 298 (1), provided, of course, the impugned bye-laws can be justified by reference to the requirements of S. 298 (1). There can be no doubt that the impugned bye-laws in regard to the markets framed by respondent No. 2 are for the furtherance of municipal administration under the Act, and so, would attract the provisions of S. 298 (1). Therefore, we are satisfied that the High Court was right in coming to the conclusion that the impugned bye-laws are valid."

45 In the case **Rohtak (supra),** the Constitution Bench of the Supreme Court observed as under;

"18. The next point raised by Mr. Setalvad is in relation to the addition of two items to the Schedule by respondent No.1. We have already mentioned these items. Mr. Setalvad objects to the addition of item 11-B which has reference to welfare schemes, such as provident fund, gratuities, etc., as well as item 11-C which has reference to the age of superannuation or retirement, rate of pension or any other facility which the employers may like to extend or may be agreed upon between the parties. We do not think that this argument is well founded. We have already emphasised the fact that the Act, even in its original form, was intended to require the employers to define with sufficient precision the conditions of employment

under them. In pursuance of the said object, the Schedule enumerated 10 items in respect of which Standing Orders had to be drafted by the employers and submitted for certification. Item 11 in the Schedule refers to any other matter which may be prescribed. When the appropriate Government adds any item to the Schedule, the relevant question to ask would be whether it refers to the conditions of employment or not. If it does, it would be within the competence of the appropriate Government to add such an item. Section 15 (1) confers wide powers on the appropriate Government to make rules to carry out the purposes of the Act; and S. 15 (2) specifies some of the matters enumerated by Cls. (a) to (e), in respect of which rules may be framed. It is well-settled that the enumeration of the particular matters by sub-section (2) will not control or limit the width of the powers conferred on the appropriate Government by sub-section (1) of S. 15; and so, if it appears that the item added by the appropriate Government has relation to conditions of employment, its addition cannot be challenged as being invalid in law. Whether or not such addition should be made, is a matter for the appropriate Government to decide in its discretion. The reasonableness of such addition cannot be questioned, because the power to decide which additions should be made has been left by the Legislature to the appropriate Government. Having regard to the development of industrial law in this country during recent years, it cannot be said that gratuity or provident fund is not a term of conditions of employment in industrial establishments. Similarly, it would be difficult to sustain the argument that the age of superannuation or retirement is not a matter relating to the conditions of employment. Therefore, we are satisfied that the contention raised by Mr. Setalvad that the addition of items 11-B and 11-C to the Schedule is invalid, must fail."

46 In the case of **Y. Narayana (supra)**, the Supreme Court in para 10 observed as under:

"Mr. Sastri then challenges the validity of the cancellation of the registration of the three firms on the ground that R. 6B under which the Income-tax Officer purported to act is ultra vires. R. 6B provides that in the event of the Income-tax Officer being satisfied that the certificate granted under R. 4 or under R. 6A has been obtained without there being a genuine firm in existence he may cancel the certificate so granted. The material rules of which R. 6B is a part have been framed by the Central Board of Revenue under the authority conferred by S. 59 of the Act. This section empowers the Central Board of Revenue, subject to the control of the Central Government, to make rules inter alia for carrying out the purposes of the Act. Section 59 (2) (e) lays down that such rules may provide for any matter which by this Act is to be prescribed and the rules preceding R. 6B deal with the procedure to be followed, and prescribe the

application to be made, for the registration of firm under S. 26A of the Act. Section 59 (5) provides that the rules made under the said section shall be published in the official gazette and shall thereupon have effect as if enacted in this Act. Thus there is no doubt that the rules are statutory rules and once they are published in the official gazette they are operative as if they were a part of the Act. Mr. Sastri concedes this position ; but he argues that R, 6B is inconsistent with the material provisions in the Act and is therefore ultra vires the Central Board of Revenue. This argument is based substantially on the provisions of S, 23 (4). We have already referred to the provisions of this sub-section, Mr. Sastri contends that it is only where the requirements of S. 23 4) are satisfied that the registration of a firm can be cancelled. The procedure for registration of firms is laid down in S. 26A of the Act. An application has to be made to the Income-tax Officer on behalf of any firm constituted under the instrument of partnership specifying the individual shares of the partners for registration for the purposes of the Act and of any other enactment for the time being in force and relating to income-tax and super-tax. Sub-section (2) requires that the said application shall be made by such person or persons and at such times and shall contain such particulars and shall be in such form and be verified in such manner as may be prescribed and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed. It is in pursuance of the requirments of S. 26 (2) that the relevant rules for the registration of the firms have been made. The question which arises for our decision in this connection is : if a firm has been registered under S. 26A, when can such registration be cancelled ? The appellant suggests that the only cases in which such registration can he cancelled are those prescribed in S. 23 (4). We have no doubt that this argument is fallacious. The cancellation of registration under S. 23 (4) is in the nature of a penalty and the penalty can he imposed against a firm if it is guilty of any of the defaults mentioned in the said sub--section. It would be noticed that where registration is cancelled under S. 23 (4), there is no doubt that the application for registration had been properly granted. The basis of an order under S. 23 (4) is not that the firm which had been registered was a fictitious one, but that, though the registered firm was genuine, by its failure to comply with the requirements of law it had incurred the penalty of having its registration cancelled. That is the effect of the provisions of S. 23 (4). On the other hand, R. 6B deals with cases where the Income-tax Officer is satisfied that a certificate of registration has been granted under R. 4 or under R. 6A without there being a genuine firm in existence; that is to say an application for registration had been made in the name of a firm which really did not exist; and on that ground the Income-tax Officer proposes to set right the matter by cancelling the certificate which should never have born granted to the alleged firm. That being the effect of R. 6B it is impossible to accede to the argument that the provisions of this rule are inconsistent with the provisions of S. 23 (4) of the Act. If the Income-tax Officer is empowered under S. 26A read with the relevant rules to grant or refuse the request of the firm for registration, it would normally

be open to him to cancel such registration if he discovers that registration had been erroneously granted to a firm which did not exist. R. 6B has been made to clarify this position and to confer on the Income-tax Officer in express and specific terms such authority to review his own decision in the matter of the registration of the firm when he discovers that his earlier decision proceeded on a wrong assumption about the existence of the firm. In our opinion, there is no difficulty in holding that R. 6B is obviously intended to carry out the purpose of the Act and since it is not inconsistent with any of the provisions of the Act its validity is not open to doubt."

47 In the case of **M/s. Patel Engineering Ltd (supra),** the Supreme Court observed in para 12 as under:

"It follows from the above judgment that the decision of State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into contractual relationship with such persons is called blacklisting. State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that State is to act fairly and rationally without in any way being arbitrary - thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors."

By placing reliance in the aforesaid observations made by the Supreme Court, Mr. Trivedi submitted that the power to perpetually debar the Notary from practice is a necessary concomitant to the power of the delegate to regulate the profession of the Notary. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State should actually fairly and rationally without in any way being arbitrary.

48 A rule under delegated legislation can be held to be *ultra vires* the statutory provisions of the Act if it is shown :

(i) that it is beyond the scope of or in excess of the rule-making power of the delegate conferred under the Act, or

(ii) that it is in conflict with or repugnant to any enactment in the Act.

49 The question whether any particular legislation suffers from excessive delegation has to be decided having regard to the subject matter, the scheme, the provisions of the Statutes including its preamble and the facts and circumstances in the background of which the Statute is enacted. (See ***Registrar, Co-operative Societies vs. K. Kunjabmu, AIR 1980 SC 350 and State of Nagaland v. Ratan Singh, AIR 1967 SC 212***). It is also well settled that in considering the vires of subordinate legislation one should start with the presumption that it is *intra vires* and if it is open to two constructions, one of which would make it valid and other invalid, the Courts must adopt that construction which makes it valid and the legislation can also be read down to avoid its being declared *ultra vires* [See ***St. Johns Teachers Training Institute vs. Regional Director, National Council for Teacher Education*** *reported in AIR 2003 SC 1522]*.

50 In the case of **Ajay Canu vs. Union of India, AIR 1988 SC 2027,** the Supreme Court held that it was well established proposition of law that where a specific power is conferred without prejudice to the generality of the power already specified, the particular power is only illustrative and it did not in any way restrict the general power.

51 We have already quoted Section 15 of the Act which provides for the power to make rules. It may be noted that Section 15 of the Act confers power on the Central Government to frame the rules. Under Section 15(1) of the Act, the Central Government has the power to make rules generally to carry out all or any of the purposes of the Act. It is

significant to note that apart from the general power under Section 15(1) of the Act, Section 15(2)(g) specifies the power to the Central Government to frame rules in respect of "the manner in which inquiries into the allegations of professional or other misconduct of Notaries may be made". Section 15(2)(i) provides for any other matter which has to be, or may be, prescribed.

52 The moot question is whether the Rule 13(12)(b)(i) is in conflict with Section 10 of the Act?

53 There can be no dispute with the contention that the provisions of the Rules cannot go beyond the scope of the relevant provision in the Act.

54 In the case of **Central Bank of India vs. Their Workmen, AIR 1960 SC 12,** the Supreme Court has held that a statutory rule cannot enlarge the meaning of the Section and that if a rule goes beyond what the section contemplates, the rule must yield to the statute.

55 In the case of **State of U. P. vs. Babu Ram, AIR 1961 SC 751**, a Constitution Bench of the Supreme Court held that the Rules must be consistent with the provisions of the Statute.

56 Thus, once it is shown that the relevant authority has the power to promulgate the Rules under the Statutory Law, such rules will have force as if they are part of the statute. They can be struck down or ignored when it is found (i) that they are beyond the scope of the relevant provision in the Statute; or (ii) when it is shown that the Rules are irreconcilably inconsistent with the relevant enactment in the Statute. A writ Court before reaching a decision on the question whether Rule 13(12)(b)(i) is *ultra vires* should examine the object and the scheme of

the legislation to consider exactly what is the area over which the powers are given by the section under which the Central Government is purporting to act.

57 In **Maharashtra State Board of Secondary and Higher Secondary Education vs. Paritosh Bhupesh Kurmarsheth, AIR 1984 SC 1543** while dealing with the question of validity of Regulation 104 of the Maharashtra Secondary and Higher Secondary Education Boards Regulations 1977, it was held :-

> *"In our opinion, this approach made by the High Court was not correct or proper because the question whether a particular piece of delegated legislation whether a rule or regulation or other type of statutory instrument is in excess of the power of subordinate legislation conferred on the delegate is to be determined with reference only to the specific provisions contained in the relevant statute conferring the power to make the rule, regulation, etc, and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It would be wholly wrong for the Court to substitute its own opinion for that of the legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation making body and declare a regulation to be ultra vires merely on the ground that, in the view of the Court, the impugned provisions will not help to serve the object and purpose of the Act. So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the Statute, the Court should not concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of the Statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the Courts to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation making power conferred on the delegate by the Statute.....The Court cannot sit in judgment over the wisdom of the policy evolved by the legislature and the subordinate regulation making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in*

effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being whereby beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution."

It was further held in the said case that it is also relevant to notice in this context the nature and the composition of the body on which the regulation making-power has been conferred by the Act.

58 In **D. K. V. Prsada Rao vs. Govt. of Andhra Pradesh, AIR 1984 Andh Pra 75** it was held in para 97 of the report :-

"*Therefore in adjudging the vires of the rule, we have to keep in view the following principles : it is now well settled that there is a presumption in favour of the constitutionality of the statute and the burden is upon him who attacks to show that there has been a clear transgression of the constitutional principles. It must be presumed that the Legislature understands and correctly appreciates the need of its people and that the laws it enacts are directed to problems which are made manifest by experience. The Legislature is free to recognise the degree of harm and may confine its restrictions to those where the need is deemed to be clearest. In order to sustain the presumption of a constitutionality the Court may take into consideration matters of common knowledge, matters of report, history of the time and may assume every state of facts which can be conceived existing at the time of legislation.*"

59 Broadly speaking, the rules can be divided into three categories. The first is where the Legislature itself frames the Rules, which then form an appendix or schedule to the Act. There can be no doubt that in such a case, the Rules are an integral part of the statute. If there is any inconsistency between the provisions, the ordinary rules of

interpretation will come into play. Where there is a provision to the effect that upon the making of Rules it would have the same effect 'as if incorporated in the Act', then again, although the rules are framed by an Administrative body, yet the effect of making and publishing such rules in accordance with law incorporates the rules within the statute and then it becomes part of the Act. The legal consequences would be the same as in the first category, mentioned above. The third case is, where it has been provided that the rules may be made to carry out the provisions of the Act. In such a case, the moot question is as to whether, when such rules have been framed, they should be considered in the same manner as the rules framed under the first two categories mentioned above. We think that there is a difference. In this third category, the rules made are only in furtherance of the provisions of the Act, and therefore, they must confine themselves within the four corners of the Act.

60 A delegated legislation can be challenged inter alia on the ground that it has gone beyond the power conferred by the Act or that it encroaches on the fundamental rights or other constitutional provisions.

61 It is also well settled that legislature cannot abdicate its essential legislative functions.

62 An abdication of power amounts to effacement thereof which may be complete or partial. A case of complete abdication would be where a legislation may not exercise any control over the delegate; and partial abdication when it exercises loose supervision.

63 In **Re. Delhi Laws Act** reported in **1951 SC Reporter 747** Chief Justice Kania pointed out that the true test in respect of 'abdication' or 'effacement' appears to be where in conferring power to delegate the

legislature in the words used to confer the power has retained its control. Does the decision to delegate derive sanction from the Act of the delegator? Has it got the sanction from what the legislature has indicated and decided?

64 In **A. N. Parasuraman v. State of Tamil Nadu** reported in **AIR 1990 SC 40**, L. M. Sharma, J. (as his Lordship then was), laid down the law in the following terms (at p. 42): -

> "*The point dealing with legislative delegation has been considered in numerous cases of this court, and it is not necessary to discuss this aspect at length. It is well established that determination of legislative policy and formulation of rule of conduct are essential legislative functions which cannot be delegated. What is permissible is to leave to the delegated authority the task of implementing the object of the Act after the legislature lays down adequate guidelines for the exercise of power. When examined in this light the impugned provisions miserably fail to come to the required standard.*"

65 Similarly in **M/s. Shri Sitaram Sugar Co. Ltd. v. Union of India,** reported in **AIR 1990 SC 1277** it has been stated as follows (at p. 1296):

> "*Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably intra vires the power granted, and on relevant consideration of material facts. All his decisions whether characterised as legislative or administrative or quasi judicial must be in harmony with the constitution and other laws of the land. They must be 'reasonably related to the purposes of enabling legislation' See Leila Mourning v. Family Publications Service (1973) 411 US 356, 36 Law Ed. 2d 318. If they are manifestly unjust or oppressive or outrageous or directed to an unauthorised end or do not tend in some degree to the accomplishment of the objects of delegation, Courts might well say," Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires .*"

Per Lord Russel of Kilowen, C.J. in **Kruse v. Johnson, (1898) 20B 91, 99**."

66 Francis Bennion in his classical book 'Statutory Interpretation' states the law thus: -

> "*58. Delegated legislation; doctrine of ultra vires . Any provision of an item of delegated legislation is ineffective if it goes outside the powers which (expressly or by implication) are conferred on the delegate by the enabling Act. The provision is then said to be ultra vires (beyond the powers). This applies even where the instrument has been sanctioned by a confirming authority. Except here to do so would produce an instrument the effect of which the delegate would or might not have approved, the Court has power to modify the instrument so as to remove its ultra vires quality.*"
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> "*59. Delegated legislation; rule of primary intention. There are various types of delegated legislation, but all are subject to certain fundamental restraints. Some of these restraints are dealt with individually in Ss. 51, 57 and 58 of this Code. Underlying the whole concept of delegated legislation is the basic principle that the Legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is lay down the outline. This means that the intention of the Legislature, as indicated in the prime guide to the meaning of delegated legislation. In the code this is referred to as the rule of primary intention.*"

67 In **Hukumchand vs. Union of India,** reported in **AIR 1972 SC 2427: 1972 (2) SCC 6**, the Supreme Court held that the power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred thereby.

68 In G. P. Singh's Principles of Statutory Interpretation at page 590, it has been stated "there cannot be any doubt that the power is conferred to make subordinate legislation in general terms and particularisation of topic as construed is merely legislative and does not limit the scope of general power. But even the general power to make rule and regulation for carrying out or giving effect to the Act is strictly ancillary in nature and cannot enable the authority on whom the power is conferred to extend the scope of general operation of the Act."

69 In **Utah Construction and Engineering (P) Ltd. v. Pataky,** reported in **1965 (3) All ER 650 at page 653,** the Privy Council quoted with approval the following dictum laid down in **Sahanahan vs. Kot, 1957 (96) CLR 245**:

> "*Such a power will not support attempts to widen the purpose of the Act, to add a new and different meaning for carrying them out, to depart from or from its term.*"

Reference in this connection may also be made to **Venkateswara Rao, G. v. Govt. of A.P**., reported in **AIR 1966 SC 828,** Deputy Commercial Tax Officer v. Sukhraj, reported in AIR 1968 SC 67.

70 In **Sant Saran Lal vs. Parsuram Sahu,** reported in **AIR 1966 SC 1852**, it has been held as follows (at p. 1855) :

> "*We have referred to the fact that the Act does not anywhere provide for the fixing of the upper limit for the loans remaining outstanding at any particular time. The rule making power of the Government to prescribe inter alia the form of the registration certificate and the particulars to be contained in an application made for the purpose of being registered as a money-lender. It is significant to note that the rule making power given to the State Government is not expressed in the usual form i.e. is not to the effect that the State Government may make rules for the purposes of the Act. The rule making power is limited to what is stated in Cls. (a) to (e) of Section 27 and these clauses do not empower the State Government to prescribe the limit up to which the loans advanced by a money-lender are to remain outstanding at any particular moment of time.*"

71 In 1976 (2) All ELR 937, it has been held by Lord Simon at page 95 that it can rarely, if ever be, right to read into statute words which are not there in order to satisfy the vires of the subordinate legislation which is *prima facie ultra vires* .'

72 The Supreme Court in **Union of India and others vs. S. Srinivasan** reported in **2012 (7) SCC 683,** after an exhaustive review of

various other decisions, has observed as under:

> *"16. At this stage, it is apposite to state about the rule making powers of a delegating authority. If a rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires . If a rule supplants any provision for which power has not been conferred, it becomes ultra vires . The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it. In this context, we may refer with profit to the decision in* ***General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav AIR 1988 SC 876****, wherein it has been held as follows:-*
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> > *".....Before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void."*
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> *17. In* ***Additional District Magistrate (Rev.) Delhi Administration v. Shri Ram AIR 2000 SC 2143 : (2000 AIR SCW 2205),*** *it has been ruled that it is a well recognised principle that the conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.*
>
> *18. In* ***Sukhdev Singh v. Bhagat Ram AIR 1975 SC 1331****, the Constitution Bench has held that the statutory bodies cannot use the power to make rules and regulations to enlarge the powers beyond the scope intended by the legislature. Rules and regulations made by reason of the specific power conferred by the statute to make rules and regulations establish the pattern of conduct to be followed.*
>
> *19. In* ***State of Karnataka and another v. H. Ganesh Kamath etc. AIR 1983 SC 550,*** *it has been stated that it is a well settled principle of interpretation of statutes that the conferment of rule making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.*
>
> *20. In* ***Kunj Behari Lal Butail and others v. State of H.P. and others AIR 2000 SC 1069 : (2000 AIR SCW 543)****, it has been ruled thus:*

> *"13. It is very common for the legislature to provide for a general rule making power to carry out the purpose of the Act. When such a power is given, it may be permissible to find out the object of the enactment and then see if the rules framed satisfy the test of having been so framed as to fall within the scope of such general power confirmed. If the rule making power is not expressed in such a usual general form then it shall have to be seen if the rules made are protected by the limits prescribed by the parent Act... "*

21. In ***St. Johns Teachers Training Institute v. Regional Director AIR 2003 SC 1533 : (2003 AIR SCW 894),*** *it has been observed that a regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and Regulations are all comprised in delegated legislation. The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limit of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details.*

22. In ***Global Energy Ltd. and another v. Central Electricity Regulatory Commission (2009) 15 SCC 570 : (AIR 2009 SC 3194 : 2009 AIR SCW 5121),*** *this Court was dealing with the validity of clauses (b) and (f) of Regulation 6-A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading Licence and other Related Matters) Regulations, 2004. In that context, this Court expressed thus:-*

> *"It is now a well-settled principle of law that the rule-making power "for carrying out the purpose of the Act" is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation-making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act."*

23. In the said case, while discussing further about the discretionary power, delegated legislation and the requirement of law, the Bench observed thus:-

> *"The image of law which flows from this framework is its neutrality and objectivity: the ability of law to put sphere of general decision-making outside the discretionary power of those wielding governmental power. Law has to provide a basic level of "legal*

> *security" by assuring that law is knowable, dependable and shielded from excessive manipulation. In the contest of rule-making, delegated legislation should establish the structural conditions within which those processes can function effectively. The question which needs to be asked is whether delegated legislation promotes rational and accountable policy implementation. While we say so, we are not oblivious of the contours of the judicial review of the legislative Acts. But, we have made all endeavours to keep ourselves confined within the well-known parameters."*

24. In this context, it would be apposite to refer to a passage from ***State of T.N. and another v. P. Krishnamurthy and others (2006) 4 SCC 517 : (AIR 2006 SC 1622 : 2006 AIR SCW 1778)*** *wherein it has been held thus:-*

> *"16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity."*

25. In ***Pratap Chandra Mehta v. State Bar Council of Madhya Pradesh and others (2011) 9 SCC 573****, while discussing about the conferment of extensive meaning, it has been opined that the Court would be justified in giving the provision a purposive construction to perpetuate the object of the Act while ensuring that such rules framed are within the field circumscribed by the parent Act. It is also clear that it may not always be absolutely necessary to spell out guidelines for delegated legislation when discretion is vested in such delegated bodies. In such cases, the language of the rule framed as well as the purpose sought to be achieved would be the relevant factors to be considered by the Court."*

73 With profound respect, it is difficult for us to subscribe to the view of the Allahabad High Court in the case of **Kashi Prasad Saksena (supra)**. The question whether Rule 13(12)(b) is validly framed to carry out the purposes of the Act can be determined on the analysis of the provisions of the Act. The declared will of the legislature and the policy and purpose of the Act are discernible from the title, preamble and the

express provisions of the Act. The legislative will is declared by the preamble of the Act which seeks to deal with the subject of enactment. Generally, the preamble to an Act, briefly indicates the object of the legislation. It may not be exhaustive, but still it discloses the primary purpose of the legislation. If the express provisions of the Act are plain and unambiguous, it is always advisable to find out the purpose of the legislation from those provisions, but if the provisions are ambiguous and the Courts face the difficulty in deducing the purpose of the Act from the express provisions of the Act, it is permissible to refer to the title and preamble of the Act to find out the legislative object and the purpose of the Act. In the instant case, the title of the Act is "the Notaries Act, 1952" and its preamble declares that it is an Act to empower the Central and State Governments to appoint Notaries, not only for the limited purposes of the Negotiable Instruments Act, but generally for all recognized notarial purposes and to regulate the profession of such Notaries. Thus, one of the objects of the Act is to regulate the profession of the Notaries. The general power to confer by Section 15 to make rules to carry out the purposes of the Act contemplates the framing of any rule which may have bearing on the regulation of the profession of the Notaries. The rule in question could be said to have been framed for the purposes of the Act. Section 10, in our opinion, should be read in conjunction with Section 4 of the Act. Section 4 of the Act mandates the Central Government and the State Government to maintain a register of the Notaries appointed and entitled to practice as such under the Act. However, such register would include the particulars about the Notaries like his full name, date of birth, etc. The pertinent feature of Section 10 of the Act is that the name of the Notary can be removed from the register even if the Notary himself makes a request to that effect. His name can also be removed if he has failed to pay any prescribed fee. His name can be removed even if he is declared as insolvent or is convicted by any Court for the offence involving moral turpitude or does not get

his certificate of practice renewed. These are all events which may not be directly related to any professional misconduct rendering the Notary unfit to practice. In our opinion, when the power is conferred in general and thereafter in respect of the enumerated matters, as in the present case, the particularisation in respect of the specified subject is construed as merely illustrative and does not limit the scope of the general power. Rule 13 of the Rules has been made to give effect to the provisions of the Act. In our opinion, what the Act has contemplated or is in any way in conflict with Section 10 of the Act. Hence, this has to be treated as if the same is contained in the Act. If a particular penalty is imposed as prescribed under the Rules, the consequence of the same would be the removal of the name of the Notary from the register. In our opinion, that is the only purport of Section 10 of the Act. We find it difficult to take the view that Section 10 of the Act is the only source of power for the purpose of imposing penalty or punishment upon a Notary Public for the professional or any other misconduct. Once the certificate of practice is cancelled, the name of the Notary from the register will have to be deleted or removed. However, that does not mean that the State Government is not empowered or competent to pass an order of perpetually debarring the Notary from practice or suspend him from practice for a specified period. In a given case, having regard to the nature of the misconduct of the Notary, the State Government may even deem fit to let him off with a warning. In our opinion, at the cost of repetition, we state that Section 10 is not the repository of the power to impose appropriate penalty or punishment.

74 The entire issue can also be looked at from another angle. It is clear from Sections 4 and 5 of the Act that the same are in the context of maintenance of a register of notaries only. The appointment of a notary actually takes place under Section 3. Clearly therefore, the substantive right to function as a notary is granted under Section 3 upon finding the

relevant person eligible in all respects. Sections 4 and 5 deal with the consequential entry of the name of the notary in the register once he is appointed under Section 3, after being found so fit.

It is very pertinent to note that *at least* two sections of the parent Act, *i.e.* Section 10(d) and Section 15(2)(g), specifically contemplate that an inquiry can be initiated to hold a notary guilty of the professional or other misconducts. Thus, there is sufficient recognition of holding of an inquiry for finding the person guilty of misconduct in the parent Act itself. Again, Section 10(d) further provides that the Government may form an opinion rendering a person unfit to practice as a notary upon such an inquiry. Thus, it can, in no circumstance, be held that the parent Act does not have the provisions which contemplate an inquiry to be held in the context of misconduct and the Government arriving at an opinion of the person being unfit to practice as a notary. The argument, therefore, that rule 13 and the exercise of power under sub-rules 12(a) and (b) are beyond the scope of the parent Act, is *ex-facie* incorrect and can only be said to be rejected. Clearly therefore, holding of an inquiry and the power of the Government to arrive at a conclusion in the context of eligibility of the person to continue as a notary is recognized in the parent Act itself. When Section 15 enables the Central Government to make rules and further provides in clause (g) of the manner of making an inquiry into the allegations of professional or other misconducts, it can leave no doubt that such a rule as rule 13 is clearly *intra vires* the Act.

Thus, when the parent Act itself provides for sections which contemplate making of an inquiry as may be prescribed and the Government forming an opinion as to whether a person is unfit to practice as a notary, it can hardly be argued that a rule to that effect cannot be made under Section 15 to carry out the purpose of the Act.

Having held that the said rule is not *ultra vires* the Act, the supplementary argument made in the context of the right to re-apply for working as a notary even after being found unfit under an inquiry under rule 13 is required to be considered. The answer to the said submission lies in the provisions of Section 3 and rule 7 of the Rules referred to above. As already held above, the right to practice as a notary is not an absolute right or an indefeasible right but is dependent upon a person in question being found fit to practice as a notary and capable of meeting with the high moral standards that such a person should possess to discharge his duties. These provisions are quite independent of the provisions of the inquiry and finding the person unfit. It is but obvious that while considering a person fit or otherwise, under rule 7 read with Section 3, the competent authority is duty bound to consider the background, moral standards, ethical aspects and other facets of the character of the person being bestowed with the license to function as a notary.

It is needless to state, inasmuch as there are no provisions to the contrary, the person who is held guilty of professional or other misconducts, can re-apply for a license to function as a notary. Such an application will again have to be considered under the provisions of Section 3 read with rule 7. It is obvious that if in an inquiry held under rule 13 and in exercise of power under sub-rule 12(b) thereof, the Government has found a particular person not fit to be appointed permanently, then while considering the application of such a person under rule 7, the competent authority can never find such a person fit enough to be so appointed again.

It is for this obvious reason that there was no reason to provide for a specific provision that prohibited such a person from applying again.

The scheme of the Act, therefore, clearly contemplates an inquiry as prescribed and also specifically contemplates a power being bestowed upon the Government to find the person not fit to continue to act as a notary. Once such an inquiry is held and such an order is passed, then the consequences thereof would be that, pending such an order, the re-application to work as a notary which flies in the face of such an order would be an empty formality.

75 In such circumstances referred to above, we do not agree with the view taken by the learned Single Judge as regards the validity of Rule 13(12)(b)(i) of the Rules is concerned. We hold that Rule 13(12)(b) of the Rules is valid and in a given case, more particularly, having regard to the nature of the professional misconduct or any other misconduct, it is open for the State Government to perpetually debar the Notary from practice.

76 We now proceed to deal with the second contention as regards the opportunity to be given to the delinquent before any particular penalty or punishment is imposed.

77 In the aforesaid context, we may look into few decisions upon which reliance has been placed by Mr. Trivedi, the learned Advocate General appearing for the State of Gujarat. In **Devi Sahai (supra)**, the Supreme Court observed in para 19 as under:

> *"19 Issuance of second show cause notice for the purpose of obtaining the views of delinquent officer in regard to quantum of punishment is not a part of the common law principles of natural justice. Such a provision could be laid down by reason of a statute. The respondent does not enjoy any status. The service conditions of employees of Regional Rural Banks are not protected in terms of Article 311(2) of the Constitution of India."*

78 In **Kailash Chandra Ahuja (supra)**, the Supreme Court observed in paras 21, 31, 36 and 44 as under:

> *"21. From the ratio laid down in B. Karunakar, it is explicitly clear that the doctrine of natural justice requires supply of a copy of the Inquiry Officer's report to the delinquent if such Inquiry Officer is other than the Disciplinary Authority. It is also clear that non-supply of report of Inquiry Officer is in the breach of natural justice. But it is equally clear that failure to supply a report of Inquiry Officer to the delinquent employee would not ipso facto result in proceedings being declared null and void and order of punishment non est and ineffective. It is for the delinquent-employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the Court on that point, the order of punishment cannot automatically be set aside."*
>
> *"31. At the same time, however, effect of violation of rule of audi alteram partem has to be considered. Even if hearing is not afforded to the person who is sought to be affected or penalized, can it not be argued that "notice would have served no purpose" or "hearing could not have made difference" or "the person could not have offered any defence whatsoever."*
>
> *"36. In S.L. Kapoor v. Jagmohan, (1980) 4 SCC 379, rejecting the argument that observance of natural justice would have made no difference, this Court said;*
>
> > *"The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It 'll come from a person who has denied justice that the person who has been denied justice is not prejudiced". (Emphasis supplied)*
>
> *"44 From the aforesaid decisions, it is clear that though supply of report of Inquiry Officer is part and parcel of natural justice and must be furnished to the delinquent-employee, failure to do so would not automatically result in quashing or setting aside of the order or the order being declared null and void. For that, the delinquent-employee has to show 'prejudice'. Unless he is able to show that non-supply of report of the Inquiry Officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated. And whether prejudice had been caused to the delinquent-employee depends upon the facts and circumstances of each case and no rule of universal application can be laid down."*

79 In **Shadi Lal Gupta (supra)**, the Supreme Court observed in para

8 as under:

> *"7. Rule 7 of these Rules deals with cases where the major punishment of dismissal removal or reduction in rank are proposed to be imposed and sub-rule (6) of that rule specifically provides that in such a case after the punishing authority has arrived at a provisional conclusion in regard to the penalty to be imposed, the accused officer shall be supplied with a copy of the report of the enquiring authority and be called upon to show cause against the particular penalty proposed to be inflicted on him. The words "without prejudice to the provisions of Rule 7" occurring at the beginning of Rule 8 are sought to be taken advantage of to contend that even in the case of minor punishments referred to in that rule, of censure, withholding of increments and recovery from pay, an opportunity should be given to show cause against the punishment proposed to be imposed. Those words do not fit in the context and cannot mean that in a case of minor punishment not only the provisions of Rule 8 but also the provisions of Rule 7 should be followed. The rules must be interpreted in their proper setting and if so interpreted, those words would not bear the interpretation sought to be placed on them. The provisions of Rule 7 are necessitated by the provisions of Article 311 (2) of the Constitution. As far as other punishments are concerned, the only right which a Government servant is entitled to is that the action proposed should be in accordance with the rules made under the proviso to Article 309. That rule, R. 8 does not contemplate anything more than an adequate opportunity of making a representation. We are, therefore, unable to accept this contention."*

80 **P. John Samuel (supra)** is a decision rendered by a Madras High Court. Markandey Katju, Chief Justice (as His Lordship then was) in a Division Bench with F. M. Ibrahim Kalifulla (as His Lordship then was) had the occasion to consider the provisions of the Act, more particularly, the question of giving an opportunity of hearing on the quantum of punishment. Their Lordships observed as under:

> *"3A. Learned counsel for the appellant submitted that Rule 12(b)(i) of the Notaries Rules, 1956 provides for imposing three different kinds of punishment for the misconduct committed by a Notary. Hence, a second opportunity of hearing on the quantum of punishment should have been given to the appellant before imposing the major punishment of cancellation of his Notary Certificate. We do not agree. There is no such legal principle that a second opportunity of hearing must be given on the quantum of punishment unless the relevant statute or the statutory rules specifically provides for the same. For instance, in the Code of Criminal*

Procedure, 1973, there is a specific provision, viz., Sec. 235(2), which reads as follows :

> *"If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."*

Thus, Sec. 235(2) of the Code of Criminal Procedure specifically provides that when a Court finds an accused guilty of the offence charged against him, a second opportunity of hearing shall be given to him on the question of sentence. There is no such provision either in the Notaries Act or in the Notaries Rules which requires a second opportunity of hearing on the question of quantum of punishment. Hence, merely because Rule 12(b)(i) of the Notaries Rules provides for imposition of three different kinds of punishments it does not mean that a second opportunity of hearing on the quantum of punishment must be given to the delinquent before the punishment is imposed on him.

4. Learned counsel for the appellant then submitted that the punishment imposed on the appellant is disproportionate as the appellant had not earlier committed any such misconduct and this mitigating circumstance was not taken into consideration before his Notary certificate was cancelled. We do not agree. The misconduct for which the appellant was punished, in our opinion, was very serious. The act of the appellant in leaving two blank Rs. 20/- non-judicial stamp-papers bearing his seal and signature with the expression "signed before me" with a document writer is certainly a very serious one. To illustrate, the said signed and verified blank stamp-papers can be used by miscreants for creating fake documents to circumvent the law. For example a person may commit a very serious offence like murder at Madurai and he may, for the purpose of creating alibi , use these blank stamp-papers, which are duly signed and verified by the appellant, to show that on the date of occurrence, he was at Chennai. The appellant has not shown any justifiable and acceptable explanation for leaving such stamp-papers with the document-writer. We, therefore, do not agree that the punishment imposed on the appellant is disproportionate. Moreover, there is no hard and fast rule that first-time offender should always be let off with a minor punishment. It depends upon the nature and gravity of the offence and the circumstances of each case. For instance, a murderer cannot plead that he has committed murder for the first time and, therefore, he should be let off. The offence committed by the appellant, who is a lawyer by profession and who is supposed to know the implications and seriousness of his act in leaving signed and verified blank stamp-papers with a document writer, was undoubtedly a very serious one. We, therefore, do not find any justification to interfere with the punishment."

81 In the case on hand, it appears that the impugned order dated 3rd December 2014 passed by the State Government is in the name and seal of the Governor of Gujarat and the same has been signed by one Shri D.M. Bhabhar, Deputy Secretary, Legal Department, State of Gujarat. Shri Bhabhar was the Presenting Officer before the Inquiry Officer. We are of the view that an opportunity of hearing should be given to a Notary before taking any final decision in the matter. If the delinquent has any grievance to redress with regard to the conduct of the inquiry, then before whom he should redress such grievance. Could it be argued that such grievance can be redressed only before the Court of law, if, ultimately, the Notary is perpetually debarred from practice. In the case on hand, after the issue of show cause notice by the Inquiry Officer, no further hearing was given to the original petitioner to make good his case that the findings recorded are incorrect or that the case is of no evidence and the same does not warrant imposition of extreme punishment of perpetually debarring from practice as a Notary. It comes to this that only the inquiry report should be looked into by the State, more particularly, the findings of the Inquiry Officer before the final decision is taken. We are of the view that the Notary Public may not be entitled to be heard for the second time with regard to penalty or punishment, but at least the State Government needs to give an opportunity of hearing with regard to the findings recorded by the Inquiry Officer in his inquiry report. Ultimately, if the State Government is convinced after hearing the delinquent as regards the findings recorded in the inquiry report, then the delinquent may not be heard for the second time for the purpose of imposition of punishment, but at least, one opportunity of hearing should be given to the delinquent if he has grievance with regard to the inquiry report of the Inquiry Officer. To this extent, we are at one with the learned Single Judge.

82 The view taken by the learned Single Judge is fortified by a later

decision of this Court in the case of **Hardasbhai Nathabhai Mahida vs. State of Gujarat** reported in **AIR 2017 Gujarat 72**, wherein the learned Single Judge of this Court observed as under:

> *"[9] As per sub rule (9) of Rule 13, a Notary who is proceeded against shall have right to defend himself before the competent authority. As per sub rule (10) of Rule 13, the competent authority shall have the power to regulate his procedure relating to the inquiry in such manner as he considers necessary and during the course of inquiry, may examine witnesses and receive any other oral or documentary evidence. It would be then the competent authority shall submit his report to the government as required by sub rule (11) of Rule 13. Sub Rule (12) of Rule 13 provides that the appropriate government shall consider the report of the competent authority and if it finds that a further inquiry is necessary, it may cause such further inquiry to be made and then further report shall be considered by the government. As further provided therein, if, after considering the report of the competent authority, the government is of the opinion that action should be taken against the Notary, the government may make an order either to cancel the certificate of practice and perpetually debar the Notary from practice or suspend him from practice for a specified period or letting him off with a warning, according to the nature and gravity of the misconduct of the Notary proved. Thus, in the Rules a Notary is given right to defend himself before the competent authority during inquiry. But on conclusion of inquiry, the Notary is not made entitled to have the copy of the report and to make any representation against the report or not given right of hearing before the appropriate government makes any of the orders contemplated in sub rule (12)(b) on consideration of the report.*
>
> *[10] In case of **Sri Kashi Prasad Saksena Vs. State of Uttar Pradesh**, reported in **AIR 1967 Allahabad 173**, relied on by learned senior advocate Mr.Mehta, the Allahabad High Court examined the issue concerning principles of natural justice for non-supply of the report of the competent authority in the context of the above Rule 13. The Allahabad High Court has held and observed in paragraph nos.14, 15, 16, 17 and 22 as under:*
>
> > ***14**. The duties assigned to him are of a professional nature. His essential function is to bestow an impress of authenticity upon certain acts performed by him under the Act at the request of individual members of the general public who requisition, his services and recompensate him by paying him the prescribed fee which flows into his pocket and not in the coffers of the Government. His duties do not relate to activities which fall directly*

within the spheres of the Union or the State. All these conclusions follow from S. 8 of the Act, which deals with the functions of a Notary and reads :

"*(1) A notary may do all or any of the following acts by virtue of his office, namely:-*

(a) verify, authenticate, certify or attest the execution of any instrument :
(b) present any promissory note, hundi or bill of exchange for acceptance or payment or demand better security :
(c) note or protest the dishonour by non-acceptance or non-payment of any promissory note, hundi or bill of exchange or protest for better security or prepare acts of honour under the Negotiable Instruments Act, 1881, or serve notice of such note or protest;
(d) note and draw up ship's protest, boat's protest or protest relating to demurrage and other commercial matter;
(e) administer oath to, or take affidavit from, any person;
(f) prepare bottomry and respondentia bonds, charter parties and other mercantile documents;
(g) prepare, attest or authenticate any instrument intended to take effect in any country or place outside India in such form and language as may conform to the law of the place where such deed is intended to operate;
(h) translate, and verify the translation of any document from one language into another;
(i) any other act which may be prescribed.

(2) No act specified in sub-section (1) shall be deemed to be a notarial act except when it is done by a notary under his signature and official seal."

***15**. The appointment is made under the Act. The preamble of the Act reads :*

"*An Act to regulate the profession of notaries.*"

This shows that a notary carries on a profession and is not in the employment of any one including the State Government. Even though the preamble cannot be used to defeat the enacting clauses of a Statute, it has been treated to be a key for the interpretation of the Statute (See In re, Kerala Education Bill, 1957, AIR 1958 SC 956 and Biswambhar Singh v. State of Orissa. AIR 1954 SC 139).

***16**. Section 10 of the Act provides for the name of a notary being removed from the register of Notaries on the ground of professional*

misconduct and S. 15 of the Act empowers the Central Government to frame rules inter alia for making enquiries into the allegations of professional misconduct against a Notary. How can there be a professional misconduct if a Notary is not carrying on a profession, but is in service. Therefore, sections 10 and 15 of the Act also, like the preamble show that a Notary carries on a profession and is not in the service or employment of anyone. Sections 5, 9, 11 and 12 speak of the vocation of a Notary as "practice". The relevant words in S. 5 are 'every notary who intends to practise". Those in S. 9 are "no person shall practise as a notary or do any notarial act". In S. 11 the words are "any reference to a notary public in any other law shall be construed as a reference to a notary entitled to practise under this Act", while in S. 12 of the Act the words are "practises as a notary".

From what we have said above it is clear that a Notary practises a profession and is not in service. Section 5 of the Act requires that every Notary who intends to practise as such has to pay the prescribed fee. The Notary becomes "entitled (a) to have his name entered in the register" of Notaries and (b) "to a certificate authorizing him to practise for a period of three years" only after he has paid the prescribed fee. He has also to pay a fee for getting his certificate renewed. The payment of fee is inconsistent with the holding of a post under the Government. It is consistent only with the carrying of a profession, the fee being in the nature of a licence fee for it is the fee for obtaining the certificate to practise. It is conceded that even when the Government, in the capacity of a litigant or in connection with its non-sovereign functions, requisitions the services of a Notary, it has to pay a fee to him like any member of the general public. The payment of fees by the Government to the Notary is inconsistent with its being the employer of the Notary.

***17**. For the reasons mentioned above we are satisfied that the petitioner-appellant in the capacity of a Notary was only practising a profession and was not in the employment of the U. P. Government. He was, therefore, not holding a civil post under the State of U. P. and for that reason was not entitled to the protection of Art. 311 (2) of the Constitution of India. Mr. Hajela, who has appeared for the petitioner-appellant, has placed reliance upon **Stale of Uttar Pradesh v. Audh Narain Singh, AIR 1965 SC 360.** This case related to Tahsildars appointed in a Government treasury in U. P. In that case admittedly the Tahsildars were in service and the only question was whether they were in the service of the State Government or in that of the Treasurer, who was appointed by the Government. In the present case the question is a very different one. the same being whether the petitioner-appellant*

was carrying on a profession or was in service under the State of U. P. We have recorded our reasons for coming to the conclusion that he was carrying on a profession and was not in the service of anybody including the State of U. P. This case, therefore, cannot be of any help to the learned counsel for the petitioner-appellant.

***22**. Mr. Hajela also submits that inasmuch as the petitioner-appellant in spite of his request was not furnished with a copy of the report of the competent authority, there has been a failure of the principles of natural justice. There is no dispute about the fact that in spite of the request of the petitioner-appellant no copy of the enquiry report was furnished to him. Rule 13 (12) (a) and (b) of the Act clearly require the report of the competent authority to be considered before taking action against a Notary. Inasmuch as in the present case the petitioner-appellant was neither shown the report of the competent authority nor was furnished a copy of the same, he had no occasion to know as to what findings had been recorded against him by the competent authority. It has been contended by the learned Senior Standing Counsel that inasmuch as the law does not require any opportunity being given to a Notary after the competent authority has submitted its report and before action is taken by the appropriate Government, the petitioner appellant did not suffer in any manner by a copy of the enquiry report not being furnished to him.*

The proceedings against a Notary under S. 10 of the Act read with R. 13 of the rules are of a serious and penal nature. Not only a Notary is liable to be removed in those proceedings, he might also be adjudged guilty of serious charges of misconduct. In fact, any decision taken in those proceedings might adversely affect his reputation and future prospects. The enquiry, therefore, must be a fair one and a Notary must have full opportunity of knowing the material on the basis of which action may be taken against him. The appropriate Government while exercising powers under S. 10 of the Act read with R. 13 exercises quasi-judicial and not merely administrative powers. Inasmuch as the copy of the report of the competent authority had not been furnished to the petitioner-appellant, he did not know as to what had been held against him and inasmuch as the State Government acted on the basis of that report, the proceedings before the State Government cannot be said to have been fair. It is true that rules of natural justice vary with the varying constitutions of the Statutory bodies and the rules prescribed by the Act under which they function, but it is well settled that whether or not any rules of natural justice had been contravened should be decided in the light of the statutory rules and provisions. (See Nagendra Nath v. Commissioner of Hills Division, AIR 1958 SC 398.

In the present case we have already shown earlier that it is the report of the competent authority which is to be considered by the appropriate Government and it is that report which provides the basis for action against a Notary. The circumstances that a copy of that report, though asked for, was not given to the petitioner-appellant nor was the report shown to him leads to the conclusion that there was an infringement of the principles of natural justice. It is true that neither S. 10 nor R. 13 provide a right of hearing, but it is implicit in the nature of the proceedings that a Notary whose conduct has been enquired into by the competent authority should be permitted to meet the report of the enquiry officer before it is acted upon by the appropriate Government.

[11] In the case of ***Institute of Chartered Accountants of India Vs. L. K. Ratna and others*** *reported in* ***(1986) 4 SCC 537****, the Honble Supreme Court, while examining the fundamental questions as regards the conduct and procedure of the disciplinary proceedings taken under the Chartered Accountants Act, 1949, has held and observed in paragraph nos.12 to 20 as under:*

12. *Now when it enters upon the task of finding whether the member is guilty of misconduct, the Council considers the report submitted by the Disciplinary Committee. The report constitutes the material to be considered by the Council. The Council will take into regard the allegations against the member, his case in defence, the recorded evidence and the conclusions expressed by the Disciplinary Committee. Although the member has participated in the inquiry, he has had no opportunity to demonstrate the fallibility of the conclusions of the Disciplinary Committee. It is material which falls within the domain of consideration by the Council. It should also be open to the member, we think, to point out to the Council any error in the procedure adopted by the Disciplinary Committee which could have resulted in vitiating the inquiry. S. 21(8) arms the Council with power to record oral and documentary evidence, and it is precisely to take account of that eventuality and to repair the error that this power seems to have been conferred. It cannot, therefore, be denied that even though the member has participated in the inquiry before the Disciplinary Committee, there is a range of consideration by the Council on which he has not been heard. He is clearly entitled to an opportunity of hearing before the Council finds him guilty of misconduct.*

13*. At this point it is necessary to advert to the fundamental character of the power conferred on the Council. The Council is empowered to find a members guilty of misconduct. The penalty*

which follows is so harsh that it may result in his removal from the Register of Members for a substantial number of years. The removal of his name from the Register deprives him of the right to a certificate of practice. As is clear from s. 6(1) of the Act, he cannot practice without such certificate. In the circumstances there is every reason to presume in favour of an opportunity to the member of being heard by the Council before it proceeds to pronounce upon his guilt. As we have seen, the finding by the Council operates with finality in the proceeding, and it constitutes the foundation for the penalty imposed by the Council on him. We consider it significant that the power to find and record whether a member is guilty of misconduct has been specifically entrusted by the Act to the entire Council itself and not to a few of its members who constitute the Disciplinary Committee. It is the character and complexion of the proceeding considered in conjunction with the structure of power constituted by the Act which leads us to the conclusion that the member is entitled to a hearing by the Council before it can find him guilty. Upon the approach which has found favour with us, we find no relevance in James Edward Jeffs and others v. New Zealand Dairy Production and Marketing Board and others, [1967] 1 AC 551 cited on behalf of the appellant. The Court made observations there of a general nature and indicated the circumstances when evidence could be recorded and submissions of the parties heard by a person other than the decision making authority. Those observations can have no play in a power structure such as the one before us.

***14**. Our attention has been invited to the difference between the terms in which s. 21(3) and s. 21(4) have been enacted and, it is pointed out, that while in s. 21(4) Parliament has indicated that an opportunity of being heard should be accorded to the member, nowhere in s. 21(3) do we find such requirement. There is no doubt that there is that difference between the two provisions. But, to our mind, that does not affect the question. The textual difference is not decisive. It is the substance of the matter, the character of the allegations, the far-reaching consequences of a finding against the member, the vesting of responsibility in the governing body itself, all these and kindred considerations enter into the decision of the question whether the law implies a hearing to the member at that stage.*

***15**. Learned counsel for the appellant relies on Chandra Bhavan Boarding and Lodging, Bangalore v. The State of Mysore and Anr., [1970] 2 SCR 600, where this Court found that the procedure adopted by the Government in fixing a minimum wage under s. 5(1) of the Minimum Wages Act, 1948 was not vitiated merely on the ground that the Government had failed to constitute a*

committee under s. 5(1) (a) of that Act. Reference was also made to K.L. Tripathi v. State Bank of India and Others, [1984] 1 SCC 43 where the petitioner complained of a breach of the principles of natural justice on the ground that he was not given an opportunity to rebut the material gathered in his absence. Neither case is of assistance to the appellant. In the former, the Court found that reasonable opportunity had been given to all the concerned parties to represent their case before the Government made the impugned order. In the latter, the Court held that no real prejudice had been suffered by the complainant in the circumstances of the case.

***16**. It is next pointed out on behalf of the appellant that while Regulation 15 requires the Council, when it proceeds to act under s. 21(4), to furnish to the member a copy of the report of the Disciplinary Committee, no such requirement is incorporated in Regulation 14 which prescribes what the Council will do when it receives the report of the Disciplinary Committee. That, it is said, envisages that the member has no right to make a representation before the Council against the report of the Disciplinary Committee. The contention can be disposed of shortly. There is nothing in Regulation 14 which excludes the operation of the principle of natural justice entitling the member to be heard by the Council when it proceeds to render its finding. The principles of natural justice must be read into the unoccupied interstices of the statute unless there is a clear mandate to the contrary.*

***17**. It is then urged by learned counsel for the appellant that the provision of an appeal under s. 22-A of the Act is a complete safeguard against any insufficiency in the original proceeding before the Council, and it is not mandatory that the member should be heard by the Council before it proceeds to record its finding. Section 22-A of the Act entitles a member to prefer an appeal to the High Court against an order of the Council imposing a penalty under s. 21(4) of the Act. It is pointed out that no limitation has been imposed on the scope of the appeal, and that an appellant is entitled to urge before the High Court every ground which was available to him before the Council. Any insufficiency, it is said, can be cured by resort to such appeal. Learned counsel apparently has in mind the view taken in some cases that an appeal provides an adequate remedy for a defect in procedure during the original proceeding. Some of those cases are mentioned in Sir William Wades erudite and classic work on "Administrative Law" But as that learned author observes, "in principle there ought to be an observance of natural justice equally at both stages", and*

"if natural justice is violated at the first stage, the right of

> *appeal is not so much a true right of appeal as a corrected initial hearing: instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial."*

And he makes reference to the observations of Megarry J. in Leary v. National Union of Vehicle Builders, [1971] 1 Ch. 34. Treating with another aspect of the point, that learned Judge said:

> *"If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body."*

The view taken by Megarry, J. was followed by the Ontario High Court in Canada in Re Cardinal and Board of Commissioners of Police of City of Cornwall, [1974] 42 D.L.R. (3d) 323. The Supreme Court of New Zealand was similarly inclined in Wislang v. Medical Practioners Disciplinary Committee, [1974] 1 N.Z.L.R. 29 and so was the Court of Appeal of New Zealand in Reid v. Rowley, [1977] 2 N.Z.L.R. 472.

***18**. But perhaps another way of looking at the matter lies in examining the consequences of the initial order as soon as it is passed. There are cases where an order may cause serious injury as soon as it is made, an injury not capable of being entirely erased when the error is corrected on subsequent appeal. For instance, as in the present case, where a member of a highly respected and publicly trusted profession is found guilty of misconduct and suffers penalty, the damage to his professional reputation can be immediate and far-reaching. "Not all the Kings horses and all the*

Kings men" can ever salvage the situation completely, notwithstanding the widest scope provided to an appeal. To many a man, his professional reputation is his most valuable possession. It affects his standing and dignity among his fellow members in the profession, and guarantees the esteem of his clientele. It is often the carefully garnered fruit of a long period of scrupulous, conscientious and diligent industry. It is the portrait of his professional honour. In a world said to be notorious for its blase attitude towards the noble values of an earlier generation, a mans professional reputation is still his most sensitive pride. In such a case, after the blow suffered by the initial decision, it is difficult to contemplate complete restitution through an appellate decision. Such a case is unlike an action for money or recovery of property, where the execution of the trial decree may be stayed pending appeal, or a successful appeal may result in refund of the money or restitution of the property, with appropriate compensation by way of interest or mesne profits for the period of deprivation. And, therefore, it seems to us, there is manifest need to ensure that there is no breach of fundamental procedure in the original proceeding, and to avoid treating an appeal as an overall substitute for the original proceeding.

***19**. Upon the aforesaid considerations, we are of definite opinion that a member accused of misconduct is entitled to a hearing by the Council when, on receipt of the report of the Disciplinary Committee, it proceeds to find whether he is or is not guilty. The High Court is, therefore, right in the view on this point.*

***20**. Accordingly, the respective findings of the Council that Ratna, Behl and Bhoopatkar are guilty of misconduct are vitiated and must be quashed. Consequently, the penalty imposed on each of them is also liable to be quashed.*

*[12] In the case of **Basudeo Tiwary Vs. Sido Kanhu University and others**, reported in **(1998) SCC 194**, the Honble Supreme Court has held and observed in paragraph no.10 as under:*

10.In order to impose procedural safeguards, this Court has read the requirement of natural justice in many situations when the statute is silent on this point. The approach of this Court in this regard is that omission to impose the hearing requirement in the statute under which the impugned action is being taken does not exclude hearing it may be implied from the nature of the power particularly when the right of a party is affected adversely. The justification for reading such a requirement is that the court merely supplies omission of the legislature (vide Mohinder Singh Gill v. Chief

Election Commr.) and except in the case of direct legislative negation or implied exclusion (vide S. L. Kapoor v. Jagmohan).

[13] In the case of ***Prakash Ratan Sinha Vs. State of Bihar and others****, reported in* ***(2009) 14 SCC 690****, the Honble Supreme Court has held and observed in paragraph nos.13 and 14 as under:*

13. The law in this regard has been settled by several decisions of this Court. The principle that emerge from the decisions of this Court is that, if there is a power to decide and decide detrimentally to the prejudice of a person, duty to act judicially is implicit in exercise of such a power and that the rule of natural justice operates in areas not covered by any law validly made.

14. Corollary principles emanating from these cases are as to what particular rule of natural justice should apply to a given case must depend to an extent on the facts and circumstances of that case and that it is only where there is nothing in the statute to actually prohibit the giving of an opportunity of being heard and on the other hand, the nature of the statutory duty imposed on the decision maker itself implies an obligation to hear before deciding. These cases have also observed, whenever an action of public body results in civil consequences for the person against whom the action is directed, the duty to act fairly can be presumed and in such a case, the administrative authority must give a proper opportunity of hearing to the affected person.

[14] In light of the above principles enunciated by the Honble Supreme Court in different decisions, what is provided in Rule 13 (12) of the Rules is to be adhered, it would defy a fair procedure of giving an opportunity to the Notary to represent against the flaw in conclusion reached against him in the report and also to represent not to take any penal against him. Final actions to be taken under Sub rule (12) include taking of lenient action against the Notary or letting Notary off with a warning according to the nature and gravity of misconduct of the Notary proved. When powers to take lenient action or letting the Notary off with a warning are available with the government, the Notary proceeded against will be well within his right to urge to either impose lenient penalty or let him off with a warning on the ground that the nature and gravity of the misconduct were not so grave. But, if he is not given the copy of the report of the inquiry he would be deprived of opportunity to represent not only against the conclusion reached in the report but also against the proposed actions. Therefore, as a part of fairness in procedure, if requirement of giving the report of inquiry of the competent authority to the Notary, permitting the Notary to make representation against the report and also giving of

hearing before taking final decision on the report are read in the Rules, the same shall be in consonance with the principles of natural justice. The Court finds it necessary to read such requirements in Rules as the penalty will entail damage to professional reputation and there is no contrary mandate in the Rules to exclude giving of hearing before the penal action is taken on report. The Court therefore finds that reading of such requirement of giving copy of the report of the competent authority, giving an opportunity of making representation against such report and also affording of hearing to the Notary before taking any final decision based on the report under sub rule (12) of Rule 13 of the Rules will better serve the principles of natural justice.

[15] The Court finds that the impugned order though records that inquiry was handed over to the competent authority under Rule 13(6) of the Rules, however, what happened to inquiry or whether the inquiry was concluded and the report was submitted is not stated. What is recorded is that by making affidavits in the names of the complainant and his sisters without their presence before the petitioner Notary, the petitioner committed misconduct in discharge of his professional duty. On reading the impugned order, it does not become clear that the impugned order is made by considering the report of the inquiry. Be that as it may, it is not disputed by respondent nos.1 and 2 that the petitioner was neither given the copy of the inquiry report nor was afforded any opportunity to make representation against the report nor was granted any hearing before taking the impugned decision. The Court, therefore, finds that the impugned order is made in breach of principles of natural justice."

83 Our final conclusions may be summarised as under:

[1] Rule 13(12)(b) of the Rules, 1956 is not invalid or *ultra vires* the parent Act. It is permissible in law to cancel the certificate of practice and perpetually debar the Notary from practice.

[2] A Notary Public is entitled to be heard by the State Government before passing any final order as regards the cancellation of certificate of practice.

84 In the result, this appeal is partly allowed. We hold that Rule

13(12)(b)(i) of the Rules, 1956 is not invalid or *ultra vires* Section 10 of the Act, 1952. It would be within the discretion of the State Government having regard to the serious nature of the professional or any other misconduct to impose appropriate punishment or penalty, as prescribed under the Rules. At the same time, we hold that before passing the final order, the Notary Public should be given an opportunity of hearing by the State Government. This hearing may not be on the question of imposition of appropriate penalty or punishment, but only as regards the findings recorded by the Inquiry Officer in its inquiry report. We quash and set aside the judgement of the learned Single Judge on the question of validity of Rule 13 of the Rules, 1956 and uphold the findings as regards the opportunity of hearing to be given before the final decision is taken.

85 The State Government is directed to give an opportunity of hearing to the respondent No.1 herein (original petitioner) if he has anything to say as regards the legality and validity of the inquiry as well as the findings recorded by the Inquiry Officer in the inquiry report. Let this exercise be undertaken within a period of fifteen days from the date of receipt of the writ of this order and final order thereafter shall be passed in accordance with law within a period of four weeks.

86 In view of the final disposal of this appeal, the connected Civil Application No.2 of 2016 is also disposed of.

(J. B. PARDIWALA, J)

(VIRESHKUMAR B. MAYANI, J)

CHANDRESH