

MOST RESPECTFULLY SHOWETH THAT

1.1 The petitioner by way of the present petition under Article 32 of the Constitution of India is approaching this Hon'ble Court challenging the arbitrary inaction on the part of respondent in withholding the appointment of Hon'ble Mr. Justice Akil Kureshi, Puisne Judge, High Court Of Judicature, Bombay, as Chief Justice of the Madhya Pradesh High Court, despite the recommendation of the Collegium of this Hon'ble Court dated 10.05.2019. The Petitioner has an interest, like, all members of the Bar to uphold the independence of the judiciary and rule of law and has, therefore, approached this Hon'ble Court since the inaction on the part of Respondent has infringed Article 14 of the Constitution of India and the rule of law.

1.2 The present writ petition brings to the fore a seminal issue of public importance on the time line for the appointment of a Chief Justice of a High Judge under Article 217 of the Constitution of India – an issue that is integral to the independence of the judiciary and rule of law. The Petitioner association being a wheel in the chariot of justice administration is interested in upholding aspects of independence of judiciary and rule of law both of which are inalienable features of the basic structure of the Constitution as also part of Articles 14 and 50 of the Constitution of India.

1.3 The Petitioner association has made a representation to the Respondent vide its letter dated 11.06.2019. That despite the said representation having been made to the Respondent, through the Hon'ble Law Minister, the same not being replied to, the Petitioner association is constrained to approach this Hon'ble Court by way of the present writ petition.

1.4 The Petitioner herein is filing the present petition in public interest and has no private personal interest or private / oblique motive in filing the instant petition. There is no civil, criminal or any other litigation involving the petitioner that has or could have a legal nexus with the issues involved in this writ petition.

2. Facts of the Case of the Petitioner is as under:

2.1 The petitioner is a voluntary organization formed by Association of Advocates regularly and ordinarily practicing in the Gujarat High Court with a purpose to promote the professional goals, objects and interest of Advocate members in general. It is a registered Trust incorporated under the provisions of the Bombay Public Trust Act, 1963. The Petitioner is one of the important pillars of justice dispensation and, therefore, is vitally interested in the administration of justice.

2.2 On 07.03.2004, Hon'ble Mr. Justice Akil Kureshi was appointed as Additional Judge, Gujarat High Court. Later

on, on 12.08.2005, Hon'ble Mr. Justice Akil Kureshi was made permanent Judge of Gujarat High Court.

2.3 On 02.11.2018, Hon'ble Mr. Justice Akil Kureshi was made Acting Chief Justice of Gujarat High Court. On 14.11.2018, he was transferred to Bombay High Court and presently he is discharging his duties as a Puisne Judge of the Bombay High Court.

2.4 During his tenure as a Judge at the Gujarat High Court as well as his present tenure as Judge of Bombay High Court, Hon'ble Mr. Justice Akil Kureshi has demonstrated all the qualities of a good Judge, viz. independence, impartiality, being uninfluenced by stature of litigants or the Counsel representing the litigants, patiently hearing the parties to the dispute and displaying a prompt comprehension of dispute involved in the matter. These and other qualities of Hon'ble Mr. Justice Akil Kureshi as a Judge has earned him tremendous admiration and respect of the members of the Petitioner as well as lawyers practicing in the Bombay High Court. Suffice it to say that the recommendation of the collegium of the Supreme Court for the appointment of Mr Justice Akil Kureshi as the Chief Justice of the Madhya Pradesh High Court has put to rest any debate about his competency.

2.5 On 10.05.2019, the Collegium of this Hon'ble Court recommended four names for their appointment as Chief

Justices of different High Courts and two names for appointment as Additional Judges of the Madhya Pradesh High Court.

Annexed hereto is copy of Minutes of meeting of Collegium of this Hon'ble Court dated 10.05.2019 recommending appointment of Mr Justice Akil Kureshi as the Chief Justice of the Madhya Pradesh High Court is marked as **Annexure P-1** at page ____ to ____.

Annexed hereto is copy of Minutes of meeting of Collegium of this Hon'ble Court dated 10.05.2019 recommending appointment of Mr Justice D.N. Patel as the Chief Justice of the Delhi High Court is marked as **Annexure P-2** at page ____ to ____.

Annexed hereto is copy of Minutes of meeting of Collegium of this Hon'ble Court dated 10.05.2019 recommending appointment of Mr Justice R S Chauhan as the Chief Justice of the Telangana High Court is marked as **Annexure P-3** at page ____ to ____.

Annexed hereto is copy of Minutes of meeting of Collegium of this Hon'ble Court dated 10.05.2019 recommending appointment of Mr Justice V Ramasubramanian as the Chief Justice of the Himachal Pradesh High Court is marked as **Annexure P-4** at page ____ to ____.

Annexed hereto is copy of Minutes of meeting of Collegium of this Hon'ble Court dated 10.05.2019 recommending appointment of Mr Justice Vishal Dhagat and Mr Justice Vishal Mishra as the Additional judges of the Madhya Pradesh High Court is marked as **Annexure P-5** at page ____ to ____.

2.6 It would be pertinent to place on record here that Hon'ble Mr. Justice D. N. Patel present Chief Justice, Delhi High Court from 07.06.2019, was appointed as Additional Judge, Gujarat High Court on the same day that of Hon'ble Mr. Justice Akil Kureshi i.e on 07.03.2004. Justice D. N. Patel was made permanent judge on 25.01.2006 whereas Hon'ble Mr. Akil Kureshi was made permanent judge on 12.08.2005. It is therefore Hon'ble Mr. Justice Akil Kureshi is senior to Hon'ble Mr. Justice D. N. Patel.

2.7 Till the date of filing of the present writ petition, the Council of Ministers have advised the President in terms of the recommendations of the Collegium dated 10.05.2019 except for the recommendation of Hon'ble Mr. Justice Akil Kureshi for his elevation as the Chief Justice of Madhya Pradesh High Court. All Hon'ble Judges who were recommended for the office of the Chief Justices of respective High Court are now functioning as the Chief Justices of the said High Courts.

2.8 Respondent instead of issuing notification in terms of the recommendation of the Collegium of this Hon'ble Court dated 10.05.2019, on 07.06.2019 appointed Hon'ble Mr Justice Ravi Shankar Jha, senior most judge of the Madhya Pradesh High Court as the Acting Chief Justice of the Madhya Pradesh High Court with effect from 10.06.2019. That a copy of the notification issued by respondent dated 07.06.2019 is annexed herewith and marked as **Annexure P-6** at page ___ to ___.

2.9 On 10.06.2019, the members of the Petitioner association deliberated the inaction of the Respondent in not appointing Mr Justice Akil Kureshi as the Chief Justice of the Madhya Pradesh High Court despite the recommendation made by the Collegium of this Hon'ble Court and passed a resolution that a suitable representation will be made by the Petitioner to the Hon'ble Law Minister. It was further resolved that if nothing turns out positively then the Petitioner will prefer a petition under Article 32 of the Constitution of India. That a copy of the resolution dated 10.06.2019 passed by the Petitioner is annexed herewith and marked as **Annexure P-7** at page ___ to ____.

2.10 Pursuant to the resolution passed on 10.06.2019, the Petitioner association made a representation to the Respondent vide letter dated 11.06.2019. That a copy of

the representation dated 11.06.2019 written by the Petitioner is annexed herewith and marked as **Annexure P-8** at page ____ to ____.

2.11 In addition to the written representation, the Petitioner made several efforts to contact the Hon'ble Law Minister via phone calls. As efforts to make a personal representation before the Hon'ble Law Minister did not succeed, on 25.06.2019, the members of the Petitioner resolved to approach this Hon'ble Court by way of a writ petition under Article 32 of the Constitution of India. That a copy of the resolution dated 25.06.2019 passed by the Petitioner is annexed herewith and marked as **Annexure P-9** at page ____ to ____.

2.12 Hence, the Petitioner association is constrained to approach this Hon'ble Court by way of the present writ petition.

GROUND

3. The Petitioner is preferring the writ petition on the following, inter alia, other grounds without prejudice to one another -

A. BECAUSE the inexplicable failure by the Respondent to comply with the mandatory procedure under the Memorandum of Procedure for appointment and transfer of Chief Justices and Judges of High Courts (hereinafter referred to as "MOP") with consequential failure to advise

the President of India under Article 74 (1) of the Constitution of India is not only unreasonable and arbitrary, but also seriously jeopardizes the independence of the judiciary and hence, violates the basic structure of the Constitution of India.

B. BECAUSE the non-appointment of Mr Justice Akil Kureshi is violative of Article 14 and 217 of the Constitution of India and is subversive of the rule of law. The independence of judiciary has been repeatedly held to be a part of the Basic Structure and the appointment process of the judges of the Constitutional Courts as per the MOP is designed to maintain such independence. That the refusal to follow the MOP only for Mr Justice Akil Kureshi that is, inter alia, the subject matter of the present petition is in the teeth of the law laid down by this Hon'ble Court with respect to appointment and transfer of Chief Justices and High Court Judges in *Supreme Court Advocate on Record Association and others Vs. Union of India* reported at 1993 (4) SCC 441, (hereinafter to be referred to as '*Second Judges Case*' for short) and followed thereafter in *Special Reference No. 1 of 1998* reported at 1998 (7) SCC 739 popularly known as '*Third Judges Case*' as well as in *Supreme Court Advocate on Record Association and others Vs. Union of India* reported at 2016 (5) SCC 1 (hereinafter to be referred to as '*NJAC Case*').

C. BECAUSE the deliberate inaction of the Respondent in not appointing Mr Justice Akil Kureshi as the Chief Justice of the Madhya Pradesh High Court impinges and diminishes the primacy of the judiciary in the matters of appointment and transfer of judges to High Court and Supreme Court. The said action or rather the in-action of the Respondent is also an attack on the independence of the judiciary as appointment of judges of High Court and Supreme Court is an integral part of independence of judiciary. The primacy of the Judiciary over the Executive in the matters of appointment of judges of the Constitutional Courts is to secure the independence of the judiciary.

D. BECAUSE as per the law laid down in the *Second Judges Case*, the proposal to appoint Chief Justice of High Courts is initiated by the Chief Justice of India. As a part of forming the opinion, the Chief Justice of India consults the 2 senior-most Judges of Supreme Court of India apart from the Judge(s) of the Supreme Court who served in the High Court wherein the recommendee also served as a judge of the High Court. After due consultation as envisaged in the *Second Judges case*, the recommendation is forwarded by Hon'ble the Chief Justice of India to Union Minister of Law. The Union Minister of Law is then required to obtain views of the concerned State Government. After receipt of the views of State Government, Union Minister of Law submits

that proposal to the Hon'ble Prime Minister who will then advise the President. That in the instant case the recommendation dated 10.05.2019 was made by the Collegium of this Hon'ble Court in accordance with the law laid down in the *Second Judges Case* and MOP, the said recommendation is rendered moot by the arbitrary inaction by the Respondent in withholding the appointment of Mr Justice Akil Kureshi.

E. BECAUSE the Respondent has a mandate to act in accordance with Paragraphs 5 and 6 of the MOP. Para 5 and 6 of the MOP reads as under:-

“5. Initiation of the proposal for the appointment of Chief Justice of a High Court would be by the Chief Justice of India. The process of appointment must be initiated well in time to ensure the completion at least one month prior to the date of anticipated vacancy for the Chief Justice of the High Court. The Chief Justice of India would ensure that when a Chief Justice is transferred from one High Court to another simultaneous appointment of his successor in office should be made and ordinarily the arrangement of appointment of an acting Chief Justice should not be made for more than one month.

5.1 The Chief Justice of India would send his recommendation for the appointment of a puisne Judge of the High Court as Chief Justice of that High Court or of another High Court, in consultation with the two seniormost Judges of the Supreme Court. He would also ascertain the views of the seniormost colleague in the Supreme Court who is conversant with the affairs of the High Court in which the recommendee has been functioning and whose opinion is likely to be significant in adjudging the suitability of the candidate. It is of no consequence whether the Judge of the Supreme Court, so consulted, had that High Court as Parent High Court or was transferred there from any other High Court.

5.2 The views of the Judges of the Supreme Court thus consulted would then be sent by the Chief Justice of India alongwith his proposal, to the Union Minister of Law, Justice and Company Affairs.

6. After receipt of the recommendation of the Chief Justice of India, the Union Minister of Law, Justice and Company Affairs would obtain the views of the concerned State Government. After receipt of the views of the State Government, the Union Minister of Law, Justice and Company Affairs, will submit proposals to the Prime Minister, who will then advise the President as to the selection.”

F. BECAUSE this Hon'ble Court has in the case of *Samsher Singh* reported at 1974 (2) SCC 831, Union of India Vs. Sankalchand reported in 1977 (4) SCC 193 as well as in *Second Judges Case* has held that independence of judiciary is part of the basic structure of the Constitution of India. Apart from this, it is held that appointment of Judges of High Court and Supreme Court is an integral part of the independence of judiciary. To ensure independence of judiciary, primacy is accorded to Judiciary over Executive in the *Second Judges Case* with respect to appointment of Judges of High Court and Supreme Court. The primacy of Judiciary over Executive in the matter of appointment of Judges of High Court and Supreme Court is also a part of basic structure of the Constitution of India. It is trite law that neither 'law' as described in Article 13 of the Constitution of India nor 'Executive action/inaction' can violate the basic structure of Constitution of India.

- G. BECAUSE the law and practice propounded in *Second Judges Case* with respect to appointment of Judges of higher echelons of Indian judiciary is followed in the Third Judges Case as well as in the *NJAC Case* and has been practised for the last quarter of a century. Based on law laid down in the *Second Judges Case*, the Respondent in consultation with the Chief Justice of India has framed the MOP which has also not been followed in the instant case.
- H. BECAUSE the Petitioner relies upon Paragraphs 476, 478 (3), 478 (5), 478 (6) of the *Second Judges Case*.
- I. BECAUSE the Petitioner relies upon Paragraphs 300, 380, 561, 712, 562, 988 of the *NJAC Case*.
- J. BECAUSE the arbitrariness of the inaction of the Respondent is writ large by the fact that all the recommendations of the collegium of this Hon'ble Court were carried out and only the recommendation appointing Mr Justice Akil Kureshi as the Chief Justice of the Madhya Pradesh has not been act upon by the Respondent.
- K. BECAUSE 18 other additional judges of different High Courts have been appointed pursuant to the advice of the Respondent to the President of India after 10.05.2019, thus, the process of appointment of judges to Hon'ble High Court is followed by the Respondent except in the case of Mr Justice Akil Kureshi.

- L. BECAUSE the singling out of Mr. Justice Akil Kureshi by the Respondent by making the appointments of all other recomendees but for Mr. Justice Akil Kureshi, amounts to breach of directions issued by this Hon'ble Court in *Second Judges Case* and is a classic case of violation of Articles 14 & 217 of the Constitution of India. It is further stated that no circumstances as described in para 478(3) of the *Second Judges Case* exist in the facts of the present case to justify a departure from the standard practice and yet the directions issued by this Hon'ble Court are breached.
- M. BECAUSE it is germane to note that not only the law laid down in *Second Judges Case* but also the MOP records that for the purpose of elevation as Chief Justice, inter-se seniority of Puisne Judges will be reckoned on the basis of their seniority in their own High Courts and they will be considered. This Hon'ble Court has held in *Second Judges Case* that unless there be any strong, cogent reason to justify a departure, the order of seniority must be maintained while making the appointment. It is stated that in the facts of present case, the action of Respondent in not advising the President with respect to appointment of Hon'ble Mr. Justice Akil Kureshi as Chief Justice of Madhya Pradesh High Court flies in the face of law and practice described by this Hon'ble Court in *Second Judges Case* with

respect to maintaining order of inter-se seniority amongst the recommendees of the High Courts.

N. BECAUSE the withholding of advice by the Respondent to the President only with respect to recommendation of Hon'ble Mr. Justice Akil Kureshi for appointment as Chief Justice of Madhya Pradesh High Court, amounts to direct participation of Executive in the appointment of Chief Justice that is not countenanced at law. As stated above, it is the Judiciary that has primacy over Executive in the matters of appointment and transfer of Chief Justices and High Court Judges and by withholding the advice, the Executive is exerting disproportionate influence in the process of appointment of Chief Justice of a High Court. Thus, in the facts of the present case, the inaction of Respondent in advising the President is not countenanced at law.

O. BECAUSE the Petitioner states that this Hon'ble Court in *Second Judges Case* has held that deviation by the Executive from the recommendation of Chief Justice of India with respect to appointment and transfer of Chief Justices and High Court Judges is justiciable.

P. BECAUSE in Paragraph 478 (13) of the *Second Judges Case* the time limit for forwarding the recommendation to the State Government (the other Constitutional Functionary) is 6 weeks.

Q. BECAUSE the only role ascribed to the Respondent under the *Second Judges Case* and the MOP as far as the appointment of the Chief Justice of the High Court is concerned, is to elicit the views of the State Government with respect to the recommendee. In the scheme of the things as it stands with respect to appointment of Chief Justice of the High Court, the Union Minister of Law can only convey views of the State Government to Chief Justice of India but in no circumstances Union Minister can withhold the advice to the President as it will tantamount to arbitrary action.

R. BECAUSE the time bound procedure prescribed by the Second Judges case as per Paragraphs 478 (12), 478 (13) and 478 (14) have to be complied. That in the instant case the time bound procedure as laid down therein has not been complied with.

S. BECAUSE the inaction of the Respondent is in violation of the constitutional mandate under Articles 141 and 144 of the Constitution of India.

4. The petitioner craves leave of this Hon'ble Court to submit further grounds, if necessary, at the time of hearing, in the interest of justice.

5. The Petitioner has not filed any other writ petition or any other petition on the same cause of action before this Hon'ble Court or any other Court.

6. The Petitioner does not have any other efficacious alternative remedy and hence has to prefer the writ petition under Article 32 of the Constitution of India to impugn the inaction on the part of the Respondent.

PRAYER

7. The petitioner, therefore, prays that Your Lordships be pleased to:
- a) Issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ, order and/or directions, directing respondent to act and comply with Article 217 of the Constitution of India read with Paragraph 6 of the *“Memorandum of Procedure for Appointment and Transfer of Chief Justices and Judges of High Courts”* for the purpose of implementing the Collegium recommendation of this Hon’ble Court dated 10.05.2019 recommending appointment of Hon’ble Mr. Justice Akil Kureshi, Judge High Court of Judicature, Bombay to be the Chief Justice of Madhya Pradesh High Court;
 - b) Issue a further writ of mandamus or any other appropriate writ, order and/or directions to the Respondent to ensure compliance with the provisions of Para 5 and 6 of the Memorandum of Procedure for Appointment and Transfer of Chief Justices and Judges of High Courts in all future appointments of all the Chief Justices of various High Courts in India within a period of 6 weeks as directed by

this Hon'ble Court in paragraphs 476, 478 (3), 478 (5), 478 (6) of the Second Judges Case.

- c) Your Lordships may be pleased to pass such other and/or further orders as may be deemed fit, just and proper in the interest of justice.

AND FOR THIS ACT OF KINDNESS AND JUSTICE, THE PETITIONER HEREIN AS IN DUTY BOUND SHALL FOREVER PRAY

PLACE : NEW DELHI
DATE : 03.07.2019

PURVISH JITENDRA MALKAN
ADVOCATE FOR THE PETITIONER