KALLAKKURICHI TALUK RETIRED OFFICIAL ASSOCIATION, TAMILNADU, ETC.
*v.*
STATE OF TAMILNADU
(Civil Appeal Nos. 8848-8849 of 2012)

JANUARY 17, 2013

**[D.K. JAIN AND JAGDISH SINGH KHEHAR, JJ.]**

*Service Law:*

*Pension - Calculation of - Government order - While calculating pension, classified the employees retiring before and after 1.6.1988 - Lower component of 'dearness pay' was extended to the employees retiring after 1.6.1988 vis-à-vis the employees who retired prior thereto - Held: Such classification is arbitrary and discriminatory and is liable to be set aside as violative of Articles 14 and 16 of the Constitution - Constitution of India, 1950 - Articles 14 and 16 - Tamilnadu Pension Rules, 1976 - r.30.*

*Constitution of India, 1950 - Articles 14 and 16 - Valid classification - A classification to be valid, must be based on just objective and differentiation must have reasonable nexus to the objective sought to be achieved - Any classification without reference to the object sought to be achieved, would be arbitrary and violative of the protection offered under Art.14 and also discriminatory and violative of protection offered under Art.16 - Quantum of discrimination is irrelevant to a challenge based on a plea of arbitrariness.*

*Words and Phrases - 'Dearness Pay' - Meaning of.*

**The employees of the State Government who retired on or after 1.6.1988 challenged the Government Order dated 9.8.1989, whereby the pensionary benefits of an**





**employee retired/retiring on or after 1.6.1988 were required to be computed by adding 'dearness allowance' to 'dearness pay' at a fixed percentage. By virtue of he said determination, the employees retiring on or after 1.6.1988 were at disadvantage as compared to the employees who had retired prior thereto. High Court allowed the petition holding that the order dated 9.8.1989 was unsustainable. Division Bench of High Court set aside the order of Single Judge. Hence the present appeals.**

**Allowing the appeals, the Court**

**HELD: 1. The Constitution of India ensures to all, equality before the law and equal protection of the laws. These rights flow to an individual under Articles 14 and 16 of the Constitution. The extent of benefit or loss in such a determination is irrelevant and inconsequential. The extent to which a benefit or loss actually affects the person concerned, cannot ever be a valid justification for a court in either granting or denying the claim raised on these counts. The rejection of the claim of the appellants by the High Court, merely on account of the belief that the carry home pension for employees who would retire after 1.6.1988, would be trivially lower than those retiring prior thereto, amounts to bagging the issue pressed before the High Court. In the instant case, in a given situation, an employee retiring on or after 1.6.1988 could suffer a substantial loss, in comparison to an employee retiring before 1.6.1988. Therefore, the High Court erred while determining the issue projected before it. [Para 26] [910-B-F]**

**2. A valid classification is truly a valid discrimination. Article 16 of the Constitution permits a valid classification. A valid classification is based on a just objective. The result to be achieved by the just objective presupposes the choice of some for differential consideration/**

**treatment, over others. A classification to be valid must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective. And secondly, the choice of differentiating one set of persons from another, must have a reasonable nexus to the objective sought to be achieved. Legalistically, the test for a valid classification may be summarized as a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. Whenever a cut-off date is fixed to categorise one set of pensioners for favourable consideration over others, the twin test for valid classification (or valid discrimination) must necessarily be satisfied. Any classification without reference to the object sought to be achieved, would be arbitrary and violative of the protection afforded under Article 14 of the Constitution of India, it would also be discriminatory and violative of the protection afforded under Article 16 of the Constitution of India. [Paras 27 and 30] [910-G-H; 911-A-C; 915-B]**

**3. 'Dearness allowance' is extended to employees to balance the effects of ongoing inflation, so as to ensure that inflation does not interfere with the enjoyment of life, to which an employee is accustomed. Likewise, the objective of 'dearness pay' is to balance the effects of ongoing inflation, so that a pensioner can adequately sustain the means of livelihood to which he is accustomed. In the present context, 'dearness allowance' is paid to Government employees keeping in mind the All India Consumer Price Index. When a State Government chooses to treat 'dearness allowance' as 'dearness pay', the objective remains the same i.e., inflation in the market place is sought to be balanced for retired employees by giving them the benefit of 'dearness pay'. Since the component of inflation similarly affects all employees, and all pensioners (irrespective of the date of their entry**



**into service or retirement), it is not per se possible to accept different levels of 'dearness pay' to remedy the malady of inflation. Just like the date of entry into service (for serving employees) would be wholly irrelevant to determine the 'dearness allowance' to be extended to serving employees, because the same has no relevance to the object sought to be achieved. Likewise, the date of retirement (for pensioners) would be wholly irrelevant to determine the 'dearness pay' to be extended to retired employees. [Paras 27 and 28] [911-D-E, F-H; 912-A-C]**

**4. In the instant case, the State Government has not disclosed any object which is desired to achieve by the cut-off date. Most importantly, the financial constraints of the State Government, were not described as the basis/ reason for the classification made in the impugned Government order dated 9.8.1989. No employee has a right to draw 'dearness allowance' as 'dearness pay' till such time as the State Government decides to treat 'dearness allowance' as 'dearness pay'. And therefore, the State Government has the right to choose whether or not 'dearness allowance' should be treated as 'dearness pay'. As such, it is open to the State Government not to treat any part of 'dearness allowance' as 'dearness pay'. In case of financial constraints, this would be the most appropriate course to be adopted. Likewise, the State Government has the right to choose how much of 'dearness allowance' should be treated as 'dearness pay'. As such, it is open to the State Government to treat a fraction, or even the whole of 'dearness allowance' as 'dearness pay'. Based on Rule 30 of the Tamilnadu Pension Rules, 1978, it is clear that the component of 'dearness pay' would be added to emoluments of an employee for calculating pension. In a situation where the State Government has chosen, that a particular component of 'dearness allowance' would be treated as 'dearness pay', it cannot discriminate between one set of**

**pensioners and another, while calculating the pension payable to them. Though a valid classification may justify such an action, but in the present case, the State Government has not come out with any justification/basis for the classification whereby one set of pensioners has been distinguished from others for differential treatment. Therefore, the instant classification made by the State Government in the impugned Government order dated 9.8.1989 placing employees who had retired after 1.6.1988 at a disadvantage, vis-à-vis the employees who retired prior thereto, by allowing them a lower component of 'dearness pay', is clearly arbitrary and discriminatory, and as such, is liable to be set aside, as violative of Articles 14 and 16 of the Constitution of India. [Paras 28, 29 and 31] [913-F-H; 914-A-E; 915-E-F]**

*Union of India vs. P.N. Menon* **(1994) 4 SCC 68;** *State of Rajasthan vs. Amrit Lal Gandhi* **(1997) 2 SCC 342: 1997 (1) SCR 121;** *State of Punjab vs. Amar Nath Goel* **(2005) 6 SCC 754: 2005 (2) Suppl. SCR 549 -distinguished.**

**Case Law Reference:**

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|---|---|---|
| **(1994) 4 SCC 68** | **distinguished** | **Para 32(i)** |
| **1997 (1) SCR 121** | **distinguished** | **Para 32(ii)** |
| **2005 (2) Suppl. SCR 549** | **distinguished** | **Para 32(iii)** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8848-8849 of 2012.

From the Judgment & Order dated 17.12.2007 of the High Court of Judicature at Madras in W.A. Nos. 9 and 75 of 2007.

WITH

C.A. Nos. 8850-8852, 8853-8855, 8856, 8857, 8858, 8859, 8860, 8861-8863, 8864, 8865, 8866, 8868, 8869, 8871, 8872, 8873-8874, 8875, 8876, 8877-8878, 8879, 8880, 8881, 8882, 8883 & 8870 of 2012.



K. Ramamoorthy, A.K. Ganguly, V. Krishnamurthy, Dr. A. Francies Julian, Raju Ramachandran, S. Gurukrishna Kumar, AAG, N. Shoba, Sri Ram J. Thalapathy, V. Adhimoolam, V. Balaji, MSM. Asai Thambi, C. Kannan (for B.K. Pal), Hari Shankar K., V. Balachandran, S. Beno Bencigar (for M.A. Chinnasamy), P.R. Kovilan Poongkuntran, Geetha Kovilan, R.V. Kameshwaran, Gautam Narayan, Asmita Singh, Nikhil Nayyar, P.V. Yogeswaran, Danish Zubair Khan, Sumit Kumar, Syed burhanur Rahman, Madhur Panjwani, A. Prasanna Venkat (for B. Balaji), Subramonium Prasad for the appearing parties.

The Judgment of the Court was delivered by

**JAGDISH SINGH KHEHAR, J.** 1. The Government of Tamil Nadu has been issuing executive order from time to time to determine the composition of allowances to be added to pay for quantifying wages for calculating pension. It is the case of the appellants, that the State Government followed a consistent practice of treating 'dearness allowance' as 'dearness pay' for the computation of pension and other retiral benefits. Illustratively, we are informed, that by a Government Order dated 11.3.1970 the State Government included 'dearness allowance' at the rate then prevalent, as a component of wages for calculating average emoluments for determining pension, for those who retired on or after 26.2.1970. The instant Government Order dated 11.3.1970 was applicable to employees who retired between 26.2.1970 and 1.10.1970.

2. One R. Narasimachar who had retired on 21.11.1969 was not extended the benefit of 'dearness allowance' drawn by him at the time of his retirement, while computing his pension. This denial was because the Government order dated 11.3.1970, extended the benefit referred to above only to such employees who had/would retire on or after 26.2.1970. Dissatisfied with the aforesaid denial, he filed Writ Petition no.1815 of 1986 contending, that his pension should have been calculated by taking into consideration 'dearness allowance'

which was being drawn by him at the time of his retirement, as 'dearness pay'. A learned Single Judge of the High Court of Judicature at Madras (hereinafter referred to as, the High Court) allowed the aforesaid writ petition on 15.3.1990 by holding, that the State Government was not right in restricting the applicability of the Government Order dated 11.3.1970 only to employees who retired between 26.2.1970 and 1.10.1970. The learned Single Judge directed, that 'dearness allowance' which the appellant was drawing, at the time of his retirement, be treated as 'dearness pay' for calculating his pension. On 26.2.1991, the writ appeal filed by the State Government against the order dated 15.3.1990 (passed by the learned Single Judge allowing Writ Petition no.1815 of 1986), was dismissed.

3. Based on the aforesaid judgment dated 15.3.1990, which the State Government accepted, a clarificatory Government Order dated 4.12.1991, was issued. Under the Government Order dated 4.12.1991, even for employees who had retired prior to 1.12.1966, 'dearness allowance' actually drawn by them, at the time of their retirement,would be taken as 'dearness pay' for purposes of calculating pension. For employees retiring between 1.12.1966 and 25.2.1970, 'dearness allowance' upto the level obtaining in December, 1966 would be taken into consideration as 'dearness pay' for determining pension (and gratuity). It is therefore submitted, that 'dearness allowance' became a component of pension, for all employees who had retired upto 25.2.1970.

4. In order to place the sequence of facts in the correct perspective, it was further brought to our notice that the Government order dated 11.3.1970 was clarified by a subsequent letter dated 4.12.1991. As per the aforesaid order and letter, Government servants retiring from service on or after 26.2.1970, and upto 1.10.1970, 'dearness allowance' up to the level obtaining in December, 1966, was to be reckoned as 'dearness pay' for purposes of pension (and gratuity). Thereupon, through a subsequent Government order dated



4.12.1991, directions were issued for extending the benefit contemplated by the Government order dated 11.3.1970 and the Government's letter dated 4.2.1991, even to those who had retired prior to 26.2.1970.

5. A Government order dated 4.12.1991 was then brought to our notice. It provided, that notional revised pension payable from 1.6.1988 would be encashable only with effect from 1.12.1991. It also provided, that those Government servants who had retired prior to 26.2.1970 but had died before 1.12.1991, would be ineligible for the benefits contemplated for retirees prior to 26.2.1970. However, if the concerned Government employee had died after 1.12.1991, the benefits contemplated for retirees prior to 26.2.1970 would be released to the legal heirs of such retirees. It is, therefore apparent, that for the benefits of the aforesaid Government order, the retirees under reference would be deprived of the actual monetary benefit payable to him, from the date of his or her retirement, till 30.11.1991 (as arrears of pension under the aforesaid Government orders were payable only with effect from 1.12.1991).

6. The aforesaid R. Narasimachar again assailed the Government order dated 4.12.1991, by contesting the determination of the State Government, in denying to him, the benefit of arrears from the date of his retirement (on 21.11.1969) till 30.11.1991, by filing Writ Petition no. 4038 of 1992 before the High Court. The aforesaid Writ Petition was allowed by the High Court. The High Court held, that monetary benefits could not be denied for the period preceding 1.12.1991. In other words, retirees before 1.12.1991 were held entitled to arrears from the date of their retirement till 30.11.1991. The cut off date (1.12.1991) for extending the benefit of arrears was accordingly set aside.

7. The judgment rendered by the High Court in Writ Petition no. 4038 of 1992 on 15.6.1993, quashing the action

of the State Government in limiting payment of arrears, only with effect from 1.12.1991, was accepted by the State Government. The judgment of the High Court was given effect to, by a Government order dated 26.7.1993, whereby, the earlier Government order dated 4.12.1991 was modified. Under the Government order dated 26.7.1993, pensioners were held eligible for arrears of pension from the date of their actual retirement. The aforesaid benefit of arrears was also extended to legal heirs of such pensioners, who had died in the meantime.

8. Based on the factual position narrated in the foregoing paragraphs, it clearly emerges, that 'dearness allowance' was taken as 'dearness pay' for employees retiring from government service, at all times, without any interruption, for the computation of retiral benefits including pension. The aforesaid narration also reveals, that the component of 'dearness allowance' to be treated as 'dearness pay' for being taken into consideration for calculating pension, was determined by the State Government, through Government orders issued from time to time. The narration recorded hereinabove pertains to employees whose date of retirement preceded 1.10.1970.

9. The factual position being recorded hereinafter relates to the period after 1.10.1970.

10. On 6.2.1974, a Dearness Allowance Committee was constituted, to inter alia make recommendations, of allowances which should be treated as a component of wages, for calculating pension of retired/retiring employees. On 7.7.1974, the Dearness Allowance Committee inter alia recommended, that 'dearness allowance' be treated as 'dearness pay' in full, for computing retiral benefits including pension. Accepting the recommendations of the Dearness Allowance Committee, the Finance Department, issued a Government Order dated 6.2.1975 directing, that 'dearness allowance' actually being drawn by employees retiring on or after 1.2.1975 be treated as



'dearness pay' for calculating average pay ( by taking not consideration 10 months wages, prior to the date of retirement), for calculating pension, (gratuity and travelling allowance). It would be relevant to mention, that at the aforesaid juncture, employees drawing pay upto Rs.299/-, were entitled to Rs.55/- as 'dearness allowance'; and those drawing pay at Rs.300/- and above, were entitled to Rs.70/- as 'dearness allowance'. Accordingly, by the Government Order dated 6.2.1975, the State Government, determined the component of 'dearness allowance' (Rs.55/- or Rs.70/-, as the case may be) to be taken into consideration, for calculating pension. The intention of the instant Government Order was, that employees retiring on or after 1.2.1975, should derive full benefit of, the merger of the then existing 'dearness allowance' into wages, as 'dearness pay' for computing pension. The Government order dated 6.2.1975 permitted employees retiring on or after 1.2.1975, an addition of 'dearness allowance' actually being drawn by them, (during the period of ten months, prior to the date of their retirement), by treating the same as 'dearness pay', for calculating average wages. The said average wage, would lead to the computation of pension actually payable.

11. K. Venkataraman filed Writ Petition no. 8237 of 1995 before the High Court with a prayer that 'dearness allowance' drawn by him for a period of ten months prior to the date of his retirement (on 30.6.1974) be treated as 'dearness pay' for calculating his pension. The benefit sought, had been denied because he had retired on 30.6.1974, whereas, the benefit of the Government order dated 6.2.1975 was extended only to such employees who had retired after 1.2.1975. The aforesaid Writ Petition came to be transferred to the Tamil Nadu Administrative Tribunal (hereinafter referred to as, the Administrative Tribunal). Before the Administrative Tribunal, the Writ Petition was renumbered as T.A. 845 of 1991. The Administrative Tribunal, by its order dated 1.4.1993, held that K. Venkataraman was entitled to the benefits extended to other

pensioners, irrespective of the fact that he had retired (on 30.6.1974 i.e., prior to the cut off date (1.2.1975).

12. The State Government, accepted the decision of the Administrative Tribunal in K. Venkataraman's case (in T.A. no. 845 of 1991 decided on 1.4.1993), and implemented the same. For the aforesaid purpose, the Finance (Pension) Department issued a Government order dated 23.9.1993. Accordingly, K. Venkataraman's pension was recalculated by treating 'dearness allowance' actually drawn by him, during the ten months preceding the date of his retirement, as 'dearness pay'. It therefore emerges, that the manner of computing pension for retired and retiring employees were equated, in so far as the component of 'dearness allowance' is concerned.

13. We were told, that when one or the other Government order introduced a distinction in pensionary benefits, for computing pension, the same was equated through judicial intervention. Such judicial interventions were then adopted by the State Government, from time to time. This aspect of the matter, factual as well as legal, was not disputed by the learned counsel representing the respondents. This position continued till the adoption of the recommendations of the Fourth Tamil Nadu Pay Commission Report, details whereof, shall be narrated soon hereafter.

14. On 1.1.1979, the Tamil Nadu Pension Rules, 1978 (hereinafter referred to as "the Pension Rules") came to be enforced. After the promulgation of the Pension Rules, pension of retiring government employees had to be determined in consonance with the said Rules. It is not in dispute, that pension to Government employees is now regulated under the Pension Rules. Under the Pension Rules, pension is calculated on the basis of an employee's emoluments/wages, immediately before his retirement. For this, reference may be made to Rule 30 of the Pension Rules, which is being extracted hereunder:-

"30. Emoluments-In the rules, unless the context otherwise



requires,--

(1) Emoluments means and include:-

(i) Pay, other than special pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity (including temporary capacity under emergency provisions) or to which he is entitled by reason of his position in a cadre:

(ii) special pay, dearness pay and personal pay; and

(iii) any other remuneration which may be specially clausedas emoluments by the Government."

(emphasis is ours)

The emoluments/wages to be taken into consideration for computing pension is dependent on the allowances which are added to pay. The composition and component of the said allowances is determined by the State Government from time to time through Government orders. A perusal of Rule 30 of the Pension Rules reveals, that 'dearness pay' is a component of the wages to be taken into consideration for computing pension. And 'dearness pay' is a component of 'dearness allowance; which on a declaration by the State Government approves (through a Government order) for being taken into consideration for calculating pension.

15. In 1986, the Fourth Tamil Nadu Pay Commission gave its report. The Pay Commission recommended, that 'dearness allowance', prevalent at the end of three years (after the Pay Commission's recommendations), should be treated as 'dearness pay', in order to ensure a reasonable pension level.

The Finance (Pension) Department having considered the recommendations made by the Pay Commission, issued a Government Order dated 30.4.1986, providing that 'dearness allowance' and 'additional dearness allowance' sanctioned upto 30.9.1987 would be treated as 'dearness pay' for calculating pension, in respect of those who retired (or died) on or after 1.10.1987. The concession of adding 'dearness pay' was extended to the period of 10 months for calculating average emoluments, for those who retired before or after 31.7.1987. But employees retiring on or after 1.10.1987 were entitled to add 'dearness allowance' sanctioned upto 1.10.1987 to their wages, for quantifying pension (family pension and death-cum-retirement gratuity). It is therefore apparent, that even after the acceptance of the recommendations of the Fourth Pay Commission report, 'dearness allowance' remained a component of wages. As such, 'dearness allowance' continued to be taken into consideration for computing pension of retiring government employees.

16. The Fifth Tamil Nadu Pay Commission submitted its report in 1989. The instant Pay Commission recommended, the following formula for calculating pension:

| Basic Pay Per Month | Rate of Pension Per Month |
|---|---|
| (i) Not exceeding Rs.1,500 | 30 percent of basic pay subject to a minimum of Rs.375 p.m. |
| (ii) Exceeding Rs.1,500 but not exceeding Rs.3,000/- | 20 per cent of basic pay subject to a minimum of Rs.450 p.m. |
| (iii) Exceeding Rs.3,000/- | 15 per cent of basic pay subject to a minimum of Rs.600 and a maximum of Rs.1,250 p.m. |
| | |



The Fifth Pay Commission also recommended different percentages of increase in pension for existing pensioners, who had retired prior to 1.6.1988. By a Government Order dated 9.8.1989 the Finance Department while accepting the recommendations of the Fifth Tamil Nadu Pay Commission fixed a slab system, for adding 'dearness allowance' as 'dearness pay' for calculating pension. This decision of the State Government was to be implemented for employees retiring on or after 1.6.1988.

17. Original Application no. 1919 of 1991 was filed by Ambasamudaram, Taluk Pensioner Associations before the Administrative Tribunal. Likewise, a large number of other Original Applications (including OA no. 4952 of 1992, O.A. no. 2227 of 1992, O.A. no. 4265 of 1992, O.A. no. 4953 of 1992, OA no.2645 of 1994 and OA no.2646 of 1994) were filed before the Administrative Tribunal. Through the aforesaid original applications, the petitioners/applicants assailed the Government Order dated 30.4.1986 (issued in furtherance of the recommendations made by the Fourth Tamil Nadu Pay Commission), as well as, the Government Order dated 9.8.1989 (issued in furtherance of the recommendations made by the Fifty Tamil Nadu Pay Commission). All the aforesaid original applications were disposed of by the Administrative Tribunal vide a common order dated 6.5.1996. The operative part of the order passed by the Administrative Tribunal while disposing of the aforementioned original applications is being extracted hereunder:

"OA 1919/91

We set aside the G.O.Ms. No.810 (Finance and Pay Commission) Department dated 9.8.89 in so far as it affects the applicant's association and direct the respondent to extend the benefits of 60% increase in the pre-revised pension plus the Dearness Allowance at 608 points available to those who retired prior to 1.6.60 to

those pensioners and family pensioners of cases of retirements or death occurring after 1.6.60.

OA 2227/92

We quash the G.O.Ms. No.371, Finance dated 30.4.1986 and G.O.Ms.No.911, finance dated 4.12.1991 in so far as they have restricted their applicability to the pensioners and family who retired prior to 1.10.1987 listed in Appendix 1 and 2 and those who retired during the period from 1.10.1987 to 31.5.1988 as listed in Appendix from the services of Government, local bodies and aided educational institutions and direct the respondent to count the DA and ADA as dearness pay for all ten months preceding retirement for computing average emoluments to fix their pensionary benefits including pension and value of commutation and also direct the respondent to pay the arrears of pension, gratuity and value of commutation of pension on such refixation computed from the date of retirement or death as the case may be to the pensioners and family pensioners.

OA 4265/92

We quash the G.O.Ms.No.115, Finance dated 6.2.1975 and G.O.Ms.No.911 Finance dated 4.12.1991 in respect of the applicant as far as it relates to classification of pensioners and direct the respondent to extend the benefits of the impugned G.Os. to the affected pensioners and family pensioners and pay the arrears of pension and gratuity and the family pension computed on refixation of their original pension or family pension from the date of their retirement or the date of death of the Government servant as the case may be.

OA 4953/92

We quash G.O.Ms.No.371, Finance dated



30.4.1986 and G.O.Ms.No.911 Finance dated 4.112.91 in respect of the applicant as far as they have restricted their applicability to the pensioners and family pensioners' who retired or died as the case may be prior to 1.10.87 and after 1.4.78 and direct the respondent to allow the pensioners who retired during the period from 1.10.87 to 31.5.1988 to count the DA and ADA as dearness pay for all the 10 months preceding retirement for computing average emoluments and extend the benefits of the impugned GOS to them, and pay them the arrears of pension, gratuity and value of commutation on such refixation computed on and from the date of retirement or death as the case may be to the affected pensioners and family pensioners.

OA No.2645/94

We direct the respondents to extend the benefit of G.O.Ms.No.679, Finance (Pension) Department, dated 23.9.93 to the applicant also and revise his pension with effect from 1.11.1974 taking into account the Dearness Allowance drawn by him from 9.1.1974 to 31.10.1974 and pay him the arrears due to him consequent on the revision from 1.11.1974.

OA No.2646/94

We quash the letter No.88079/Pension/93-I, Finance Department, dated 1.10.1993 and direct the respondent to extend the benefit granted in G.O.Ms.No.115, Finance dated 6.2.75 to those who retired during the period from 1.10.70 to 1.2.75 and pay them ar4rears of pension and DCRG from the dates of their retirement.

The applications are allowed. Taking into consideration the fact that most of the applicants would have died or most of them would have reached the age of more than 70, we direct the respondent to refix their

pension and pay the arrears within two months from the date of receipt of this order or a copy thereof."

18. The factual narration recorded hereinabove refers to the Government orders issued from to time, directing the component of 'dearness allowance', which was to be taken into consideration as 'dearness pay' for computation of pension; the outcome of the challenges raised to the aforesaid Government orders; and the eventual implementation thereof in the context of the implementation of the component of 'dearness pay' to be taken into consideration for calculating pension. Even though the exhaustive details of the same have been narrated above, it is necessary to record a summary thereof, so as to have a bird's eye view of the manner in which 'dearness pay' has been extended to retired Government employees from time to time. Accordingly, the aforesaid summary is being paraphrased below:-

(i) Government order dated 11.3.1970 included 'dearness allowance' as a component of wages for calculating pension for only such employees who retired between 26.2.1970 and 1.10.1970. By judicial intervention, the aforesaid Government order extending the benefit of treating 'dearness allowance' as 'dearness pay', was held to be applicable even to employees who had retired prior to 26.2.1970. The State Government accepted the aforesaid legal position and extended the same benefit of 'dearness allowance' by treating the same as 'dearness pay' to all pensioners equally.

(ii) Government order dated 6.2.1975 was issued to give effect to the recommendations made by the Dearness Allowance Committee to the effect, that 'dearness allowance' sanctioned with effect from 1.4.1974 (Rs.55/- for employees drawing pay upto Rs.599/-, and Rs.70/- for employees drawing pay upto Rs.600/- and above) would be treated as 'dearness pay' for employees retiring on or



after 1.2.1975 ( by 'adding dearness allowance actually drawn by them during the ten months preceding their retirement. By judicial intervention, it was held that the aforesaid benefit would also extend to such employees who had retired during the period between 2.10.1970 and 31.1.1975, and that, 'dearness allowance' sanctioned from time to time and actually drawn by the retiring employee would be treated as 'dearness pay' in case of those who retired during the period between 2.10.1970 and 31.1.1975 (for calculation of pension).

(iii) Government order dated 30.4.1986, while accepting the recommendation made by the Fourth Tamil Nadu Pay Commission, provided for certain pensionary benefits to employees who had retired between 1.10.1987 and 31.5.1988, by allowing them to count 'dearness allowance' and 'additional dearness allowance' as 'dearness pay'. The concession of 'dearness pay' was extended for the entire ten months for calculating average emoluments in case of those who retired after 31.7.1987. By judicial intervention, it was held that the concession of adding 'dearness allowance' as 'dearness pay' would extend even to employees who had retired (or died) prior to 1.10.1987. It was also held, that pensioners who had retired during the period between 1.10.1987 and 31.5.1988 would be entitled to count 'dearness allowance' and 'additional dearness allowance' as 'dearness pay' (for all the ten months preceding their retirement) for computing average wages for calculating pension. The State Government accepted the aforesaid legal position and extended the aforesaid benefits equally to all pensioners.

(iv) Government order dated 9.8.1989, while accepting the recommendations made by the Fifth Tamil Nadu Pay Commission, introduced a slab system, for adding 'dearness allowance' as 'dearness pay' into the component of wages for calculating pension. A distinction was made

between employees retiring before and after 1.6.1988. By judicial intervention, the benefit of treating 'dearness allowance' as 'dearness pay' was extended to employees irrespective of the date of their retirement.

(v) Government order dated 4.12.1991 provided, that arrears of pension based on recalculation of pension, by taking into consideration the component of 'dearness allowance' as 'dearness pay', would be released to pensioners with effect from 1.12.1991, even in cases where the concerned pensioner had retired with effect from a date preceding 1.12.1991. By judicial intervention, arrears of pension, based on recalculation of pension, were ordered to be released to retired employees, by taking into consideration the component of 'dearness allowance' as 'dearness pay' equally for all employees. The State Government accepted the aforesaid legal position and extended the said benefit to pensioners who had retired prior to 1.12.1991.

19. The aforesaid factual/legal position is a historical narration of the inclusion of 'dearness allowance' as 'dearness pay' from time to time for computation of pension. What emerges from this narration is, that all pensioners (past, present and future) were equally granted the benefit of 'dearness allowance' as 'dearness pay' for calculating pension. Whenever a class of pensioners was discriminated against, for computation of pension, on the basis of dearness allowance/ pay judicial intervention restored the equation. The equation was then given effect to by the State Government from time to time. Clearly, judicial intervention repeatedly erased the classifications created between pensioners, on the basis of 'dearness pay'.

20. The present controversy yet again presents a dispute, inter se, between the State Government and retired employees in respect of the component of 'dearness allowance' liable to be treated as 'dearness pay', for computing pension payable



to retired Government employees. Even though the instant controversy also arises out of Government order dated 9.8.1989, the same remained unsettled in the earlier rounds of litigation (emerging out of the same Government order dated 9.8.1989), presumably because none of the retired employees fell within the classes of pensioners included in the present litigation. The employees herein are those who retired on or after 1.6.1988. By the impugned Government order dated 9.8.1989, pensionary benefits of an employee retired/retiring on or after 1.6.1988 were required to be computed by adding 'dearness allowance' to 'dearness pay' at a fixed percentage. By virtue of the aforesaid determination, employees retiring on or after 1.6.1988 would be at a disadvantage, as against the employees who had retired prior thereto.

21. The afore-stated challenge to the impugned Government order dated 9.8.1989 was raised before the Administrative Tribunal through an Original Application (O.A. no. 5771 of 2001) by an Association of retired Government employees. The aforesaid Original Application came to be transferred to the High Court, wherein it was renumbered as Writ Petition (T) no. 32045 of 2005. A learned Single Judge of the High Court allowed the aforesaid Writ Petition on 20.4.2006. The learned Single Judge held, that the State Government, in not extending benefits to members of the appellant Association, had discriminated against them. The impugned Government order dated 9.8.1989, to the extent that it did not confer the same benefits (based on the component of 'dearness allowance' treated as 'dearness pay'), for employees who retired on or after 1.6.1988, was held as unsustainable. Writ Petition (T) no. 32045 of 2005 was accordingly allowed.

22. Dissatisfied with the order dated 20.4.2006 passed by the learned Single Judge, allowing Writ Petition (T) no. 32045 of 2005, the State Government preferred a Writ Appeal before a Division Bench of the High Court. The aforesaid Writ Appeal, alongwith writ petitions filed before the High Court on

the same subject, were taken up for collective adjudication. By an order dated 17.12.2007, Writ Appeal no. 1002 of 2006 was allowed. The order dated 20.4.2006, passed by the learned Single Judge (allowing the claim of the employees who had retired on or after 1.6.1988), was set aside. All writ petitions filed by retired employees on the same subject matter which were taken up for disposal alongwith the Writ Appeal referred to above, were simultaneously dismissed. Through the instant Civil Appeals, different employees' associations, as also employees (singularly and collectively), have assailed the order passed on 17.12.2007 by the Division Bench of the High Court, allowing Writ Appeal no. 1002 of 2006 (and connected appeals); and dismissing the writ petitions preferred by employees (and employees' associations) taken up for collective disposal, alongwith the aforesaid Writ Appeal (no. 1002 of 2006).

23. During the course of hearing, learned counsel representing the appellants, first and foremost, vehemently contended, on the basis of the legal and the factual position noticed above, that the benefit of 'dearness allowance' as 'dearness pay' has always equally been extended to all the pensioners, irrespective of the date of their retirement. It was further contended, that as and when there was discrimination on the above subject, the same was suitably remedied by the State Government, by amending/modifying the earlier Government orders. It was submitted, that a similar discrimination emanating out of the same Government order dated 9.8.1989, pertaining to a set of employees differently classified, was corrected through judicial intervention (details already noticed above). During the aforesaid course of repeated adjudication, on the subject under consideration, the matter once came up to this Court, when Special Leave Petition (Civil) no. 23643 of 1996, filed before this Court by the State Government, was dismissed. Even a review petition filed before this Court, by the State Government thereafter, admittedly met the same fate. It was accordingly submitted, that



the same principle which was made applicable to different sections of pensioners, under the same Government order dated 9.8.1989, should be extended to the instant class of retired Government employees i.e., those who retired on or after 1.6.1988.

24. Besides the aforesaid legal premise, for assailing the impugned Government order dated 9.8.1989, learned counsel representing the appellants, invited our pointed attention to a compilation enclosed by the Retired Officers' Association (in Civil Appeal no. 8856 of 2012). The said compilation was relied upon to demonstrate to us, the extent of discrimination caused to the appellants (who retired on or after 1.6.1988). For this reason various hypothetical situations were illustratively placed before us, for our consideration. In each such hypothetical illustration, the appellants took into consideration the same number of years of service rendered, against the same post, wherein the pensioner had also retired at the same component of last pay drawn. Therefrom, it was sought to be established, that employees who had retired on or after 1.6.1988 would be at a substantial disadvantage. Illustratively, for the adjudication of the present controversy, a hypothetical situation relating to an employee holding the post of Deputy Collector is being placed below:

'A'

| | | |
|---|---|---|
| Cadre taken | : | Deputy Collector |
| Date of retirement | : | 30.04.1988 |
| Net qualifying service | : | 33 years |
| Scale of Pay | : | 1340-75-1715-90-2435 |
| Pay last drawn | : | Rs. 2435/- |
| Average Emoluments | : | Rs. 2435/- |
| Original Pension fixed | : | Rs. 1218/- |
| Pension revised as per G.O. 449 | : | Rs. 1448/- |
| Revision as per G.O. 810 | | |
| As on 01.06.1988 | : | Rs. 1622/- |

| | | |
|---|---|---|
| Pension as per G.O. 271 | : | 1622/- |
| Add: 50% increase | : | 811/- |
| | | --- |
| Total Pension | | 2433/- (With effect from 1.6.1988) |
| (Pension as on 1.1.1966) | : | 2433/- |
| Add: 111% | : | 2701/- |
| Interim Relief-I | | 50/- |
| Interim Relief -II | : | 244/- |
| 40% Hike | : | 974/- |
| | | --- |
| Total Pension | : | 6402/- (With effect from 1.1.1996) |

xxx xxx xxx xxx

'B'

| | | |
|---|---|---|
| Cadre taken | : | Deputy Collector |
| Date of retirement | : | 30.06.1988 |
| Net qualifying service | : | 33 years |
| Scale of Pay | : | 2200-75-2800-100-4000 |
| Average Emoluments | : | Rs. 2515/- + |
| Add: 13% as per G.O. 810 | : | Rs. 327/- |
| | : | Rs.2842/- |
| Pension 50% | : | Rs.1421/- |
| As on 1.1.96: | | |
| Pension | : | Rs.1421/- |
| Add 148% | : | 2104/- |
| Interim relief-I | : | 50/- |
| Interim relief-II | : | 143/- |
| 40% Hike | : | 569/- |
| | | --- |
| Total Pension | | Rs.4287/- (With effect from 1.1.1996) |

xxx xxx xxx xxx



'C'

| | | |
|---|---|---|
| Cadre taken | : | Deputy Collector |
| Date of retirement | : | 30.06.1993 |
| Net qualifying service | : | 33 years |
| 10 months average emoluments | : | Rs.2725/- |
| Add: 13% increase | : | Rs. 355/- |
| | : | Rs.3080/- |
| Pension fixed at 50% | : | Rs.1540/- |
| Revised pension as on 1.1.1996 | : | Rs.1540/- |
| Add Dearness Allowance 148% | : | 2280/- |
| Interim relief-I | : | 50/- |
| Interim relief-II | : | 154/- |
| 40% Hike | : | 616/- |
| | | --- |
| Total Pension | | Rs.4640/- (With effect from 1.1.1996) |

After narrating the computations made in the illustrations referred to above, it was submitted that it clearly emerged, that a person who had retired as a Deputy Collector on 30.4.1988 (before 1.6.1988) would get pension of Rs.6,402/-; while a Deputy Collector, who retired on 30.6.1988, would get Rs.4,287/-; and a Deputy Collector who retired on 30.6.1993, would get Rs.4,640/- as pension, all of them having the same 33 years of qualifying service, as well as, a similar last pay prior to their retirement. What is important is, that the figures referred to above were accepted in the response sought by the High Court from the Accountant General, Tamil Nadu. In the response from the Accountant General, Tamil Nadu, the only mistake found was the amount of pension depicted as Rs.6,402/- for a Deputy Collector (who retired prior to 1.6.1988). According to the Accountant General, Tamil Nadu, on a correct analysis, the said figure would be Rs.6,808/-. It is therefore apparent, that

in identical circumstances, a Deputy Collector retiring prior to 1.6.1988 would draw pension at the monthly rate of Rs.6,808/-, whereas, a Deputy Collector retiring thereafter on 30.6.1988, would get a monthly pension of Rs.4,287/-. This would show that a person who retired from the same cadre before the crucial date i.e., 1.6.1988, would get about Rs.2,500/- per month more than the one who had retired from the same cadre after the said date. The aforesaid illustration has been highlighted by us, in order to determine the correctness of the following inferences drawn by the Division Bench of the High Court, while passing the impugned order dated 17.12.2007:-

> "Learned counsel for the parties circulated their respective calculations showing working sheet of pension as admissible to a class of employees, who retired prior to 1st June, 1988 in the unrevised scales of pay and those similarly situated and retired after 1st June, 1988 in the revised scales of pay. Charts are varying. <u>While in the chart submitted by the State Government it has been shown that those who retired after 1st June, 1988 will be getting a little bit higher than those who retired prior to 1st June, 1988, the calculation submitted by individual parties shows that those who retired just prior to 1st June, 1988 may get a little higher emoluments than those who retired after 1st June, 1988.</u> It is for the said reason, we also sought for opinion from the Accountant General, Tamil Nadu, who has submitted its calculation chart, as circulated between the parties and quoted hereunder:-
>
> > "As per instructions of the Hon'ble High Court of Madras in W.P. 11634 of 2002, the working sheets submitted by both the Government and the petitioners in WA 1002 of 2006 have been scrutinized and the following observations are made:-
> >
> > A. Government Working Sheet:



| Details of the case | As it is | As it should be |
|---|---|---|
| Designation: Tahsildar<br>Date of Retirement: 31.5.1988<br>Scale of Pay: Rs.1160-50-1460-70-1950<br>Pay Rs.1880 | Rs.1387 | Rs.1573 |
| Designation: Tahsildar<br>Date of Retirement: after 1.6.1988<br>Scale of Pay: Rs.2000-60-2300-75-3200<br>Pay Rs.2300 | Rs.1534 | Rs.1534 |

1/579 revision is applied in this case, then the revised pension from 1.6.88 works out to Rs.2000 + 18% D.A.

> > B. Petitioner Working Sheet: Out of nine illustrations, five cases are found to be correct and in four cases, the correct calculations are given below:-

| Details of the case | As it is | As it should be |
|---|---|---|
| Designation: Deputy Collector ('A')<br>Date of Retirement: 30.4.1988<br>Scale of Pay: Rs.1340-75-1715-90-2435<br>Pay Rs.2435 | Rs.2433 (from 1.6.88)<br>Rs.6402 (from 1.1.96) | Rs.2589 (from 1.6.88)<br>Rs.6808 (from 1.1.96) |
| Designation: Block Development Officer ('A')<br>Date of Retirement: 31.1.1988<br>Scale of Pay: Rs.1045-45-1450-65-1675<br>Pay Rs.1515 | Rs. 849 (from 1.2.88)<br>Rs. 1427 (from 1.6.88)<br>Rs. 4303 (from 1.1.96) | Rs. 947 (from 1.2.88)<br>(from 1.6.88)<br>Rs. 4796 (from 1.1.96) |
| Designation: Secondary Grade Teacher ('A') (Sel. Grade) | Rs. 472 (from 1.1.88)<br>Rs. 815 | Rs. 513 (from1.1.88)<br>Rs. 890 |

| | | |
|---|---|---|
| Date of Retirement: 31.12.1987<br>Scale of Pay: Rs.<br>Pay Rs.820 | (from 1.6.88)<br>Rs. 2480<br>(from 1.1.96) | (from 1.6.88)<br>Rs. 2790<br>(from 1.1.96) |
| Designation: Tahsildar<br>Date of Retirement: 31.3.1990<br>Scale of Pay: Rs.1160-50-1460-70-1950<br>Pay Rs.2180 from 1.1.90 | Rs.1232<br>(from 1.4.90)<br>Rs. 3723<br>(from 1.1.96) | Rs. 1209<br>(from 1.4.90)<br>Rs. 3654<br>(from 1.1.96) |

It is certified that subject to the observations made supra the illustrative calculations are in order.

Branch Officer/Pension 30"

From the aforesaid chart it appears that those who retired prior to 1st June, 1988 or after 30th June, 1988 from similar post, they will get almost similar quantum of pension.

(emphasis is ours)

25. Learned counsel for the appellants pointed out, that the determination by the High Court to the effect, that employees who had retired prior to 1.6.1988 from a similar post, would "…get a little higher…" pensionary emoluments, than those who retired afterwards, was clearly preposterous. Learned counsel for the appellants, while referring to the illustration narrated above, also invited our attention to the affidavit dated 15.12.2011 (filed by the first respondent in Civil Appeal no.8856 of 2012), wherein the position canvassed at the behest of the appellants was considered. According to the acknowledged position, the first respondent (in the affidavit dated 15.12.2011), on proper calculations asserted, that in identical circumstances, a Deputy Collector retiring prior to 1.6.1988 would draw pension at a monthly rate of Rs.6,808/-, whereas, a Deputy Collector retiring after 30.6.1988 would get a monthly pension of Rs.4,287/-. This would show, that merely on account of the accident of retiring before or after 1.6.1988, one of the pensioners would draw pension at the rate of about Rs.2,500/- per month more than the other. We are satisfied, that the illustration referred to hereinabove, clearly negates the



conclusion drawn by the Division Bench of the High Court in the impugned order dated 17.12.2007, to the effect, that retirees prior to 1.6.1988 from a similar post would "…get a little higher" pensionary emoluments.

26. We have given our thoughtful consideration to the controversy in hand. First and foremost, it needs to be understood that the quantum of discrimination, is irrelevant to a challenge based on a plea of arbitrariness, under Article 14 of the Constitution of India. Article 14 of the Constitution of India ensures to all, equality before the law and equal protection of the laws. The question is of arbitrariness and discrimination. These rights flow to an individual under Articles 14 and 16 of the Constitution of India. The extent of benefit or loss in such a determination is irrelevant and inconsequential. The extent to which a benefit or loss actually affects the person concerned, cannot ever be a valid justification for a court in either granting or denying the claim raised on these counts. The rejection of the claim of the appellants by the High Court, merely on account of the belief that the carry home pension for employees who would retire after 1.6.1988, would be trivially lower than those retiring prior thereto, amounts to bagging the issue pressed before the High Court. The solitary instance referred to above, which is not a matter of dispute even at the hands of the first respondent, clearly demonstrates, that in a given situation, an employee retiring on or after 1.6.1988 could suffer a substantial loss, in comparison to an employee retiring before 1.6.1988. We are, therefore satisfied, that the High Court clearly erred while determining the issue projected before it.

27. At this juncture it is also necessary to examine the concept of valid classification. A valid classification is truly a valid discrimination. Article 16 of the Constitution of India permits a valid classification (see, *State of Kerala vs. N.M. Thomas* (1976) 2 SCC 310). A valid classification is based on a just objective. The result to be achieved by the just objective presupposes, the choice of some for differential

consideration/treatment, over others. A classification to be valid must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective. And secondly, the choice of differentiating one set of persons from another, must have a reasonable nexus to the objective sought to be achieved. Legalistically, the test for a valid classification may be summarized as, a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. Whenever a cut off date (as in the present controversy) is fixed to categorise one set of pensioners for favourable consideration over others, the twin test for valid classification (or valid discrimination) must necessarily be satisfied. In the context of the instant appeals, it is necessary to understand the overall objective of treating "dearness allowance" (or a part of it) as "dearness pay". There can be no doubt, that 'dearness allowance' is extended to employees to balance the effects of ongoing inflation, so as to ensure that inflation does not interfere with the enjoyment of life, to which an employee is accustomed. Likewise, the objective of 'dearness pay' is to balance the effects of ongoing inflation, so that a pensioner can adequately sustain the means of livelihood to which he is accustomed . Having understood the reason why the Government extends the benefit of 'dearness allowance' and 'dearness pay', to its employees and pensioners respectively, we would venture to search for answers to the twin tests which must be satisfied, for making a valid classification (or a valid discrimination), in the present fact situation.

28. In the present context, it needs to be kept in mind, that 'dearness allowance' is paid to Government employees keeping in mind the All India Consumer Price Index. Inflation in the market place is sought to be balanced by paying 'dearness allowance' to Government employees. When a State Government chooses to treat 'dearness allowance' as 'dearness pay', the objective remains the same i.e., inflation in the market place is sought to be balanced for retired employees



by giving them the benefit of 'dearness pay'. Since the component of inflation similarly affects all employees, and all pensioners (irrespective of the date of their entry into service or retirement), it is not per se possible to accept different levels of 'dearness pay' to remedy the malady of inflation. Just like the date of entry into service (for serving employees) would be wholly irrelevant to determine the 'dearness allowance' to be extended to serving employees, because the same has no relevance to the object sought to be achieved. Likewise, the date of retirement (for pensioners) would be wholly irrelevant to determine the 'dearness pay' to be extended to retired employees. Truthfully, it may be difficult to imagine a valid basis of classification for remedying the malaise of inflation. In the absence of any objective, projected in this case, the question of examining the reasonableness to the object sought to be achieved, simply does not arise. Our straying into this expressed realm of imagination, was occasioned by the fact, that the pleadings filed on behalf of the State Government, do not reveal any reason for the classification, which is subject matter of challenge in the instant appeal. The only position adopted in the pleadings filed before this Court for introducing a cut off date for differential treatment, is expressed in paragraph 4 of the counter affidavit, filed by the State of Tamil Nadu, which is being extracted herewith:.-

> "With reference to the averments made in the Grounds of the Special Leave Petition, I submit that the fifth Pay Commission has revised pay and pension with effect from 1.6.1988. As per the recommendation of the above Pay Commission, the Government had issued orders for the revision of pension and Family Pension with effect from 1.6.1988 in G.O.Ms. No. 810. Finance (PC) Department, dated 9.8.1989. It is submitted that the fourth Tamil Nadu Pay Commission has recommended that at the end of the period of three years, the Dearness Allowance sanctioned upto that period could be treated as Dearness Pay. The Fourth Pay Commission revision was given with effect

from 1.10.1984. Based on the above recommendation, the Government has issued orders in G.O.Ms. No.371, Finance, dated 30.4.1986, read with Government letter No.124414/Pension/86-1, dt. 11.2.1987, that the Dearness Allowance sanctioned upto 30.9.1987 shall be treated as Dearness Pay for the purpose of pensionary benefit in the case of the Govt. Servant retiring on or after 1.10.1987. The orders issued in G.O.Ms. 371, Finance dated 30.4.1985 as amended in Government letter No.70707-A/ Pension /86-1, dated 8.7. 1986 read as follows:-

> "The Fourth Tamil Nadu Pay Commission have among other things recommended that at the end of a period of three years the Dearness Allowance sanctioned upto the period could be treated as Dearness Pay in order to ensure a reasonable pension level. The Government accept the recommendation of the Commission and direct that in the case of Government servant, who will be retiring on or after 1.10.1987, the Dearness Allowance sanctioned upto 1.10.1987 shall be reckoned as Dearness Pay for purpose of pension in the case of death of a Government servant occurring on or after 1.10.1987 while in service the Dearness Allowance sanctioned upto 1.10.1987 shall be treated as Dearness Pay for the purpose of computing Family Pension."

It is therefore, evident, that the State Government has not disclosed any object which is desired to achieve by the cut off date. Most importantly, the financial constraints of the State Government, were not described as the basis/reason for the classification made in the imputgned Government order dated 9.8.1989.

29. The issue in hand needs to examine from another perspective as well. It must be clearly understood, that no



employee has a right to draw 'dearness allowance' as 'dearness pay' till such time as the State Government decides to treat 'dearness allowance' as 'dearness pay'. And therefore, the State Government has the right to choose whether or not 'dearness allowance' should be treated as 'dearness pay'. As such, it is open to the State Government not to treat any part of 'dearness allowance' as 'dearness pay'. In case of financial constraints, this would be the most appropriate course to be adopted. Likewise, the State Government has the right to choose how much of 'dearness allowance' should be treated as 'dearness pay'. As such, it is open to the State Government to treat a fraction, or even the whole of 'dearness allowance' as 'dearness pay'. Based on Rule 30 of the Pension Rules, it is clear that the component of 'dearness pay' would be added to emoluments of an employee for calculating pension. In a situation where the State Government has chosen, that a particular component of 'dearness allowance' would be treated as 'dearness pay', it cannot discriminate between one set of pensioners and another, while calculating the pension payable to them (for the reasons expressed in the preceding paragraph). Of course, a valid classification may justify such an action. In this case, the State Government has not come out with any justification/basis for the classification whereby one set of pensioners has been distinguished from others for differential treatment.

30. The instant controversy should not be misunderstood as a determination of the total carry home pension of an employee. All the Government orders referred to above, deal with the quantum of 'dearness allowance' to be treated as 'dearness pay' for the calculation of pension. 'Dearness pay' is one of the many components, which go into the eventual determination of pension. Therefore, the focus in the adjudication of the present controversy must be on 'dearness pay', rather than on the eventual carry home pension. The relevance and purpose of treating 'dearness allowance' as 'dearness pay', has been brought out in the foregoing

paragraphs. Therefore, clearly, the object sought to be achieved by adding 'dearness pay' to the wage of a retiree, while determining pension payable to him, is to remedy the adverse effects of inflation. The aforesaid object has to be necessarily kept in mind, while examining the present controversy. Any classification without reference to the object sought to be achieved, would be arbitrary and violative of the protection afforded under Article 14 of the Constitution of India, it would also be discriminatory and violative of the protection afforded under Article 16 of the Constitution of India.

31. Having given our thoughtful consideration to the controversy in hand, it is not possible for us to find a valid justification for the State Government to have classified pensioners similarly situated as the appellants herein (who had retired after 1.6.1988), from those who had retired prior thereto. Inflation, in case of all such pensioners, whether retired prior to 1.6.1988 or thereafter, would have had the same effect on all of them. The purpose of adding the component of 'dearness pay' to wages for calculating pension is to offset the effect of inflation. In our considered view, therefore, the instant classification made by the State Government in the impugned Government order dated 9.8.1989 placing employees who had retired after 1.6.1988 at a disadvantage, vis-à-vis the employees who retired prior thereto, by allowing them a lower component of 'dearness pay', is clearly arbitrary and discriminatory, and as such, is liable to be set aside, as violative of Articles 14 and 16 of the Constitution of India.

32. It is also imperative for us to take into consideration, a few judgments rendered by this Court, which were brought to our notice by the learned counsel representing the State Government. Reliance was placed on three judgments to substantiate the submissions advanced on behalf of the respondents.

(i) First of all, reliance was placed on the decision rendered by this Court in *Union of India Vs. P.N. Menon,.*



(1994) 4 SCC 68. Facts in the first cited judgment reveal, that a recommendation was made by the Third Pay Commission to the State Government, suggesting review of the existing wage position, based on unprecedented inflation. The State Government was asked (by the Third Pay Commission) to take a decision on whether the dearness allowance scheme should be extended further; or in the alternative pay-scales themselves should be revised. This suggestion of the Third Pay Commission was based on the fact, that the price level index had arisen above the 12 monthly average to 272. Having considered the matter, the State Government decided to extend the dearness allowance scheme. It simultaneously issued an Office Memorandum, (hereinafter referred to as 'O.M.') whereby, a portion of 'dearness allowance' was to be treated as pay for computation of retiral benefits. The benefit of the aforesaid O.M. was extended only to those employees who had/would retire on or after 30.9.1977. The aforesaid O.M, also contemplated, that persons who had/would retire on or after 30.9.1977 but not later than 30.04.1979 would be allowed to exercise an option, to choose one out of the two alternatives. They could either seek the benefit of death-cum-retirement gratuity by excluding the element of 'dearness allowance', alternatively, they could seek the same, by including the element of 'dearness allowance'. The issue which came up for adjudication before this Court was, whether the aforesaid O.M. was sustainable in law, as it did not extend equal benefits to all retirees, irrespective of the dates of their retirement. All the respondents had retired before 30.9.1997. While determining the aforesaid issue, this Court took into consideration inter alia the fact that the decision to merge a part of 'dearness allowance' with pay, was taken with reference to the price index level. This decision was taken on the recommendations of the Third Pay Commission. In the aforesaid view of the matter, and specially because, an option was given to employees who had retired between 30.09.1977 and 30.04.1979, to get their pension and (death-cum-retirement gratuity) calculated, by including or excluding the element on dearness pay, this Court

ruled, that the State Government had adopted measures ensuring similar benefits to all. And that, there was no intention to create a class within a class. This Court felt that the classification, had a reasonable nexus with the price level index at 272, on 30.09.1977. This according to this Court was just and valid. The factual position, that needs to be highlighted, in so far as the first cited judgment i.e. in *P.N. Menon's* case (supra) is that, the respondent employees had never been in receipt of dearness pay, when they retired from service, and therefore, the O.M. in question could not have been applied to them. This is how this Court examined the matter in the cited case. This Court also noticed, that prior to the O.M. in question, the pension scheme was contributory, and only with effect from 22.9.1977, the pension scheme was made non contributory. Since the respondent employees in the first cited case, were not in service at the time of introducing the same, they were held not eligible for the said benefit.

(ii) Next, learned counsel relied upon the judgment in *State of Rajasthan Vs. Amrit Lal Gandhi,* (1997) 2 SCC 342. The facts, in the second cited judgment were, that originally teachers of the Jodhpur University were governed by contributory provident fund rules. There was no pension scheme applicable to them. In 1983, a committee constituted by the University Grants Commission, recommended the introduction of pension-cum- gratuity for university and college teachers. Thereupon, the Senate and Syndicate of the Jodhpur University resolved to introduce a pension scheme for university teachers. The resolution of the Syndicate and Senate also provided, that options would be sought from existing teachers, so as to enable them, to choose whether they should be governed by the contributory provident fund rules, or would like to accept the benefits under the pension scheme. As the recommendation of the Syndicate and the Senate, of the Jodhpur University had financial implications, approval of the State Government was imperative. On examining the recommendations, the State Government decided to introduce the pension scheme with



effect from 1.1.1990. Based thereon, the Syndicate and the Senate passed a concurring resolution expressing, that the pension scheme would become operational with effect from 1.1.1990. Based thereon, those teachers who were in the service of the Jodhpur University on or after 1.1.1990, were required to submit their options. The question which arose for consideration in the second cited judgment was, whether employees who had retired before 1.1.1990, had a similar right to claim pension, as was being extended to employees, who had/would retire on or after 1.1.1990. The High Court partly accepted the plea of the retirees by holding, that the pension scheme should be extended to employees who had retired on or after 1.1.1986. This Court did not approve the decision rendered by the High Court. This Court noticed, that the approval of the resolutions of the Syndicate and Senate of the Jodhpur University had been accorded by the State Government after the State Legislature had passed the University Pension Rules, and the General Provident Fund Rules. This Court also noticed, that the State Government in its affidavit had taken an express stand, that the introduction of the pension scheme was economically viable only with effect from 1.1.1990. In other words, the State Government could bear the financial burden of the pension scheme, only if it was introduced with effect from 1.1.1990. Based on the aforesaid position adopted by the State Government, this Court concluded, that the determination of the State Government in introducing the pension scheme for employees, who had retired with effect from 1.1.1990 had not been fixed arbitrarily or without any valid reason/basis. This Court accordingly, set aside the judgment rendered by the High Court.

(iii) Finally, learned counsel placed reliance on the judgment rendered by this Court in *State of Punjab Vs. Amar Nath Goel,* (2005) 6 SCC 754. In the third cited case, employees both of the Central Government, as also, of the State Governments of Punjab and Himachal Pradesh, who had retired prior to 1.4.1995 sought death cum-retirement gratuity,

up to the increased limit of Rs. 2.5 lakhs. The claim raised by the employees was rejected in some cases, whereas in some other cases the Central Administrative Tribunal and the High Court took the view, that the benefit of increased quantum of death-cum-retirement gratuity, should be extended to employees, who had retired between 1.7.1993 and 31.3.1995 as well. Having examined the aforesaid controversy, this Court arrived at the conclusion, that the decision of the Central Government and State Governments to limit the benefit only to employees, who had retired ( or died) on or after 1.4.1995, was based on a concrete determination of financial implications, as such, it was held that the cut off date (1.4.1995) was neither arbitrary nor irrational, as alleged. Consequently, the plea advanced at the hands of the employees assailing the cut off date as arbitrary, and by alleging that it was not based on any rational criteria, was rejected.

33. We have considered the submissions urged at the hands of the learned counsel for the respondent, based on the judgments cited at the bar. In our view, none of the judgments relied upon is relevant to the present controversy.

(i) In so far as *P.N. Menon's* case (supra) is concerned, having examined the controversy. this Court arrived at the conclusion, that the State Government adopted measures which would ensure, similar benefits to all. This court also expressed the view, that there was no intention of the State Government, to create any class within a class. The price level index at 272 on 30.9.1977 was the determining factor for the State Government's decision. It was accordingly concluded, that there was a valid and reasonable nexus to the object sought to be achieved. But most importantly this Court felt, that the decision of the State Government in not extending benefits to the respondents was based on the fact, that they were not in receipt of the any 'dearness pay' at the time of their retirement. Moreover, since the family pension scheme was contributory when the respondents had retired, the respondents could not



justifiably seek the benefits, which were available only to the retirees after the pension scheme was made non contributory. There is, therefore no co-relation of the first cited judgment with the controversy in hand.

(ii) In *Amrit Lal Gandhi's* case (supra) pension was introduced for the first time for university teachers based on resolutions passed by the Syndicate and the Senate of the Jodhpur University. The same were approved by the State Government with effect from 1.1.1990. The instant controversy is, therefore, not between one set of pensioners alleging discriminatory treatment, as against another set of pensioners. There were no pensioners, to begin with. Retirees were entitled to provident fund under the existing Provident Fund Scheme. The question of discrimination of one set of pensioners from another set of pensioners, therefore, did not arise in the second cited judgment. Financial viability was, as such, a relevant issue. The State Government adopted the stance, that the introduction of the pension scheme was financially viable only if the scheme was introduced with effect from 1.1.1990. The cut off date clearly disclosed a classification founded on an intelligible differentia, which had a rational relationship with the object sought to be achieved. There is therefore, in our view, no correlation of the second cited judgment with the controversy in hand.

(iii) In so far as the third cited judgment is concerned, this Court in *Amrit Lal Gandhi's* case (supra) examined an issue where, the increased death-cum-retirement gratuity could only be claimed by employees, who had retired after the cut off date (1.4.1995). Death-cum-retirement gratuity is a one time benefit, whereas, pension enures to retired employees for the entire length of their lives. Pension is therefore a continuing benefit. Death-cum-retirement gratuity, is a one time benefit, disbursed in accordance with to the rules prevalent at the time (of retirement). Herein also, the issue under consideration was not different measures for computing, a continuing retiral benefit, based on any cut off date. We are therefore of the view, that

the instant judgment is also not relevant for the adjudication of the controversy in hand.

In view of the above, we are satisfied, that none of judgments relied upon by the learned counsel for the respondents, have any bearing to controversy in hand.

34. The instant appeals are accordingly allowed. The impugned order dated 17.12.2007 passed by the High Court is hereby set aside. The impugned Government Order dated 9.8.1989, to the extent that it extends to employees who retire on or after 1.6.1988, a lower component of 'dearness pay', as against those who had retired prior to 1.6.1988, is set aside, being violative of Articles 14 and 16 of the Constitution of India.

K.K.T. Appeals allowed.



SARASWATI DEVI (D) BY LR.
*v.*
DELHI DEVT. AUTHORITY & ORS.
(Civil Appeal No. 4373 of 2009)

JANUARY 29, 2013

**[R.M. LODHA AND ANIL R. DAVE, JJ.]**

*Land Acquisition - Acquisition of land owned by Government - Whether permissible - Held: If the Government has complete ownership, such land cannot be acquired, but if some private rights have been created in such land or the land has some encumbrances, such land can be acquired - In the instant case, the subject land though owned by Government, encumbrance was created by giving possessory rights to the private party, hence could have been acquired under Land Acquisition Act - Land Acquisition Act, 1947 - s.4 r/w. s, 17(1)(iv).*

*Words and Phrases - 'Encumbrance' - Meaning of.*

**The land in question was an evacuee property, acquired by Central Government under s.12 of Displaced Persons (Compensation and Rehabilitation) Act, 1954. The property was sold in public auction and the appellant's husband was the highest bidder therefore. In the year 1960, appellant's husband was given provisional possession of the land. In the year 1980, title of the land was transferred to the auction purchaser. In the meantime i.e. in the year 1962, the land in question was acquired by the respondent Authority. After 30 years of acquisition, the appellants filed a writ petition challenging the acquisition proceedings. Single Judge of High Court allowed the petition. In Writ Appeal, Division Bench of High Court, set aside the judgment of Single Judge. Hence the present appeal.**

**Dismissing the appeal, the Court**

**HELD: 1. In respect of the property forming part of the compensation pool put to public auction under Rule 90 of Displaced Persons (Compensation and Rehabilitation) Rules, 1955, a binding contract for the sale of the property to the auction-purchaser comes into existence on approval of the highest bid by the Competent Authority. Once the payment of the full purchase price is made, title in the property would pass to an auction-purchaser. In other words, on the payment of the full purchase price, the ownership in the property sold in public auction would stand transferred but the transfer formally becomes complete on issuance of the certificate of sale. If in the sale certificate, any particular date is mentioned as provided in the proforma appended to Rule 90, such date mentioned in the sale certificate may be presumed to be the date on which the purchase has become effective but crucial date for transfer of ownership in the property in favour of auction-purchaser is the date when full purchase price has been paid by the auction-purchaser. But this legal position does not help the appellant because of completion of acquisition proceedings in 1962 i.e. much before the payment of full purchase price by the appellant. In the absence of any title in favour of the appellant or her husband on the date of acquisition, the challenge to such acquisition could not have been allowed by the Single Judge. The Division Bench rightly set aside the erroneous order of the Single Judge. [Paras 32 and 47] [947-G-H; 948-A-C; 955-B-D]**

*Bishan Paul vs. Mothu Ram* **AIR 1965 SC 1994;** *M/s. Bombay Salt and Chemical Industries vs. L.J. Johnson and Ors.* **AIR 1958 SC 289;** *Jaimal Singh, s/o Jawahar Singh and Anr. vs. Smt. Gini Devi* **AIR (1964) Punjab 99 - referred to.**

**2. The word "encumbrance", according to its ordinary significance, means any right existing in another**



**to use the land or whereby the use by the owner is restricted. The word "encumbrance" imports within itself every right or interest in the land, which may subsist in a person other than the owner; it is anything which places the burden of a legal liability upon property. The word "encumbrance" in law has to be understood in the context of the provision under consideration but ordinarily its ambit and scope is wide. Seen thus, a binding contract entered into between an auction-purchaser and the Government on approval of the highest bid relating to sale of property, which is part of compensation pool under Section 14 of Displaced Persons (Compensation and Rehabilitation) Act, 1954 followed by provisional possession to the auction-purchaser, should come within the purview of the word "encumbrance". [Para 40] [951-A-C]**

*Mahadeo Prasad Sahu vs. Gajadhar Prasad Sahu* **AIR 1924 Patna 362;** *Collector of Bombay vs. Nusserwanji Rattanji Mistri and Ors.* **AIR 1955 SC 298** *M. Ratanchand Chordia and Ors. vs. KasimKhaleeli* **AIR 1964 Madras 209 - referred to.**

*Concise Oxford English Dictionary [Tenth Edition, Revised]; Webster Comprehensive Dictionary* **[International Edition; Volume I]; The Law Lexicon by P. Ramanatha Aiyar [Second Edition Reprint 2000] - referred to.**

**3. A person in possession of the property - though not owner - is entitled to certain rights by virtue of his possession alone. An auction-purchaser on provisional possession being given to him, possesses possessory rights, though he does not have proprietary rights in the auctioned property. Thus, there remains no doubt that in October, 1960 or near about encumbrance in the subject property came to be created. [Para 41] [951-D-E]**

*Roshan Lal Goswami vs. Gobind Raj and Ors.* **AIR (1963) Punjab 532 - relied on.**

**4. Ordinarily, when the Government possesses an interest in land, which is the subject of acquisition under the Land Acquisition Act, that interest is outside such acquisition because there can be no question of the Government acquiring what is its own. But this rule is not without an exception. There is no impediment in acquisition of land owned by the Central Government by invoking the provisions of the Land Acquisition Act where such land is encumbered or where in respect of the land owned by the Government some private interest has been created. In other words, if the Government has complete ownership or the entirety of rights in the property with it, such land cannot be acquired by the Government by invoking its power of acquisition under the Land Acquisition Act, but if some private rights have been created in such property or the property has encumbrance(s), the acquisition of such land is not beyond the pale of the Land Acquisition Act. [Para 42] [951-F-H; 952-A-C]**

*Collector of Bombay vs. Nusserwanji Rattanji Mistri and Ors.* **AIR 1955 SC 298 - referred to.**

**5. In the instant case, by approval of the highest bid given by the appellant's husband followed with provisional possession, an encumbrance was created in 1960 in the subject land which was part of the compensation pool before the acquisition proceedings were initiated and, therefore, it could have been acquired by the Delhi Administration under the Land Acquisition Act. Also the acquisition which was commenced by Section 4 read with Section 17(1)(iv) Notification issued on 07.03.1962 which ultimately culminated into an award on 30.06.1962 was challenged for the first time after more than thirty years of the passing of the award. The**



**appellant has failed to show her title or her husband's title in the property, on the date of the acquisition. As a matter of fact, though the approval to the highest bid given by the appellant's husband in respect of the subject property was given on 31.10.1960, the payment of full price by the appellant was made pursuant to the communication dated 16.06.1980 but by that time the subject land already stood acquired by the Delhi Administration and, therefore, despite the payment of full price by the appellant in 1980 and the issuance of the sale certificate, no title came to be vested in the appellant. [Para 47] [954-E-H; 955-A-B]**

*Delhi Administration and Ors. vs. Madan Lal Nangia and Ors.* **(2003) 10 SCC 321: 2003 (4) Suppl. SCR 360;** *Sharda Devi vs. State of Bihar and Anr.* **(2003) 3 SCC 128: 2003 (1) SCR 73 - relied on.**

*Nanak Chand Sharma vs. Union of India and Ors.* **29 (1986) DLT 246** *Sham Sunder Khanna vs. Union of India* **1997 Rajdhani Law Reporter 101;** *Dr. Bhargava and Co. and Anr. vs. Shyam Sunder Seth by LRS.* **(1994) 5 SCC 471: 1994 (1) Suppl. SCR 445;** *Hans Raj Banga vs. Ram Chander Aggarwal* **(2005) 4 SCC 572: 2005 (3) SCR 994 - referred to.**

**Case Law Reference:**

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|---|---|---|
| **29 (1986) DLT 246** | **referred to** | **Para 12** |
| **1997 RLR 101** | **referred to** | **Para 12** |
| **1994 (1) Suppl. SCR 445** | **referred to** | **Para 16** |
| **2005 (3) SCR 994** | **referred to** | **Para 16** |
| **AIR 1965 SC 1994** | **referred to** | **Para 29** |
| **AIR 1958 SC 289** | **referred to** | **Para 30** |

| | | |
|---|---|---|
| **AIR (1964) Punjab 99** | **referred to** | **Para 31** |
| **AIR 1924 Patna 362** | **relied on** | **Para 37** |
| **AIR 1955 SC 298** | **referred to** | **Para 38** |
| **AIR 1964 Madras 209** | **referred to** | **Para 39** |
| **AIR (1963) Punjab 532** | **referred to** | **Para 41** |
| **2003 (1) SCR 73** | **relied on** | **Para 42** |
| **AIR 1955 SC 298** | **referred to** | **Para 43** |
| **2003 (4) Suppl. SCR 360** | **relied on** | **Para 43** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4373 of 2009.

From the Judgment & Order dated 31.05.2007 of the High Court of Delhi at New Delhi in L.P.A. No. 388 of 2005.

Ranjit Kumar, Vijay Hansaria, P.P. Malhotra, Amarendra Sharan, Rajiv K. Garg, Ashish Garg, Annam D.N. Rao, Rachna Srivastava, Sonia Malhotra, Yasir Rauf, Utkarsh Sharma, Vishnu B. Saharya, Viresh B. Saharya, Dhruv Pal (for Saharya & Co.) for the appearing parties.

The Judgment of the Court was delivered by

**R.M. LODHA, J.** 1. This is an appeal by the appellant against the decision of the Division Bench of the Delhi High Court on 31.05.2007, in allowing the Letters Patent Appeal (LPA) preferred by the Delhi Development Authority (DDA) against the decision of the Single Judge dated 09.08.2002. Leave to appeal was granted by this Court on 13.07.2009.

2. The facts which form the background of the appeal can be briefly stated as follows : The controversy relates to a piece of land admeasuring 5 Bighas 19 Biswas comprised in Khasra No. 368 situate in the revenue village Masjid Moth, New Delhi.



The above property was an evacuee property which was acquired by the central government under Section 12 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (for short, '1954 Act'). On acquisition of that property under Section 12, it became part of the compensation pool under Section 14. By exercise of the power conferred under Section 20, the above property was notified to be sold by way of public auction on 21.06.1958.

3. Dev Prakash Jagwani, the appellant's husband being a displaced person participated in the public auction for the sale of above property. His bid of Rs. 24,500/- which was the highest bid was accepted.

4. On 31.10.1960, the office of the Assistant Settlement Commissioner (Rural), Ministry of Rehabilitation intimated to the appellant's husband that it has been decided to give him provisional possession of the auctioned property subject to the terms and conditions stipulated in the indemnity bond and the special affidavit already executed by him. He was also informed that the issue of the above intimation did not constitute transfer of complete title in the property until the final letter of adjustment of compensation was issued.

5. The appellant's husband is said to have died in 1970. On 16.06.1980, a letter was received from the Ministry of Rehabilitation by a friend of the appellant's late husband requiring the deposit of a sum of Rs. 14,992/- towards balance price of auction sale within fifteen days. The appellant deposited the balance price.

6. On 22.08.1980, a sale certificate as contemplated by the Displaced Persons (Compensation and Rehabilitation) Rules, 1955 (for short, '1955 Rules') was issued. On 15.07.1981 the sale certificate was registered with the Sub-Registrar.

7. Between 31.10.1960 when the appellant's husband was

intimated that his bid had been approved in respect of the above property; the payment of full price by the appellant pursuant to the communication dated 16.06.1980; the issuance of sale certificate dated 22.08.1980 and its registration thereof on 15.07.1981, an important event took place. On 07.03.1962, the Delhi Administration, Delhi issued a Notification under Section 4 read with Section 17(1)(iv) of the Land Acquisition Act, 1894 (for short, 'LA Act') proposing to acquire a large tract of land admeasuring 198 Bighas and 11 Biswas which included the subject land situate at Masjid Moth for the public purpose, namely, for the plan development of Delhi. Since the urgency clause under Section 17(1)(iv) of the LA Act was invoked, the provisions of Section 5A were dispensed with. The declaration under Section 6 was made and later on award was passed on 30.06.1962.

8. It is the appellant's case that somewhere in 1981, after the sale certificate was registered, one Mr. Chhugani, a friend of the appellant's late husband, learnt about the acquisition of the subject land and he made representations to the authorities. It is further case of the appellant that a notice in Land Acquisition Case No. 72/85 was received by Mr. Chhugani for 11.08.1992 which was communicated to the appellant. The appellant initially filed a suit but later on challenged the above acquisition before the Delhi High Court by filing a writ petition on 10.08.1993.

9. The challenge to the acquisition after more than 30 years of the passing of the award was principally founded on the ground that at the relevant time in 1962, the land belonged to the central government being an evacuee land acquired under Section 12 of the 1954 Act and as such the said land could not have been acquired under the LA Act.

10. DDA was not impleaded as party respondent initially but later on it was impleaded as Respondent No. 4 in the writ petition. DDA filed its written response in opposition to the writ



petition and raised the plea of delay and laches. In its reply, DDA submitted that the physical vacant possession of the land was taken on 11.07.1962 after the award was passed on 30.06.1962 and the subject land was placed at its disposal on 09.02.1981. It was also submitted by DDA that though the property was conveyed to the petitioner (appellant herein) on 22.08.1980 but she was declared purchaser of the said property with effect from 11.12.1960 and, thus, the subject land ceased to be government land with effect from 11.12.1960 and whatever rights the appellant had could be acquired under the LA Act.

11. In light of the rival position set up by the parties, the Single Judge framed two questions for consideration:

(i) Whether the land in question was an evacuee land on the date of issue of Notification under Section 4 of the LA Act on 07.03.1962?

(ii) Whether the land, if it was an evacuee property, could have been acquired under the law?

12. The Single Judge was not persuaded by the plea of delay and laches. He considered the provisions of the 1954 Act and the relevant procedure of auction sale prescribed in the 1955 Rules. He referred to a decision of this Court in *Bishan Paul v. Mothu Ram*[1], few decisions of his own High Court including *Nanak Chand Sharma v. Union of India and Others*[2] and *Sham Sunder Khanna v. Union of India*[3] and a decision of the Punjab High Court. On consideration of the above provisions and the precedents, the Single Judge allowed the writ petition; quashed the Notification dated 07.03.1962 issued under Section 4 of the LA Act and the subsequent proceedings in the Land Acquisition Case No. 72/85.

1. AIR 1965 SC 1994.
2. 29 (1986) DLT 246.
3. 1997 Rajdhani Law Reporter 101

13. DDA challenged the decision of the Single Judge in LPA and since it suffered from the delay of 760 days, an application was made for condonation of delay.

14. The Division Bench of the Delhi High Court observed that there was delay of about 760 days in filing the LPA against the decision of the Single Judge but, at the same time, there was delay of more than 31 years on the part of the writ petitioner in challenging the acquisition proceedings and since there was delay on the part of both sides and the question related to valuable rights in the land, the delay on the part of either of the parties should not come in the way of doing justice. This is what the Division Bench observed:

> "6. There is delay of about 760 days in filing of this appeal. The appellant has filed an application (CM No. 2093/2005) for condonation of the said delay. This application is supported by the affidavit of Mr. S.P. Pandey, Director, LM (HQ) DDA. The appellant had contended in its application for condonation of delay that the delay of 760 days in filing of the appeal was neither willful nor due to negligence but was due to the time consuming and unavoidable administrative procedures which have to be gone through in cases like the preset one, where the Government is the litigant and decisions have to be taken collectively. It is further contended that the appellant had to collate documents, administrative orders, judgments of the Supreme Court and various other records for preparation of the present appeal. The request made by the appellant for condonation of the delay is opposed by the counsel appearing on behalf of the respondent No. 1 on the ground that the explanation given by the appellant for delay in filing of the present appeal is unsatisfactory. We have given our anxious consideration to this aspect relating to condonation of delay. While considering the delay on the part of the appellant in filing of the present appeal, we have also taken into account the delay of more than 31 years



> on the part of respondent No. 1 in challenging the acquisition proceedings by way of writ petition in which the impugned order which is the subject matter or challenge in this appeal has been opposed. We are of the view that since the question in the present proceedings relates to valuable rights of the parties in the land in question, the delay on the part of either of the parties cannot be allowed to come in the way of doing justice. We are further of the view that when substantial justice and technical consideration are pitted against each other, cause of substantial justice deserves to be preferred. We feel that by delay, the appellant would not stand to gain anything and at best he would only be entitled to get his claim adjudicated on merits instead of it being thrown to winds on technical consideration of delay in filing of the appeal. Having regard to the circumstances of the case, we are inclined to condone the delay in filing of the present appeal. The delay is accordingly condoned and the appeal is taken up for disposal on merits."

15. On consideration of the matter on merits, the Division Bench was of the view that the decision of Single Judge was unsustainable in view of the Division Bench decision of that Court in *M.S. Dewan*[4]. The Division Bench also relied upon a decision of this Court in *Delhi Administration and Others v. Madan Lal Nangia and Others*[5]. The consideration of the matter by the Division Bench is reflected in paragraphs 10,11 and 12 of the judgment which read as under:

> "10. It may be seen from the above judgment in *Madan Lal Nagia's* case (Supra) that the Supreme Court has categorically held that even if there is a finding that the property acquired was an evacuee property on the date of Notification under Section 4 of the Land Acquisition Act,

4. *M.S. Dewan v. Union of India & Ors.* [C.W.P. No. 1400/1986]; Decided on 06.02.2003

5. (2003) 10 SCC 32.

the acquisition in respect of the said land would still be valid.

11. The acquisition of land on similar facts, as are in the present case, was upheld by a Division Bench of this Court in case titled *'M.S. Dewan v. UOI & Ors.,* CWP No. 1400/1986 decided on 06.02.2003. In *M.S. Dewan's case* (Supra) a Division Bench of this Court had upheld the acquisition of evacuee property and dismissed the writ petition of the auction purchaser. Even S.L.P. (Civil) No. 71152/2003 filed by the auction purchaser against the aforementioned decision of this Court was also dismissed by the Hon'ble Supreme Court. Hence the view taken by this Court in M.S. Dewan's case became final. Hence it would be relevant and necessary to refer to para 23 of the said judgment which is extracted here-in-below:-

"We have already held above that the title in the property passed in favour of the petitioner on 14.11.1961. Even assuming that the title had not passed to the petitioner till 22.07.1963, when sale certificate was issued, in that case also we do not find any substance in the submission made on behalf of the petitioner that the property could not have been notified for being acquired being the property of the Government till 22.07.1963 and the Government could not have acquired its own property. The reason in our holding so is that the property on being put to auction on 28.12.1960, the petitioner was declared to be the highest bidder against his verified claims of the property left behind in Pakistan the verified claims were surrendered by him as a part of consideration for purchase of the property in question in public auction. The balance consideration was paid in cash. The entire consideration stood paid by 14.11.1961. The right of the petitioner in the property on being declared to the highest bidder was a valuable right, which the petitioner could enforce against the respondents in compelling the respondent to transfer the property in his name. Such a right could be acquired.



The property on being put to auction and on the petitioner being declared to be the highest bidder and on receipt of entire sale consideration went out of compensation pool. The petitioner alone had interest in the property. This interest could definitely be acquired pursuant to the notification issued under Section 4 of the Act. Therefore, it cannot be said that the notification under section 4 of the Act was non est. It was for the petitioner to have raised a claim. Proceedings for acquisition thus cannot be challenged on the ground that such interest could not have been acquired. Therefore, no fault can be found in the notification under Section 4 of the Act."

12. The question that needs our consideration in the present appeal is squarely covered by the above judgment of this Court in M.S. Dewan's case. The facts of the present case as well as that of M.S. Dewan's case are almost same. It has been categorically held in M.S. Dewan's case that the right held by the auction purchaser can be legally acquired by way of Notification under Section 4 of the Land Acquisition Act notwithstanding the transfer of title in respect of land in question in his favour. We respectfully agree with the view already taken by this Court in the aforesaid case. Hence we have no hesitation in holding that Learned Single Judge erred in holding that the property in question was an evacuee property on the date of Notification dated 07.03.1962 and in quashing the said Notification for that reason. The view so taken by Learned Single Judge in the impugned order thus cannot be sustained in law particularly in view of the above referred judgment of the Supreme Court and of this Court."

15.1. The Division Bench, accordingly, set aside the order of the Single Judge passed on 09.08.2002 and allowed the appeal of DDA with cost throughout.

16. Before us, Mr. Ranjit Kumar, learned senior counsel for the appellant, vehemently argued that the appellant acquired

the title in the land on the day the full sale consideration was paid in 1980 and prior to that date the land belonged to the central government and as such it could not have been acquired under the LA Act by the Delhi Administration. He highlighted the facts relating to auction of the subject land which was conducted on 21.06.1958; approval of the highest bid of the appellant's husband by the Settlement Commissioner on 31.10.1960, communication from the Ministry of Rehabilitation dated 16.06.1980 requiring the deposit of Rs. 14,992/- as balance sale consideration, deposit of that amount by the appellant within fifteen days thereof; issuance of sale certificate on 22.08.1980 and its registration on 15.07.1981 and submitted that until the full price was paid, the appellant (auction purchaser) acquired no right in the land of any nature and the land remained with the central government. In this regard, he relied upon decisions of the Punjab High Court in *Roshan Lal Goswami v. Gobind Raj & Ors.*[6] *and Jaimal Singh, s/o Jawahar Singh & Anr. v. Smt. Gini Devi*[7] and the decisions of this Court in *M/s. Bombay Salt & Chemical Industries v. L.J. Johnson & Ors.*[8]*, Bishan Paul1, Dr. Bhargava & Co. and Another v. Shyam Sunder Seth by LRS.*[9] and *Hans Raj Banga v. Ram Chander Aggarwal*[10].

17. Mr. Ranjit Kumar heavily relied upon the decision of this Court in *Sharda Devi v. State of Bihar and Another*[11] in support of his argument that so long as title vests with the central government, the land cannot be acquired under the LA Act. He argued that under the LA Act, the acquisition is of land and not the 'rights in the land' which are not even absolute and which are subject to certain obligations.

6. AIR (1963) Punjab 532.
7. AIR (1964) Punjab 99.
8. AIR 1958 SC 289.
9. (1994) 5 SCC 471.
10. (2005) 4 SCC 572.
11. (2003) 3 SCC 128.



18. Mr. P.P. Malhotra, learned Additional Solicitor General and Mr. Amarendra Sharan, learned senior counsel for DDA conversely not only supported the final conclusion of the Division Bench in upsetting the judgment of the Single Judge but also vehemently argued that writ petition filed by the appellant was liable to be dismissed on the grounds of delay and laches of more than 30 years and suppression of material facts inasmuch as the writ petition in the High Court was supported by an affidavit of J.K. Jagwani claiming himself to be power of attorney holder while one Devi Dayal Jagwani is a registered power of attorney holder of the appellant. It was also submitted that present appeal is a proxy appeal at the instance of J.K. Jagwani who has purchased the subject property by a registered sale deed dated 28.02.2003.

19. Mr. P.P. Malhotra, learned Additional Solicitor General further argued that on approval of the bid of the appellant's husband a binding contract came into existence between the central government and him which amounted to 'encumbrance' and, therefore, there was no impediment in acquisition of the subject land under the LA Act.

20. On behalf of the respondents, heavy reliance was placed on the decision of this Court in *Madan Lal Nangia*[5].

21. Mr. Amarendra Sharan, learned senior counsel for the DDA also submitted that the subject land was placed at the disposal of DDA way back in 1981 and subsequently it has been allotted to All India Institute of Medical Sciences (AIIMS) which has also taken possession of the said land.

22. In rejoinder, Mr. Ranjit Kumar and Mr. Vijay Hansaria, learned senior counsel for the appellant submitted that there was nothing to show that AIIMS has been allotted the above land. In the written submissions filed by the appellant, it is stated that there is no land in Masjid Moth ever given to AIIMS. In this regard, reference has been made to the reply received pursuant to the query made by the appellant under Right to Information

Act. They denied that appeal was a proxy litigation. It was submitted that J.K. Jagwani, power of attorney holder, was one of the family members residing in Delhi; the family had purchased the property from their verified claim and the sale certificate was issued in favour of Smt. Saraswati Devi who under the family settlement transferred part of land in favour of J.K. Jagwani and other family members.

23. The approach of the Division Bench of the High Court in offsetting the delay and laches of more than 30 years in challenging the acquisition proceedings with the delay of 760 days in filing the LPA is a little strange and though does not commend to us but we do not intend to disturb the finding of the Division Bench on this aspect in view of the appropriate final conclusion in the matter.

24. The principal contention on behalf of the appellant raised before us (which was also argued before the Single Judge and the Division Bench of the High Court) is that on the date of the acquisition, the subject property vested in the central government having been acquired under Section 12 of the 1954 Act; the title in that land did not transfer in favour of the appellant's husband despite public auction conducted on 21.06.1958 and the approval of the highest bid given by the appellant's husband on 31.10.1960, as the full price had only been paid in 1980 by the appellant (her husband had died in the meanwhile), and, therefore, acquisition of the subject land in 1962 under the LA Act at the instance of the Delhi Administration was bad in law. In this regard, heavy reliance has been placed on behalf of the appellant upon the decision of this Court in *Sharda Devi*[11]. We shall first refer to the decision of this Court in *Sharda Devi*[11].

25. In *Sharda Devi*[11], this Court was concerned with the question whether the State could proceed to acquire land on an assumption that it belonged to a particular person, whether in such situation the award passed by the land acquisition officer could be called in question by the State seeking a



reference under Section 30 of the LA Act on the premise that the land did not belong to the person from whom it was purportedly acquired and was a land owned by the State having vested in it, consequent upon abolition of proprietary rights, much before the acquisition. This Court examined and analysed provisions of the LA Act and also considered few earlier decisions of this Court and the decisions of some high courts. Considering the question in light of the above, this Court held as under:

> "27. We have entered into examining the scheme of the Act and exploring the difference between reference under Section 18 and the one under Section 30 of the Act as it was necessary for finding out answer to the core question staring before us. The power to acquire by the State the land owned by its subjects hails from the right of eminent domain vesting in the State which is essentially an attribute of sovereign power of the State. So long as the public purpose subsists, the exercise of the power by the State to acquire the land of its subjects without regard to the wishes or willingness of the owner or person interested in the land cannot be questioned. (See *Scindia Employees' Union v. State of Maharashtra* [(1996) 10 SCC 150], SCC para 4 and *State of Maharashtra v. Sant Joginder Singh Kishan Singh* [1995 Supp (2) SCC 475], SCC para 7.) The State does not acquire its own land for it is futile to exercise the power of eminent domain for acquiring rights in the land, which already vests in the State. It would be absurdity to comprehend the provisions of the Land Acquisition Act being applicable to such land wherein the ownership or the entirety of rights already vests in the State. In other words, the land owned by the State on which there are no private rights or encumbrances is beyond the purview of the provisions of the Land Acquisition Act. The position of law is so clear as does not stand in need of any authority for support. Still a few decided cases in point may be referred since available.

28. In *Collector of Bombay v. Nusserwanji Rattanji Mistri* [AIR 1955 SC 298] this Court held that when the Government acquires lands under the provisions of the Land Acquisition Act, it must be for a public purpose, and with a view to put them to that purpose, the Government acquires the sum total of all private interests subsisting in them. If the Government has itself an interest in the land, it has only to acquire the other interests outstanding thereof so that it might be in a position to pass it on absolutely for public user. An interesting argument was advanced before the Supreme Court. It was submitted that the right of the Government to levy assessment on the lands is an "encumbrance" and that encumbrance is capable of acquisition. The Court held that the word "encumbrance" as occurring in Section 16 can only mean interests in respect of which a compensation was made under Section 11 or could have been claimed. It cannot include the right of the Government to levy assessment on the lands. The Act does not contemplate the interest of the Government in any land being valued or compensation being awarded therefor.

29. In *Secy. of State v. Sri Narain Khanna* [AIR 1942 PC 35: 44 Bom LR 788] it was held that where the Government acquires any property consisting of land and buildings and where the land was the subject-matter of the government grant, subject to the power of resumption by the Government at any time on giving one month's notice, then the compensation was payable only in respect of such buildings as may have been authorized to be erected and not in respect of the land.

30. In the matter of the Land Acquisition Act: *Govt. of Bombay v. Esufali Salebhai* [ILR (1910) 34 Bom 618 : 12 Bom LR 34] ILR (at p. 636) Batchelor, J. held that the Government are not debarred from acquiring and paying for the only outstanding interests merely because the Act,



which primarily contemplates all interests as held outside the Government, directs that the entire compensation based upon the market value of the whole land must be distributed among the claimants. The Government was held liable to acquire and pay only for the superstructure as it was already the owner of the land.

31. In *Dy. Collector, Calicut Division v. Aiyavu Pillay* [9 IC 341: (1911) 2 MWN 367 : 9 MLT 272] Wallis, J. observed that the Act does not contemplate or provide for the acquisition of any interest which already belongs to the Government in land which is being acquired under the Act but only for the acquisition of such interests in the land as do not already belong to the Government.

32. In *Collector of Bombay v. Nusserwanji Rattanji Mistri* [AIR 1955 SC 298] the decisions in *Esufali Salebhai* case [ILR (1910) 34 Bom 618 : 12 Bom LR 34] and *Aiyavu Pillay* case [9 IC 341: (1911) 2 MWN 367 : 9 MLT 272] were cited with approval. Expressing its entire agreement with the said views, the Court held that when the Government possesses an interest in land which is the subject of acquisition under the Act, that interest is itself outside such acquisition because there can be no question of the Government acquiring what is its own. An investigation into the nature and value of that interest is necessary for determining the compensation payable for the interest outstanding in the claimants but that would not make it the subject of acquisition. In the land acquisition proceedings there is no value of the right of the Government to levy assessment on the lands and there is no award of compensation therefor. It was, therefore, held by a Division Bench of Judicial Commissioners in *Mohd. Wajeeh Mirza v. Secy. of State for India in Council* [AIR 1921 Oudh 31: 24 Oudh Cas 197] that the question of title arising between the Government and another claimant cannot be settled by the Judge in a reference under

Section 18 of the Act. When the Government itself claims to be the owner of the land, there can be no question of its acquisition and the provisions of the Land Acquisition Act cannot be applicable. In our opinion the statement of law so made by the learned Judicial Commissioners is correct."

26. This Court answered the question under consideration in the negative and held that the acquisition of land wherein the ownership or the entirety of rights already vested in the State on which there were no private rights or encumbrances, such land was beyond the purview of LA Act. We agree with the position of law highlighted in Sharda Devi11 but the question is of its applicability on the factual situation of the present case. Before we consider this aspect, we may also deal with the statutory provisions and the decisions of this Court and the two decisions of the Punjab High Court upon which strong reliance has been placed on behalf of the appellant in support of the argument that acceptance of the highest bid in public auction under Rule 90 of the 1955 Rules for sale of the property forming part of the compensation pool does not create any title or right in favour of the auction-purchaser unless the full auction price is paid/deposited.

27. By virtue of Section 14 of the 1954 Act, an evacuee property acquired under Section 12 becomes part of the compensation pool. The compensation pool vests in the central government free from all encumbrances. Section 20 empowers the managing officer or managing corporation to transfer any property out of the compensation pool subject to the 1955 Rules. Chapter XIV of the 1955 Rules provides for the procedure for sale of property in the compensation pool. Rule 87 provides that the property forming part of compensation pool may be sold by public auction or by inviting tenders. Rule 90 provides for the procedure for sale of property by public auction. The said rule, to the extent it is relevant, reads as under:

"90. Procedure for sale of property by public auction-(1) Where any property is to be sold by public auction-



(a) The property shall be sold through firms of repute who have been approved as auctioneer by the Chief Settlement Commissioner or through the officers appointed by the Central Government in this behalf;

(b) the terms and conditions on which auctioneers may be appointed shall, from time to time, be determined by the Chief Settlement Commissioner.

(2) to (7) xxx xxx xxx xxx

(8) The person declared to be the highest bidder for the property at the public auction shall pay in cash or by a cheque drawn on a scheduled bank and endorsed "good for payment upto six months" or in such other form as may be required by the Settlement Commissioner, immediately on the fall of the hammer a deposit not exceeding 20 per cent of the amount of his bid to the officer conducting the sale and in default of such deposit the property may be resold:

Provided that where the highest bidder is a displaced person having a verified claim, the compensation in respect of which exceeds the amount of the deposit required under this sub-rule, he may, instead of making a deposit, execute an indemnity bond in the form specified in Appendix XXI-A.

(9) xxx xxx xxx xxx

(9)(A) xxx xxx xxx xxx

(9) (B). xxx xxx xxx xxx

(10) The bid in respect of which the initial deposit has been accepted shall be subject to the approval of the Settlement Commissioner or an officer appointed by him

for the purpose.

Provided that no bid shall be approved until after the expiry of a period of seven days from the date of the auction.

(11) Intimation of the approval of a bid or its rejection shall be given to the highest bidder (hereinafter referred to as the auction purchaser) by registered post acknowledgement due and the auction purchaser shall where the bid has been accepted be required within fifteen days of the receipt of such intimation to send by registered post acknowledgement due or to produce before the Settlement Commissioner or any other officer appointed by him for the purpose a treasury challan in respect of the deposit of the balance of the purchase money:

Provided that the Settlement Commissioner or other officer appointed by him in this behalf may, for reasons to be recorded in writing, extend the aforesaid period of fifteen days by such period, not exceeding fifteen days, as the Settlement Commissioner or such other officer may think fit.

Provided further that the period extended under the preceding proviso may further be extended (without any limit of time) by the Chief Settlement Commissioner.

(12) The balance of the purchase money may, subject to the other provisions of these rules be adjusted against the compensation payable to the auction purchaser in respect of any verified claim held by him. In any such case the auction purchaser shall be required to furnish within seven days of the receipt of intimation about the approval of the bid, particulars of the compensation application filed by him :

Provided that the Settlement Commissioner or any



officer appointed by him in this behalf may, for reasons to be recorded in writing, extend the aforesaid period of seven days by such further period not exceeding fifteen days as the Settlement Commissioner or such other officer may deem fit:

Provided further that the period extended under the preceding proviso may further be extended (without any limit of time) by the Chief Settlement Commissioner.

(13) If the Regional Settlement Commissioner, on scrutiny of the compensation application of the auction purchaser finds that further sum is due to make up the purchase price, he shall send an intimation to that effect to the auction purchaser calling upon him to deposit the balance in cash within fifteen days of the receipt of such intimation.

(14) If the auction purchaser does not deposit the balance of the purchase money within the period specified in sub-rule (11) or does not furnish particulars of his compensation application as specified in sub-rule (12), or if that net compensation admissible to the auction purchaser is found to be less than the balance of the purchase money and the auction purchaser does not make up the deficiency as provided in sub-rule (13), the initial deposit made by the auction purchaser under sub-rule (8) shall be liable to forfeiture and he shall not have any claim to the property.

(15) When the purchase price has been rgalised in full from the auction purchaser, the Managing Officer shall issue to him a sale certificate in the form specified in Appendix XXII or XXIII, aq the case may be. A certified copy of the sale certificate shall be sent by him to the Registering Officer within the local limits of whose jurisdiction the whol% or any part of the property to which

the certificate relates is situated. If the auction purchaser has associated with himself any other displaced person having a verified claim whose net compensation is to be adjusted in whole or in part against the purchase price, the sale certificate shall be made out jointly in the name of all such persons, and shall specify the extent of interest of each in the property.

Provided that if every such displaced person who has associated himself with the auction-purchaser sends an intimation in writing to the Regional Settlement Commissioner that the sale certificate may be made out in the name of the auction-purchaser, the sale certificate may be made out in the name of the auction-purchaser."

28. In *Bombay Salt & Chemical Industries*[8], this Court with reference to the public auction of certain salt pans which were evacuee property and formed part of the compensation pool constituted under the 1954 Act held in para 10 of the Report as under :

"10. It is clear from the rules and the conditions of sale set out above that the declaration that a person was the highest bidder at the auction does not amount to a complete sale and transfer of the property to him. The fact that the bid has to be approved by the Settlement Commissioner shows that till such approval which the Commissioner is not bound to give, the auction-purchaser has no right at all. It would further appear that even the approval of the bid by the Settlement Commissioner does not amount to a transfer of property for the purchaser has yet to pay the balance of the purchase money and the rules provide that if he fails to do that he shall not have any claim to the property. The correct position is that on the approval of the bid by the Settlement Commissioner, a binding contract for the sale of the property to the auction-purchaser comes into existence. Then the provision as to the sale certificate would indicate that only upon the issue of it a transfer of the property takes place. Condition of Sale No. 7 in this case, furthermore,



expressly stipulated that upon the payment of the purchase price in full the ownership would be transferred and a sale certificate issued. It is for the appellants to show that the property had been transferred. They have not stated that the sale certificate was issued, nor that the balance of the purchase money had been paid. In those circumstances, it must be held that there has as yet been no transfer of the salt pans to Respondents 4 and 5. The appellants cannot therefore claim the benefit of Section 29 and ask that they should not be evicted. Mr. Purshottam Trikamdas contended that the sale certificate will in any event be granted and that once it is granted, as the form of this certificate shows, the transfer will relate back to the date of the auction. It is enough to say in answer to this contention that assuming it to be right, a point which is by no means obvious and which we do not decide, till it is granted no transfer with effect from any date whatsoever takes place and none has yet been granted."

29. In *Bishan Paul*[1], a two-Judge Bench of this Court observed that in *Bombay Salt & Chemical Industries*[8] this Court did not directly decide the question when title would pass to an auction-purchaser. It was held that title would pass when the full price was realized. This Court observed having regard to the time lag between acceptance of the highest bid, payment of full price and the issuance of certificate, that title must be deemed to have been passed when the sale became absolute and the sale certificate must relate back to that date, i.e., when the sale became absolute.

30. In *Roshan Lal Goswami*[6], a Division Bench of the Punjab High Court, on examination of the provisions of the 1954 Act and Rule 90 of the 1955 Rules, held that till a sale certificate was issued to the highest bidder and till the balance of the purchase money had been paid, rights of ownership would not vest in the auction-purchaser and the proprietary rights, therefore, would not stand transferred by the mere fact that the highest bid of the auction-purchaser has been accepted. The

Division Bench of the Punjab High Court noticed the lacuna in the 1954 Act about transitional stage after the acceptance of the highest bid at the auction and till the sale certificate was granted. Pertinently, with regard to the provisional possession given to the auction-purchaser on acceptance of the highest bid, the Division Bench of the Punjab High Court observed as under:

> "8. After provisional possession has been given, the auction-purchaser, even though he does not possess proprietary rights, has possessory rights. He has the right of possession which can exist independently of ownership. Possession and ownership may co-exist but in a number of cases a person may be the owner of a thing and not possess it; and conversely, a person may be the possessor without being the owner. A person, who is a possessor but not the legal owner, is entitled to certain rights by virtue of his possession alone. . . . . ."

31. In *Jaimal Singh*[7], the Punjab High Court, after noticing Rule 90 of the 1955 Rules, in para 16 of the Report, inter alia, held as under:

> "……..In my view, title passes when the sale is confirmed, because it is that date on which the auction-purchaser is recognised officially as the owner and is entitled to obtain possession of the property. The issue of the sale certificate is invariably delayed because certain routine formalities have to be complied with and it is in very rare cases that an office can be so prompt as to issue the sale certificate on the very day the sale is confirmed. But when a sale certificate is issued, it dates back to the date when the sale was confirmed."

32. The legal position with regard to transfer of title in respect of the property forming part of the compensation pool put to public auction under Rule 90 of the 1955 Rules may be summarized thus : on approval of the highest bid by the



Competent Authority, a binding contract for the sale of the property to the auction-purchaser comes into existence. Once the payment of the full purchase price is made, title in the property would pass to an auction-purchaser. In other words, on the payment of the full purchase price, the ownership in the property sold in public auction would stand transferred but the transfer formally becomes complete on issuance of the certificate of sale. If in the sale certificate, any particular date is mentioned as provided in the proforma appended to Rule 90, such date mentioned in the sale certificate may be presumed to be the date on which the purchase has become effective but crucial date for transfer of ownership in the property in favour of auction-purchaser is the date when full purchase price has been paid by the auction-purchaser.

33. The above being the legal position, let us recapitulate the facts and the effect of provisional possession given to the appellant's husband. The auction of the subject land was conducted on 21.06.1958. The highest bid submitted by the appellant's husband was approved by the Settlement Commissioner and a communication to that effect was sent on 31.10.1960 intimating to him that it has been decided to give him provisional possession of the auctioned property. It is an admitted case that provisional possession was in fact given to the appellant's husband. On 16.06.1980, the concerned authority asked the auction-purchaser to deposit Rs. 14,992/- as balance sale consideration which was done by the appellant within the prescribed time (appellant's husband had died in the meanwhile) and sale certificate was issued in favour of the appellant on 22.08.1980. The said sale certificate was registered on 15.07.1981. It may be noticed here that the sale certificate mentions that the appellant has been declared purchaser of the subject property with effect from 11.12.1958 but as a matter of law as indicated above, the ownership could have transferred in favour of the appellant only in 1980 when she paid full purchase price. In fact no ownership was transferred in favour of the appellant even on that date. We shall

indicate the reason therefor a little later.

34. What is the effect of provisional possession which was given to the appellant's husband in 1960 on approval of his highest bid? Does it amount to creation of an encumbrance in the property? If the provisional possession given to the appellant's husband amounted to creation of an encumbrance, whether the said property could have been acquired under the LA Act although the ownership vested in the central government? The fate of the appeal significantly will depend upon answer to these questions.

35. Concise Oxford English Dictionary [Tenth Edition, Revised] defines "encumbrance" - 1. a burden or impediment. 2. Law a mortgage or other charge on property or assets.

36. Webster Comprehensive Dictionary [International Edition; Volume I] defines "encumbrance" as follows:

> "1. That which encumbers. 2. Law Any lien or liability attached to real property. 3. One's wife, child or dependent. Also spelled incumbrance. See synonyms under IMPEDIMENT, LOAD [<OF encumbrance <encombrer. See ENCUMBER.]"

37. In P. Ramanatha Aiyar's The Law Lexicon [Second Edition Reprint 2000] with reference to a decision of the Patna High Court in *Mahadeo Prasad Sahu v. Gajadhar Prasad Sahu*[12], the term "encumbrance" is explained as follows :

> "Encumbrance. Burden or property; impediment; mortgage or other claim on property. Grant of lands rent free or the grant of the landlords zarait land to a tenant for the purposes of cultivation does amount to an encumbrance of the estate. Apart from mere dealings such as mortgages which create a charge upon the land, there are other dealings which amount to an encumbrance. Anything

12. AIR 1924 Patna 362



> which interferes with the unrestricted rights of the proprietors as they then existed would be an encumbrance upon the land, even the granting of a lease of zarait lands, that is to say the lands which the landlord is entitled to hold in direct possession and to cultivate for his own purposes. A lease of such lands granted to an occupier in circumstances which would give him a right of occupancy over the land, would amount to an encumbrance."

38. In *Collector of Bombay v. Nusserwanji Rattanji Mistri and Others*[13], the term "encumbrance" as occurring in Section 16 of the LA Act has been explained by this Court to mean interests in respect of which a compensation was made under Section 11 or could have been claimed thereunder.

39. In *M. Ratanchand Chordia & Ors. v. Kasim Khaleeli*[14], a Division Bench of the Madras High Court had an occasion to consider the meaning of the word "encumbrances" with reference to the 1954 Act and the LA Act in the context of the easemantary right of way. The Division Bench considered the word "encumbrances" thus :

> "18. The word "Encumbrances" in regard to a person or an estate denotes a burden which ordinarily consists of debts, obligations and responsibilities. In the sphere of law it connotes a liability attached to the property arising out of a claim or lien subsisting in favour of a person who is not the owner of the property. Thus a mortgage, a charge and vendor's lien are all instances of encumbrances. The essence of an encumbrance is that it must bear upon the property directly and in-directly and not remotely or circuitously. It is a right in realiena circumscribing and subtracting from the general proprietary right of another person. An encumbered right, that is a right subject to a limitation, is called servient while the encumbrance itself

13. AIR 1955 SC 298.

14. AIR 1964 Madras 209.

is designated as dominant. . . . . ."

40. The word "encumbrance", according to its ordinary significance, means any right existing in another to use the land or whereby the use by the owner is restricted. The word "encumbrance" imports within itself every right or interest in the land, which may subsist in a person other than the owner; it is anything which places the burden of a legal liability upon property. The word "encumbrance" in law has to be understood in the context of the provision under consideration but ordinarily its ambit and scope is wide. Seen thus, it is difficult to see why a binding contract entered into between an auction-purchaser and the government on approval of the highest bid relating to sale of property, which is part of compensation pool under Section 14 of the 1954 Act followed by provisional possession to the auction-purchaser, should not come within the purview of the word "encumbrance".

41. It is well known in law that a person in possession of the property - though not owner - is entitled to certain rights by virtue of his possession alone. We are in agreement with the view of the Punjab High Court in *Roshan Lal Goswami*[6] that an auction-purchaser on provisional possession being given to him possesses possessory rights, though he does not have proprietary rights in the auctioned property. Thus, there remains no doubt that in October, 1960 or near about encumbrance in the subject property came to be created.

42. The next question is whether on creation of an encumbrance, the subject property could have been acquired under the LA Act although the ownership in the land vested in the central government. Ordinarily, when the government possesses an interest in land, which is the subject of acquisition under the LA Act, that interest is outside such acquisition because there can be no question of the government acquiring what is its own. This is what this Court said in *Nusserwanji Rattanji Mistri*[13] but this rule is not without an exception. There is no impediment in acquisition of land owned by the central



government by invoking the provisions of the LA Act where such land is encumbered or where in respect of the land owned by the government some private interest has been created. As a matter of fact, *Sharda Devi*[11] does not hold to the contrary. It is so because what *Sharda Devi*[11] holds is this : the acquisition of land wherein the ownership or the entirety of rights already vested in the State on which there are no private rights or encumbrance such land is beyond the purview of the LA Act. In other words, if the government has complete ownership or the entirety of rights in the property with it, such land cannot be acquired by the government by invoking its power of acquisition under the LA Act but if some private rights have been created in such property or the property has encumbrance(s), the acquisition of such land is not beyond the pale of the LA Act.

43. *Madan Lal Nangia*[5] has been relied upon by the Division Bench in the impugned order in upsetting the decision of the Single Judge. Mr. Ranjit Kumar, learned senior counsel for the appellant sought to distinguish this judgment. He submitted that *Madan Lal Nangia*[5] was a case where this Court was concerned with the properties which vested in the custodian and having regard to this aspect, this Court said that merely because the properties vest in the custodian as an evacuee property it does not mean that the same cannot be acquired for some other purpose.

44. It is true that facts in *Madan Lal Nangia*[5] were little different but, in our view, the legal position highlighted therein does not become inapplicable to the present case on that ground. In paragraphs 16, 17 and 18 of the Report (Pgs. 334-335), this Court observed as follows:

> "16.……A property is a composite property because a private party has an interest in that property. The scheme of separation, to be framed under Section 10 of the Evacuee Interest (Separation) Act, is for the purpose of separating the interest of the evacuee from that of the private party. Therefore, even if the evacuee's interest was

acquired under Section 12, the interest of the private person could have been acquired under the Land Acquisition Act. Further, if the land stood acquired by the notification dated 7-7-1955 then the question would arise as to how the respondents acquired title to these lands. If they purchased after the date of notification dated 7-7-1955, they would get no title. They then would not be able to maintain the writ petition. Dr Dhavan submitted that the appellants had admitted the title of the respondents and thus this question would not arise. We are unable to accept the submission. It is only a person who has an interest in the land who can challenge acquisition. When a challenge is made to an acquisition at a belated stage, then even if the court is inclined to allow such a belated challenge, it must first satisfy itself that the person challenging acquisition has title to the land. Very significantly, in their writ petition the respondents do not state when they acquired title.

17.……Undoubtedly, the evacuee properties vested in the Custodian for the purposes of distribution as per the provisions of the various Acts. However, it is to be noted that under the various Acts in lieu of properties, compensation in terms of money can also be paid. Thus, merely because the properties vest in the Custodian as evacuee properties does not mean that the same cannot be acquired for some other public purpose…….

18……..It would be open to the Government to acquire evacuee property and give to the Custodian compensation for such acquisition. Section 4 notification dated 23-1-1965 not having excluded evacuee properties the respondents can get no benefit from the fact that in the 1959 notification evacuee properties had been excluded."

45. From the judgment in Madan Lal Nangia[5] , three propositions of law emerge:

(i) At the time of acquisition of evacuee property under



Section 12 of the 1954 Act if such property has interest of a private person, the interest of private person can be acquired under the LA Act even though the land is owned by the government.

(ii) The properties that vest in the Custodian as evacuee properties can be acquired for some other public purpose.

(iii) When a challenge is laid to the acquisition of the land at a belated stage then if the court is inclined to allow such a belated challenge, it must first satisfy itself that the person challenging acquisition has title to the land.

46. What follows from proposition (i) is also this that after the acquisition of evacuee property under Section 12, if any encumbrance is created or interest of a private person intervenes therein, such land even if owned by the government can be acquired under the LA Act. This is in congruity and consonance with *Sharda Devi*[11] as well.

47. When the facts of the instant case are seen in light of the above legal position, we are of the considered view that the appeal must fail. In the first place, as noticed above, by approval of the highest bid given by the appellant's husband followed with provisional possession, an encumbrance was created in 1960 in the subject land which was part of the compensation pool before the acquisition proceedings were initiated and, therefore, it could have been acquired by the Delhi Administration under the LA Act. Secondly, and equally important, the acquisition which was commenced by Section 4 read with Section 17(1)(iv) Notification issued on 07.03.1962 which ultimately culminated into an award on 30.06.1962 was challenged for the first time after more than thirty years of the passing of the award. The appellant has failed to show her title or her husband's title in the property on the date of the acquisition. As a matter of fact, though the approval to the

highest bid given by the appellant's husband in respect of the subject property was given on 31.10.1960, the payment of full price by the appellant was made pursuant to the communication dated 16.06.1980 but by that time the subject land already stood acquired by the Delhi Administration and, therefore, despite the payment of full price by the appellant in 1980 and the issuance of the sale certificate, no title came to be vested in the appellant. The legal position that we have summarised with regard to transfer of title in respect of the property forming part of the compensation pool put to public auction under Rule 90 of the 1955 Rules in the earlier part of the judgment does not help the appellant at all because of completion of acquisition proceedings in 1962 much before the payment of full purchase price by the appellant. In the absence of any title in favour of the appellant or her husband on the date of acquisition, the challenge to such acquisition could not have been allowed by the Single Judge. The Division Bench rightly set aside the erroneous order of the Single Judge.

48. In view of the above, appeal has no merit and is liable to be dismissed and is dismissed with no order as to costs.

49. It is, however, clarified that appellant's claim for compensation, refund or any other monetary claim shall be considered and/or decided on its own merits in accordance with law and the present judgment shall have no bearing in relation to such claim.

K.K.T. Appeal dismissed.



RAJYA SABHA SECRETARIAT AND ORS.
*v.*
SUBHASH BALODA AND ORS.
(Civil Appeal No. 1099 of 2013)

FEBRUARY 11, 2013

**[G.S. SINGHVI AND H.L. GOKHALE, JJ.]**

*Service Law - Recruitment/Selection - Allocation of certain marks for NCC/Sports and computer course certificates - The certificate marks were made component of Interview marks - Unsuccessful candidates challenging the bifurcation of the marks of the interview - Single Judge of High Court held the same as arbitrary and violative of Article 14 - Division Bench of High Court upholding the order of Single Judge further recommended that proficiency in NCC/Sports or Computer should have been adjudged by the Interview Board and marks therefor should have been added in the range of 0 to 5 instead of 7 - On appeal, held: The method applied by the selecting authority was not wrong - The selection process was not discriminatory and there was no breach of provisions of Articles 14 and 16 of the Constitution - The High Court has imposed its own reading of the requirements of the selection process on the Interview Board - It is not the job of the Court to substitute what it thinks appropriate for that which selecting authority decided as desirable - Proposal of the High Court amounts to re-writing the rules for selection, which is impermissible while exercising the power of judicial review - Judicial Review - Scope of.*

**During recruitment to the post in question, at the time of the interview, out of the total marks for interview (i.e. 25 marks), 7 marks were allocated for the certificates of NCC/sports and Computer Course.**

**The respondent, who were not selected, filed writ**

**petition on the ground that the Interview Board could not have made the certificate marks a component of interview marks, as the splitting of marks was not indicated to them in advance and that minimum cut-off marks should have been adjudged by excluding the certificate marks.**

**Single Judge of the High Court allowed the petition, holding that the action of the Interview Board in applying minimum cut-off marks, after taking into consideration also the certificate marks, that too without disclosing the same to the candidates, was aarbitrary and violative of Article 14 of the Constitution. Division Bench of the High Court, upholding the judgment of the Single Judge, further recommended that the proficiency in NCC/Sports or in computer course should have been adjudged by the Interview Board and those marks should have been added in the range of 0 to 5. Hence the present appeal.**

**Allowing the appeal, the Court**

**HELD: 1. There was nothing wrong in the method applied by the appellants in the Selection. There was no discrimination whatsoever among the candidates called for the interview, nor was there any departure from the advertised requirements. One can always say that some other method would have been a better method, but it is not the job of the Court to substitute what it thinks to be appropriate for that which the selecting authority has decided as desirable. While taking care of the rights of the candidates, the Court cannot lose sight of the requirements specified by the selecting authority. What the High Court has proposed in the impugned orders amounts to re-writing the rules for selection, which was clearly impermissible while exercising the power of judicial review. [Para 28] [977-D-F]**

*K. Manjushree vs. State of Andhra Pradesh* **2008 (3) SCC 512: 2008 (2) SCR 1025;** *Himani Malhotra vs. High*



*Court of Delhi* **2008 (7) SCC 11: 2008 (5) SCR 1066 - distinguished.**

**2. The interview board can not be faulted for making the certificate marks a component of the 25 interview marks. The appellants had advertised that the NCC/ Sports and Computer certificates were 'desirable'. The call-letter, specifically called upon the candidates to bring their certificates at the time of the Personal Interview, accompanied by a declaration by the concerned institute that the course done by the candidate was recognized by AICTE or DOEACC. Thus, it was clear that credit was to be given to those certificates as a part of the interview. The respondents, therefore, can not make any grievance that they were taken by surprise by giving of 7 (out of 25) marks for such certificates to the successful candidates. Nor can the respondents say that any prejudice is caused to them, since all candidates having such certificates were uniformly given 5 and/or 2 marks for the certificates, and those who were not having them were not given such marks. The process cannot, therefore, be called arbitrary. [Para 23] [973-G-H; 974-A-C]**

**3. In the present case, the interview was to be of 25 marks. The view which has appealed to the Judges of the High Court would mean that the cut-off marks (say 50%) will have to be obtained out of 18 marks, whereas the advertisement clearly stated that the cut-off marks had to be obtained in the Written Test and the Personal Interview. This meant obtaining cut-off marks out of 25 marks set out for interview as well. The consequence of the view which was accepted by the High Court would be that it might as well happen that candidates who did not have the NCC/Sports certificates or any computer course certificates would obtain higher marks out of 18 marks, and would top the list. On the other hand, the candidates who had these certificates might not get the**

**cut-off marks out of 18, or even if they got those marks, they might land at the lower level in the inter-se seniority in the merit order for selection. This was certainly not meant to be achieved by the selection process, when these certificates were declared in advance as 'desirable'. [Para 24] [974-D-G]**

**4. The recommendation of the Division Bench that the proficiency of the candidates producing certificates be assessed on a scale of 0 to 5 would mean holding one more test as far as computer course certificate is concerned, or asking the candidates concerned, to exhibit their skill in a particular sport or as NCC Cadet. That was certainly not contemplated in the advertisement. The advertisement only stated that the NCC/Sport certificate and the computer course certificate recognised by AICTE/DOEACC were desirable. The call-letter specifically stated they would be given credit at the time of interview. The Joint Recruitment Cell did not want to go behind those certificates once they were from the proper authorities, and therefore, the interview board fairly granted all the marks to the candidates who produced those certificates, making them a component out of 25 marks. It cannot be disputed that the appellants applied a uniform standard. [Para 25] [974-H; 975-A-C]**

**5. It was for the Lok Sabha and Rajya Sabha Secretariat to decide what qualifications they expected in the Security Assistants. They did want persons with Sports/NCC and Computer course certificates. Therefore, they specifically mentioned those certificates as desirable. Specifying 5+2 marks for these certificates was in consonance with the objective to be achieved. The method followed by the interview board in giving these certificates 7 out of 25 marks cannot, therefore, be faulted as denying equal opportunity in the matter of public employment. Dissimilar candidates could not be expected**



**to receive similar treatment. Thus, in the present process of selection, there is no breach either of Article 14 or 16 of the Constitution of India. [Para 25] [975-E-G]**

**6. The High Court imposed its own reading of the requirements of the selection process on to the interview board. It was for the interview board to decide which method to follow. The interview board had followed a particular pattern earlier in the year 2006, which was upheld by a Single Judge and the Division Bench of High Court. The interview board was following the same pattern. [Para 26] [975-H; 976-A]**

*Haryana Public Service Commission vs. Amarjeet Singh* **1999 SCC (L&S) 1451 - relied on.**

**7. In the present matter it was made clear in the call letters that the relevant certificates would be given credit at the time of interview, since they were 'desirable', and therefore there was no question of any prejudice or lack of fairness on the part of the interview board in giving the specified marks for the certificates. [Para 27] [977-B-C]**

*Barot Vijay Kumar Balakrishna and Ors. vs. Modh VinayKumar Dasrathlal and Ors.* **2011 (7) SCC 308: 2011 (7) SCR 154 - relied on.**

*Mahesh Kumar and Anr. vs. Union of India* **151 (2008) Delhi Law Times 353;** *State of U.P. vs. Synthetics and Chemicals Ltd.* **1991 (4) SCC 139;** *Union of India vs. Dhanwanti Devi* **1996 (6) SCC 44: 1996 (5) Suppl. SCR 32;** *Manish Kumar Shahi vs. State of Bihar and Ors.* **2010 (12) SCC 576 - referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **151 (2008) DLT 353** | **referred to** | **Para 10** |
| **1991 (4) SCC 139** | **referred to** | **Para 11** |

| | | |
|---|---|---|
| **1996 (5) Suppl. SCR 32** | **referred to** | **Para 11** |
| **2010 (12) SCC 576** | **referred to** | **Para 20** |
| **2008 (2) SCR 1025** | **distinguished** | **Para 22** |
| **2008 (5) SCR 1066** | **distinguished** | **Para 22** |
| **1999 SCC (L&S) 1451** | **relied on** | **Para 26** |
| **2011 (7) SCR 154** | **relied on** | **Para 27** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1099 of 2013.

From the Judgment & Order dated 29.11.2011 of the High Court of Delhi at New Delhi in LPA No. 839 of 2011.

Rakesh Kr. Khanna, Abha R. Sharma, D.S. Parmar, Susheel Tomar for the Appellants.

Jyoti Singh, Sudarshan Rajan for the Respondents.

The Judgment of the Court was delivered by

**H.L. GOKHALE J.** 1. Leave Granted.

2. This appeal raises the question with respect to the scope of judicial review in the matter of selections and appointments made by Public Authorities. A learned Single Judge of the Delhi High Court has found-fault with the process of selection of Security Assistants Grade-II, conducted, in the year 2009, by the Joint Recruitment Cell of the Parliament of India (Appellant No. 3), for the Rajya Sabha Secretariat and Lok Sabha Secretariat (Appellant Nos. 1 & 2). By his judgment and order dated 1.9.2011, rendered in Writ petition (C) 4835/2011 filed by the Respondents (unsuccessful candidates) he has directed the appellants to consider the claim of the Respondents for selection, by the process approved by him. The appeal therefrom, filed by the appellants herein, being LPA No. 839 of 2011 has been dismissed by a Division bench of



that High Court by its judgment and order dated 29.11.2011, which has led to the present appeal by special leave.

**Facts leading to this appeal:-**

3. This appeal arises on the background of following facts. Sometime in the year 2009, Appellant No. 3 issued an advertisement bearing No. 04/2009, inviting applications for various posts such as those of Research Assistants, Junior Parliamentary Reporters, Stenographers, Translators, Security Assistants Grade-II, and Junior Clerks. In the present matter we are concerned with the posts of Security Assistants Grade-II. In this advertisement, 37 vacancies were advertised in the cadre of Security Assistants Grade-II, in the Lok Sabha Secretariat, and 19 vacancies in the Rajya Sabha Secretariat.

4. The scheme of the examination for these posts was also incorporated in the advertisement. The examination for the recruitment of Security Assistants Grade-II was to be conducted in four stages. They were as follows:-

(1) Preliminary Examination,

(2) Physical Measurement and Field Tests,

(3) Descriptive Type Written Papers,

(4) Personal Interview

The candidates were expected to be graduates in any discipline, provided they met the requisite physical requirements as per the Lok Sabha and Rajya Sabha Rules. As per the approved scheme of the examination, the recruitment of the candidates depended on their performance in each of the four stages. Each test was an elimination round for the subsequent test. The candidates were required to attain the prescribed standards, and to qualify in each of the stages. However, the marks secured by them in the third and fourth stage, viz. descriptive type written paper and personal interview,

were to be considered for determining the *inter-se* seniority in the merit order for selection.

5. (i) The advertisement specified as 'desirable', certain additional qualifications, which were as follows:-

> ***"Desirable:*** *'C' Certificate in NCC or sportsmen of distinction who have represented a State or the Country at the National or International level or who have represented a University in recognised inter-university tournament.*
>
> ***Note:*** *In case of vacancies in Rajya Sabha Secretariat:*
>
> *(i) Certificate in computer course recognised by AICTE/ DOEACC or courses equivalent to 'O' Level in terms of syllabus and duration of course as prescribed by DOEACC, is also a desirable qualification.*
>
> *(**AICTE**- All India Council for Technical Education)*
>
> *(**DOEACC**- Department of Electronics Accreditation of Computer Courses)"*

(ii) The advertisement specifically stated that for these posts:

> *"Personal interview will carry 25 marks. Candidates will have to secure the minimum qualifying marks in the Personal Interview."*

(iii) Para XV of the advertisement laid down the cut off percentage of marks. This para reads as follows:-

> ***"XV.CUT OFF PERCENTAGE OF MARKS:*** *The minimum cut of percentages of marks in Written Test and Personal Interview in an examination is 50%, 45% and 40% for vacancies in GENERAL, OBC and SC/ST categories respectively. The above percentages are relaxable by 5% in case of physically handicapped persons of relevant disability and category for appointment against the vacancies reserved in Lok Sabha Secretariat for physically handicapped persons. These percentages are the minimum marks which a candidate is required to secure in each paper/component and aggregate in the written test and in aggregate in the personal interview. However, the cut-off percentages may be raised or lowered in individual component/paper/ aggregate to arrive at reasonable vacancy: candidate ratio."*



6. Out of the candidates who wrote the descriptive type written paper, 68 candidates secured the minimum qualifying marks, and were called for the personal interview of 25 marks. The break-up of marks for Personal Interview was as follows:-

| | |
|---|---|
| *"a) Dress, manners and appearance* | *6 marks* |
| *b) Behaviour in communication (whether courteous and disciplined)* | *6 marks* |
| *c) General awareness and knowledge of duties involved security service* | *6 marks* |
| *d) Skill and Extra-curricular activities* | *5 marks* |
| *I. NCC C- Certificate* | *5 marks* |
| *II. Sports* | |
| *International level/national level* | *5 marks* |
| *University Level* | *4 marks* |
| *e) Certificate in computer operations* | *2 marks "* |

7.It is the case of the appellant that the breakup of these marks for the personal interview was approved by the Secretary Generals of both Lok Sabha and Rajya Sabha, in 2001. The candidates who were called to appear for the personal interview were sent call-letters, specifically informing them that they had to bring the original certificates of NCC/Sports or the certificate of the computer course. Specimen call-letter dated 3.5.2011 sent to a candidate is reproduced herein below. It reads as follows:-

*"PARLIAMENT OF INDIA*
*(JOINT RECRUITMENT CELL)*

*RECRUITMENT TO THE POST OF SECURITY ASSISTANT GRADE-II IN LOK SABHA AND RAJYA SABHA SECRETARIATS*

*PARLIAMENT HOUSE ANNEXE,*

*NEW DELHI-110001* *No. 7/3/SA-II(open)-JRC/2010*
*Dated: the 3rd May 2011*

***CALL LETTER***

*On the basis of your performance in the Physical Measurement Tests, Field Tests and Descriptive Type Written Papers held in December 2010, you have been declared successful for appearing in the Personal Interview to be held on Sunday, the 29th May, 2011 in Parliament House Annexe, New Delhi.*

*2. Your Roll Number is 105999.*

*3. You are requested to be present at 9.30 A.M. sharp at the Reception Office, Parliament House Annexe, New Delhi, from where you will be conducted to the venue of interview.*

*4. You are also required to bring the following documents/testimonials for verification at the time of Personal Interview:-*

*(i) Original certificates of Matriculation or equivalent examination as proof of date of birth.*

*(ii) All original certificates of Educational and other qualifications.*

*(iii) All original certificates of NCC/Sports.*

*(iv) Original certificate of Hill area resident, if any, issued by the competent authority.*



*(v) Original Caste Certificate issued by the competent authority (in case of SC, ST and OBC candidates).*

***5. In case, a candidate has done a computer course, he/she should bring the original certificate thereof at the time of Personal Interview. However, the credit for the same shall be given only if it is accompanied by a declaration by the concerned institute that the computer course done by the candidate is recognised by the All India Council for Technical Education (AICTE)/Department of Electronic Accreditation of Computer Courses (DOEACC) or the course is equivalent to 'O' level in terms of syllabus and duration of course as prescribed by DOEACC.***

*6. The minimum qualifying marks in Personal Interview are 50%, 45% and 40% for vacancies in General, OBC and SC/ST categories, respectively.*

*7. Selection will be made on the basis of overall performance of the candidates in the descriptive type written papers and the personal interview, subject to the availability of vacancies.*

*8. The decision of the Joint recruitment Cell regarding allocation of the successful candidates to either the Lok Sabha or the Rajya Sabha Secretariat shall be final.*

*9. You should bring this call letter to the venue of Personal Interview without fail.*

*Sd/-*
*(A.S.K. DAS)*
*Under Secretary"*
(emphasis supplied)

8. In was pointed out on behalf of the appellants that at the time of the interview the exercise of checking the certificates was undertaken by the officers of the Joint Recruitment Cell, by verifying the documents prior to the personal Interview. The officers simply assisted the interview board, and saved their time. This exercise was done in the presence of all the candidates, and they had the full knowledge thereof. A candidate producing the 'C' Certificate of NCC was entitled to full 5 marks. Similarly a candidate producing the computer course certificate was entitled to 2 marks. There was no discretion in awarding these marks. These marks were deemed to be awarded by the members of the interview board. After the checking of the certificates and the oral interview, 27 candidates were selected for the posts of Security Assistants Grade-II for Lok Sabha as against 37 vacancies, and 13 were selected for Rajya Sabha as against 19 vacancies.

9. The respondents were some of the candidates who participated in this process but were not selected. They filed a Writ Petition in the High Court of Delhi bearing Writ Petition (C) No. 4835 of 2011. The respondents principally raised two contentions: (1) firstly, that the splitting of the marks, in the interview, was not indicated to them in advance, and (2) secondly, attainment of minimum cut-off marks (say 50% for the general category) be adjudged out of 18 marks ear-marked for the oral interview, and the marks for the NCC or the computer course certificates be considered only thereafter.

10. The appellants herein pointed out before the Learned Single Judge that the issue was no longer res-integra, and had been decided in a judgment rendered by a Single Judge of the Delhi High Court in the case of *Mahesh Kumar & Anr. Vs Union of India* 151 (2008) Delhi Law Times 353. It was a case of selection to the very cadre of Security Assistants Grade-II in the Rajya Sabha Secretariat, in the year 2006. The judgment of the Learned Single Judge, which was confirmed by a Division Bench, had held that prescribing the minimum cut-off for the



skills in the interview could not be faulted. The Learned Single Judge had also observed that the decision to assign minimum 50% marks for the interview was arrived at 'in a thorough and scientific manner.'

11. In the present matter, the Learned Single Judge, however, distinguished the case before him from the decision in *Mahesh Kumar* (supra) by holding that no arguments were advanced in that case that the splitting up of the interview marks (as 18 +7) was not justified, and that in any event it was not specified in the advertisement. The Learned Single Judge held that the question of fairness of the selection process was not raised in that matter and therefore, he could go into it, since the doctrine of sub-silentio operates as an exception to the rule of precedent. He relied upon two decisions of this Court in *State of U.P. Vs. Synthetics and Chemicals Ltd.* reported in 1991 (4) SCC 139 and *Union of India Vs. Dhanwanti Devi* reported in 1996 (6) SCC 44 in support.

12. Having decided to go into this issue, the Learned Single Judge in terms held, in para 25 of his Judgment, that allotting 7 marks for the certificates out of the 25 marks for the interview had resulted in elimination of those candidates who had otherwise obtained the minimum qualifying marks out of 18 marks. He further held that even if marks were to be given for the certificates, they ought to have been in addition to the qualifying marks, and ought not to have been used to eliminate those who had otherwise qualified as per the marks in the remaining portion of the interview.

13. The Learned Judge, thereafter, held in paragraph 26 as follows:-

*"26. The action of the Respondent in applying the criteria of minimum qualifying percentage to twenty-five marks and not to 18 marks which related to the actual interview and that too without disclosing this change either in the advertisement or to the candidates before the interview*

*is arbitrary and violative of Article 14 of the Constitution. It has resulted in the unfair elimination of those Petitioners who have scored the minimum qualifying percentage (50% for General Category, 45% OBC and 40% SC/ST) in both the written test as well as in the actual interview."*

14. The Learned Single Judge allowed the petition by his judgment and order dated 1.9.2011, but confined the benefit of his judgment and order to the petitioners before the court, and directed that on applying the criteria as suggested by him, if any of the petitioners are found to have qualified, they be offered appointments to the posts either in Lok Sabha or in the Rajya Sabha Secretariat.

15. The appellants carried the matter in Letters Patent Appeal to the Division Bench which accepted the view-point that had appealed to the Learned Single Judge. The Division Bench dismissed the L.P.A No. 839 of 2011 by its judgment and order dated 29.11.2011. The Division Bench, however, extended the benefit of the principle laid down by the Learned Single Judge across the board to all those who had participated in the selection process. The Division Bench went further ahead in another aspect. With respect to the marks for participation in NCC or having done the computer course, it observed as follows:-

*"3……. It was believed by us that mere participation in NCC/Sports and/or undergoing a course in Computer Operations would not entitle a candidate to the maximum marks of 5 & 2 respectively prescribed therefor and it was for the Interview Board to assess the proficiency and extent of participation of the candidate in the respective fields and the marks to be allocated therefore may vary from zero to five in case of NCC/Sports and zero to two in the case of certificate in Computer Operations……"*

16. The Division Bench, therefore, accepted the



proposition laid down by the Single Judge that the eligibility marks for interview were to be computed out of 18 marks only. It further directed that where the proficiency in NCC/Sports or in computer course was to be judged by the Interview Board, those marks be added in the range of zero to five as per its observations in paragraph 3 quoted above. Being aggrieved by these two judgments this appeal has been filed.

**Submissions by the rival parties:**

17. Mr. R.K. Khanna, Learned Senior Counsel appearing for the appellant submitted that the Learned Single Judge as well as the Division Bench have gone into an area where they ought not to have gone, while exercising judicial review. In his submission, the advertisement had clearly stated that the C-certificates in NCC or the Sport certificates or the certificates in computer course were 'desirable'. The call letter specifically called upon the candidates to come with the original certificates. How the marks ought to be given, out of 25 interview marks, was an aspect to be decided by the interview board. He pointed out that even so, to avoid arbitrariness, the splitting of the marks was effected as per the decision of the Secretaries of Lok Sabha and Rajya Sabha, arrived at way back in 2001. Previous selections were also done on that basis in 2006, and they were upheld by a Single Judge and a Division Bench of Delhi High court. It was, therefore, not expected of the High Court to go into that controversy once again. In any case assuming that the controversy could be gone into afresh, while deciding the petition the Court had gone into the question as to how the interview board ought to have given the marks, which was outside the scope of judicial review. Secondly, the Court ignored that the marks were given to the certificates uniformly, and in that there was no discrimination whatsoever. In his submission, there was no occasion for the court to impose its reading of the relevant requirements on to the interview board.

18. Ms. Jyoti Singh, learned senior counsel appearing for

the respondents, on the other hand submitted that the Learned Single Judge of the High Court was right in holding that *Mahesh Kumar* (supra) had not considered the issue in the manner in which it was placed before the High Court in the present matter. The advertisement clearly meant an interview of 25 marks. The splitting of the marks of interview under various categories was not informed to the respondents anytime prior to the interview. If the oral interview was of 18 marks, then the cut-off marks ought to have been assessed out of 18 marks, and the marks for the certificates ought to have been added subsequently. The manner in which the marks for the interview were allotted was arbitrary, and it resulted into denial of equal opportunity in public employment. She, therefore, submitted that the decisions of the High Court did not call for interference by this Court.

**Consideration of the submissions:**

19. The first submission of Mr. Khanna has been that the procedure adopted by the appellants had been approved by the High Court earlier in *Mahesh Kumar* (supra) and the same procedure was being followed this time also. He submitted that if we look into the judgment in *Mahesh Kumar* (supra), the same pattern of allotment of marks for the posts in this very cadre is reproduced in para 14 of the judgment. In the present matter also the single Judge has accepted in para 15 of his judgment that the qualification requirements in both the cases were the same. On the format of allotting the marks the Learned Single Judge observed in Mahesh Kumar is as follows:-

> *"17. For recruiting candidates to a particular post a procedure is prescribed by the experts in the field after carrying out the necessary research taking into consideration the requirement of the job and nature of employment. One should not lose sight of the fact that if the selection process is divided into series of steps then each step has a purpose to serve and has been included with an objective, be it written test/physical test or an interview…….* ***The procedure devised by the respondent eliminates arbitrariness to a great extent as it is not just the whim of the members of the interview board.*** *There is proper format for evaluation which is almost akin to another written examination. The format for evaluation has different marks for different traits which are detailed in earlier paragraph.*
>
> *…….*
>
> *29. In the present case, the norms were approved by the Secretary Generals of the Lok Sabha and Rajya Sabha and in order to minimize any arbitrariness or personal perception, separate marks were allocated for dress; manners and appearance; behaviour in communication(whether courteous and disciplined); general awareness and knowledge of duties involved in security services; skill and extracurricular activities.* ***In the oral interview, the marks were also to be given on the basis whether the candidates had participated either in NCC or sports or paramilitary forces and the weightage was also given for knowledge of computer operations.*** *With this detailed breakup of different heads under which, in the interview the marks were awarded to the candidates, it is reasonable to infer that while assigning minimum 50% marks in viva voce; the decision was arrived at in a thorough and scientific manner……"*
>
> (emphasis supplied)

The judgment of the Learned Single Judge in Mahesh Kumar was left undisturbed by the Division Bench. Mr. Khanna, therefore, submitted with emphasis that once the scheme of selection was approved by the Division Bench, the Learned Single Judge in the present matter ought not to have entertained the contention that the submissions raised in the present matter were not raised earlier.

20. It was also submitted that the respondents having participated in the selection process, it was not permissible for them to challenge the recruitment process subsequently.

Reliance was placed upon the judgment of this Court in *Manish Kumar Shahi Vs. State of Bihar & Ors.* reported in 2010 (12) SCC 576 in that behalf.

21. As against the submissions of the appellants, the submission of the respondents has been that although they secured high marks in the overall performance i.e the written test and the interview combined, they found that other candidates were selected though they had overall less merit than them, and yet they were shown as having secured higher marks. After making an enquiry under the Right to Information Act, they came to know that the selected candidates were given more marks for their having the NCC and /or Computer Course Certificates, leading to the selection of candidates having less merit. They contended that the method of splitting up of marks was not informed to them. This was unjust, discriminatory and violative of Articles 14 and 16 of the Constitution of India.

22. The Learned Single Judge in his impugned Judgment has referred to the cases of *K. Manjushree Vs. State of Andhra Pradesh* reported in 2008 (3) SCC 512 and *Himani Malhotra Vs. High Court of Dehi* reported in 2008 (7) SCC 11. The factual situation in these two cases is however, quite different from the one in the present case. In *Manjushree* (supra), the minimum cut-off marks were prescribed after the interviews were over, and after the first merit list was prepared. In *Himani Malhotra* (supra) there was no indication in the advertisement about the minimum qualifying marks for the interview and the same were introduced by the selecting committee after the written test was over and after the date for oral interview was postponed.

23. The question before us is whether the interview board can be faulted for making the certificate marks a component of the 25 interview marks, and whether thereby the candidates were in any way taken by surprise. In this connection we must note that the appellants had advertised that the NCC/Sports and Computer certificates were 'desirable'. The call-letter, in



paragraph 5 thereof, specifically called upon the candidates to bring their certificates at the time of the Personal Interview. It further stated that credit for the same shall be given only if the certificate was accompanied by a declaration by the concerned institute that the course done by the candidate was recognized by AICTE or DOEACC. Thus, it was clear that credit was to be given to those certificates as a part of the interview. The respondents, therefore, can not make any grievance that they were taken by surprise by giving of 7 (out of 25) marks for such certificates to the successful candidates. Nor can the respondents say that any prejudice is caused to them, since all candidates having such certificates were uniformly given 5 and/or 2 marks for the certificates, and those who were not having them were not given such marks. The process cannot, therefore, be called arbitrary.

24. The decisions rendered by the High Court were erroneous for one more reason. In the present case, the interview was to be of 25 marks. The view which has appealed to the Learned Judges of the High Court would mean that the cut-off marks (say 50%) will have to be obtained out of 18 marks, whereas the advertisement clearly stated that the cut-off marks had to be obtained in the Written Test and the Personal Interview. This meant obtaining cut-off marks out of 25 marks set out for interview as well. The consequence of the view which is accepted by the High Court will be that it may as well happen that candidates who did not have the NCC/Sports certificates or any computer course certificates will obtain higher marks out of 18 marks, and will top the list. On the other hand the candidates who have these certificates may not get the cut-off marks out of 18, or even if they get those marks, they may land at the lower level in the *inter-se* seniority in the merit order for selection. This was certainly not meant to be achieved by the selection process, when these certificates were declared in advance as 'desirable'.

25. In the impugned order the Division Bench has recommended in its judgment, as quoted above that the

proficiency of the candidates producing certificates be assessed on a scale of 0 to 5. That will mean holding one more test as far as computer course certificate is concerned, or asking the candidates concerned to exhibit their skill in a particular sport or as NCC Cadet. That was certainly not contemplated in the advertisement. The advertisement only stated that the NCC/Sport certificate and the computer course certificate recognised by AICTE/DOEACC were desirable. The call-letter specifically stated they will be given credit at the time of interview. The Joint Recruitment Cell did not want to go behind those certificates once they were from the proper authorities, and therefore, the interview board fairly granted all the marks to the candidates who produced those certificates, making them a component out of 25 marks. It cannot be disputed that the appellants have applied a uniform standard. The respondents who had filed the petition were all constables. The posts of Security Assistants were being filled from amongst them. Although, dress, manners and appearance was given 6 marks, behavior in communication was allotted 6 marks and general awareness and knowledge of duties involved in security service was allotted 6 marks, what was 'desirable' was having the NCC/Sports or Computer course certificate. It was for the Lok Sabha and Rajya Sabha Secretariat to decide what qualifications they expected in the Security Assistants. They did want persons with Sports/NCC and Computer course certificates. Therefore, they specifically mentioned those certificates as desirable. Specifying 5+2 marks for these certificates was in consonance with the objective to be achieved. The method followed by the interview board in giving these certificates 7 out of 25 marks cannot, therefore, be faulted as denying equal opportunity in the matter of public employment. Dissimilar candidates could not be expected to receive similar treatment. Thus, in the present process of selection, there is no breach either of Article 14 or 16 of the Constitution of India.

26. What the High Court has done is to impose its own reading of the requirements of the selection process on to the



interview board. It was for the interview board to decide which method to follow. The interview board had followed a particular pattern earlier in the year 2006, which was upheld by a Single Judge and the Division Bench of Delhi High Court. The interview board was following the same pattern. We may at this stage refer to an order passed by this Court in *Haryana Public Service Commission Vs. Amarjeet Singh* reported in 1999 SCC (L&S) 1451. In that matter the issue was with respect to the selection for the post of Agricultural Engineers and Subject Matter Specialists in the Department of Agriculture. The Haryana Public Service Commission had allocated marks for higher qualification and specialized training to the extent of 40% of the marks. The High Court had interfered therewith as being arbitrary and directed the Commission to send the names of Respondent Nos. 1 and 2 for appointment after stating as to what marks should have been allotted to them in the interview. This Court held that though the standard adopted by the Public Commission may be defective, the same standard was applied to all, and did not prejudice Respondents Nos. 1 and 2 or any of the candidates. The Court observed that:-

> *"3…….When uniform process had been adopted in respect of all and selections had been made, it was highly inappropriate for the High Court to have examined the matter in further detail and to have allocated marks to the two candidates and thereafter directed the appellant Commission to select them."*

27. In *Barot VijayKumar Balakrishna and Ors. Vs. Modh VinayKumar Dasrathlal and Ors.* reported in 2011 (7) SCC 308 the Rules framed under Article 309 of the Constitution governing the selection process for the posts of Assistant Public Prosecutor in the State of Gujarat mandated that there would be minimum qualifying marks each for the written test and the oral interview. In that case cut-off marks for viva-voce were not specified in the advertisement. As observed by this Court, in view of that omission, there were only two courses open. One, to carry on with the selection process, and to complete it without

fixing any cut-off marks for the viva-voce, and to prepare the select list on the basis of the aggregate of marks obtained by the candidates in the written test and the viva voce. That would have been clearly wrong, and in violation of the statutory rules governing the selection. The other course was to fix the cut-off marks for the viva voce, and to notify the candidates called for interview. This course was adopted by the commission just two or three days before the interview. Yet, it did not cause any prejudice to the candidates, and hence the Court did not interfere in the selection process. In the present matter it was made clear in the call letters that the relevant certificates will be given credit at the time of interview, since they were 'desirable', and therefore there was no question of any prejudice or lack of fairness on the part of the interview board in giving the specified marks for the certificates.

28. Having noted this factual and legal scenario, in our view there was nothing wrong in the method applied by the appellants in the Selection of the Security Assistants Grade-II. There was no discrimination whatsoever among the candidates called for the interview, nor any departure from the advertised requirements. One can always say that some other method would have been a better method, but it is not the job of the Court to substitute what it thinks to be appropriate for that which the selecting authority has decided as desirable. While taking care of the rights of the candidates, the Court cannot lose sight of the requirements specified by the selecting authority. What the High Court has proposed in the impugned orders amounts to re-writing the rules for selection, which was clearly impermissible while exercising the power of judicial review.

29. For the reasons stated above we allow this appeal and set-aside the impugned judgments of the Single Judge as well as that of the Division Bench. Writ Petition bearing No. 4835 of 2011 filed by the respondents will stand dismissed. In the facts of the case however, there will be no order as to costs.

K.K.T. Appeal allowed.



THE RAJASTHAN STATE INDUSTRIAL DEVELOPMENT AND INVESTMENT CORPORATION

*v.*

SUBHASH SINDHI COOPERATIVE HOUSING SOCIETY JAIPUR & ORS.

(Civil Appeal No. 7254 of 2003 etc.)

FEBRUARY 12, 2013

**[DR. B.S. CHAUHAN AND V. GOPALA GOWDA, JJ.]**

*Land Acquisition - Release of Land from acquisition - Agreement for sale of land, after it was notified u/s.4 of Land Acquisition Act - Challenge to the acquisition proceedings by the vendor and vendee dismissed with liberty to ask for release of the land on the ground of parity - Writ petition by vendee for release of the land allowed - Held: High Court wrongly directed release of the land - The agreement to sell, entered into subsequent to the Notification under Land Acquisition Act, did not create any title in favour of the vendee - Rajasthan Land Acquisition Act, 1953 - s.4.*

*Estoppel - There can be no estoppel against the law or public policy - A statutory body cannot be estopped from denying that it had entered into a contract which was ultra vires.*

*Circulars/Notice/Guidelines - Executive instructions which have no statutory force, cannot override law - Therefore, any notice, circular, guidelines, etc. which run contrary to statutory laws, cannot be enforced - In the instant case, circulars issued be State Government, being inconsistent with the policy and law regarding acquisition, cannot be taken note of - Issuance of such circulars amounts to committing fraud upon statutes and also tantamounts to colourable exercise of power.*

*Constitution of India, 1950 - Article 14 - Doctrine of discrimination - Held: Article 14 does not envisage negative equality - Doctrine of discrimination is applicable only when invidious discrimination is meted out to equals, similarly circumstanced without any rational basis or to relationship that would warrant such discrimination.*

*Writs: Purpose, nature and grant of - Held: Primary purpose of writ is to protect and establish rights and to impose corresponding imperative duty existing in law - It cannot be granted unless an existing legal right of the applicant and existent duty of the respondent is established - Writ does not create or establish a legal right, but enforces one which stood already established - The writ is equitable in nature and thus its issuance is governed by equitable principles - Grant of writ is at the discretion of the Court - The Courts to exercise such discretion on the ground of public policy, public interest and public good.*

*Writ of Mandamus - Grant of - Criteria discussed.*

*Words and Phrases:*

*'Void' - Meaning of.*

*'Discrimination' - Meaning of.*

**A large area of land, including the land in question, was notified u/s. 4(1) of Rajasthan Land Acquisition Act, 1953 for the purpose of industrial development, to be executed by the appellant-Corporation. Immediately thereafter, the respondent-Society entered into an agreement to sell, with the khatedars of the land in question. Subsequently, on declaration u/s. 6 of the Act, possession of the notified land, including the land in question, was taken by the Government, which was handed-over to the appellant-Corporation. The land in question, alongwith other piece of land was further allotted by the appellant-Corporation to respondent No.37**



**(a Company).**

**The acquisition proceedings were challenged by the khatedars of the land in question and the respondent-Society jointly in writ petition before High Court of Rajasthan at Jodhpur which was dismissed on the ground of delay and laches. SLP against the same was also dismissed, but with the observation that the dismissal would not operate as res-judicata if the society approached the Court for release of the land on the ground that land of similarly situated persons were released from acquisition.**

**The respondent-Society filed writ petition, praying for release of the land in question. The petition was allowed with direction to release the land in question in favour of the respondent-Society. Hence the present appeals.**

**Allowing the appeals, the Court**

**HELD: 1. Acquisition proceedings cannot be challenged at a belated stage. In the instant case, the earlier writ petition filed by the society and the khatedars jointly, was dismissed by the High Court only on the ground of delay. This Court upheld the said judgment and order, while granting the said parties liberty to challenge the acquisition afresh, on the ground of discrimination alone. [Para 6] [998-C-D]**

**2.1. A purchaser, subsequent to the issuance of a Section 4 Notification under Land Acquisition Act, in respect of the land, cannot challenge the acquisition proceedings, and can only claim compensation as the sale transaction in such a situation is Void qua the Government. Any such encumbrance created by the owner, or any transfer of the land in question, that is made after the issuance of such a notification, would be deemed to be void and would not be binding on the**

**Government. In the instant case, the society members had entered into an agreement to sell, even though a Notification under Section 4 to carry out acquisition had been issued by the Government fully knowing the legal consequences that may arise. The agreement to sell did not create any title in favour of the society. (Paras 7 and 33) [998-D-F; 1015-D-E]**

*Gian Chand v. Gopala and Ors.* **(1995) 2 SCC 528: 1995 (1) SCR 412;** *Yadu Nandan Garg v. State of Rajasthan and Ors.* **AIR 1996 SC 520: 1995 (4) Suppl. SCR 710;** *Jaipur Development Authority v. Mahavir Housing Coop. Society, Jaipur and Ors.* **(1996) 11 SCC 229: 1996 (6) Suppl. SCR 491;** *Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain and Ors.* **(1997) 1 SCC 35: 1996 (6) Suppl. SCR 584;** *Meera Sahni v. Lieutenant Governor of Delhi and Ors.* **(2008) 9 SCC 177: 2008 (10) SCR 1012;** *Har Narain (Dead) by Lrs. v. Mam Chand (Dead) by LRs. and Ors.* **(2010) 13 SCC 128: 2010 (12) SCR 974;** *V. Chandrasekaran and Anr. v. The Administrative Officer and Ors.* **JT 2012 (9) SC 260: 2012 (12) SCC 133 - relied on.**

**2.2. The word, "void" has been defined as: ineffectual; nugatory; having no legal force or legal effect; unable in law to support the purpose for which it was intended. It also means merely a nullity, invalid; null; worthless; sipher; useless and ineffectual and may be ignored even in collateral proceeding as if it never were. The word "void" is used in the sense of incapable of ratification. A thing which is found non-est and not required to be set aside though, it is sometimes convenient to do so. There would be no need for an order to quash it. It would be automatically null and void without more ado. The continuation orders would be nullities too, because no one can continue a nullity. [Para 11] [999-E-G]**

*Smt. Kalawati v. Bisheshwar* **AIR 1968 SC 261: 1968**



**SCR 223;** State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) and Ors. **AIR 1996 SC 906: 1995 (6) Suppl. SCR 139;** *Behram Khurshid Pesikaka v. State of Bombay* **AIR 1955 SC 123: 1955 SCR 613;** *Pankaj Mehra and Anr. v. State of Maharashtra and Ors.* **AIR 2000 SC 1953: 2000 (1) SCR 825;** *Dhurandhar Prasad Singh v. Jai Prakash University and Ors.* **AIR 2001 SC 2552: 2001 (3) SCR 1129;** *Government of Orissa v. Ashok Transport Agency and Ors.* **(2002) 9 SCC 28: 2002 (3) SCR 632 - relied on.**

*Black's Law Dictionary* **- referred to.**

**2.3. The policies of the Government, which allowed the exemption of land upon which construction existed on the date of issuance of Section 4 Notification, is not applicable in the instant case. In the instant case, the respondent society entered into an agreement to sell, subsequent to the issuance of the Section 4 Notification, and therefore, the question of the existence of any construction on the said land by any of its members on the date of Section 4 Notification does not arise. The aforesaid policy decision therefore, must be implemented, while strictly adhering to the terms incorporated therein. [Para 13] [1000-D-F]**

*Bondu Ramaswamy and Ors. v. Bangalore Development Authority and Ors.* **(2010) 7 SCC 129: 2010 (6) SCR 29 - relied on.**

**3.1. Even if the lands of other similarly situated persons has been released, the society must satisfy the court that it is similarly situated in all respects, and has an independent right to get the land released. Article 14 of the Constitution does not envisage negative equality, and it cannot be used to perpetuate any illegality. The doctrine of discrimination based upon the existence of an enforceable right, and Article 14 would hence apply, only when invidious discrimination is meted out to**

**equals, similarly circumstanced without any rational basis, or to relationship that would warrant such discrimination. [Para 12] [1000-A-C]**

*Smt. Sneh Prabha and Ors. v. State of U.P. and Anr.* **AIR 1996 SC 540: 1995 (5) Suppl. SCR 264;** *Yogesh Kumar and Ors. v.Government of NCT Delhi and Ors.* **AIR 2003 SC 1241: 2003 (2) SCR 662;** *State of West Bengal and Ors. v. Debasish Mukherjee and Ors.* **AIR 2011 SC 3667: 2011 (13) SCR 1077;** *Priya Gupta v. State of Chhattisgarh and Ors.* **(2012) 7 SCC 433: 2012 (5) SCR 768 - relied on.**

**3.2. A party seeking relief on the ground of discrimination must take appropriate pleadings, lay down the factual foundation and must provide details of the comparable cases, so that the court may reach a conclusion, whether the authorities have actually discriminated against that party; and whether there is in fact any justification for discrimination, assessing the facts of both sets of cases together. [Para 16] [1002-G-H; 1003-A]**

**3.3. There is nothing on record to show that the society had ever applied for release of the said land before the Competent Authority who had initiated the acquisition proceedings under the Act. Furthermore, the society is not in a position to show that the societies whose lands stood released, were similarly situated to itself in all respects, i.e., such Societies had no title over the land, and had in fact, entered into an agreement to sell subsequent to the issuance of the Notification under Section 4 of the Act. [Para 14] [1001-F-G]**

*Narmada Bachao Andolan v. State of Madhya Pradesh and Anr.* **AIR 2011 SC 1989: 2011 (6) SCR 443 - relied on.**

**3.4. The primary purpose of the writ is to protect and establish rights, and to impose a corresponding**



**imperative duty existing in law. It is designed to promote justice, (ex debito justiceiae) and its grant or refusal is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or establish a legal right but, to enforce one that stood already established. [Para 17] [1003-B-C]**

**3.5. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, inter-alia, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal. Hence, discretion must be exercised by the court on grounds of public policy, public interest and public good. The writ is equitable in nature and thus, its issuance is governed by equitable principles. Refusal of relief must be for reasons which would lead to injustice. The prime consideration for issuance of the writ is, whether or not substantial justice will be promoted. Furthermore, while granting such a writ, the court must make every effort to ensure from the averments of the writ petition, whether proper pleadings are being made. Further in order to maintain the writ of mandamus, the first and foremost requirement is that, the petition must not be frivolous and it is filed in good faith. Additionally, the applicant must make a demand which is clear, plain and unambiguous. It must be made to an officer having the requisite authority to perform the act demanded. Furthermore, the authority against whom mandamus is issued, should have rejected the demand earlier. Therefore, a demand and its subsequent refusal, either by words, or by conduct are necessary to satisfy the court that the opposite party is determined to ignore the demand of the applicant with respect to the enforcement**

**of his legal right. However, a demand may not be necessary when the same is manifest from the facts of the case, that is, when it is an empty formality, or when it is obvious that the opposite party would not consider the demand. Thus, it is evident that a writ is not issued merely as is legal to do so. The court must exercise its discretion after examining pros and cons of the case. [Paras 17 and 18] [1003-C-H; 1004-A-B, H; 1005-A]**

*Commissioner of Police, Bombay v. Govardhandas Bhanji* **AIR 1952 SC 16: 1952 SCR 135;** *Praga Tools Corporation v. Shri C.V Imanual and Ors.* **AIR 1969 SC 1306: 1969 (3) SCR 773;** *Punjab Financial Corporation v. Garg Steel* **(2010) 15 SCC 546:** *Union of India and Ors. v. Arulmozhi Iniarasu and Ors.* **AIR 2011 SC 2731: 2011 (9) SCR 1;** *Khela Banerjee and Anr. v. City Montessori School and Ors.* **(2012) 7 SCC 261 - relied on.**

*General Officer Commanding v. CBI and Anr.* **AIR 2012 SC 1890: 2012 (2) SCR 640 - referred to.**

**3.6. During the hearing of the case, if it is pointed out to the court that the party has raised the grievance before the statutory/appropriate authority and the authority has not decided the same, it is always warranted that the court may direct the said authority to decide the representation within a stipulated time by a reasoned order. However, it is not desirable that the court take upon itself the task of the statutory authority and pass an order. [Para 20] [1005-D-E]**

*G. Veerappa Pillai v. Raman and Raman Ltd. and Ors.* **AIR 1952 SC 192: 1952 SCR 583;** *Life Insurance Corporation of India v. Mrs. Asha Ramchandra Ambedkar and Anr.* **AIR 1994 SC 2148: 1994 (2) SCR 163;** *H.P. Public Service Commission v. Mukesh Thakur and Anr.* **AIR 2010 SC 2620: 2010 (7) SCR 189;** *Manohar Lal (D) by Lrs. v. Ugrasen (D) by Lrs. and Ors.* **JT 2011 (12) SC 41: 2011 SCR 634 - relied on.**



**3.7. There was correspondence between the JDA and the appellant RIICO, and also other departments. There were also meetings held with higher officials of the State Government, including the Chief Minister but despite this, the land of the appellant was not released. It was in fact, after the order of this Court dated 9.9.1992, that the respondent society sent a telegram dated 17.10.1992, to the Chief Secretary demanding justice, and there was no request made to the Competent Authority to release the said land in its favour. Immediately thereafter, the second writ petition was filed. The said telegram cannot be termed a comprehensive representation. It does not furnish any detail, or give any reason, with respect to how not releasing the land of the society could amount to violative of any provision of the Constitution of India including Article 14. It also did not disclose any comparable cases, where land belonging to persons/institutions who were similarly situated to itself, stood released. [Para 24] [1008-E-H; 1009-A]**

**3.8. The High Court entertained the writ petition, without comparing the actual facts of the respondent society qua other societies. The High Court has not recorded any finding to the effect that the land which stood released from acquisition proceedings, was also acquired by group housing societies subsequent to the issuance of the Section 4 Notification, or the society had acquired interest in the same on the basis of an agreement to sell, or on any other ground similar to those raised by the respondent society. The situation of societies whose land stood released, was not compared with the case of the respondent society. [Paras 30 and 33] [1013-H; 1014-A-C; 1016-F-G]**

**4.1. Executive instructions which have no statutory force, cannot override the law. Therefore, any notice, circular, guidelines etc. which run contrary to statutory laws cannot be enforced. [Para 19] [1005-B]**

*B.N. Nagarajan and Ors. etc. v. State of Mysore and Ors. etc.* **AIR 1966 SC 1942;** *Sant Ram Sharma v. State of Rajasthan and Ors.* **AIR 1967 SC 1910: 1968 SCR 111;** *Secretary, State of Karnataka and Ors. v. Umadevi and Ors.* **AIR 2006 SC 1806: 2006 (3) SCR 953;** *Mahadeo Bhau Khilare (Mane) and Ors. v. State of Maharashtra and Ors.* **(2007) 5 SCC 524: 2007 (6) SCR 244 - relied on.**

**4.2. The material on record revealed, that after entering into an agreement to sell just after the Section 4 Notification in respect of the suit land was issued, the respondent society submitted a plan for approval before the JDA, and also applied for conversion of the user of the land before the Revenue Authority. In relation to this, it also deposited requisite conversion charges on 13.8.1986. However, as certain developments took place in the interim period, and the State Government made a public advertisement dated 27.2.1982, asking people to get their agricultural land converted to land to be used for non-agricultural purposes. Circular dated 1.3.1982 issued by the State Government enabled the persons/ tenure holders seeking conversion and regularization. The Circular also provided that land covered by buildings or by any constructed area as on the cut-off date, i.e. 20.8.1981 would also be exempted from acquisition proceedings, if any. Similar benefits were conferred upon those who were purchasers of land subsequent to the issuance of a Section 4 Notification, though such transfer was void. The benefit was also extended to cooperative housing societies, which had made certain developments and constructions prior to the said cut-off date i.e. 20.8.1981, and even to those areas where no construction was made or even where no sale deed had been executed, but there existed an agreement to sell prior to 20.8.1981. It is also evident from the Circular that even if the Government wanted to exempt the land, it would require a notification by the Government. Law provides**



**a notification under Section 48 of the Land Acquisition Act, 1894, or abandonment of the land acquisition proceedings by the State but it is permissible only prior to taking possession of the land. Once the land is vested in the State free from all encumbrances, it cannot be divested. Therefore, it cannot be said that the respondent-society was entitled for release of the land. [Paras 21, 22] [1005-G-H; 1006-A-D, F-H; 1007-A]**

**4.3. The object and purpose of issuing such circulars could be to regularise the construction of residential houses where the land was sought to be acquired for residential purposes. Various states have issued circulars to meet such a situation. However, such a construction should be in consonance with the development scheme, or may be compatible with certain modification. Even in absence of such schemes, this Court has dealt with the issue and held that where the land is acquired for establishing residential, commercial, or industrial area and the application for release of the land reveal that the land has been used for the same purpose, the Government may release the land, if its existence does not by any means hinder development as per the notification for acquisition. In the instant case land has been acquired for industrial development. The respondent-society wants the said land for developing the residential houses. The land cannot be permitted to be used for residential purposes. Therefore, demand of respondent-society cannot be accepted. [Paras 22 and 33] [1007-B-D; 1017-F]**

**4.4. The circulars issued by the State Government, being inconsistent with the policy and the law regarding acquisition, cannot be taken note of. Issuance of such circulars amounts to committing fraud upon statutes, and further, tantamounts to colourable exercise of power. The State in exercise of eminent domain acquires the land. Thus, before completing the acquisition**

**proceedings, it should not release the land in favour of some other person who could not have acquired title over it at any point of time. [Para 33] [1017-D-E]**

*Union of India and Anr. v. Bal Ram Singh and Anr.* **1992 Suppl (2) SCC 136;** *Sube Singh and Ors. v. State of Haryana and Ors.* **(2001) 7 SCC 545;** *Jagdish Chand and Anr. v. State of Haryana and Anr.* **(2005) 10 SCC 162;** *Dharam Pal v. State of Haryana and Ors.* **(2009) 2 SCC 397: 2008 (17) SCR 564 - relied on.**

**4.5. There can be no estoppel against the law or public policy. The State and statutory authorities are not bound by their previous erroneous understanding or interpretation of law. Statutory authorities or legislature cannot be asked to act in contravention of law. "The statutory body cannot be estopped from denying that it has entered into a contract which was ultra vires for it to make. No corporate body can be bound by estoppel to do something beyond its powers, or to refrain from doing what it is its duty to do." Even an offer or concession made by the public authority can always be withdrawn in public interest. Thus, the respondent-society is not entitled to take any advantage of those illegal circulars. [Para 23] [1007-F-H; 1008-A, D-E]**

*State of Madras and Anr. v. K.M. Rajagopalan* **AIR 1955 SC 817: 1955 SCR 541;** *Badri Prasad and Ors. v. Nagarmal and Ors.* **AIR 1959 SC 559: 1959 Suppl. SCR 709;** *Dr. H.S. Rikhy etc. v. The New Delhi Municipal Committee* **AIR 1962 SC 554: 1962 Suppl. SCR 604;** *Surajmull Nagoremull v. Triton Insurance Co. Ltd.* **AIR 1925 PC 83; Shiba Prasad Singh v. Srish Chandra Nandi AIR 1949 PC 297 - relied on.**

**5. In the instant case, the Government itself labeled the sale-deeds, executed after issuance of s.4 Notification as void. Therefore, the State authorities could not have regularised such orders. The schemes floated by the**



**State Government (knowing well that acquiring land after the issuance of Section 4 Notification would be void), indicates a sorry state of affairs. Such orders have been passed without realizing that administration does not include mal-administration. [Paras 32 and 33] [1014-H; 1015-A, 1017-B-C]**

*The Kerala Education Bill* **1957 AIR 1958 SC 956: 1959 SCR 995 - followed.**

*All Bihar Christian Schools Association and Anr. vs. State of Bihar and Ors.* **AIR 1988 SC 305: 1988 (2) SCR 49;** *Sindhi Education Society and Anr. vs. The Chief Secretary, Govt. of NCT of Delhi and Ors.* **(2010) 8 SCC 49: 2010 (8) SCR 81;** *State of Gujarat and Anr. vs. Hon'ble Mr. Justice R.A. Mehra (Retd.) and Ors.* **JT 2013 (1) SC 276: 2013 (3) SCC 1 - relied on.**

**6. In the instant case, at the initial stage, the writ petition was filed before the High Court at Jodhpur, while, the land is situated in the heart of the Jaipur city, and all relevant orders including notifications for acquisition were issued at Jaipur. The writ petition ought to have been filed before the Jaipur Bench as per the statutory requirements therein. No explanation was furnished, as under what circumstances the first writ petition had been filed by the society alongwith tenure-holders at Jodhpur. Therefore, the sanctity of the order passed by the High Court is rather doubtful and it creates doubt about the bonafides of the parties and further, as to whether such a move could have been made in good faith. [Para 31] [1014-D-F]**

*Sri Nasiruddin vs. State Transport Appellate Tribunal* **AIR 1976 SC 331: 1976 (1) SCR 505;** *U.P. Rashtriya Chini Mill Adhikari Parishad, Lucknow vs. State of U.P. and Ors.* **AIR 1995 SC 2148: 1995 (1) Suppl. SCR 733;** *Rajasthan High Court Advocates Association vs. Union of India and Ors.* **AIR 2001 SC 416: 2000 (5) Suppl. SCR 743;** *Dr. Manju Verma*

*vs. State of U.P. and Ors.* **(2005) 1 SCC 73: 2004 (6) Suppl. SCR 22 - relied on.**

**Case Law Reference:**

| | | |
|---|---|---|
| **1995 (1) SCR 412** | **relied on** | **Para 7** |
| **1995 (4) Suppl. SCR 710** | **relied on** | **Para 7** |
| **1996 (6) Suppl. SCR 491** | **relied on** | **Para 7** |
| **1996 (6) Suppl. SCR 584** | **relied on** | **Para 7** |
| **2008 (10) SCR 1012** | **relied on** | **Para 7** |
| **2010 (12) SCR 974** | **relied on** | **Para 7** |
| **2012 (12) SCC 133** | **relied on** | **Para 7** |
| **1968 SCR 223** | **relied on** | **Para 9** |
| **1995 (6) Suppl. SCR 139** | **relied on** | **Para 9** |
| **1955 SCR 613** | **relied on** | **Para 11** |
| **2000 (1) SCR 825** | **relied on** | **Para 11** |
| **2002 (3) SCR 632** | **relied on** | **Para 11** |
| **1995 (5) Suppl. SCR 264** | **relied on** | **Para 12** |
| **2003 (2) SCR 662** | **relied on** | **Para 12** |
| **2011 (13) SCR 1077** | **relied on** | **Para 12** |
| **2012 (5) SCR 768** | **relied on** | **Para 12** |
| **2010 (6) SCR 29** | **relied on** | **Para 13** |
| **2011 (6) SCR 443** | **relied on** | **Para 15** |
| **1952 SCR 135** | **relied on** | **Para 17** |
| **1969 (3) SCR 773** | **relied on** | **Para 17** |
| **(2010) 15 SCC 546** | **relied on** | **Para 17** |



| | | |
|---|---|---|
| **2011 (9) SCR 1** | **relied on** | **Para 17** |
| **(2012) 7 SCC 261** | **relied on** | **Para 17** |
| **2012 (2) SCR 640** | **referred to** | **Para 17** |
| **AIR 1966 SC 1942** | **relied on** | **Para 19** |
| **1968 SCR 111** | **relied on** | **Para 19** |
| **2006 (3) SCR 953** | **relied on** | **Para 19** |
| **2007 (6) SCR 244** | **relied on** | **Para 19** |
| **1952 SCR 583** | **relied on** | **Para 20** |
| **1994 (2) SCR 163** | **relied on** | **Para 20** |
| **2010 (7) SCR 189** | **relied on** | **Para 20** |
| **2011 SCR 634** | **relied on** | **Para 20** |
| **1992 Suppl (2) SCC 136** | **relied on** | **Para 22** |
| **(2001) 7 SCC 545** | **relied on** | **Para 22** |
| **(2005) 10 SCC 162** | **relied on** | **Para 22** |
| **2008 (17) SCR 564** | **relied on** | **Para 22** |
| **1955 SCR 541** | **relied on** | **Para 23** |
| **1959 Suppl. SCR 709** | **relied on** | **Para 23** |
| **1962 Suppl. SCR 604** | **relied on** | **Para 23** |
| **AIR 1925 PC 83** | **relied on** | **Para 23** |
| **AIR 1949 PC 297** | **relied on** | **Para 23** |
| **1976 (1) SCR 505** | **relied on** | **Para 31** |
| **1995 (1) Suppl. SCR 733** | **relied on** | **Para 31** |
| **2000 (5) Suppl. SCR 743** | **relied on** | **Para 31** |

| | | |
|---|---|---|
| **2004 (6) Suppl. SCR 22** | **relied on** | **Para 31** |
| **1959 SCR 995** | **followed** | **Para 32** |
| **1988 (2) SCR 49** | **relied on** | **Para 32** |
| **2010 (8) SCR 81** | **relied on** | **Para 32** |
| **2013 (3) SCC 1** | **relied on** | **Para 32** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7254 of 2003.

From the Judgment & Order dated 30.07.2002 of the High Court of Judicature at Jaipur Bench, Jaipur in D.B. Civil Writ Petition No. No. 454 of 1993.

WITH

C.A. No. 853 of 2013.

Dhruv Mehta, Dr,. Manish Singhvi, AAG, Milind Kumar, Amit Lubhaya, Pragati Neekhra for the Appellant.

P.S. Patwalia, Rakesh Dwivedi, M.N. Krishnamani, Ajay Singh, Ashok K. Mahajan, Shibashish Misra, Sanskriti Pathak, P.V. Yogeswaran, R. Gopalankrishnan, Sanjay Parikh, Mamta Saxena, Bushra Parveen, A.N. Singh, Aruneshwar Gupta for the Respondents.

The Judgment of the Court was delivered by

**DR. B. S. CHAUHAN, J.** 1. These appeals have been preferred against the impugned judgment and order dated 30.7.2002 passed by the High Court of Rajasthan (Jaipur Bench) in Civil Writ Petition No. 454 of 1993, by which the High Court has issued directions to the Rajasthan State Industrial Development and Investment Corporation (in short `RIICO'), the appellant herein, to release the land in dispute from land acquisition in favour of respondent No.1 - housing society (hereinafter referred to as 'the society').



2. As both the appeals have been preferred against the common impugned judgment, for convenience, Civil Appeal No. 7254 of 2003 is taken to be the leading case. The facts and circumstances giving rise to this appeal are:

A. That, a huge area of land admeasuring 607 Bighas and 5 Biswas situate in the revenue estate of villages Durgapura, Jhalan Chod, Sanganer and Dhol-ka-Bad in District Jaipur, including the suit land measuring about 17 Bighas and 9 Biswas in village Durgapura stood notified under Section 4(1) of the Rajasthan Land Acquisition Act, 1953 (hereinafter referred to as the `Act') on 18.7.1979, for a public purpose i.e. industrial development, to be executed by the RIICO.

B. The respondent society claims to have entered into an agreement to sell with the Khatedars of the suit land on 21.7.1981.

C. Declaration under Section 6 of the Act was made on 22.6.1982 for the land admeasuring 591 Bighas and 17 Biswas. After meeting all requisite statutory requirements contained in the Act, possession of the land, including the land in dispute was taken by the Government and was subsequently handed over to RIICO, on 18.10.1982 and 17.11.1983. The Land Acquisition Collector assessed the market value of the land of the Khatedars, and made an award on 14.5.1984. Vide allotment letter dated 10.3.1988, RIICO, made allotment of land admeasuring 105 acres of the land, out of the total acquired land measuring 591 Bighas, to Diamond & Gem Development Corporation Ltd., a Private Ltd. Company (hereinafter referred to as the 'Company'), respondent no. 37, to facilitate the establishment of a Gem Industrial Estate for the manufacturing of Gem stones. This piece of land included within it, the land which was subject matter of an agreement to sell between the respondent society and the original khatedars.

D. Acquisition proceedings emanating from the Section 4 Notification dated 18.7.1979, were challenged by the

respondent society, as well as by the khatedars jointly in 1989, by filing of Writ Petitions before the High Court of Rajasthan at Jodhpur. A lease deed was executed by appellant-RIICO in favour of the company-respondent No.37 in relation to 105 acres of land on 22.5.1989, including the land in question, which is comprised of Khasra Nos. 226 to 230 is village Durgapura. The aforementioned writ petitions filed by the respondent society and the original khatedars, challenging the land acquisition proceedings stood dismissed on the ground of delay and latches, vide judgment and order dated 21.8.1990 passed by the High Court.

E. Aggrieved, the respondent society and one khatedar filed SLPs before this Court challenging the judgment and order dated 21.8.1990. This Court vide order dated 9.9.1992 dismissed the said SLPs, however, while doing so, the Court made an observation that the dismissal of the said SLPs, would not operate as res-judicata if the society approaches the court for release of their land on the ground that lands owned by similar set of individuals or institutions, if any, has been released from acquisition. Such a direction was issued in view of the submissions made by the respondent society, stating that allotment of the said land in favour of the Company had been made fraudulently.

F. In view thereof, the society filed a Writ Petition No. 454 of 1993 praying for release of the land admeasuring 17 Bighas and 9 Biswas in Khasra Nos. 226 to 230, in revenue estate of village Durgapura or in the alternative, for the allotment of equivalent suitable land, and also for the cancellation of the allotment of 105 acres of land in favour of the Company. The writ petition was contested by the appellants on the grounds that the respondent society had no locus standi to challenge the acquisition proceedings which had attained finality upto this Court; the transfer of land by the khatedars to the respondent society was void; the respondent society could not claim parity with other persons/societies, whose land stood released for



bonafide reasons on good grounds. The High Court heard the said writ petition alongwith another writ petition that had been filed by the Company, which will be dealt with separately. During the pendency of the writ petition, certain other developments took place, that is, the allotment of land made in favour of the Company, was cancelled by the appellant vide order dated 1.10.1996, and possession of the same was taken over from it on 3.10.1996.

G. The Division Bench of the High Court allowed the said writ petition vide judgment and order dated 30.7.2002, thereby releasing land admeasuring 17 Bighas and 9 Biswas in favour of the respondent society.

Hence, this appeal.

3. Shri Dhruv Mehta, learned senior counsel appearing on behalf of the appellant-RIICO, and Shri Manish Singhvi, learned Additional Advocate General for the State of Rajasthan, have submitted that challenge to the acquisition proceedings emanating from the Section 4 Notification dated 18.7.1979 had attained finality upto this Court. However, this Court vide order dated 9.9.1999 had granted very limited relief to the respondent-society, to the extent that it could approach the court for release of its land only on the ground of discrimination qua other tenure holders, whose land stood released and that the dismissal of the SLP would not operate as res-judicata. The society had not made any representation before the filing of the first or the second writ petition, before any appropriate authority for release of the said land, nor had it raised issue with respect to any form of discrimination suffered by it. The High Court also did not consider the case on the basis of any ground of discrimination whatsoever, rather made a bald observation, stating that as the land of the other tenure holders had been released, the society too, was entitled for similar relief. Such an order is not justified for the reason that court did not compare the facts of two sets of the parties.

Article 14 is not meant to perpetuate an illegality or fraud. Moreover, it is to be established that discrimination was made cautiously. The agreement to sell dated 21.7.1981 in favour of the respondent-society did not create any title in favour of the society. Furthermore, any sale subsequent to a Section 4 Notification with respect to the said land, is void. An agreement to sell, or to execute any transfer of such land is barred by the Rajasthan Lands (Restrictions on Transfer) Act, 1976 (hereinafter referred to as, the `Act 1976'). At the most, the High Court could have directed consideration of the representation of the society, if there was any, but it most certainly could not have issued direction to release the said land itself. The Society had approached the High Court, Jodhpur (main seat) though, petition could be filed only before the Jaipur Bench as the suit land situate at Jaipur and all relevant orders/notifications were issued at Jaipur. Thus, the present appeals deserve to be allowed.

4. Per contra, Shri Rakesh Dwivedi, learned senior counsel appearing on behalf of the respondent - society and its members, has submitted that a representation was in fact made by the society, but the same was not considered by the State Government, and that the award made in respect of the land itself, clearly revealed that some land was released by the government, in favour of various persons and institutions. The respondent society had therefore, been discriminated against, by the State authorities. The respondent-society is entitled for the relief on the basis of the Government Orders, (hereinafter referred to as G.Os.) provided for release of the land of Group Housing Societies, if under acquisition. Technical issue must not be entertained by this Court, as the second writ petition has been filed under the liberty granted by this Court. Thus, the present appeals lack merit and are liable to be dismissed.

5. Mr. P.S. Patwalia, learned senior counsel appearing on behalf of the Company, respondent no. 37, has submitted that the High Court has directed to release the land in favour of the respondent - society, from the land which was allotted to the



Company, and that Company has no objection to the order passed by the High Court, releasing a particular piece of land in favour of the society. Thus, the appeals are liable to be dismissed.

6. We have considered the rival submissions made by the learned counsel for the parties and perused the records.

It is a settled legal proposition that acquisition proceedings cannot be challenged at a belated stage. In the instant case, the earlier writ petition filed by the society and the khatedars jointly, was dismissed by the High Court only on the ground of delay. This Court upheld the said judgment and order, while granting the said parties liberty to challenge the acquisition afresh, on the ground of discrimination alone.

7. There can be no quarrel with respect to the settled legal proposition that a purchaser, subsequent to the issuance of a Section 4 Notification in respect of the land, cannot challenge the acquisition proceedings, and can only claim compensation as the sale transaction in such a situation is **Void** qua the Government. Any such encumbrance created by the owner, or any transfer of the land in question, that is made after the issuance of such a notification, would be deemed to be void and would not be binding on the Government. (Vide: *Gian Chand v. Gopala & Ors.,* (1995) 2 SCC 528; *Yadu Nandan Garg v. State of Rajasthan & Ors.,* AIR 1996 SC 520; *Jaipur Development Authority v. Mahavir Housing Coop. Society, Jaipur & Ors.* (1996) 11 SCC 229; *Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain & Ors.,* (1997) 1 SCC 35; *Meera Sahni v. Lieutenant Governor of Delhi & Ors.,* (2008) 9 SCC 177; *Har Narain (Dead) by Lrs. v. Mam Chand (Dead) by LRs. & Ors.,* (2010) 13 SCC 128; and *V. Chandrasekaran & Anr. v. The Administrative Officer & Ors.,* JT 2012 (9) SC 260).

8. Thus, in the instant case, the respondent-society, and its members, have to satisfy the court as regards their locus

standi with respect to maintenance of the writ petition on any ground whatsoever, as none of the original khatedars has joined the society in subsequent petition.

9. In *Smt. Kalawati v. Bisheshwar,* AIR 1968 SC 261, this Court held:

*"Void means non-existent from its very inception."*

10. In *State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) & Ors.,* AIR 1996 SC 906, this Court held:

*"The word "void" has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity, depending upon the gravity or the infirmity, as to whether it is, fundamental or otherwise."*

11. The word, "void" has been defined as: ineffectual; nugatory; having no legal force or legal effect; unable in law to support the purpose for which it was intended. (Vide: Black's Law Dictionary). It also means merely a nullity, invalid; null; worthless; sipher; useless and ineffectual and may be ignored even in collateral proceeding as if it never were.

The word "void" is used in the sense of incapable of ratification. A thing which is found non-est and not required to be set aside though, it is sometimes convenient to do so. There would be no need for an order to quash it. It would be automatically null and void without more ado. The continuation orders would be nullities too, because no one can continue a nullity. (Vide: *Behram Khurshid Pesikaka v. State of Bombay,* AIR 1955 SC 123; *Pankaj Mehra & Anr. v. State of Maharashtra & Ors.,* AIR 2000 SC 1953; *Dhurandhar Prasad Singh v. Jai Prakash University & Ors.,* AIR 2001 SC 2552; and *Government of Orissa v. Ashok Transport Agency & Ors.,* (2002) 9 SCC 28).



12. Even if the lands of other similarly situated persons has been released, the society must satisfy the court that it is similarly situated in all respects, and has an independent right to get the land released. Article 14 of the Constitution does not envisage negative equality, and it cannot be used to perpetuate any illegality. The doctrine of discrimination based upon the existence of an enforceable right, and Article 14 would hence apply, only when invidious discrimination is meted out to equals, similarly circumstanced without any rational basis, or to relationship that would warrant such discrimination. (Vide: *Smt. Sneh Prabha & Ors. v. State of U.P. & Anr.,* AIR 1996 SC 540; *Yogesh Kumar & Ors. v. Government of NCT Delhi & Ors.,* AIR 2003 SC 1241; State of West Bengal & Ors. v. Debasish Mukherjee & Ors., AIR 2011 SC 3667; and *Priya Gupta v. State of Chhattisgarh & Ors.,* (2012) 7 SCC 433).

13. The respondent society has placed reliance upon various policies of the Government, which allowed the exemption of land upon which construction existed on the date of issuance of Section 4 Notification. In the instant case, the respondent society entered into an agreement to sell, subsequent to the issuance of the Section 4 Notification, and therefore, the question of the existence of any construction on the said land by any of its members on the date of Section 4 Notification does not arise. The aforesaid policy decision therefore, must be implemented, while strictly adhering to the terms incorporated therein, as has been held by this Court in *Bondu Ramaswamy & Ors. v. Bangalore Development Authority & Ors.,* (2010) 7 SCC 129. In the said case, this Court examined the issue of discrimination with respect to releasing land belonging to one set of interested persons, while rejecting the release of land belonging to other similarly situated persons, whose land was situated in close vicinity to the land released. The Court held:

*"We are conscious of the fact that when a person subjected to blatant discrimination, approaches a court*

*seeking equal treatment, he expects relief similar to what others have been granted. All that he is interested is getting relief for himself, as others.* ***He is not interested in getting the relief illegally granted to others, quashed.*** *Nor is he interested in knowing whether others were granted relief legally or about the distinction between positive equality and negative equality. In fact* ***he will be reluctant to approach courts for quashing the relief granted to others on the ground that it is illegal,*** *as he does not want to incur the wrath of those who have benefited from the wrong action. As a result, in most cases those who benefit by the illegal grants/actions by authorities, get away with the benefit, while others who are not fortunate to have "connections" or "money power" suffer. But these are not the grounds for courts to enforce negative equality and perpetuate the illegality"*

(Emphasis added)

14. The Respondent society claims to have applied before the Jaipur Development Authority (hereinafter referred to as the 'JDA') and deposited requisite charges etc. for regularisation of their proposed scheme as per G.Os. issued by the State Government, also for providing relief to the societies that had no construction on the land which belonged to them, on the date of initiation of acquisition proceedings. However, there is nothing on record to show that the society had ever applied for release of the said land before the Competent Authority i.e. Secretary to the Department of Industries, Rajasthan, who had initiated the acquisition proceedings under the Act. Furthermore, the society is not in a position to show that the societies whose lands stood released, were similarly situated to itself in all respects, i.e., such Societies had no title over the land, and had in fact, entered into an agreement to sell subsequent to the issuance of the Notification under Section 4 of the Act.

15. This Court explained the phrase "discrimination" in



*Narmada Bachao Andolan v. State of Madhya Pradesh & Anr.,* AIR 2011 SC 1989 observing :

*"66. Unequals cannot claim equality. In Madhu Kishwar and Ors. v. State of Bihar and Ors., AIR 1996 SC 1864, it has been held by this Court that every instance of discrimination does not necessarily fall within the ambit of Article 14 of the Constitution.*

*67. Discrimination means an unjust, an unfair action in favour of one and against another. It involves an element of intentional and purposeful differentiation and further an element of unfavourable bias; an unfair classification. Discrimination under Article 14 of the Constitution must be conscious and not accidental discrimination that arises from oversight which the State is ready to rectify. (Vide: Kathi Raning Rawat v. State of Saurashtra, AIR 1952 SC 123; and M/s Video Electronics Pvt. Ltd. and Anr. v. State of Punjab and Anr., AIR 1990 SC 820).*

*68. However, in Vishundas Hundumal and Ors. v. State of Madhya Pradesh and Ors., AIR 1981 SC 1636; and Eskayef Ltd. v. Collector of Central Excise, (1990) 4 SCC 680, this Court held that when discrimination is glaring, the State cannot take recourse to inadvertence in its action resulting in discrimination. In a case where denial of equal protection is complained of and the denial flows from such action and has a direct impact on the fundamental rights of the complainant, a constructive approach to remove the discrimination by putting the complainant in the same position as others enjoying favourable treatment by inadvertence of the State authorities, is required."* (Emphasis added)

16. Thus, a party seeking relief on the ground of discrimination must take appropriate pleadings, lay down the factual foundation and must provide details of the comparable cases, so that the court may reach a conclusion, whether the

authorities have actually discriminated against that party; and whether there is in fact any justification for discrimination, assessing the facts of both sets of cases together.

17. The primary purpose of the writ is to protect and establish rights, and to impose a corresponding imperative duty existing in law. It is designed to promote justice, (ex debito justiceiae) and its grant or refusal is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or establish a legal right but, to enforce one that stood already established. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, *inter-alia,* the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal.

Hence, discretion must be exercised by the court on grounds of public policy, public interest and public good. The writ is equitable in nature and thus, its issuance is governed by equitable principles. Refusal of relief must be for reasons which would lead to injustice. The prime consideration for issuance of the writ is, whether or not substantial justice will be promoted. Furthermore, while granting such a writ, the court must make every effort to ensure from the averments of the writ petition, whether proper pleadings are being made. Further in order to maintain the writ of mandamus, the first and foremost requirement is that, the petition must not be frivolous and it is filed in good faith. Additionally, the applicant must make a demand which is clear, plain and unambiguous. It must be made to an officer having the requisite authority to perform the act demanded. Furthermore, the authority against whom mandamus is issued, should have rejected the demand earlier. Therefore, a demand and its subsequent refusal, either by words, or by conduct are necessary to satisfy the court that the



opposite party is determined to ignore the demand of the applicant with respect to the enforcement of his legal right. However, a demand may not be necessary when the same is manifest from the facts of the case, that is, when it is an empty formality, or when it is obvious that the opposite party would not consider the demand. (Vide: *Commissioner of Police, Bombay v. Govardhandas Bhanji,* AIR 1952 SC 16; *Praga Tools Corporation v. Shri C.V Imanual & Ors.,* AIR 1969 SC 1306; *Punjab Financial Corporation v. Garg Steel,* (2010) 15 SCC 546; *Union of India & Ors. v. Arulmozhi Iniarasu & Ors.,* AIR 2011 SC 2731; and *Khela Banerjee & Anr. v. City Montessori School & Ors.,* (2012) 7 SCC 261).

18. This Court in *General Officer Commanding v. CBI & Anr.,* AIR 2012 SC 1890, explained the phrase "good faith" :

> *"…Good faith has been defined in Section 3(22) of the General Clauses Act, 1897, to mean a thing which is, in fact, done honestly, whether it is done negligently or not. Anything done with due care and attention, which is not malafide, is presumed to have been done in good faith. There should not be personal ill-will or malice, no intention to malign and scandalize. Good faith and public good are though the question of fact, it required to be…..In Brijendra Singh v. State of U.P. & Ors., AIR 1981 SC 636, this Court while dealing with the issue held:*
>
> > *"In the popular sense, the phrase 'in good faith' simply means ;honestly, without fraud, collusion, or deceit; really, actually, without pretence and without intent to assist or act in furtherance of a fraudulent or otherwise unlawful scheme….. It is a cardinal canon of construction that an expression which has no uniform, precisely fixed meaning, takes its colour, light and content from the context."*

Thus, it is evident that a writ is not issued merely as is legal

to do so. The court must exercise its discretion after examining pros and cons of the case.

19. Executive instructions which have no statutory force, cannot override the law. Therefore, any notice, circular, guidelines etc. which run contrary to statutory laws cannot be enforced. (Vide: *B.N. Nagarajan & Ors., etc. v. State of Mysore and Ors. etc.,* AIR 1966 SC 1942; *Sant Ram Sharma v. State of Rajasthan & Ors.,* AIR 1967 SC 1910; *Secretary, State of Karnataka & Ors. v. Umadevi & Ors.,* AIR 2006 SC 1806; and *Mahadeo Bhau Khilare (Mane) & Ors. v. State of Maharashtra & Ors.,* (2007) 5 SCC 524).

20. During the hearing of the case if it is pointed out to the court that the party has raised the grievance before the statutory/appropriate authority and the authority has not decided the same, it is always warranted that the court may direct the said authority to decide the representation within a stipulated time by a reasoned order. However, it is not desirable that the court take upon itself the task of the statutory authority and pass an order. (Vide: *G. Veerappa Pillai v. Raman and Raman Ltd. & Ors.,* AIR 1952 SC 192; *Life Insurance Corporation of India v. Mrs. Asha Ramchandra Ambedkar & Anr.,* AIR 1994 SC 2148; *H.P. Public Service Commission v. Mukesh Thakur & Anr.,* AIR 2010 SC 2620; and *Manohar Lal (D) by Lrs. v. Ugrasen (D) by Lrs. & Ors.,* JT 2011 (12) SC 41).

21. The instant case, requires to be examined in the light of aforesaid settled legal propositions.

The material on record revealed, that after entering into an agreement to sell just after the Section 4 Notification in respect of the suit land was issued, the respondent society submitted a plan for approval before the JDA, and also applied for conversion of the user of the land before the Revenue Authority. In relation to this, it also deposited requisite conversion charges on 13.8.1986. However, as certain developments took place in the interim period, and the Government of Rajasthan made



a public advertisement dated 27.2.1982, asking people to get their agricultural land converted to land to be used for non-agricultural purposes. Circular dated 1.3.1982 issued by the Government of Rajasthan enabled the persons/tenure holders seeking conversion and regularization. The Circular also provided that land covered by buildings or by any constructed area as on the cut-off date, i.e. 20.8.1981 would also be exempted from acquisition proceedings, if any. Similar benefits were conferred upon those who were purchasers of land subsequent to the issuance of a Section 4 Notification, though such transfer was void. The benefit was also extended to cooperative housing societies, which had made certain developments and constructions prior to the said cut-off date i.e. 20.8.1981, and even to those areas where no construction was made or even where no sale deed had been executed, but there existed an agreement to sell prior to 20.8.1981.

22. More so, the relevant part of the Circular dated 1.3.1982 issued by the Revenue Department, Government of Rajasthan, reads as under:

> "….Land acquisition notifications are statutorily issued by the Administrative Department of the State Government and therefore **the lands which are proposed to be de-acquired will have to be notified by the Government itself."**
>
> (Emphasis added)

Thus, it is evident from the Circular that even if, the Government wanted to exempt the land, it would require a notification by the Government. Law provides a notification under Section 48 of the Land Acquisition Act, 1894, (hereinafter called as `Act 1894') or abandonment of the land acquisition proceedings by the State but it is permissible only prior to taking possession of the land. Once the land is vested in the State free from all encumbrances it cannot be divested.

Therefore, we do not find any force in the submission advanced on behalf of the respondent-society that they were entitled for release of the land.

The object and purpose of issuing such circulars could be to regularise the construction of residential houses where the land was sought to be acquired for residential purposes. Various states have issued circulars to meet such a situation. However, such a construction should be in consonance with the development scheme, or may be compatible with certain modification. Even in absence of such schemes, this Court has dealt with the issue and held that where the land is acquired for establishing residential, commercial, or industrial area and the application for release of the land reveal that the land has been used for the same purpose, the Government may release the land, if its existence does not by any means hinder development as per the notification for acquisition. (Vide : *Union of India & Anr. v. Bal Ram Singh & Anr.,* 1992 Suppl (2) SCC 136; *Sube Singh & Ors. v. State of Haryana & Ors.,* (2001) 7 SCC 545; *Jagdish Chand & Anr. v. State of Haryana & Anr.,* (2005) 10 SCC 162; and *Dharam Pal v. State of Haryana & Ors.,* (2009) 2 SCC 397).

In the instant case land has been acquired for industrial development. The respondent-society wants the said land for developing the residential houses. Therefore, such a demand is not worth acceptance.

23. Be that as it may, there can be no estoppel against the law or public policy. The State and statutory authorities are not bound by their previous erroneous understanding or interpretation of law. Statutory authorities or legislature cannot be asked to act in contravention of law. "The statutory body cannot be estopped from denying that it has entered into a contract which was ultra vires for it to make. No corporate body can be bound by estoppel to do something beyond its powers, or to refrain from doing what it is its duty to do." Even an offer or concession made by the public authority can always be



withdrawn in public interest. (Vide: *State of Madras & Anr. v. K.M. Rajagopalan,* AIR 1955 SC 817; *Badri Prasad & Ors. v. Nagarmal & Ors.,* AIR 1959 SC 559; and *Dr. H.S. Rikhy etc. v. The New Delhi Municipal Committee,* AIR 1962 SC 554).

In *Surajmull Nagoremull v. Triton Insurance Co. Ltd.,* AIR 1925 PC 83, it was held as under:

> *"..No court can enforce as valid, that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be dispensed by the consent of the parties or by a failure to plead or to argue the point at the outset..."*

A similar view was re-iterated by the Privy Council in *Shiba Prasad Singh v. Srish Chandra Nandi,* AIR 1949 PC 297.

Thus, in view of the above, we are of the considered opinion that the respondent-society is not entitled to take any advantage of those illegal circulars.

24. There was correspondence between the JDA and the appellant RIICO, and also other departments. There were also meetings held with higher officials of the State Government, including the Chief Minister but despite this, the land of the appellant was not released.

It was in fact, after the order of this Court dated 9.9.1992, that the respondent society sent a telegram dated 17.10.1992, to the Chief Secretary demanding justice, and there was no request made to the Competent Authority to release the said land in its favour. Immediately thereafter, the second writ petition was filed. It is pertinent to mention here, that the said telegram cannot be termed a comprehensive representation. It does not furnish any detail, or give any reason, with respect to how not releasing the land of the society could amount to violative of any provision of the Constitution of India including Article 14. It

also did not disclose any comparable cases, where land belonging to persons/institutions who were similarly situated to itself, stood released. The said telegram reads as under:

> "Only our land Khasra Nos. 226 to 230 at village Durgapura without notice to us or Khatedar was ex-parte acquired under award dated 14.5.84 leaving all others land of Durgapura notified earlier. Perpetrating discrimination despite contrary directions by J.D.A. under Chairmanship of Chief Minister - 105 acre including our land was fraudulently and in abuse of power were allotted by RIICO to Diamond and Gem Development Corporation (DGDC) in a biggest land scandal with collusive acts of officials of RIICO. The said DGDC is in big way encroaching on our land despite the knowledge and notice of order dated 9.9.92 in SLP No. 165, 67-69/90 - *Banwarilal and Ors. v. State of Rajasthan & Ors.* Kindly quash allotment of 105 acre land to DGDC and return land Khasra Nos. 226 to 230 or equivalent land to us within seven days and meanwhile stop all encroachment on our land failing which filing writ petitions in Hon'ble High Court pursuant to Supreme Court order dated 9.9.92 at your cost and consequences.
>
> Subhash Sindhi Housing Co-operative Society Ltd. and its Members through K.K. Khanna Advocate."

25. When the writ petition was filed, the High Court asked the respondent therein, to furnish an explanation of the alleged discrimination claimed by it. The authorities thereafter, filed affidavits, stating that the fact could be ascertained from the award dated 14.5.1984 itself. The relevant portion thereof reads as under:

> "The Deputy Secretary Industries (Group I) Department Rajasthan Jaipur released from acquisition the land in Durgapura, Khasra No. 137, measuring 6 Bigha 2 Biswas in village Jaland chod, Khasra No. 124 measuring 2 Bighas 4 Biswas, Khasra No. 2389 measuring 1 Bigha - 2 Biswas, Khasra No. 250, measuring 0.05 Biswas, 261 measuring 0.08 Biswas in village Dolka Abad Khasra No. 44 measuring 1 Bigha 11 Biswas, Khasra No. 45 measuring 2 Bigha 11 Biswas, Khasra No. 45 measuring 2 Bigha, 13 Biswas, vide his order Nos. P-(4)/IND/75 dated 19.10.1981 No. P(4)Ind/1/79 dated 1.1.1982 and No. P5(4) Ind/75 dated 22.6.82. Besides the Industries Department also released from acquisition the total land measuring 126 Bighas 13 Biswas vide notification P5 (4)/ Ind/1/75 dated 31.7.1982 in village Jalana Chod of Khasra No. 177, 181, 182, 184, 185, 186 and 180 min,. and 187, the land which is acquired by the Rajasthan Housing Board. All these lands was de-acquired under Section 48 of the Act whose possession was not taken by concerned Department. Assistant Manager (adarboot) RIICO Jaipur vide his letter No. IPI/3/6-76 dated 31.10.1983 to Deputy Secretary Industries Department Rajasthan Government recommended release for acquisition of Khasra No. 126 Min. measuring 2 Bighas as there being no passage and there godown being situated there. Therefore, it is not possible to consider this till final orders are received. Only after the receipt of the final decision of the concerned department further action can be possible."

26. It is thus evident from the award itself, that land admeasuring 126 Bighas 13 Biswas was de-notified on 31.7.1982, in the village Jalana Chod, for the reason that the said land had also been notified under the Act for some other public purpose, i.e., the same had been acquired for the Rajasthan Housing Board, and therefore, such land was de-notified under Section 48 of the Act 1894. In other cases, small pieces of land measuring 6 bighas 2 biswas, and 2 bighas and 4 biswas were also released, for the reason that construction existed on some of this land and the other piece of land was found to be entirely land-locked, with no passage to access it.

27. A large number of issues were agitated before the High Court, however, the High Court did not deal with any of those. The Court allowed the petition merely observing:

> "The petitioner Subhash Sindhi Cooperative Housing Society is contesting only for a limited piece of land measuring 17 Bighas 9 Biswas which had been acquired and given to DGDC by the RIICO. The case of the society is that in view of the observations made by the Supreme Court in its order, it has pleaded its case in this petition on the basis that the other land which had been acquired had been released or it stood de facto released and the government was itself a party to it in releasing the acquired land and large number of lands of this nature de facto stood released from acquisition inasmuch as houses have been constructed thereon; the Government itself has acquiesced with such construction and has also taken steps for regularisation of such construction and the decision which was taken by the JDA in the meeting headed by the Chief Minister was implemented qua all others except the land of petitioner Society, merely because the petitioner society's land had been given to DGDC/RIICO. This small piece of land which is claimed by the society in the facts and circumstances of the case, can very well be restored to the Society and to that extent, land allotted to DGDC can be curtailed without having any adverse impact on the prospects of business of DGDC. Facts have come on record through documents that to start with, DGDC had demanded only 35 acres of land. This demand was raised from time to time and ultimately, it reached upto 105 acres. It is also on record that the RIICO had given only 80 acres of land to DGDC as against the allotment of 105 acres. In such a situation, if a small piece of land measuring 17 Bighas 9 Biswas out of the land allotted to DGDC is restored back to the petitioner Society it cannot have any adverse impact on the business prospects of DGDC nor the RIICO may have any just objection and the State Government which has already acquiesced with the release of such acquired lands in large number of cases, cannot have any legitimate case to contest the grant of relief to the petitioner society and the petitioner Society is found to be entitled for the same on the principles of parity as well as equity."



28. The High Court had asked the authorities of the appellant-RIICO to provide an explanation regarding the release of land in village Durgapura, and in its reply to the said order, an additional affidavit was filed. The High Court, after taking note of the same held as under:

> "As per the acquisition proceedings which commenced in July, 1979, the land which was sought to be acquired in Village Durgapura, was 119 Bighas 4 Biswas.
>
> - The land (of which possession was not taken) measured 12 Bighas & Biswas (comprised in Khasra Nos. 126, 128, 129, 137, 153 and 156).
> - Land of which possession was taken 106 Bighas 18 Biswas.
> - Land for which acquisition proceedings were quashed as per the judgment rendered on 12.7.79 in CWP No. 324/89 i.e. S.D. Agarwal v. State of Rajasthan) 20 Bighas
> - And thus, the balance land remained 86 Bighas 18 Biswas.
> - Land belonging to the petitioner Subhash Sindhi Cooperative Housing Society Ltd. - 17 Bighas 9 Biswas.
> - After deducting this land measuring 17 Bighas 9 Biswas from the balance land of 86 Bighas 18

Biswas, the remaining land measures 69 Bighas 9 Biswas and this is the land of which although possession was taken during the acquisition proceedings somewhere in 1982-83 yet on submission of the scheme plans by various Cooperative Housing Societies much after taking of the possession plans were approved in compliance of various orders issued by the Government of Rajasthan after 1986.

- Compensation to the recorded khatedars of the land was also paid in terms of the award dated 14.5.1984 and the amount was duly received by the khatedars/persons having interest in the land.

29. The High Court herein above, has observed that land admeasuring 69 Bighas 9 Biswas of which possession had been taken in acquisition proceedings, stood released in favour of various group housing societies in view of the G.Os. issued after 1986, on extraneous considerations. Such observation is not based on any material whatsoever. Learned counsel appearing for the society could not point out any document on record, on the basis of which such an observation could be made. Same remained the position when the High Court held, that it was evident from the documents on record that the tenure holders whose land had been acquired, could not be paid compensation for the reason "that there was shortage of funds with the government". While recording the aforesaid findings, reliance was placed on the affidavit filed by the officers of the appellant. However, there is no such averment in the said affidavit. There are claims and counter claims regarding the payment of compensation, as there are some documents on record to show that compensation had been deposited by the appellant-RIICO, in favour of the predecessor-in-interest of the society in the court.

30. Be that as it may, the High Court has not recorded any finding to the effect that the land referred to hereinabove (in



village Durgapura), which stood released from acquisition proceedings, was also acquired by group housing societies subsequent to the issuance of the Section 4 Notification, or the society had acquired interest in the same on the basis of an agreement to sell, or on any other ground similar to those raised by the respondent society. The situation of societies whose land stood released, was not compared with the case of the respondent society. Moreover, in case the government had assured such release by issuing several circulars or floating schemes, and the application of the respondent society was in fact pending before the authority concerned, the court ought to have directed the authority to consider the same. But the court, in such facts could not decide the case itself.

31. In the instant case, at the initial stage, the writ petition was filed before the High Court at Jodhpur. Admittedly, the land is situated in the heart of the Jaipur city, and all relevant orders including notifications for acquisition were issued at Jaipur. The writ petition ought to have been filed before the Jaipur Bench as per the statutory requirements therein. Learned counsel appearing for the parties could not furnish any explanation, as under what circumstances the first writ petition had been filed by the society alongwith tenure-holders at Jodhpur. Therefore, we are not only doubtful regarding the sanctity of the order passed by the High Court rather, it creates doubt about the bonafides of the parties and further, as to whether such a move could have been made in good faith.

This Court has on various occasions dealt with the similar situation and explained as where the writ petition is maintainable. (See: *Sri Nasiruddin v. State Transport Appellate Tribunal,* AIR 1976 SC 331; *U.P. Rashtriya Chini Mill Adhikari Parishad, Lucknow, v. State of U.P. & Ors.,* AIR 1995 SC 2148; *Rajasthan High Court Advocates Association v. Union of India & Ors.,* AIR 2001 SC 416; and *Dr. Manju Verma v. State of U.P. & Ors.,* (2005) 1 SCC 73).

32. In the instant case, the government itself labeled the

sale deeds, executed after issuance of Section 4 Notification as Void, we fail to understand as for what reasons the State authorities could think to regularise such orders. The right to administer, cannot obviously include the right to maladminister. Thus, we find no words to express anguish as what kind of governance it had been. (Vide: In Re: *The Kerala Education Bill,* 1957, AIR 1958 SC 956; *All Bihar Christian Schools Association & Anr. v. State of Bihar & Ors.,* AIR 1988 SC 305; *Sindhi Education Society & Anr. v. The Chief Secretary, Govt. of NCT of Delhi & Ors.,* (2010) 8 SCC 49; and *State of Gujarat & Anr. v. Hon'ble Mr. Justice R.A. Mehra (Retd.) & Ors.,* JT 2013 (1) SC 276).

33. In view of the above discussion, we reach the following inescapable conclusions:

(i) The society members had entered into an agreement to sell even though, a Notification under Section 4 to carry out acquisition had been issued by the Govt., fully knowing the legal consequences that may arise.

(ii) The agreement to sell, made by the society (an unregistered document), did not create any title in favour of the society.

(iii) The acquisition proceedings were challenged after a decade of the issuance of Notification under Section 4, and 5 years after the date of award, by the society alongwith original khatedars. The petitions in which the aforesaid acquisition proceedings were challenged were dismissed by the High Court on the ground of delay and latches.

(iv) When the land in dispute is situated in Jaipur city, the society, for reasons best known, had filed the writ petition challenging the acquisition proceedings at Jodhpur and not at Jaipur bench of the High Court. No explanation could be furnished by the learned counsel for the respondent society, as regards the circumstances under which the petition was filed at Jodhpur, and whether the same was maintainable.

(v) The first writ petition cannot be held to have been filed in good faith and the bonafides of the parties, becomes doubtful.

(vi) Challenge to the acquisition proceedings attained finality so far as the khatedars are concerned, upto this court.

(vii) The respondent society never made any application for release of the land on any ground whatsoever, before the Competent Authority i.e. Secretary to the Department of Industries, instead, it applied for regularization before the JDA and before the revenue authorities for conversion of user of the land.

(viii) After the order of this court dated 9.9.1992, a telegram was sent by the society to the Chief Secretary stating that great injustice had been done to them, as their land was not released, raising the issue of discrimination qua other societies, but no factual foundation was laid therein, pointing out the discrimination meted out.

(ix) The High Court entertained the writ petition, without comparing the actual facts of the respondent society qua other societies.

(x) The High Court did not consider a single objection raised by the appellant RIICO before it. The finding of fact recorded to the effect that compensation could not be paid to the khatedars for want of money, is based on no evidence even though a reference was made to an affidavit filed by the State

Authorities. Such findings are absolutely perverse.

(xi) There is no denial in specific terms as to whether the tenure holders had received compensation for the land in dispute, even though in the earlier proceedings, some khatedars were parties.

(xii) The schemes floated by the State Government (knowing well that acquiring land after the issuance of Section 4 Notification would be void), indicates a sorry state of affairs. Such orders have been passed without realizing that administration does not include mal-administration.

(xiii) The circulars issued by the State Government, being inconsistent with the policy and the law regarding acquisition, cannot be taken note of. Issuance of such circulars amounts to committing fraud upon statutes, and further, tantamounts to colourable exercise of power. The State in exercise of eminent domain acquires the land. Thus, before completing the acquisition proceedings, it should not release the land in favour of some other person who could not have acquired title over it at any point of time.

(xiv) The land had been acquired for industrial development and thus, cannot be permitted to be used for residential purposes. Therefore, the demand of the respondent-society cannot be held to be justified.

34. In view of the above, both the appeals are allowed. The impugned judgment and order of the High Court dated 30.7.2002 in Civil Writ Petition No. 454 of 1993 is hereby set aside. No costs.

K.K.T. Appeals allowed.



BALMER LAWRIE & CO. LTD. & ORS.

*v.*

PARTHA SARATHI SEN ROY & ORS.

(Civil Appeal Nos. 419-426 of 2004 etc.)

FEBRUARY 20, 2013

**[DR. B.S. CHAUHAN AND V. GOPALA GOWDA, JJ.]**

*Constitution of India, 1950 - Art. 12 - Instrumentality and agency of Government - Determination - Criteria - Discussed and held: The Company in question is an authority u/Art. 12.*

*Contract - Contract of employment - Amenability to judicial review - Held: Unfair, untenable, irrational or unjust clause in a contract hit by s.23 of Contract Act and against public policy, is amenable to judicial review - In the present case employment contract providing termination of service of employee at the sole discretion of the employer is not justifiable - Hence the contract held void to that extent - Contract Act - s. 23 - Judicial Review.*

*Service Law - Termination of Service - By the State or State instrumentality - As per clause in appointment letter providing sole discretion to the employer to terminate the services of employees - Held: State itself or a State instrumentality cannot impose unconstitutional conditions in statutory rules/regulations vis-à-vis its employees, in order to terminate the services of its permanent employees in accordance with such terms and conditions - The alleged clause of the appointment letter is unconscionable and thus Service Condition Rules held violative of Art.14 of the Constitution to this extent.*

*Words and Phrases:*

*'Control' and 'Pervasive control' - Meaning of.*

**The appellant-Company was a Government company and subsidiary of a Government Company. Respondent-employees joined the services of the Company at different times. Services of the respondent-employees were terminated in view of a clause in the letter of appointment which provided that the company would have a right which would be exercised at its sole discretion to terminate the services of such employees without assigning any reason.**

**In a writ petition challenging the same the appellant-Company contested the writs contending that it was not an authority within the meaning of Article 12 of the Constitution and therefore was not amenable to writ jurisdiction. The Single Judge of the High Court held that the Company was not a State within meaning of Art. 12, however, in another case the learned Single Judge held that the Company was a State within meaning of Article 12. In writ appeals, held that the Company was a 'State' within meaning of Article 12 of the Constitution. Hence the present appeals.**

**Disposing of the appeals, the Court**

**HELD: 1.1. It is difficult to provide an exhaustive definition of the term "authorities", which would fall within the ambit of Article 12 of the Constitution. This is precisely why, only an inclusive definition is possible. It is in order to keep pace with the broad approach adopted with respect to the doctrine of equality enshrined in Articles 14 and 16 of the Constitution. There has been a corresponding expansion of the judicial definition of the term State, as mentioned in Article 12 of the Constitution. In light of the changing socio-economic policies of the country, and the variety of methods by which government functions are usually performed, the court must examine, whether an inference can be drawn to the effect that such an authority is infact an instrumentality of the State under Article 12 of the Constitution. It may not be easy for the**



**court, in such a case, to determine which duties form a part of private action, and which form a part of State action, for the reason that the conduct of the private authority, may have become so entwined with governmental policies, or so impregnated with governmental character, so as to become subject to the constitutional limitations that are placed upon State action. Therefore, the court must determine whether the aggregate of all relevant factors once considered, would compel a conclusion as regards the body being bestowed with State responsibilities. [Para 12] [1038-C-G]**

**1.2. In order to determine whether an authority is amenable to writ jurisdiction except in the case of habeas corpus or quo warranto, it must be examined, whether the company/corporation is an instrumentality or an agency of the State, and if the same carries on business for the benefit of the pubic; whether the entire share capital of the company is held by the Government; whether its administration is in the hands of a Board of Directors appointed by the Government; and even if the Board of Directors has been appointed by the Government, whether it is completely free from governmental control in the discharge of its functions; whether the company enjoys monopoly status; and whether there exists within the company, deep and pervasive State control. The other factors that may be considered are whether the functions carried out by the company/corporation are closely related to governmental functions, or whether a department of Government has been transferred to the company/corporation, and the question in each case, would be whether in light of the cumulative facts as established, the company is financially, functionally and administratively under the control of the Government. In the event that the Government provides financial support to a company, but does not retain any control/watch over how it is spent, then the same would not fall within the**

**ambit of exercising deep and pervasive control. Such control must be particular to the body in question, and not general in nature. It must also be deep and pervasive. The control should not therefore, be merely regulatory. [Para 17] [1040-H; 1041-A-E]**

**1.3. When 'pervasive control' is discussed, the term 'control' is taken to mean check, restraint or influence. Control is intended to regulate, and to hold in check, or to restrain from action. The word 'regulate', would mean to control or to adjust by rule, or to subject to governing principles. [Para 13] [1038-H; 1039-A]**

*State of Mysore vs. Allum Karibasauppa and Ors.,* **AIR 1974 SC 1863: 1975 (1) SCR 601;** *U.P. Cooperative Cane Unions Federations vs. West U.P. Sugar Mills Association and Ors. etc.etc.,* **AIR 2004 SC 3697: 2004 (2) Suppl. SCR 238;** *Union of India (UOI) and Ors. vs. Asian Food Industries* **AIR 2007 SC 750: 2006 (8) Suppl. SCR 485;** *K. Ramanathan vs. State of Tamil Nadu and Anr.* **AIR 1985 SC 660: 1985 (2) SCR 1028;** *Vodafone International Holdings B.VS. vs. Union of India and Anr.* **(2012) 6 SCC 613: 2012 (1) SCR 573;** *Steel Authority of India Ltd. and Ors. etc. vs. National Union Water Front Workers and Ors. etc.etc.* **AIR 2001 SC 3527: 2001 (2) Suppl. SCR 343;** *M/s. Star Enterprises and Ors. vs. City and Industrial Development Corpn. of Maharashtra Ltd. and Ors.* **(1990) 3 SCC 280: 1990 (2) SCR 826;** *LIC of India and Anr. vs. Consumer Education and Research Centre and Ors.* **AIR 1995 SC 1811: 1995 (1) Suppl. SCR 349;** *Mysore Paper Mills Ltd. vs. Mysore Paper Mills Officers' Assn. and Anr.* **2002 (1) SCR 37 - relied on.**

**1.4. A public authority is a body which has public or statutory duties to perform, and which performs such duties and carries out its transactions for the benefit of the public, and not for private profit. Article 298 of the Constitution provides that the executive power of the Union and the State extends to the carrying on of any**



**business or trade. A public authority is not restricted to the Government and the legislature alone, and it includes within its ambit, various other instrumentalities of State action. The law may bestow upon such organization, the power of eminent domain. The State in this context, may be granted tax exemption, or given monopolistic status for certain purposes. The State being an abstract entity, can only act through an instrumentality or an agency of natural or juridical persons. The concept of an instrumentality or agency of the Government is not limited to a corporation created by a statute, but is equally applicable to a company, or to a society. In a given case, the court must decide, whether such a company or society is an instrumentality or agency of the Government, so as to determine whether the same falls within the meaning of expression 'authority', as mentioned in Article 12 of the Constitution, upon consideration of all relevant factors. [Para 12] [1037-E-H; 1038-A-B]**

**1.5. In view of factors like the formation of the appellant company, its objectives, functions, its management and control, the financial aid received by it, its functional control and administrative control, the extent of its domination by the Government, and also whether the control of the Government over it is merely regulatory, and the cumulative effect of all the aforesaid facts in reference to a particular company i.e. the appellant, would render it as an authority amenable to the writ jurisdiction of the High Court. [Para 27] [1050-D-E]**

*Virendra Kumar Srivastava vs. U.P. Rajya Karmachari Kalyan Nigam and Anr.* **AIR 2005 SC 411: 2004 (6) Suppl. SCR 304;** *Lt. Governor of Delhi and Ors. vs. V.K. Sodhi and Ors.* **AIR 2007 SC 2885: 2007 (8) SCR 1027;** *Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology and Ors.* **(2002) 5 SCC 111: 2002 (3) SCR 100;** *Ramana Dayaram Shetty vs. International Airport Authority of India and*

*Ors.* **AIR 1979 SC 1628: 1979 (3) SCR 1014 - relied on.**

*Rajasthan State Electricity Board Jaipur vs. Mohan Lal and Ors.* **AIR 1967 SC 1857: 1967 SCR 377;** *Sukhdev Singh and Ors. vs. Bhagatram Sardar Singh Raghuvanshi and Anr.* **AIR 1975 SC 1331: 1975 (3) SCR 619;** *Ajay Hasia etc. vs. Khalid Mujib Sehravardi and Ors. etc.* **AIR 1981 SC 487: 1981 (2) SCR 79;** *Mysore Paper Mills Ltd. vs. Mysore Paper Mills Officers' Assn. and Anr.* **AIR 2002 SC 609: 2002 (1) SCR 37;** *M/s. Zee Telefilms Ltd. and Anr. vs. Union of India and Ors.* **AIR 2005 SC 2677: 2005 (1) SCR 913;** *N. Nagendra Rao and Co. vs. State of A.P.* **AIR 1994 SC 2663: 1994 (3) Suppl. SCR 144;** *Chief Conservator of Forests and Anr. vs. Jagannath Maruti Kondhare etc.etc.,* **AIR 1996 SC 2898: 1995 (6) Suppl. SCR 259;** *Bangalore Water Supply and Sewerage Board vs. A. Rajappa and Ors.,* **AIR 1978 SC 548: 1978 (3) SCR 207;** *Agricultural Produce Market Committee vs. Ashok Harikuni and Anr. etc.* **AIR 2000 SC 3116: 2000 (3) Suppl. SCR 379;** *State of U.P. vs. Jai Bir Singh* **(2005) 5 SCC 1: 2005 (1) Suppl. SCR 20;** *Assam Small Scale Ind. Dev Corporation Ltd. and Ors. vs. M/s. J.D. Pharmaceuticals and Anr.* **AIR 2006 SC 131: 2005 (4) Suppl. SCR 232;** *M.D., H.S.I.D.C. and Ors. vs. M/s. Hari Om Enterprises and Anr.* **AIR 2009 SC 218: 2008 (9) SCR 821 - referred to.**

**2.1. Where the actions of an employer bear public character and contain an element of public interest, as regards the offers made by him, including the terms and conditions mentioned in an appropriate table, which invite the public to enter into contract, such a matter does not relegate to a pure and simple private law dispute, without the insignia of any public element whatsoever. Where an unfair and untenable, or an irrational clause in a contract, is also unjust, the same is amenable to judicial review. The Constitution provides for achieving social and economic justice. Article 14 of the Constitution guarantees to all persons, equality before the law and**



**equal protection of the law. Thus, it is necessary to strike down an unfair and unreasonable contract, or an unfair or unreasonable clause in a contract, that has been entered into by parties who do not enjoy equal bargaining power, and are hence hit by Section 23 of the Contract Act, and where such a condition or provision becomes unconscionable, unfair, unreasonable and further, is against public policy. Where inequality of bargaining power is the result of great disparity between the economic strengths of the contracting parties, the aforesaid principle would automatically apply for the reason that, freedom of contract must be founded on the basis of equality of bargaining power between such contracting parties, and even though ad idem is assumed, applicability of standard form of contract is the rule. Consent or consensus ad idem as regards the weaker party may therefore, be entirely absent. Thus, the existence of equal bargaining power between parties, becomes largely an illusion. The State itself, or a State instrumentality cannot impose unconstitutional conditions in statutory rules/regulations vis-à-vis its employees, in order to terminate the services of its permanent employees in accordance with such terms and conditions. [Para 19] [1042-C-H; 1043-A-B]**

*West Bengal State Electricity Board and Ors. vs. Desh Bandhu Ghosh and Ors.* **(1985) 3 SCC 116: 1985 (2) SCR 1014;** *Workmen vs. Hindustan Steel Ltd.* **AIR 1985 SC 251: 1985 SCR 428;** *Central Inland Water Transport Corporation Ltd. vs. Brojo Nath Ganguly* **AIR 1986 SC 1571: 1986 (2) SCR 278;** *D.T.C. vs. D.T.C. Mazdoor Congress,* **AIR 1991 SC 101: 1990 (1) Suppl. SCR 142;** *K.C. Sharma vs. Delhi Stock Exchange and Ors.,* **AIR 2005 SC 2884: 2005 (4) SCC 4;** *Punjab National Bank by Chairman and Anr. vs. Astamija Dash,* **AIR 2008 SC 3182: 2008 (7) SCR 365 - relied on.**

**2.2. The "hire and fire" policy adopted by the**

**appellant- company cannot be approved, and the terms and conditions incorporated in the Manual of Officers in 1976, cannot be held to be justifiable, and the same being arbitrary, cannot be enforced. In such a fact-situation, clause 11 of the appointment letter is held to be an unconscionable clause, and thus the Service Condition Rules are held to be violative of Article 14 of the Constitution to this extent. [Para 28] [1051-B-D]**

*Rajesh D. Darbar and Ors. vs. Narasingrao Krishnaji Kulkarni and Ors.* **(2003) 7 SCC 219: 2003 (2) Suppl. SCR 273 - referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **2004 (6) Suppl. SCR 304** | **relied on** | **Para 7** |
| **2007 (8) SCR 1027** | **relied on** | **Para 8** |
| **2002 (3) SCR 100** | **relied on** | **Para 9** |
| **1967 SCR 377** | **referred to** | **Para 9** |
| **1975 (3) SCR 619** | **referred to** | **Para 9** |
| **1979 (3) SCR 1014** | **relied on** | **Para 9** |
| **1981 (2) SCR 79** | **referred to** | **Para 9** |
| **2002 (1) SCR 37** | **referred to** | **Para 9,16** |
| **2005 (1) SCR 913** | **referred to** | **Para 10** |
| **1994 (3) Suppl. SCR 144** | **referred to** | **Para 11** |
| **1995 (6) Suppl. SCR 259** | **referred to** | **Para 11** |
| **1978 (3) SCR 207** | **referred to** | **Para 11** |
| **2000 (3) Suppl. SCR 379** | **referred to** | **Para 11** |
| **2005 (1) Suppl. SCR 20** | **referred to** | **Para 11** |
| **2005 (4) Suppl. SCR 232** | **referred to** | **Para 11** |



| | | |
|---|---|---|
| **2008 (9) SCR 821** | **referred to** | **Para 11** |
| **1975 (1) SCR 601** | **relied on** | **Para 13** |
| **2004 (2) Suppl. SCR 238** | **relied on** | **Para 13** |
| **2006 (8) Suppl. SCR 485** | **relied on** | **Para 13** |
| **1985 (2) SCR 1028** | **relied on** | **Para 14** |
| **2012 (1) SCR 573** | **relied on** | **Para 15** |
| **2001 (2) Suppl. SCR 343** | **relied on** | **Para 16** |
| **1990 (2) SCR 826** | **relied on** | **Para 16** |
| **1995 (1) Suppl. SCR 349** | **relied on** | **Para 16** |
| **1985 (2) SCR 1014** | **relied on** | **Para 18** |
| **1985 SCR 428** | **relied on** | **Para 18** |
| **1986 (2) SCR 278** | **relied on** | **Para 19** |
| **1990 (1) Suppl. SCR 142** | **relied on** | **Para 19** |
| **2005 (4) SCC 4** | **relied on** | **Para 19** |
| **2008 (7) SCR 365** | **relied on** | **Para 19** |
| **2003 (2) Suppl. SCR 273** | **referred to** | **Para 20** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 419-426 of 2004.

From the Judgment & Order dated 30.01.2002 & 24.12.2001 of the High Court at Calcutta in FMA No. 301 of 2001, C.O. No. 2038(W) of 1993, W.P. Nos. 778 of 1992, 2613, 2798, 3169 of 2000, W.P. No. 1109 of 1998 & 1739 of 1996.

WITH

C.A. Nos. 926 of 2013.

Sudhir Chandra, Parijat Sinha, Reshmi Rea Sinha, Anil

Kumar Mishra, S.C. Ghosh, Snehashish Mukherjee, Rameshwar Prasad Goyal for the Appellants.

Sangram Patnaik, Umesh Yadav, Swayam Siddha, Naresh Kumar, Pijush K. Roy, Kakali Roy, C. Balakrishna, Bijan Kumar Ghosh, Sarla Chandra, Abhisth Kumar for the Respondents.

The Judgment of the Court was delivered by

**DR. B.S. CHAUHAN, J.** 1. These appeals have been preferred against the impugned judgments and orders of the High Court of Calcutta dated 30.1.2002 and 24.12.2002 in FMA No. 301/2001, CO. 2038/1993, WP. Nos. 778/1992, 2613, 2798 & 3169/2000, 1109/1998 and 1739/1996, by which the Calcutta High Court by a majority decision held that the Balmer Lawrie & Co. Ltd. - appellant, is a State within the purview of Article 12 of the Constitution of India, 1950 (hereinafter referred to as, the 'Constitution'), and is thus, amenable to writ jurisdiction.

2. Facts and circumstances giving rise to these appeals are:

A. The appellant is a public limited company incorporated under the Indian Companies Act, 1956. The shares of the appellant company were originally held by Indo-Burma Petroleum Co. Ltd., Life Insurance Corporation, Unit Trust of India, General Insurance Corporation and its subsidiaries, Nationalised Banks and also by the public. Subsequently, in 2001 its majority equity shares, i.e. 61.8% of its shareholding, which was held by IBP Co. Ltd., was transferred to Balmer Lawrie Investments Ltd. (BLIL), a Govt. company in which 59% shares are held by the government.

B. The appellant company carries on business in diverse fields through various Strategic Business Units (SBUs). None of these SBUs have monopoly in any business. The said SBUs



are involved in the manufacturing of packing materials, i.e. steel drums and LPG cylinders, grease and lubricants. They also provide air freight services, ocean freight services, and project cargo management. They operate under a broader segment classified as 'Logistic Services', providing space and scope for segregation, storage and aggregation of containerized cargo, i.e. an infrastructural service carried on outside the port premises for handling, loading/unloading and storage of containerized import, as well as export cargo. The appellant company also deals with leather chemicals and tea blending and packaging.

C. The respondents-employees joined the services of the company at different times. However, for the purpose of deciding this case it would be convenient to take up the facts presented by respondent, Partha Sarathi Sen Roy.

The said respondent joined the appellant - company in May 1975 as a Management Trainee, and was later on confirmed vide order dated 1.6.1976 as an officer in Grade-III, subject to the terms and conditions mentioned in the letter of confirmation w.e.f. 20.5.1976. He had previously worked in different branches of the company in Dubai, the United Arab Emirates etc. as an Accountant-cum-Administrative Officer. His services were terminated vide order dated 27.2.1981, in view of Clause 11(a) of the letter of appointment which provided that the company would have a right, which would be exercised at its sole discretion, to terminate the services of such employees by giving them three calendar months' notice in writing, without assigning any reason for such decision. The respondent challenged the said termination order by filing writ petition (C.R. No. 1562 (W) of 1981) in the High Court of Calcutta, praying for the issuance of a writ of mandamus, directing that the said termination order be quashed.

D. The appellant company contested the said writ petition contending that it was not an authority within the meaning of

Article 12 of the Constitution, and therefore was not amenable to writ jurisdiction. The terms and conditions of contractual rights and obligations could therefore, not be enforced through writ jurisdiction. The matter was decided by the learned Single Judge vide judgment and order dated 19.12.2000, holding that the appellant was neither a State, nor any other authority within the meaning of Article 12 of the Constitution, and thus the writ petition itself was not maintainable.

E. Aggrieved, the respondent filed an appeal (FMA. No. 301/2001), against the said judgment and order of the learned Single Judge. However, in the meantime, another writ petition No. 778/1992 was decided by another learned Single Judge of the same High Court, holding that the appellant was infact a State within the meaning of Article 12 of the Constitution. Thus, the appellant preferred an appeal against the said judgment and order dated 27.3.2001, and the matters were heard together by a Division Bench. Both the Judges delivered their judgment on 30.1.2002 taking different views on the aforesaid issue. The matter was referred to a third Hon'ble Judge, who vide judgment and order dated 24.12.2002, held the appellant to be a State within the meaning of Article 12 of the Constitution, and directed that the matter be placed before an appropriate bench for decision of the writ petitions on merits.

Hence, these appeals.

3. Shri Sudhir Chandra, learned senior counsel appearing for the State, has submitted that the appellant company cannot be held to be a State within the meaning of Article 12 of the Constitution, or any other authority for that matter, as there is no deep and pervasive control exercised by the government over the company, though certain financial aid was given by it for specific purposes. The government however, does not have control over the day-to-day functioning of the company. Merely because the appellant company is a subsidiary of a government company, and is itself a government company, the same would not make the appellant company fall within the



purview of the word 'State' as intended by Article 12 of the Constitution. Moreover, it does not carry out any public function which could render it as, 'any other authority', for the purposes of Article 226 of the Constitution. It also does not have any kind of monopoly over its business, in fact, it carries on a variety of business activities and faces competition from all the other industries that operate in the same fields as it does. The terms of employment therefore, cannot be enforced through writ jurisdiction. Thus, the only remedy available to the respondent was to file a suit for damages. The appeals deserve to be allowed.

4. Per contra, Shri Sangaram Patnaik, Mr. Bijan Kumar Ghosh and Mr. P.K. Roy, the learned counsel appearing for the respondents have submitted that the appellant company is a government company, and is a subsidiary of a government company, which is controlled entirely by the government and that the government has absolute control over the company. The majority judgment of the Calcutta High Court, holding the appellant company to be a State within the meaning of Article 12 of the Constitution cannot be found fault with. Even otherwise, law does not permit an employer, particularly the State or its instrumentalities, to terminate the services of its employees by adopting a "hire and fire" approach, as it would be hit by the equal protection clause enshrined in Article 14 of the Constitution of India (hereinafter referred to as, the 'Constitution'). Additionally, the respondent died long ago, and no attempt was ever made by the appellant company to substitute him with his legal heirs. Thus, the appeal stands abated qua him. The facts and circumstances of the case do not warrant any interference by this court, and the appeals are therefore, liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

There is sufficient material on record, and the Memorandum and Articles of Association of the appellant

company make it abundantly clear, that the same is a government company and is a subsidiary of IBP, which is also a government company. The share holding of the appellant company has been referred to hereinabove, and more than 61.8% shares are held by IBP, a government company. However, the question for consideration before us is, whether in light of the aforementioned facts and circumstances, the appellant company is, in fact, a State within the meaning of Article 12 of the Constitution.

6. The said issue has been considered by various larger benches, and it has been held that in order to meet the requirements of law with respect to being a State, the concerned company must be under the deep and pervasive control of the government. The dictionary meaning of 'pervasive' has been provided hereunder:

> "It means that which pervades/tends to pervade in such a way, so as to be, or become, prevalent or dominant."
>
> "Extensive or far reaching, spreading through every part of something."

7. In *Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam and Anr.* AIR 2005 SC 411, this court held, that in order to examine whether or not an authority is a State within the meaning of Article 12 of the Constitution, the court must carry out an in depth examination of who has **administrative, financial and functional** control of such a company/corporation, and then assess whether the State in such a case is only a regulatory authority, or if it has deep and pervasive control over such a company/corporation, whether such company is receiving full financial support from the government, and whether administrative control over it has been retained by the State and its authorities, and further, whether it is supervised, controlled and watched over by various departmental authorities of the State, even with respect to its day-to-day functioning. If it is so, then such company/corporation



can be held to be an instrumentality of the State under Article 12 of the Constitution and therefore, will be amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution.

8. In *Lt. Governor of Delhi & Ors. v. V.K. Sodhi & Ors.* AIR 2007 SC 2885, a similar test was applied, and it was held that once finances are made available to the company, and the **administration of such finances is left to that company, and there is no further governmental control or interference with respect to the same,** such company/ corporation or society cannot be held to be a State, or a State instrumentality within the meaning of Article 12 of the Constitution. In this case, this court came to the conclusion that the very formation of an independent society under the Societies Registration Act, may be suggestive of the intention that such a society, could not be a mere appendage to the State.

9. A Seven-Judge Bench of this Court in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology & Ors.* (2002) 5 SCC 111 held, that while examining such an issue, the court must bear in mind whether in the light of the **cumulative facts** as established, the body is **financially, functionally and administratively,** dominated by, or is under the control of the Government. Such control must be **particular** to the body in question, and must be **pervasive**. If it is found to be so, then the body comes within the purview of State within the meaning of Article 12 of the Constitution. On the other hand, when the control exercised is merely regulatory, whether under a statute or otherwise, the same would not be adequate, to render the body a State. The court, while deciding the said issue placed reliance upon its earlier judgments in *Rajasthan State Electricity Board Jaipur v. Mohan Lal & Ors.* AIR 1967 SC 1857; and *Sukhdev Singh & Ors. v. Bhagatram Sardar Singh Raghuvanshi & Anr.* AIR 1975 SC 1331, wherein it was held that such a body must perform certain public or statutory duties, and that such duties must be carried out for the benefit of the

public, and not for private profit. Furthermore, it was also laid down that such an authority is not precluded from making a profit for pubic benefit. The court came to the conclusion, that although the employees of the Corporation may not be servants of either the Union, or of the State, at the same time, such a company/corporation must not represent the "voice and hands" of the government. Therefore, this court in *Pradeep Kumar Biswas* (supra), held that financial support of the State, coupled with an **unusual degree of control** over the management and policies of a body, may lead to an inference that it is a State. Additionally, other factors such as, whether the company/ corporation performs important public functions, whether such public function (s) are closely related to governmental function, and whether such function (s) are carried out for the benefit of the public, etc. are also considered. The court also considered the case of *Ramana Dayaram Shetty v. International Airport Authority of India & Ors.* AIR 1979 SC 1628, wherein it was held that a corporation can be said to be an instrumentality or agency of the government therein under certain conditions, and the same are summarised below:

*"(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.*

*(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.*

*(3) It may also be a relevant factor ... whether the corporation enjoys monopoly status which is State-conferred or State-protected.*

*(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.*



*(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.*

*(6) 'Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government."*

The Court also considered the cases of *Ajay Hasia etc. v. Khalid Mujib Sehravardi & Ors. etc.* AIR 1981 SC 487; and *Mysore Paper Mills Ltd. v. Mysore Paper Mills Officers' Assn. & Anr.* AIR 2002 SC 609.

10. In *M/s. Zee Telefilms Ltd. & Anr. v. Union of India & Ors.,* AIR 2005 SC 2677, this Court, after applying tests laid down in various cases, examined the facts of that case and came to the conclusion that the body was not a State within the meaning of Article 12 of the Constitution, or for that matter, 'any other authority' for the purposes of Article 226 of the Constitution, while observing as under:

*"23. The facts established in this case show the following:*

*1. The Board is not created by a statute.*

*2. No part of the share capital of the Board is held by the Government.*

*3. Practically no financial assistance is given by the Government to meet the whole or entire expenditure of the Board.*

*4. The Board does enjoy a monopoly status in the field of cricket but such status is not State-conferred or State-protected.*

*5. There is no existence of a deep and pervasive State control. The control if any is only regulatory in nature as applicable to other similar bodies. This control is not specifically exercised under any special statute applicable to the Board. All functions of the Board are not public functions nor are they closely related to governmental functions.*

*6. The Board is not created by transfer of a government-owned corporation. It is an autonomous body."*

*This Court further observed:*

*"35. In conclusion, it should be noted that there can be no two views about the fact that the Constitution of this country is a living organism and it is the duty of Courts to interpret the same to fulfil the needs and aspirations of the people depending on the needs of the time. It is noticed earlier in this judgment that in Article 12 the term "other authorities" was introduced at the time of framing of the Constitution with a limited objective of granting judicial review of actions of such authorities which are created under the Statute and which discharge State functions. However, because of the need of the day this Court in Rajasthan State Electricity Board (supra) and Sukhdev Singh (supra) noticing the socio- economic policy of the country thought it fit to expand the definition of the term "other authorities" to include bodies other than statutory bodies. This development of law by judicial interpretation culminated in the judgment of the 7-Judge Bench in the case of Pradeep Kumar Biswas (supra). It is to be noted that in the meantime the socio-economic policy of the Government of India has changed [See Balco Employees' Union (Regd.) v. Union of India and Ors. (2002 2 SCC 333)] and the State is today distancing itself from commercial activities and concentrating on governance rather than on business. Therefore, the situation prevailing at the time of Sukhdev Singh (supra) is not in existence at least for the time being, hence, there seems to be no need to further expand the scope of "other authorities" in Article 12 by judicial interpretation at least for the time being. It should also be borne in mind that as noticed above, in a democracy there is a dividing line between a State enterprise and a non- State enterprise, which is distinct and the judiciary should not be an instrument to erase the said dividing line unless, of course, the circumstances of the day require it to do so."*



(Emphasis added)

11. Often, there is confusion when the concept of sovereign functions is extended to include all welfare activities. However, the court must be very conscious whilst taking a decision as regards the said issue, and must take into consideration the nature of the body's powers and the manner in which they are exercised. What functions have been approved to be sovereign are, the defence of the country, the raising of armed forces, making peace or waging war, foreign affairs, the power to acquire and retain territory etc. and the same are not amenable to the jurisdiction of ordinary civil courts. (Vide: *N. Nagendra Rao & Co. v. State of A.P.,* AIR 1994 SC 2663; and *Chief Conservator of Forests & Anr. v. Jagannath Maruti Kondhare etc.etc.,* AIR 1996 SC 2898).

In *Bangalore Water Supply & Sewerage Board v. A. Rajappa & Ors.,* AIR 1978 SC 548, this Court dealt with the terms "Regal" and "Sovereign" functions, and held that such terms are used to define the term "governmental" functions, despite the fact that there are difficulties that arise while giving such a meaning to the said terms, for the reason that the government has now entered largely the field of industry. Therefore, only those services, which are governed by separate rules and constitutional provisions such as Articles 310 and 311, should strictly speaking, be excluded from the sphere of industry by necessary implication.

Every governmental function need not be sovereign. State activities are multifarious. Therefore, a scheme or a project, sponsoring trading activities may well be among the State's essential functions, which contribute towards its welfare activities aimed at the benefit of its subjects, and such activities can also be undertaken by private persons, corporates and companies. Thus, considering the wide ramifications, sovereign functions should be restricted to those functions, which are primarily inalienable, and which can be performed by the State alone. Such functions may include legislative functions, the administration of law, eminent domain, maintenance of law and order, internal and external security, grant of pardon etc. Therefore, mere dealing in a subject by the State, or the monopoly of the State in a particular field, would not render an enterprise sovereign in nature. (Vide: *Agricultural Produce Market Committee v. Ashok Harikuni & Anr. etc.* AIR 2000 SC 3116; *State of U.P. v. Jai Bir Singh,* (2005) 5 SCC 1; *Assam Small Scale Ind. Dev Corporation Ltd. & Ors. v. M/s. J.D. Pharmaceuticals & Anr.,* AIR 2006 SC 131; and *M.D., H.S.I.D.C. & Ors. v. M/s. Hari Om Enterprises & Anr.,* AIR 2009 SC 218).

12. A public authority is a body which has public or statutory duties to perform, and which performs such duties and carries out its transactions for the benefit of the public, and not for private profit. Article 298 of the Constitution provides that the executive power of the Union and the State extends to the carrying on of any business or trade. A public authority is not restricted to the government and the legislature alone, and it includes within its ambit, various other instrumentalities of State action. The law may bestow upon such organization, the power of eminent domain. The State in this context, may be granted tax exemption, or given monopolistic status for certain purposes. The State being an abstract entity, can only act through an instrumentality or an agency of natural or juridical persons. The concept of an instrumentality or agency of the government is not limited to a corporation created by a statute,



but is equally applicable to a company, or to a society. In a given case, the court must decide, whether such a company or society is an instrumentality or agency of the government, so as to determine whether the same falls within the meaning of expression 'authority', as mentioned in Article 12 of the Constitution, upon consideration of all relevant factors.

In light of the aforementioned discussion, it is evident that it is rather difficult to provide an exhaustive definition of the term "authorities", which would fall within the ambit of Article 12 of the Constitution. This is precisely why, only an inclusive definition is possible. It is in order to keep pace with the broad approach adopted with respect to the doctrine of equality enshrined in Articles 14 and 16 of the Constitution, that whenever possible courts have tried to curb the arbitrary exercise of power against individuals by centres of power, and therefore, there has been a corresponding expansion of the judicial definition of the term State, as mentioned in Article 12 of the Constitution.

In light of the changing socio-economic policies of this country, and the variety of methods by which government functions are usually performed, the court must examine, whether an inference can be drawn to the effect that such an authority is infact an instrumentality of the State under Article 12 of the Constitution. It may not be easy for the court, in such a case, to determine which duties form a part of private action, and which form a part of State action, for the reason that the conduct of the private authority, may have become so entwined with governmental policies, or so impregnated with governmental character, so as to become subject to the constitutional limitations that are placed upon State action. Therefore, the court must determine whether the aggregate of all relevant factors once considered, would compel a conclusion as regards the body being bestowed with State responsibilities.

13. When we discuss 'pervasive control', the term 'control' is taken to mean check, restraint or influence. Control is

intended to regulate, and to hold in check, or to restrain from action. The word 'regulate', would mean to control or to adjust by rule, or to subject to governing principles. (Vide: *State of Mysore v. Allum Karibasauppa & Ors.,* AIR 1974 SC 1863; *U.P. Cooperative Cane Unions Federations v. West U.P. Sugar Mills Association & Ors. etc.etc.,* AIR 2004 SC 3697; *M/s. Zee Telefilms Ltd.,* (supra); and *Union of India (UOI) & Ors. v. Asian Food Industries,* AIR 2007 SC 750).

14. In *K. Ramanathan v. State of Tamil Nadu & Anr.,* AIR 1985 SC 660, this court held as under:

> *"The power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed or the making of a rule with respect to the subject to be regulated. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation."*

15. In *Vodafone International Holdings B.V. v. Union of India & Anr.,* (2012) 6 SCC 613, this Court observed that:

> *"'Control' is a mixed question of law and fact. The control of a company resides in the voting power of its shareholders and shares represent an interest of a shareholder which is made up of various rights contained in the contract embedded in the Articles of Association.*
>
> *The question is, what is the nature of the "control" that a parent company has over its subsidiary? It is not suggested that a parent company never has control over the subsidiary. For example, in a proper case of "lifting of corporate veil", it would be proper to say that the parent company and the subsidiary form one entity. But barring such case, the legal position of any company incorporated abroad is that its powers, functions and responsibilities are governed by the law of its incorporation.*
>
> *Control, in our view, is an interest arising from holding a particular number of shares and the same cannot be separately acquired or transferred. Each share represents a vote in the management of the company and such a vote can be utilized to control the company."*



16. The need to determine and reach a conclusion as regards such an issue is of paramount importance as this Court has stated in *Steel Authority of India Ltd. & Ors. etc. v. National Union Water Front Workers & Ors. etc.etc.* AIR 2001 SC 3527, and held as under:

> *"The principle is that if the Government acting through its officers was subject to certain constitutional limitations, a fortiori the Government acting through the instrumentality or agency of a corporation must equally be subject to the same limitations. It is pointed out that otherwise it would lead to considerable erosion of the efficiency of the Fundamental Rights, for in that event the Government would be enabled to override the Fundamental Rights by adopting the stratagem of carrying out its function through the instrumentality or agency of a corporation while retaining control over it."*

(See also: *M/s. Star Enterprises & Ors. v. City and Industrial Development Corpn. of Maharashtra Ltd. & Ors.* (1990) 3 SCC 280; *LIC of India & Anr. v. Consumer Education and Research Centre & Ors.* AIR 1995 SC 1811; and *Mysore Paper Mills Ltd.* (supra).

17. In order to determine whether an authority is amenable to writ jurisdiction except in the case of *habeas corpus or quo warranto,* it must be examined, whether the company/

corporation is an instrumentality or an agency of the State, and if the same carries on business for the benefit of the pubic; whether the entire share capital of the company is held by the government; whether its administration is in the hands of a Board of Directors appointed by the government; and even if the Board of Directors has been appointed by the government, whether it is completely free from governmental control in the discharge of its functions; whether the company enjoys monopoly status; and whether there exists within the company, deep and pervasive State control. The other factors that may be considered are whether the functions carried out by the company/corporation are closely related to governmental functions, or whether a department of government has been transferred to the company/corporation, and the question in each case, would be whether in light of the cumulative facts as established, the company is financially, functionally and administratively under the control of the government. In the event that the Government provides financial support to a company, but does not retain any control/watch over how it is spent, then the same would not fall within the ambit of exercising deep and pervasive control. Such control must be particular to the body in question, and not general in nature. It must also be deep and pervasive. The control should not therefore, be merely regulatory.

18. In *West Bengal State Electricity Board & Ors. v. Desh Bandhu Ghosh & Ors.* (1985) 3 SCC 116, this Court considered a case where the respondent-employee was terminated by giving him only three months' notice, and without holding any enquiry or informing him about any actions on his part that were unwarranted. The court, after placing reliance on the judgment in *Workmen v. Hindustan Steel Ltd.* AIR 1985 SC 251, held that where a regulation enables an employer to terminate the services of an employee, in an entirely arbitrary manner and in a manner that confers vicious discrimination, the same must be struck down as being violative of Article 14 of the Constitution. Therefore, even Standing Orders must be non-



arbitrary, and must not confer uncanalised and drastic powers upon the employer, which enables him to dispense with an inquiry and further enables him to dismiss an employee, without assigning any reason for the same, by merely stating, that doing so would not be expedient, and that it would be against the interests of the industry, to allow continuation of employment with respect to the employee. This is primarily because, such a procedure is violative of the basic requirements of natural justice. Such power would tantamount to a blatant adoption of the "hire and fire" rule.

19. Where the actions of an employer bear public character and contain an element of public interest, as regards the offers made by him, including the terms and conditions mentioned in an appropriate table, which invite the public to enter into contract, such a matter does not relegate to a pure and simple private law dispute, without the insignia of any public element whatsoever. Where an unfair and untenable, or an irrational clause in a contract, is also unjust, the same is amenable to judicial review. The Constitution provides for achieving social and economic justice. Article 14 of the Constitution guarantees to all persons, equality before the law and equal protection of the law. Thus, it is necessary to strike down an unfair and unreasonable contract, or an unfair or unreasonable clause in a contract, that has been entered into by parties who do not enjoy equal bargaining power, and are hence hit by Section 23 of the Contract Act, and where such a condition or provision becomes unconscionable, unfair, unreasonable and further, is against public policy. Where inequality of bargaining power is the result of great disparity between the economic strengths of the contracting parties, the aforesaid principle would automatically apply for the reason that, freedom of contract must be founded on the basis of equality of bargaining power between such contracting parties, and even though ad idem is assumed, applicability of standard form of contract is the rule. Consent or consensus ad idem as regards the weaker party may therefore, be entirely absent. Thus, the existence of equal

bargaining power between parties, becomes largely an illusion. The State itself, or a state instrumentality cannot impose unconstitutional conditions in statutory rules/regulations vis-à-vis its employees, in order to terminate the services of its permanent employees in accordance with such terms and conditions. (Vide: *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly,* AIR 1986 SC 1571; *D.T.C. v. D.T.C. Mazdoor Congress,* AIR 1991 SC 101; *LIC of India* (supra); *K.C. Sharma v. Delhi Stock Exchange & Ors.,* AIR 2005 SC 2884; and *Punjab National Bank by Chairman & Anr. v. Astamija Dash,* AIR 2008 SC 3182).

20. A question may also arise as regards whether the court must examine only those facts and circumstances that existed on the date on which the cause of action arose, or whether subsequent developments, are also to be taken into consideration. The aforesaid issue was dealt with by this Court in *Rajesh D. Darbar & Ors. v. Narasingrao Krishnaji Kulkarni & Ors.* (2003) 7 SCC 219, and therein it was held as under:

> *"The impact of subsequent happenings may now be spelt out. First, its bearing on the right of action, second, on the nature of the relief and third, on its importance to create or destroy substantive rights. Where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief will be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it is but fair that the relief is moulded, varied or reshaped in the light of updated facts. Subsequent events in the course of the case cannot be constitutive of substantive rights enforceable in that very litigation except in a narrow category (later spelt out) but may influence the equitable jurisdiction to mould reliefs. Conversely, where rights have already vested in a party, they cannot be nullified or negated by subsequent events save where there is a change in the law and it is made applicable at any stage. Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri,*



> *AIR 1941 FC 5 falls in this category. Courts of justice may, when the compelling equities of a case oblige them, shape reliefs - cannot deny rights - to make them justly relevant in the updated circumstances. Where the relief is discretionary, courts may exercise this jurisdiction to avoid injustice. Likewise, where the right to the remedy depends, under the statute itself, on the presence or absence of certain basic facts at the time the relief is to be ultimately granted, the court, even in appeal, can take note of such supervening facts with fundamental impact. This Court's judgment in Pasupuleti Venkateswarlu v. Motor & General Traders AIR 1975 SC 1409 read in its statutory setting, falls in this category. Where a cause of action is deficient but later events have made up the deficiency, the court may, in order to avoid multiplicity of litigation, permit amendment and continue the proceeding, provided no prejudice is caused to the other side. All these are done only in exceptional situations and just cannot be done if the statute, on which the legal proceeding is based, inhibits, by its scheme or otherwise, such change in the cause of action or relief. The primary concern of the court is to implement the justice of the legislation. Rights vested by virtue of a statute cannot be divested by this equitable doctrine (see V.P.R.V. Chockalingam Chetty v. Seethai Ache AIR 1927 PC 252)."*

21. The above-mentioned appeals are required to be considered in light of the aforesaid settled legal propositions. However, at this stage it may also be pertinent to refer to the relevant Clauses of the Memorandum and Articles of Association, which read as under:

> *"7A. Notwithstanding anything contained in these Articles and so long as the Company remains a Government Company, the President of India shall subject to the provisions of Article 6 thereof and Section 255 of the Act,*

*be entitled to appoint one or more Directors (including whole time Director (s) by whatever name called) of the Company to hold office for such period and upon such terms and condition as the President of India may from time to time decide.*

*xx xx xx*

*17. The Company may, subject to the provisions of Section 284 of the Act, by ordinary resolution for which special notice has been given, remove any Director before the expiration of his period of office and may be ordinary resolution of which special notice has been given, appoint another person in his stead, if the Director so removed was appointed by the Company in General Meeting or by the Board under Article 10. The person so appointed shall hold office until the date upto which his predecessor would have held office if he had not been so removed. If the vacancy created by the removal of a Director under the provisions of this Article is not so filled by the meeting at which he is removed the Board may at any time thereafter fill such vacancy under the provisions of Article 10.*

*xx xx xx*

*26AA. Notwithstanding anything to the contrary contained in these Articles, so long as the company remains a Government company within the meaning of Section 617 of the Act, the President of India shall be entitled to issue from to time such directives or instructions as may be considered necessary to the conduct of business and affairs of the Company. Provided that all instructions from the President of India shall be in writing addressed to the Chairman or Managing Director of the Company.*

*xx xx xx*



*146. No dividend shall be payable except out of the profits of the Company or of moneys provided by the Central or a State Government for the payment of the dividend in pursuance of any guarantee given by such Government and no dividend shall carry interest against the Company."*

22. Admittedly, the appellant is a government company which is managed under the guidance of the Ministry of Petroleum and Natural Gas. The Ministry of Petroleum and Natural Gas exercises administrative control over the appellant company. The appellant company started its business as a partnership firm in 1867 and subsequently, the same was converted into a private limited company in 1924, and then eventually, into a public limited company in 1936.

Its past shareholding position has been reproduced as under:

| Category of shareholders | %age of equity holding |
|---|---|
| IBP Co. Ltd. | 61.80% |
| Financial Institutions & Banks | 21.69% |
| Public | 14.29% |
| Employees | 0.85% |
| Foreign National | 0.44% |
| Corporate Bodies | 0.86% |
| U.P. State Government | 0.02% |
| Directors & their relatives | 0.85% |

The present shareholding as per the Annual Report for 2005-06 has been as under:

| Category of shareholders | %age of equity holding |
|---|---|
| Balmer Lawrie Investment Ltd. | 61.80% |
| Mutual Fund & UTI | 5.08% |
| Financial Institutions & Banks | 12.85% |
| Foreign National | 2.97% |
| UP State Government | 0.05% |
| Private/Corporate Bodies | 6.14% |
| Indian Public | 11.10% |
| Directors & their relatives | 0.01% |

23. There is nothing on record to show that the Central Government provides any financial or budgetary support to the appellant company. The appellant company is a profitable company and meets its own working capital requirements, as well as its fixed capital requirements for all requisite purposes through internal funds generated by the re-deployment of its own profits, and also by borrowing short term funds from financial institutions. The grant given by the government to the appellant company is in fact very limited, and the extent of such grant has been shown by the company as under:

| Year | Amount of grant given in lakhs | %age of the grant-vs-avg. yearly fund requirement of the appellant-co.(353.55 crores) |
|---|---|---|
| 1999 | 91.29 | 0.26 |
| 2001 | 237 | 0.67 |
| 2002 | 20 | 0.06 |
| 2003 | 176 | 0.50 |



24. The appellant company carries on its business in diverse fields through various Strategic Business Units (hereinafter referred to as 'SBUs'), and its work is being carried on by (i) an SBU for Industrial Packaging; (ii) an SBU for Greases & Lubricants; (iii) an SBU for Logistics Services; (iv) an SBU for Projects & Engineering Consultancy; (v) an SBU for Travel & Tour; (vi) an SBU for Leather Chemicals; (vii) an SBU for Tea Blending & Packaging; and (viii) an SBU for Container & Freight Station.

25. Undoubtedly, the business carried on by the appellant company does not confer upon it any monopolistic character, as there are several private companies that are carrying on the same business and some of these businesses are even generally carried on by individual persons.

Under the Conduct, Discipline and Review Rules applicable to the officers of the appellant company, a letter dated 31.3.1989 written by Managing Director of the company, shows that government directives on the subject have been made applicable with certain modifications as required to the terms and conditions of employment that are applicable to various organizations of the company. The company is not only a Government of India enterprise, but is also under the Administrative control of the Ministry of Petroleum, Chemicals and Fertilizers, Government of India. Its directors are appointed mainly from government service. Article 26AA of the Articles of Association lays down that the President of India shall be entitled to issue from time to time, such directives or instructions, as may be considered necessary in regard to the administration of the business and affairs of the company. Article 7A thereof, provides that the President of India shall, subject to other existing provisions, be entitled to appoint one or more directors in the company for such period, and upon such terms and conditions, as the President of India may from time to time decide are required. In view of the provisions of Section 617 of the Companies Act, 1956, a government

company has been defined by way of an inclusive definition, as that which is a subsidiary of a government company. The appellant company has also been receiving grant-in-aid from the Oil Industry Development Board by way of a grant and not as a loan. Some products of the company are in fact monopoly products, whose procurement and distribution are within the direct control of the Ministry of Petroleum which is under the Central Government. All Matters of policy and also, the management issues of the appellant company, are governed by the Central Government. The Central Government has control over the appointment of Additional Directors, and Directors, and their remuneration etc. is also determined by Presidential directives, and the same is applicable to deciding the residential accommodation of the Managing Director, his conveyance, vigilance, issues regarding the welfare of weaker sections etc. The functioning of the appellant company is of great public importance. Majority of its shares are held by a government company. Its day-to-day business and operations, do not depend on the actions and decisions taken by the Board of Directors, in fact the said decisions are taken under either Presidential directives, or in accordance with instructions issued by the Administrative Ministry or the Finance Ministry. Its basic function is related to the oil industry, which is generally handled by government companies. The appellant company cannot take any independent decisions with respect to the revision of pay-scales that are applicable to its employees, and the same are always subject to the approval of the Administrative Ministry. The annual budget of the company is also passed only if the same is approved by the Administrative Ministry.

26. It is evident from the material on record that all the whole time Directors of the appellant company are appointed by the President of India, and such communications are also routed through the Administrative Ministry.

The appellant company is under an obligation to submit its monthly, as well as its half-yearly performance reports to the



Ministry of Petroleum, Government of India. The company has also promoted the use of Hindi language in the course of official work, in consonance with the circulars/guidelines that have been issued by the Government of India. The appellant company and IBP Company Limited, had a common Chairman. The remuneration structure of the employees of the appellant company, is also in conformity with those which are applicable to the Indian Oil Corporation and IBP, as has been fixed by the Bureau of Public Enterprises, Government of India. The reservation policy as enshrined in the Directive Principles of the Constitution, has also been implemented as per the directions of the Central Government in the appellant company.

27. In order to determine whether the appellant company is an authority under Article 12 of the Constitution, we have considered factors like the formation of the appellant company, its objectives, functions, its management and control, the financial aid received by it, its functional control and administrative control, the extent of its domination by the government, and also whether the control of the government over it is merely regulatory, and have come to the conclusion that the cumulative effect of all the aforesaid facts in reference to a particular company i.e. the appellant, would render it as an authority amenable to the writ jurisdiction of the High Court.

28. Clause 11(a) of the letter of appointment reads as under:

*"The Company shall have the right, at its sole discretion, to terminate your services by giving you three calendar months notice in writing and without assigning any reason. The Company also reserves the right to pay you in lieu of notice, a sum by way of compensation equal to three months emoluments consisting of basic salary, dearness allowance, house rent assistance and bonus entitlements, if any, after declaration of bonus".*

Undoubtedly, the High Court has not dealt with the issue

on merits with respect to the termination of the services of the respondents herein. However, considering the fact that such termination took place several decades ago, and litigation in respect of the same remained pending not only before the High Court, but also before this Court, it is desirable that the dispute come to quietus. Therefore, we have dealt with the case on merits. In keeping with this, we cannot approve the "hire and fire" policy adopted by the appellant company, and the terms and conditions incorporated in the Manual of Officers in 1976, cannot be held to be justifiable, and the same being arbitrary, cannot be enforced.

In such a fact-situation, clause 11 of the appointment letter is held to be an unconscionable clause, and thus the Service Condition Rules are held to be violative of Article 14 of the Constitution to this extent. The contract of employment is also held to be void to such extent. The dictionary meaning of the word 'unconscionable' is "showing no regard for conscience; irreconcilable with what is right or reasonable. An unconscionable bargain would therefore, be one which is irreconcilable with what is right or reasonable. Legislation has also interfered in many cases to prevent one party to a contract from taking undue or unfair advantage of the other. Instances of this type of legislation are usury laws, debt relief laws and laws regulating the hours of work and conditions of service of workmen and their unfair discharge from service, as also control orders directing a party to sell a particular essential commodity to another." Thus, we do not find any force in the said appeals. The same are dismissed accordingly.

29. As we have already mentioned, the present appeal stands abated qua respondent in C.A. No. 419/2004 owing to his death, and the non-substitution of his legal heirs. We would like to clarify that his legal heirs may enure the benefits of this judgment, to the extent that respondent was entitled to receive 60% of the arrears of wages due to him, from the date of his termination to the date of his superannuation. The benefit shall



be calculated on the basis of periodical revision of salary and other terminal benefits which shall be paid to the LRs of the deceased employee within three months. If it is not given within three months then interest at the rate of 9% will accrue. Additionally, they shall also be entitled to all statutory benefits like gratuity, provident fund and pension, if any.

**CIVIL APPEAL NO. 926 OF 2013**

30. The abovesaid appeal stands disposed of in terms of judgment in Civil Appeal Nos.419-426 of 2004.

K.K.T. Appeals disposed of.

STATE OF KERALA AND OTHERS
*v.*
KANDATH DISTILLERIES
(Civil Appeal No. 1642 of 2013)

FEBRUARY 22, 2013

**[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]**

*Liquor - Application for licence for setting up distillery unit - Non-consideration of - After intervention of the Court, application considered and then rejected by competent authority - Courts below quashed the rejection order directing grant of the licence - On appeal, held: Courts below wrongly directed grant of distillery licence by issuing writ of mandamus - Grant of the same was within the discretionary power of the competent authority - Court should not have interfered with the same, unless the applicant established a better claim over others, which the applicant failed - Abkari Act - s.14 - Foreign Liquor (Compounding, Blending, Bottling) Rules, 1975 - r.4.*

*Constitution of India, 1950 - Art.19(1)(g) and Art.47 - Fundamental right to trade or business in liquor - Held: In view of the directive principles provided under Art.47, State has exclusive right or privilege in respect of portable liquor - A citizen has, therefore, no right to trade or business in liquor as a beverage and the activities, which are res extra commercium.*

*Writ - Mandamus - A Writ of Mandamus can be issued only when a legal right is established against an authority who has legal duty emanating in discharge of public duty or operation of law - Court to issue the writ of mandamus keeping in mind the legislative scheme, its object and purpose, the subject matter, the evil sought to be remedied, State's exclusive privilege etc.*





*Administrative Law:*

*Policy decision - Liquor policy of State - Judicial review of - Held: Monopoly in the trade of liquor is with the State - State has the power to frame and reframe, change and rechange, adjust and readjust its policy, which cannot be declared as illegal or arbitrary by the Court on the ground that earlier Policy was better - Judicial Review.*

*Statutory discretion - Exercise of - Exercise of the discretion must be based on reasonable grounds and cannot lapse into the arbitrariness or caprice anathema to the rule of law envisaged under Art.14 of the Constitution - However, the onus to prove the discrimination is on the complainant - Abkari Act - s.14 - Foreign Liquor (Compounding Blending, Bottling) Rules, 1975 - r.4. - Constitution of India, 1950 - Art. 14 - Evidence Act, 1872 - s.10 - Onus to prove.*

*Judicial review - Of discretionary decision - Court cannot impede the exercise of discretion of an authority acting under the Statute by issuing writ of Mandamus - Writ - Writ of mandamus.*

**The respondent applied on 12.1.1987, for licence for establishing distillery unit in a particular district. In the year 1998 and prior thereto, large number of applications for setting up of distillery units were received. State Government granted licence to 4 applicants. Out of them two licences, were for the establishment of the unit, in the district for which the respondent had applied for.**

**Respondent challenged the non-consideration of his application. Initially the State communicated the respondent that his application would not be considered in view of the policy decision not to grant further licences. After intervention of the Court, the State considered the application of the respondent and rejected the same. Respondent challenged the rejection of his**

**application. Single Judge of High Court allowed the writ petition and directed the State to grant licence applied for, by the respondent. In writ appeal, Division Bench of High Court upheld the order of Single Judge. Hence the present appeal.**

**Allowing the appeal, the Court**

**HELD: 1. Article 47 is one of the Directive Principles of State Policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to the human health. Consequently, it is the privilege of the State and it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. State has, therefore, the exclusive right or privilege in respect of portable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are res extra commercium, cannot be carried on by any citizen and the State can prohibit completely trade or business in portable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. State can also impose restrictions and limitations on the trade or business in liquor as a beverage, which restrictions are in nature different from those imposed on trade or business in legitimate activities and goods and articles which are res commercium. [Para 21] [1072-G-H; 1073-A-D]**

**1.2. Legislature, in its wisdom, has given considerable amount of freedom to the decision makers, the Commissioner and the State Government since they are conferred with the power to deal with an article which is inherently injurious to human health. The powers conferred on the Commissioner and the State Government under s.14 of the Abkari Act as well as Rule 4 are**



**discretionary in nature. [Paras 22 and 23] [1073-F-H]**

*Vithal Dattatraya Kulkarni and Ors. vs. Shamrao Tukaram Power SMT and Ors.* **(1979) 3 SCC 212: 1979 (3) SCR 572;** *P.N. Kaushal and Ors. vs. Union of India and Ors.* **(1978) 3 SCC 558: 1979 (1) SCR 122;** *Krishna Kumar Narula etc. vs. State of Jammu and Kashmir and Ors.* **AIR 1967 SC 1368: 1967 SCR 50;** *Nashirwar and Others vs. State of Madhya Pradesh and Ors.* **(1975) 1 SCC 29: 1975 (2) SCR 861;** *State of A. P. and Ors. vs. McDowell and Co and Ors.* **(1996) 3 SCC 709: 1996 (3) SCR 721;** *Khoday Distilleries Ltd. and Ors. vs. State of Karnataka and Ors.* **(1995) 1 SCC 574: 1994 (4) Suppl. SCR 477 - relied on.**

**2. Liquor policy of State is synonymous or always closely associated with the policy of the Statute dealing with liquor or such obnoxious subjects. Monopoly in the trade of liquor is with the State and it is only a privilege that a licensee has in the matter of manufacturing and vending in liquor. Courts are also not expected to express their opinion as to whether at a particular point of time or in a particular situation, any such policy should have been adopted or not. In the instant case, 1998 Policy had life only in that year and if any rights accrued to any party, that had to be adjudicated then and there. Writ Petition was moved only in the year 2000, by then, policy had been changed because 1999 liquor policy was total ban, so also subsequent liquor policies. It is trite law that a Court of Law is not expected to propel into "the unchartered ocean" of State's Policies. State has the power to frame and reframe, change and re-change, adjust and readjust policy, which cannot be declared as illegal or arbitrary on the ground that the earlier policy was a better and suited to the prevailing situations. Situation which exited in the year 1998 had its natural death and cannot be revised in the year 2013, when there is total ban. [Para 24] [1074-A-E]**

*State of Maharashtra vs. Nagpur Distilleries* **(2006) 5 SCC 112 - relied on.**

**3.1. Discretionary power implies freedom of choice, a competent authority may decide whether or not to act. The legal concept of discretion implies power to make a choice between alternative courses of action. Statute has conferred discretionary power on the Commissioner and State Government but not discretion coupled with duty because they are dealing with a subject matter on which State has exclusive privilege. Permissive language used by the Statute in Section 14 of the Act and the rule making authority in Rule 4 of Foreign Liquor (Compounding, Blending, Bottling) Rules, 1975 gives the State Government and the Commissioner, no mandatory duty or obligation to grant the licence except perhaps to consider the application, if the liquor policy permits so. (Para 25) [1074-F-H]**

**3.2. The powers, conferred on the Commissioner as well as the Government, have to be understood in the light of the Constitutional scheme bearing in mind the fact that the trade or business which is inherently harmful can always be restricted, curtailed or prohibited by the State, since it is the exclusive privilege of the State. No duty is, therefore, cast on the Commissioner to grant a licence for establishing a distillery unit and no right is conferred on any citizen to claim it as a matter of right. State can always adopt a "restrictive policy", e.g., reducing the number of licences in a particular district or a particular area, or not to grant any licence at all in a particular district, even in cases where the applicants have satisfied all the conditions stipulated in the rules and the policy permits granting of licences. In other words, the satisfaction of the conditions laid down in 1975 Rules would not entitle an applicant as a matter of right to claim a distillery licence which is within the exclusive privilege of the State. [Para 26] [1075-B-E]**



**3.3. Discretionary power leaves the donee of the power free to use or not to use it at his discretion. The exercise of statutory discretion must be based on reasonable grounds and cannot lapse into the arbitrariness or caprice anathema to the rule of law envisaged in Article 14 of the Constitution. It is trite law that, though, no citizen has a legal right to claim a distillery licence as a matter of right and the Commissioner or the State Government is entitled to either not to entertain or reject the application, they cannot enter into a relationship by arbitrarily choosing any person they like or discriminate between persons similarly circumscribed. In such a situation, it is for the party who complains to establish that a discriminatory treatment has been meted out to him as against similarly placed persons but cannot demand a licence for establishing a distillery unit, as a matter of right. [Para 29] [1076-G-H; 1077-A-C]**

*Rani Drig Raj Kuer vs. Raja Sri Amar Krishna Narain Singh* **AIR1960 SC 444: 1960 SCR 431;** *State of Madhya Pradesh vs.Nandlal Jaiswal* **(1986) 4 SCC 566: 1987 (1) SCR 1 - relied on.**

**3.4. The Respondent could lay a claim only if it establishes that a preferential treatment has been meted out to other two applicants, while granting licences for establishing the respective distillery units on the ground of discrimination violating Article 14 of the Constitution of India. Respondent has never challenged the distillery licences granted to them, but only prayed for another licence for it as well which cannot be claimed as a matter of right. Citizens cannot have a fundamental right to trade or carry on business in the properties or rights belonging to the State nor can there be any infringement of Article 14, if the State prefers other applicants for the grant of licence, during the pendency of some other applications, unless an applicant establishes a better claim over**

**others. [Para 32] [1078-B-E]**

**3.5. Legislature when confers a discretionary power on an authority, it has to be exercised by it in its discretion, the decision ought to be that of the authority concerned and not that of the Court. Court would not interfere with or probe into the merits of the decision made by an authority in exercise of its discretion. Court cannot impede the exercise of discretion of an authority acting under the Statute by issuance of a Writ of Mandamus. A Writ of Mandamus can be issued in favour of an applicant who establishes a legal right in himself and is issued against an authority which has a legal duty to perform, but has failed and/or neglected to do so, but such a legal duty should emanate either in discharge of the public duty or operation of law. Since there is no legal duty cast on the Commissioner or the State Government exercising powers under Section 14 of the Act read with Rule 4 of the 1975 Rules to grant the licence applied for, the High Court cannot direct the State Government to part with its exclusive privilege. At best, it can direct consideration of an application for licence. If the High Court feels, in spite of its direction, the application has not been properly considered or arbitrarily rejected, the High Court is not powerless to deal with such a situation that does not mean that the High Court can bend or break the law. Before issuing a writ of mandamus, the High Court should have, at the back of its mind, the legislative scheme, its object and purpose, the subject matter, the evil sought to be remedied, State's exclusive privilege etc. and not to be carried away by the idiosyncrasies or the ipse dixit of an officer who authored the order challenged. Majesty of law is to be upheld not by bending or breaking the law but by strengthening the law. [Para 27] [1075-F-H; 1076-A-E]**

**4. In the facts of the case, it cannot be said that the application of the respondent was rejected solely on the**



**ground that the application could not be treated as an application put forward by a firm based on a partnership deed, which came into existence on 10.4.1991, as per Clause 3 of the Partnership Deed but on various other grounds as well. The State Government considered the respondent's application dated 12.1.1987 with regard to the conditions that existed in the year 1998. The Government letter dated 28.6.1994 would indicate that, apart from the respondent, few other applications were also pending prior to the year 1994. Over and above, the State Government during the year 1998, received 52 applications for establishing compounding, blending and bottling units in IMFLs in various parts of the State. This Court cannot activate an out-modeled, outdated, forgotten liquor policy of 1998, in the year 2013, by a Writ of Mandamus. Single Judge as well as the Division Bench of the High Court have overlooked the vital factors while issuing a Writ of Mandamus directing the State Government/ Commissioner to grant distillery licence to the respondent. [Paras 33 and 34] [1078-F-H; 1079-A-C]**

*Bihar Distillery and Anr. vs. Union of India and Ors.* **1997 (1) SCR 680;** *Comptroller and Auditor-General of India and Anr. vs. K.S. Jagannathan and Anr.* **(1986) 2 SCC 679: 1986 (2) SCR 17;** *Harigovind Yadav vs. Rewa Sidhi Gramin Bank and Ors.* **(2006) 6 SCC 145: 2006 (2) Suppl. SCR 116;** *RBF Rig Corporation, Mumbai vs. The Commissioner of Customs (Imports), Mumbai* **(2011) 3 SCC 573: 2011 (2) SCR 691 - referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **1997 (1) SCR 680** | **referred to** | **Para 3** |
| **1986 (2) SCR 17** | **referred to** | **Para 17** |
| **2006 (2) Suppl. SCR 116** | **referred to** | **Para 17** |
| **2011 (2) SCR 691** | **relied on** | **Para 17** |

| | | |
|---|---|---|
| **1979 (3) SCR 572** | **relied on** | **Para 21** |
| **1979 (1) SCR 122** | **relied on** | **Para 21** |
| **1967 SCR 50** | **relied on** | **Para 21** |
| **1975 (2) SCR 861** | **relied on** | **Para 21** |
| **1996 (3) SCR 721** | **relied on** | **Para 21** |
| **1994 (4) Suppl. SCR 477** | **relied on** | **Para 21** |
| **2006 (1) Suppl. SCR 603** | **relied on** | **Para 24** |
| **1960 SCR 431** | **relied on** | **Para 29** |
| **1987 (1) SCR 1** | **relied on** | **Para 30** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1642 of 2013.

From the Judgment & Order dated 22.01.2009 of the High Court of Kerala at Ernakulam in W.A. No. 716 of 2008.

C.S. Rajan, Ramesh Babu M.R. for the Appellants.

George Poonthottam, George Mathew, Dileep Pillai, Usha Nandini, Biju Raman, Ajay K. Jain, M.P. Vinod for the Respondent.

The Judgment of the Court was delivered by

**K.S. RADHAKRISHNAN, J.** 1. Leave granted.

2. We are, in this appeal, concerned with the question whether the High Court can issue a *Writ of Mandamus* under Article 226 of the Constitution of India, directing the State to part with its exclusive privilege, in the matter of granting licence for establishing distilleries under the Foreign Liquor (Compounding, Blending and Bottling) Rules, 1975 (for short "1975 Rules") read with Section 14 of the Abkari Act (for short "the Act").



3. M/s Kandath Distilleries, respondent herein, claimed to have submitted an application dated 12.1.1987 before the Commissioner of Excise for a licence to establish a compounding, blending and bottling unit in the Palakkad District. Few others had also filed similar applications for licence for setting up distillery units in the State of Kerala. All of them were directed to first obtain the approval of the Government of India for the setting up of new blending and bottling units and, thereafter, to approach the State Government. This Court, however, vide its judgment dated 29.1.1997 in Writ Petition No. 322 of 1996 (*Bihar Distillery and Another v. Union of India and Others*) took the view that the power to permit the establishment of any industry engaged in the manufacture of portable liquors, including Indian Made Foreign Liquors (IMFLs), beer, country liquor and other intoxicating drinks is exclusively vested in the respective State Governments. Further, it was also held that the power to prohibit and/or regulate the manufacture, production, sale, transport of consumption of such intoxicating liquors is equally that of the States.

4. We notice, during the year 1998 and prior to that, the Commissioner of Excise and the State Government had received large number of applications for setting up of distillery units in various parts of the State. The Commissioner of Excise or the State could not have entertained all those applications and granted the licences for the setting up of large number of distillery units in the State. The State Government, however, entertained four applications favourably and accorded its approval under Section 14 of the Act. The State Government, vide GO (Rt.) No. 291/98/TD dated 20.5.1998, examined the application submitted by M/s Amrut Distilleries in detail and granted approval for issuing a licence by the Excise Commissioner for the establishment of a distillery unit for the manufacture of IMFLs at Kanjkode village in the Palakkad District. The Government also, vide its order dated 6.8.1998, examined the application of M/s Empee Distilleries, Madras, and accorded approval for the grant of licence by the Excise

Commissioner for establishing a distillery unit at Kanjkode village in the Palakad District. The application submitted by M/s K. S. Distilleries, Kannur was also considered by the State Government and granted permission to the Excise Commissioner to issue a licence for a distillery unit to be established at Kannur, vide order dated 18.8.1998. The application of M/s Elite Group of Companies was also favourably considered by the Government and accorded permission to the Excise Commissioner for issuing the necessary licence for establishing a distillery unit at Trichur.

5. M/s Kandath Distilleries (respondent) having noticed that its application submitted in the year 1987 for setting up the unit in the Palakkad District was not considered, filed a Revision Petition before the Minister for Excise on 22.11.1998 to consider its application as well for the grant of licence for establishing a distillery unit in the Palakkad district, though it had not raised any dispute with regard to the grant of other two distillery licences for setting up the units in the Palakkad District.

6. We notice that the Excise Commissioner/State Government had received, during the year 1998 and prior to that, large number of applications for licences for establishing distillery units in various districts in the State of Kerala. The Government, therefore, constituted a Scrutiny/Selection Committee to shortlist the applications received for setting up of IMFL Units, as per G.O. (Rt.) No. 157/99/TD dated 3.3.1999. The Government considered the recommendations of the Committee in detail and, vide G.O. (Rt.)/689/99/TD dated 29.9.1999, took a policy decision not to grant any more licences for setting up the distillery units in any part of the State. The order was communicated to the respondent by the Joint Excise Commissioner vide his letter dated 11.11.1999.

7. Respondent then preferred O.P. No. 7727 of 2000 before the High Court to quash the above mentioned Government order dated 11.11.1999 contending that its application also should have been considered along with the



applications submitted by M/s Amrut Distilleries, Bangalore, M/s. Empee Distilleries, Madras, M/s. K. S. Distillery, Kannur and M/s. Elite Group of Companies, Thrissur, in the year 1998. Respondent, however, did not challenge the licences granted for establishing the units in the Palakkad District, the very same district where it had applied for a licence. Learned single Judge quashed the letter dated 11.11.1999 issued by the Joint Excise Commissioner and directed the State Government to consider the application submitted by the respondent in the light of the conditions prevailing in the year 1998 vide his judgment dated 23.6.2004.

8. The Excise Commissioner heard the respondent's representative on 18.10.2004 and, after obtaining the views of the State Government, rejected the application based on G.O. (Rt.) No. 689/99/TD dated 29.9.1999. Aggrieved by the communication received from the Excise Commissioner, the respondent filed a Representation on 20.2.2005 before the State Government, which was rejected by the Government vide its communication No. 4493/G3/2005/TD dated 1.9.2005.

9. Respondent then challenged the above mentioned orders by filing a Writ Petition No. 29092 of 2005. Learned single Judge vide his judgment dated 25.1.2006 quashed the above mentioned orders and passed the following order:

> "So, when this Court directed the Government to consider the claim of the petitioner under Section 14 of the Abkari Act, with reference to the conditions obtained in 1998, the Government decided the matter on the basis of the G.O. issued in 1999. So, the above quoted decision of the Government under Section 14 is unsustainable. It is declared so. Since Ext.P12 is passed, based on the above quoted communication, it is quashed. Though the petitioner raised several contentions in Ext.P13 appeal, none of them was considered in Ext.P14. Accordingly, Ext.P14 is also quashed. The Government is directed to reconsider the matter concerning grant of sanction under

Section 14 of the Abkari Act in accordance with law in the light of the directions in Ext.P11 judgment and also the above observations contained in this Judgment, within two months from the date of receipt of a copy of this Judgment."

10. State Government, in pursuance to the directions given by the learned single Judge in Writ Petition No. 29092 of 2005, again considered the matter and took the view that the Government has to make an "independent assessment of eligibility" of the applicant for the grant of licence. Holding so, the Government passed an order on 16.3.2006. The operative portion of the order reads as under:

"Whenever, applications for Distillery & Compounding (Blending & Bottling) units are received, they are processed separately. The decision taken in each application may be based on the facts & the circumstances akin to the individual application and may not be a common decision. Licenses were given on the applications of M/s Amrut Distillery, Palakkad, Empee Distillery, Palakkad, Elite Distillery, Trissur & KS Distilery, Kannur during the period as alleged by the petitioner. At the same time applications from Kandath Distillery, S.R. Distillery, Sree Chakra Distillery, Rajadhani Distilleries etc. were rejected. Government cannot grant the privilege to all those who had applied for such licence, for a host of reasons. Restrictions have to be imposed, which is permissible under the Constitution. The Government has with effect from 29/9/99 issued Government Order deciding not to grant fresh licenses for Distillery and Compounding (Blending & bolting) unit. The granting of licence for the Distillery & Compounding (blending & bottling) units is a prerogative of the Government and not the right of the petitioner. The directions and the communications from the offices to the petitioner are only the statutory requirements for processing the application and do not cast any right or claim on the petitioner.

In the above circumstances, Government finds no reasons



to reconsider the request of the petitioner under section 14 of the Abkari Act. Request of the petitioner is settled accordingly, keeping in abeyance of the judgment of the Hon'ble High Court read 5th paper.

The Excise Commissioner will pass fresh orders on Ext.P1 within the time limit prescribed by the Hon'ble High Court."

11. Respondent, noticing that the Government had not followed the directions given by the High Court while passing the order on 16.3.2006, filed Contempt Case (C) No. 521 of 2006 before the High Court. Learned single Judge of the High Court felt that the State Government should have considered, the claim for licence, in the light of the conditions, which existed in the year 1998 and could have granted permission or rejected it, but referred to irrelevant matters. Learned single Judge felt that the Government had prima facie committed contempt of court by ignoring the directions contained in its earlier judgment in O.P. No. 29092 of 2005 and passed an order on 29.6.2006, placing the matter before the Division Bench of the High Court.

12. The Division Bench of the High Court directed personal appearance of the Secretary to the Government who appeared before the Court on 9.8.2006 and offered unconditional apology and submitted that the order dated 16.3.2006 would be withdrawn and fresh orders would be passed, in conformity with the judgment in O.P. No. 29092 of 2005. The contempt case was accordingly closed on 12.9.2006.

13. The Government, later, passed a detailed order dated 11.10.2006. The operative portion of the same reads as follows:

"Government has examined the matter in detail with all available records and filed in the light of directions from the High Court of Kerala and it is found that partnership came into existence only on 10.4.91 as per clause no. 3 of the partnership deed. Therefore, the application dated

12.11.87 cannot be treated as an application submitted by the partnership firm. Further, the alleged application dated 12.11.87 was already disposed of by the Board of Revenue by letter No. XC3-32739/93/L.Dis dated 28.6.1994. thereafter, it is stated that the petitioner made an application on 21.11.1998 requesting to reconsider the application alleged to have been submitted by them on 12.1.1987. It is contended that in the year 1998, four licenses were granted on 20.5.1998, 06.08.1998 and 20.09.1998 respectively. From the files it is seen that the above licences were granted on applications which were submitted during 1995, 1996 and 1997 respectively.

From 3.2.1998 to 21.11.1998 Government received 52 applications for establishing compounding, blending and bottling units of Indian made foreign liquor. The Excise Commissioner as per letter No. XC3-15555/98 dated 25.11.1998 reported that there was an unprecedented flow of application and the Government constituted a scrutiny committee as per GO (Rt) No. 157/99/TD dated 3.3.1999 to shortlist the application. As on 21.11.1998 the date on which the petitioner made the application for compounding blending and bottling licence there were other 52 applications and Government have not considered any one of them. Moreover, the application put in by the partnership firm byname M/s. Kandath Distilleries on 12.1.1987 cannot be treated as an application put in by the firm based on a partnership deed which came into existence on 10.4.1991 as per Clause 3 of the Partnership Deed.

In the above circumstances the application put in by M/s Kandath Distilleries on 21.11.1998 does not merit consideration for approval by Government based on the factual conditions available as on 21.11.1998."

14. M/s Kandath Distilleries then challenged the above mentioned order by filing Writ Petition No. 2708 of 2007.



Learned single Judge took the view that no reason other than the constitution of the firm and the date of its effect, was noticed in the impugned order dated 11.10.2006 for refusing the licence and that there was no other ground found by the Government to refuse the licence. Consequently, learned single Judge quashed the Government order dated 11.10.2006 and directed the State Government to grant licence applied for vide application dated 12.1.1987.

15. The State Government, aggrieved by the said judgment, filed a Writ Appeal No. 716 of 2008. The Division Bench felt that the State Government had ingenuously made a classification to weed out respondent to the effect that, from 21.11.1998 onwards, State had a different policy. The Division Bench noticed that the High Court had directed the State Government to consider its application submitted as early as in 1987. Further, it was also pointed out that the State Government had no case that the respondent applicant was not suitable, nor such contention had ever been taken in the previous litigations. Further, it was also held by the Division Bench that similarly situated persons had already been granted licences long back. In such circumstances, the Division Bench held that there was no illegality in the directions given by the learned single Judge giving a positive direction to grant the licence, which was necessary to uphold the majesty of rule of law. The appeal filed by the State Government was accordingly dismissed. Aggrieved by the same, the State Government has come up with appeal.

16. Shri C. S. Rajan, learned senior counsel appearing for the State, submitted that the learned single Judge as well as the Division Bench of the High Court has committed a grave error while exercising their jurisdictions under Article 226 of the Constitution of India in giving a positive direction to grant a distillery licence to the respondent. Learned senior counsel submitted that a citizen has no fundamental right to trade or business in liquor and that the matter relating to grant of licence

for dealing in liquor or starting distillery unit is within the exclusive domain of the State.

Learned senior counsel submitted that if the State has the right to adopt a policy decision and, indisputably, it has the right to vary, amend or rescind the same. Further, it was also submitted that the application submitted by the respondent was a defective application and, therefore, the Government was justified in not entertaining that application. Learned senior counsel submitted that cogent reasons have been stated by the Government vide its order dated 11.10.2006 rejecting the application submitted by the respondent and the High Court was not right in issuing a Writ of Mandamus directing the State Government to grant the licence applied for.

17. Shri Giri, learned senior counsel and Shri George Ponthottam, learned counsel appearing for the respondent, traced the entire history of the case starting from 1987 till the Government passed the order dated 11.10.2006. Learned counsel submitted that there was a concerted effort on the part of the State not to consider the application of the respondent for licence for starting the distillery unit in the Palakkad District. At the same time, on the basis of Policy which was in force in the year 1998, four licences were granted and the respondent was discriminated. Learned counsel submitted that, on non-compliance of the various directions given by the High Court, the High Court found that the Secretary to Government had committed contempt and the order dated 11.10.2006 was nothing but a repetition of earlier orders and it is under those circumstances, the High Court gave a positive direction to grant distillery licence to the respondent, which shall not be interfered with by this Court under Article 136 of the Constitution. Learned counsel also referred the judgment of this Court in *Comptroller and Auditor-General of India and Anr. v. K.S. Jagannathan and Anr.* (1986) 2 SCC 679 and submitted that in order to prevent injustice, this Court can always give direction to compel performance of a discretion by an authority in a proper and lawful manner. Reference was also made to the judgment of



this Court in *Harigovind Yadav v. Rewa Sidhi Gramin Bank and Ors.* (2006) 6 SCC 145 and *RBF Rig Corporation, Mumbai v. The Commissioner of Customs (Imports), Mumbai* (2011) 3 SCC 573 and submitted that in appropriate cases under Article 226 of the Constitution, this Court can always mould the reliefs.

18. We may, before examining the rival contentions, examine the scheme of the Act as well as 1975 Rules. The Act was enacted to consolidate and amend law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and of intoxicating drugs in the State of Kerala. Section 14 of the Act deals with the establishment and control of distilleries, breweries, warehouses, etc, which confers power on the Commissioner to issue a licence with the previous approval of the Government to establish public distilleries, breweries or wineries, or authorize the establishment of private distilleries, breweries, wineries or other manufactories in which liquor may be manufactured. Section 14 is given below for easy reference:

> **"14. Establishment and control of distilleries, breweries, warehouses, etc.**- The Commissioner may, with the previous approval of the Government,-
>
> (a) Establish public distilleries, breweries or wineries, or authorize the establishment of private distilleries, breweries, wineries or other manufactories in which liquor may be manufactured under a licence granted under this Act.
>
> Xxx xxx xxx
>
> xxx xxx xxx"

19. The State Government, in exercise of its powers conferred by Section 29 of the Act framed the 1975 Rules. Rule 3 deals with the application for licence, which requires a person who desires to carry on operations of compounding, blending

and bottling of foreign liquor to apply in writing to the Commissioner and furnish the necessary details as required under the Rule. Rule 3 is given below for easy reference:

> **3. Application for Licence.-** Any person who desires to carry on operations of compounding, blending and bottling of foreign liquor shall apply in writing to the Commissioner. Every application for a lilcence shall give details of the operation desires to perform and shall be accompanied by -
>
> (i) description and plan of the building in which the operations are to be carried out in triplicate, drawn on scale in tracing cloth;
>
> (ii) statement specifying the number, size and descriptions of the permanent apparatus, if any, which are proposed to be used;
>
> (iii) details regarding the maximum quantity in proof litres of spirits expected to be in the store or in the process of compounding, blending or bottling; and
>
> (iv) a treasury receipt for the deposit of an earnest money of one hundred rupees."

Rule 4 deals with the grant and renewal of licence, which empowers the Commissioner to issue the licence applied for. Rule 4 reads as under:

> **"4. Grant and renewal of licence.-** (1) The Commissioner may, if he is satisfied after making such enquiries as he may consider necessary that the applicant is a person to whom licence may be issued, grant to the applicant.-
>
> (i) a compounding and blending licence in Form 1 on payment of a fee of Rs.2,00,000 (Rupees two lakhs only); and



> (ii) a bottling licence in Form 2 on payment of a fee of Rs.2,00,000 (Rupees two lakhs only).
>
> (2) The Commissioner shall retain the original of the description of plan and forward the duplicate to the officer-in-charge through the Assistant Excise Commissioner and return the triplicate to the lilcensee.
>
> (3) The earnest money deposit shall be adjusted towards the fees of the licence. If the licence applied for is not granted, the earnest money deposit of Rs.100 shall be refunded to the applicant.
>
> (4) The Commissioner may on application made to him in this behalf and on payment of the fee specified in rules renew a licence for a period of one year at a time."
>
> (emphasis supplied)

Rule 5 deals with the requirements to be satisfied with regard to building in which the compounding, blending and bottling operations are to be carried out. Licence for compounding and blending of foreign liquor is issued in Form No. 1 and the licence for bottling of foreign liquor is issued in Form No. 2.

20. We may, before examining the scope of the above mentioned provisions and the nature of jurisdiction or the powers to be exercised by the Commissioner and the State Government, examine the general purport of the Act in the light of Article 19(1)(g) of the Constitution of India.

**RIGHT TO CARRY ON TRADE OR BUSINESS IN LIQUOR**

21. Article 47 is one of the Directive Principles of State Policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to the human health. Consequently, it is the privilege of the State and

it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. State has, therefore, the exclusive right or privilege in respect of portable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are res extra commercium, cannot be carried on by any citizen and the State can prohibit completely trade or business in portable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. This legal position is well settled. State can also impose restrictions and limitations on the trade or business in liquor as a beverage, which restrictions are in nature different from those imposed on trade or business in legitimate activities and goods and articles which are res commercium. Reference may be made to the judgments of this Court in *Vithal Dattatraya Kulkarni and Others v. Shamrao Tukaram Power SMT and Others* (1979) 3 SCC 212, *P.N. Kaushal & Others v. Union of India & Others* (1978) 3 SCC 558, *Krishna Kumar Narula etc. v. State of Jammu & Kashmir & Others* AIR 1967 SC 1368, *Nashirwar and Others v. State of Madhya Pradesh & Others* (1975) 1 SCC 29, *State of A. P. & Others v. McDowell & Co and Others* (1996) 3 SCC 709 and *Khoday Distilleries Ltd. & Others v. State of Karnataka & Others* (1995) 1 SCC 574.

22. Legislature, in its wisdom, has given considerable amount of freedom to the decision makers, the Commissioner and the State Government since they are conferred with the power to deal with an article which is inherently injurious to human health.

23. Section 14 of the Act indicates that the Commissioner can exercise his powers to grant licence only with the approval of the State Government because the State has the exclusive privilege in dealing with liquor. The powers conferred on the Commissioner and the State Government under Section 14 as well as Rule 4 are discretionary in nature, which is discernible from the permissible language used therein.



**LIQUOR POLICY:**

24. Liquor policy of State is synonymous or always closely associated with the policy of the Statute dealing with liquor or such obnoxious subjects. Monopoly in the trade of liquor is with the State and it is only a privilege that a licensee has in the matter of manufacturing and vending in liquor, so held, by this Court in *State of Maharashtra v. Nagpur Distilleries* (2006) 5 SCC 112. Courts are also not expected to express their opinion as to whether at a particular point of time or in a particular situation, any such policy should have been adopted or not. 1998 Policy has life only in that year and if any rights have accrued to any party, that have to be adjudicated then and there. Writ Petition was moved only in the year 2000, by then, policy had been changed because 1999 liquor policy was total ban, so also subsequent liquor policies. It is trite law that a Court of Law is not expected to propel into "the unchartered ocean" of State's Policies. State has the power to frame and reframe, change and re-change, adjust and readjust policy, which cannot be declared as illegal or arbitrary on the ground that the earlier policy was a better and suited to the prevailing situations. Situation which exited in the year 1998 had its natural death and cannot be revised in the year 2013, when there is total ban.

**DISCRETION AND DUTY:**

25. Discretionary power implies freedom of choice, a competent authority may decide whether or not to act. The legal concept of discretion implies power to make a choice between alternative courses of action (Discretionary Justice Davis 1969). Statute has conferred discretionary power on the Commissioner and State Government but not discretion coupled with duty because they are dealing with a subject matter on which State has exclusive privilege. Permissive language used by the Statute in Section 14 and the rule making authority in Rule 4 gives the State Government and the Commissioner, no mandatory duty or obligation to grant the licence except perhaps to consider the application, if the liquor policy permits so.

26. Section 14 uses the expression "Commissioner may", "with the approval of the Government" so also Rule 4 uses the expressions "Commissioner may", "if he is satisfied" after making such enquiries as he may consider necessary "licence may be issued". All those expressions used in Section 14 and Rule 4 confer discretionary powers on the Commissioner as well as the State Government, not a discretionary power coupled with duty. The powers, conferred on the Commissioner as well as the Government, have to be understood in the light of the Constitutional scheme bearing in mind the fact that the trade or business which is inherently harmful can always be restricted, curtailed or prohibited by the State, since it is the exclusive privilege of the State. No duty is, therefore, cast on the Commissioner to grant a licence for establishing a distillery unit and no right is conferred on any citizen to claim it as a matter of right. State can always adopt a "restrictive policy", e.g., reducing the number of licences in a particular district or a particular area, or not to grant any licence at all in a particular district, even in cases where the applicants have satisfied all the conditions stipulated in the rules and the policy permits granting of licences. In other words, the satisfaction of the conditions laid down in 1975 Rules would not entitle an applicant as a matter of right to claim a distillery licence which is within the exclusive privilege of the State.

**MANDAMUS - TO ISSUE LICENCE**

27. Legislature when confers a discretionary power on an authority, it has to be exercised by it in its discretion, the decision ought to be that of the authority concerned and not that of the Court. Court would not interfere with or probe into the merits of the decision made by an authority in exercise of its discretion. Court cannot impede the exercise of discretion of an authority acting under the Statute by issuance of a Writ of Mandamus. A Writ of Mandamus can be issued in favour of an applicant who establishes a legal right in himself and is issued against an authority which has a legal duty to perform, but has



failed and/or neglected to do so, but such a legal duty should emanate either in discharge of the public duty or operation of law. We have found that there is no legal duty cast on the Commissioner or the State Government exercising powers under Section 14 of the Act read with Rule 4 of the 1975 Rules to grant the licence applied for. The High Court, in our view, cannot direct the State Government to part with its exclusive privilege. At best, it can direct consideration of an application for licence. If the High Court feels, in spite of its direction, the application has not been properly considered or arbitrarily rejected, the High Court is not powerless to deal with such a situation that does not mean that the High Court can bend or break the law. Granting liquor licence is not like granting licence to drive a cab or parking a vehicle or issuing a municipal licence to set up a grocery or a fruit shop. Before issuing a writ of mandamus, the High Court should have, at the back of its mind, the legislative scheme, its object and purpose, the subject matter, the evil sought to be remedied, State's exclusive privilege etc. and not to be carried away by the idiosyncrasies or the ipse dixit of an officer who authored the order challenged. Majesty of law is to be upheld not by bending or breaking the law but by strengthening the law.

28. Respondent-applicant, in the instant case, in our view, has failed to establish a legal right or to show that there is a legal duty on the Commissioner or the Government to issue a distillery licence.

**DISCRETIONARY ORDER - ARTICLE 14**

29. Discretionary power leaves the donee of the power free to use or not to use it at his discretion. (refer *Rani Drig Raj Kuer v. Raja Sri Amar Krishna Narain Singh* AIR 1960 SC 444). Law is well settled that the exercise of statutory discretion must be based on reasonable grounds and cannot lapse into the arbitrariness or caprice anathema to the rule of law envisaged in Article 14 of the Constitution. It is trite law that, though, no citizen has a legal right to claim a distillery licence

as a matter of right and the Commissioner or the State Government is entitled to either not to entertain or reject the application, they cannot enter into a relationship by arbitrarily choosing any person they like or discriminate between persons similarly circumscribed. The State Government, when decides to grant the right or privilege to others, of course, cannot escape of the rigor of Article 14, in the sense that it can act arbitrarily. In such a situation, it is for the party who complains to establish that a discriminatory treatment has been meted out to him as against similarly placed persons but cannot demand a licence for establishing a distillery unit, as a matter of right.

30. In *State of Madhya Pradesh v. Nandlal Jaiswal* (1986) 4 SCC 566, this Court held that no one can claim as against the State the right to carry on trade or business in liquor and the State cannot be compelled to part with its exclusive privilege or right of manufacturing and selling liquor. But, when the State decides to grant such right or privilege to others the State cannot escape from the rigor of Article 14 of the Constitution, it cannot act arbitrarily or at its sweet will.

31. We have noticed that the application preferred by M/s Kandath Distilleries (respondent herein) in the year 1987 was for establishing a distillery unit in the Palakkad District. So also the applications submitted by M/s Amrut Distilleries, Bangalore and M/s. Empee Distilleries, Madras and licences were granted to them for establishing the distillery units in the Palakkad District. However, the respondent's application was not considered. The Commissioner or the State Government has to take an independent decision in each application based on its eligibility and there cannot be any common decision. As held in *Nandlal Jaiswal* (supra) when the State Government is granting licence for putting up new industry, it is not necessary that it should advertise and invite offers for putting up such industry. The State Government is entitled to negotiate with those who have come up with an offer to set up such industry. The State Government cannot grant the privilege to all those



who have applied for such a licence in a particular district, for a host of reasons. The State Government could restrict the number of distillery lincences in a particular district by two and it can also grant a third licence in a particular district as well, but an applicant cannot claim a licence as a matter of right.

32. The Respondent, in our view, could lay a claim only if it establishes that a preferential treatment has been meted out to M/s Amrut Distilleries, Bangalore and M/s. Empee Distilleries, Madras while granting licences for establishing the respective distillery units in the Palakkad District on the ground of discrimination violating Article 14 of the Constitution of India. Respondent has never challenged the distillery licences granted to them, but only prayed for another licence for it as well which, in our view, cannot be claimed as a matter of right. Citizens cannot have a fundamental right to trade or carry on business in the properties or rights belonging to the State nor can there be any infringement of Article 14, if the State prefers other applicants for the grant of licence, during the pendency of some other applications, unless an applicant establishes a better claim over others.

33. We have gone through the Government Order dated 11.10.2006 in extenso and we are not prepared to say that the application of the respondent was rejected solely on the ground that the application dated 12.1.1987 could not be treated as an application put forward by a firm based on a partnership deed, which came into existence on 10.4.1991, as per Clause 3 of the Partnership Deed but on various other grounds as well. The State Government, in our view, has considered the respondent's application dated 12.1.1987 with regard to the conditions that existed in the year 1998. The Government letter dated 28.6.1994 would indicate that, apart from the respondent, few other applications were also pending prior to the year 1994. Over and above, the State Government during the year 1998, from 3.2.1998 to 21.11.1998, had received 52 applications for establishing compounding, blending and bottling units in IMFLs

in various parts of the State. The Excise Commissioner vide his letter dated 25.11.1998 had reported that there was an unprecedented flow of applications, that was the situation prevailing in the year 1998, a factor which was taken note of in not entertaining the respondent's application, whether it was submitted on 12.1.1987 or on 22.11.1998. We cannot, in any way, activate an out-modeled, outdated, forgotten liquor policy of 1998, in the year 2013, by a Writ of Mandamus.

34. We are, therefore, of the view that the learned single Judge as well as the Division Bench of the High Court have overlooked those vital factors while issuing a Writ of Mandamus directing the State Government/Commissioner to grant distillery licence to the respondent for setting up of a new distillery in the Palakkad District, thinking that the impugned order is nothing but old wine in new bottle. We are informed, after 1998, not even a single licence has been granted by the State Government/Commissioner for establishing distillery units anywhere in the State. That being the factual and legal position, we are of the view that the learned single Judge as well as the Division Bench of the High Court was not justified in issuing a Writ of Mandamus directing the issuance of a distillery licence to the respondent.

35. We are, therefore, inclined to allow this appeal and set aside the judgment of the learned single Judge and affirmed by the Division Bench of the High Court. Ordered accordingly. However, in the facts and circumstances of the case, there will be no order as to costs.

K.K.T. Appeal allowed.



STATE OF ORISSA & ORS.
*v.*
SRI JAGABANDHU PANDA
(Civil Appeal No. 1967 of 2013)

FEBRUARY 27, 2013

**[SURINDER SINGH NIJJAR AND M.Y. EQBAL, JJ.]**

*Service Law:*

*Ex-cadre post - Created on the basis of a proposal under a Scheme - Appointment on - Plea of appointee to make it en-cadre - Held: The post was treated as ex-cadre from the very inception and it was well within the knowledge of the appointee - An appointment outside the cadre cannot be considered to be made to temporary post borne on the cadre.*

**The respondent joined the post of 'Ore Dressing Engineer, in the year 1984. Immediately after joining, he made several representations stating that he came to know that the post was ex-cadre, only after joining the service and requested for upgrading the same and to open up promotional avenues. On rejection of the representations, he approached Administrative Tribunal. The Tribunal noticed that though the advertisement or appointment letter did not mention that the post was ex-cadre, but the notings in the Secretariat files indicated that the respondent was holder of ex-cadre post. As regards the promotional prospects of the respondent, the Tribunal held that he should be treated at par with other Class-I Engineers of 1984 Batch. Writ Petition by the State against the order of the Tribunal was dismissed on the ground that the post was described as an ex-cadre post only in the year 2005 in office-note. Hence the present appeals by the State.**

**Allowing the appeals, the Court**

**HELD: 1. The finding arrived at by the High Court that the post of Ore Engineer was for the first time treated as ex-cadre post in the year 2005, is absolutely perverse and erroneous. Immediately after joining the post of Ore-dresser, in the year 1984, the respondent started filing representations. It was well within the knowledge of the respondent that the post which he was holding was an ex-cadre post and, therefore, by series of representations he requested the Department to upgrade the said post and to open up the promotional avenues. [Para 22] [1095-C-E]**

**2. The post of Ore-dressing Engineer was created on the basis of proposal under a Scheme, and appointment was made outside the existing cadre of mining engineers. It was so understood by the respondent that from the inception that he was holding an ex-cadre post, there had been a special reason for recruiting an Ore-dressing engineer for a specific purpose temporarily outside the cadre of mining engineer. A cadre may consist of permanent as well as temporary post and there may be permanent vacancies in permanent as well as temporary post, but it does not follow that appointment made outside the very service and outside the cadre must be considered to be made to temporary post borne on the cadre merely because, the post was likely to continue indefinitely. [Para 23] [1095-E-F, G-H; 1096-A-B]**

*T.N. Administrative Service Officers Association and Anr. vs. Union of India and Ors.* **(2000) 5 SCC 728 - relied on.**

**Case Law Reference:**

| | | |
|---|---|---|
| **(2000) 5 SCC 728** | **relied on** | **Para 24** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1967 of 2013.



From the Judgment & Order dated 08.10.2010 of the High Court of Orissa at Cuttack in W.P. (C) No. 7963 of 2010.

WITH

C.A. Nos. 1968 of 2013.

L. Nageswara Rao, Jana Kalyan Das, P.S. Patwalia, Shibashish Misra, Mayank Pandey, Swetaketu Mishra, Sandeep Devashish Das, D.M. Sharma, Parmanand Gaur, Saurabh Agrawal, Samir Ali Khan, Bhakti Vardhan Singh, S. Nayak, B.R. Barik, R.C. Kohli, Anupam Lal Das for the appearing parties.

The Judgment of the Court was delivered by

**M.Y. EQBAL, J.**

**C.A.No.1967 of 2013 arising out of SLP(Civil) No.20635/2011**

1. Leave granted.

2. This appeal at the instance of State of Orissa is directed against the judgment and order dated 08.10.2010, whereby the Division Bench of the Orissa High Court refused to interfere with the order passed by the Orissa Administrative Tribunal in O.A. No.97/2009.

3. The facts of the case in brief are as under:

4. The respondent was appointed pursuant to the advertisement dated 5.4.1984 on the post of Ore Dressing Engineer in Class-1 Junior Grade of the State Services in the pay scale of Rs.850-1450. The respondent in response to the appointment letter dated 2.11.1984 joined in the said service on 14.11.1984. Between 18.6.1996 and 19.6.2001 he was deployed in Steel and Mines Department on certain terms and conditions, but he was to draw the salary from the Directorate of Geology. He was again deployed as officer on Special Duty

in Steel and Mines Department between 10.9.2003 to 8.9.2006 on certain terms and conditions and he was also drawing the salary and other service benefits from the Directorate of Geology. The post of Ore Dressing Engineer in the office of the Directorate of Geology was temporarily upgraded on 1.9.2008 as OSD-cum-Deputy Director in the scale of Rs.9350-14550/- and he was allowed to continue in the upgraded post. However, this post was termed as ex-cadre and the post of OSD-cum-Deputy Director was to lapse on his retirement. The respondent filed Original Application before the Tribunal with a prayer that he should be re-designated as OSC-cum-Deputy Director (Steel) instead of OSD-cum-Deputy Director (ex-cadre). All the representations in this regard were rejected by the department for which the opposite party had to approach the Tribunal.

5. The said application of the respondent before the Tribunal was resisted by the State on the ground that the post of Ore Dressing Engineer advertised by OPSC was an ex-cadre post and that the respondent continued in ex-cadre post through out. It was admitted by the respondent that the services of the opposite party had been placed with Steel and Mines Department, but he was reverted back to the Directorate of Geology since his services in the Department of Steel and Mines was not found to be useful. There being no scope of promotion in the ex-cadre post held by the respondent, the government decided to upgrade the same as Ore Dressing Engineer (ex-cadre) in the Directorate of Geology and re-designated the same as OSD-cum-Deputy Director (ex-cadre). The respondent having availed the benefits of the said upgraded post, requested for re-designating the said post as OSD-cum-Deputy Director (Steel).

6. Mr.L.Nageshwar Rao, learned senior Advocate appearing for the petitioner/Sate referring to several documents and rules submitted that the post of Ore Dressing Engineer in



Class-1 Junior Grade is not available in the Directorate of Geology. The cadre rules do not provide such a post and, therefore, from the beginning the said post was treated as ex-cadre post. According to the learned counsel, the respondent was appointed against the said ex-cadre post and continued as such till his services were placed in the Department of Steel and Mines for certain period. After being reverted to the Directorate of Geology, he again continued in the said ex-cadre post. However since there being no scope of promotion, the Government decided to upgrade the post held by the respondent and re-designated it as OSD-cum-Deputy Director (ex-cadre) and the respondent accepted the same and has been continuing in the said post. It was further submitted by the learned Additional Solicitor General that the respondent having worked against an ex-cadre post all through, he cannot claim that the said post be included in the cadre.

7. Per contra, Mr. Patwalia, the senior Advocate for the respondent at the very outset submitted that the case of the State that the post of respondent is an ex-cadre post is baseless, misleading and malafide which is evident from the documentary evidence including the letter of appointment. According to the learned counsel when the post of Ore Dressing Engineer was sanctioned in the year 1981 it was sanctioned as an ex-cadre post. Accordingly he submitted that the ex-cadre post can be created to meet the urgent need of department for a shorter period and such post cannot be allowed to be continued on ex-cadre basis for indefinite period. It was contended that the respondent has been working as OSD (Ore Dressing Engineer) for the last 26 years itself shows that the post is not an ex-cadre post but a cadre post. It was, further, submitted that the different pay-scales between the cadre post and ex-cadre post cannot be the sole criteria for deciding the nature of particular post as an ex-cadre post. The appellant State has been wrongly treating the post of the respondent as an ex-cadre post only because of the different pay scales. The

action of the appellant State in treating the post of the respondent as an ex-cadre post is wholly illegal and malafide.

8. We have heard the learned counsels for the parties at length and considered the facts of the case and the documents in support of their respective cases.

9. The sole question that falls for consideration is as to whether the post held by the respondent is an ex-cadre post. In order to find out the correct factual position, we have to examine the facts of the case in detail.

10. In the year 1981, a proposal was made by the Commissioner-cum- Secretary of Mining and Geology Department for creation of post of Ore Dressing Engineer in Class-1 rank in the pay scale of Rs.850-1450/- for the scheme "Applied Mineral Research" during 1981-82. In the said proposal it was mentioned that the assessment of mineral resources of the State constitute a most important objective of the Directorate of Mines. Apart from geological investigations in the field, it is necessary to determine the grades of different ores and minerals encountered during the course of such investigations. For such purposes certain facilities were developed in the research laboratory of the Directorate of Bhubaneswar. In order to take up the investigation with regard to study of the possibility characteristics of China Clay etc. it was proposed to create a post of Ore Dressing Engineer. The proposal was materialized and creation of one post of Ore Dressing Engineer temporarily in the pay scale of Rs.850-1450/- was sanctioned. Accordingly, the Directorate of Mines, Govt. of Orissa vide communication dated 26th September 1981 informed the Mines and Geological Department, Bhubaneswar about the creation of post. In the said letter it was mentioned that the post of Ore Dressing Engineer should be treated as an ex-cadre post. For better appreciation the letter dated 26th September 1981 is reproduced hereinbelow:



"Directorate of Mines
ORISSA
No.25217/Mines,Bhubaneswar: 26th Sept.1981

From

B.K.Mohanty
Director of Mines.

To

The A.F.A.-cum-Under Secretary to Govt.
Mining & Geology Department,
Bhubaneswar

Sub: Filling up the post of Ore Dressing Engineer

Sir,

In inviting the reference to your letter No.10780 MG dated the 26th Sept.1981, I am to say that the post of Ore Dressing Engineer should be treated as an ex-cadre post. The job chart of the post is as follows:

"The Ore Dressing Engineer will be required to working the Research Laboratory of the Directorate of Mines at Bhubaneswar. He may also be required to original and take the Ore dressing/beneficiation tests in the field as may be necessary. He will be responsible for maintenance and operation of the ore dressing equipment and instruments. He will conduct tests under the supervision of the Minerals Technologist and Joint Director of Projects, as may be assigned and report the results of such tests from time to time, as may be required by the Director of Mines.

Yours faithfully
Sd/-Illegible
Directorate of Mines"

11. The post was accordingly advertised by the Orissa Public Service Commission on 5th April 1984. By the said advertisement, applications in the prescribed form were invited for one post of Ore Dressing Engineer, Class-1 Junior Grade of State Service in the pay scale of Rs.850-1450/-. In the said advertisement, it was mentioned that the post is temporary but likely to be made permanent in due course. The respondent on being selected was issued an appointment letter and pursuant to the said appointment letter the respondent joined in the said post. In the year 1985, the Government sanctioned three advance increments to the respondent in the pay scale of Rs.850-1450/- as per the terms and conditions of the advertisement.

12. Immediately after joining the said post the respondent started filing representation for making his ex-cadre post en-cadre to "The Orissa Mining and Geology Service Rules" which is now an ex-cadre post. The said representations dated 28.6.1985 and 5.9.1985 followed by another representations dated 7.3.1986 and 16.4.1986 to the Secretary to Government of Orissa, Mining and Geology Department, the respondent stated that only after joining he came to know that the Ore Dressing Engineer was an ex-cadre post. He claimed that post of Ore Dressing Engineer is en-cadre post and the next promotion was to Joint Manager. By another representation submitted by the respondent on 19.9.90 wherein respondent alleged that Ore Dressing Engineer post is being treated as an ex-cadre post.

13. By another representation dated 11.2.93 to the Commissioner-cum-Secretary to the Government of Orissa, Steel & Mines Department, the respondent categorically stated that he was working as Ore Dressing Engineer in the Directorate of Mining and Geology in an ex-cadre post having no prospect of promotion in this Directorate. The said letter needs to be re-produced hereinbelow:



"From:

Jagbandhu Panda, B.Sc (Gng) Met)
Ore Dressing Engineer,
Directorate of Mining and Geology,
Orissa Bhubaneswar.

To

The Commissioner-cum-Secretary to Govt.
Steel and Mines Department, Orissa,
Bhuvaneswar.
(Through Proper channel)

Sub:- Creation of the post of Joint Director, Steel by way of up-gradation of the existing post of Ore Dressing Engineer under Steel and Mines Department.

Sir,

Respectfully, I beg to state that following facts for your kind considerations. That the proposals for the Steel Plants for our State is under active considerations of Govt. In order to coordinate and synthesize all the activities for this, I cam to learn that a cell has been constituted in the Department of Steel and Mines and a number of non-technical personnel have been inducted in to this cell. In view of Technical consultancy of IPICOL and other agencies, I fell that there is a need to avail services of a Metallurgical Engineer in the above cell which is lacking at present.

I am a Metallurgical Engineering Graduate, presently working as Ore Dressing Engineer in the Directorate of Mining and Geology in an ex-cadre post having no prospect of future promotion in this Directorate. I feel that my experience and expertise in the field of extractive metallurgy ( Iron & Steel) can be better utilized if a post Joint Director (Steel) can be created under this

Department and I am given the opportunity to man this post to coordinate all the activities of the proposal Steel Plants in the Directorate level. I urge upon you to consider the above facts in the right earnest and provide me the appropriate job opportunity as per the above proposal for which I shall be ever obliged.

Yours faithfully
Sd/- Illegible
11.02.1993
(J.B. Panda)"

14. On the basis of representations filed by the respondent, the Government decided to allow the respondent to work as Officer on Special Duty in the Department of Steel & Mines subject to the following conditions:

1. The tenure of Sri Panda as OSD in the Department of Steel & Mines will be for a period of 6 months from the date of his joining.

2. Sir Panda will draw his salary and other service benefits as usual in the post of Ore Dressing Engineer from the Directorate of Mining and Geology.

3. His further continuation as OSD will be reviewed on the basis of his performance and needs of the Department.

15. By another communication dated 30.11.1993 issued by the Department of Steel & Mines, Govt. of Orissa the respondent was conferred Ex-Officio Secretariat status and was designated as Officer on Special Duty and Ex-Officio Under Secretary to Government, Department of Steel & Mines. However, it was mentioned in the said communication that the ex-officio Under Secretary status was ceased with effect from the date his term of appointment as OSD in the Secretariat is



over. It appears that after the completion of tenure as OSD Ex-Officio Under Secretary the respondent was reverted back to his parent establishment i.e. Directorate of Geology with immediate effect vide Office Order dated 8th September 2006.

16. After the aforesaid order of reversion was passed, the respondent then filed a representation on 5.5.2007 requesting for upgradation of the post to OSD & Ex-Officio Deputy Secretary. The representation was considered by the Government and vide communication dated 10.8.2007 the respondent was informed that his request for upgradation of post Ore Dressing Engineer (Ex-cadre) could not be considered for the present. This letter also worth to be quoted herein-below:

"Department of Steel & Mines
No.7107/S.M. Bhuvaneswar, the 17.08.2007

From:

D.S. Jena, OAS
Under Secretary to Government

To

Sri Jagabandhu Panda,
Ore Dressing Engineer
Directorate of Geology,
Orissa, Bhuvaneswar.

Sir,

I am directed to invite a reference to your representation dated 05.05.2007, regarding upgradation of your post to OSD & Ex-Office-Deputy Secretary and to say that you joined Government service in the Ex-cadre post of Ore Dressing Engineer (Jr. Class-I) on 14.11.1984

in the erstwhile Directorate of Mining and Geology after being selected by the OPSC.

You were sanctioned 3 advance increments in the scale of pay of Rs. 850-1450- at the time of joining the post of Ore Dressing Engineer. Your present pay scale is Rs. 8000-13,500/-. Your case is not same as the case of other qualified Geologists and Mining Engineers, who joined the State Government in Class-II posts. Mining Engineers & Geologists appointed in Class-II posts have to serve a long period to get promotion to the Junior Class-I rank. They do not get advance increments on appointment or promotion.

You were deployed as OSD & Ex-Officio Under Secretary to Government of Steel and Mines Department from 1997 to 2001 and again from 2003 to 08.09.2006. As your continuance in the Department was felt to be of no necessity you have been reverted to your parent post of Ore Dressing Engineer (Ex-Cadre) in the Directorate of Geology w.e.f. 08.09.2006 (A.N.).

The post of Ore Dressing Engineer (Ex.Cadre) was originally created in the Directorate of Mining and Geology with a definite purpose. As per the job chart, Ore Dressing Engineer is requested to work in the Research Laboratory and look after to organize and take up Ore Dressing beneficiation test in the field as and when necessary under the direct supervision of Joint Director of Geology.

The proposal of upgradation of post of Ore Dressing Engineer (Ex.Cadre) to the rank of OSD & Ex-Officio Deputy Secretary or Deputy Director, Steel & Ex-Officio Deputy Secretary was examined. It was observed that after upgradation, the original post of Ore Dressing Engineer will stand abolished and the very purpose of creation of the post will be defeated.



Further neither there is any post of Deputy Secretary belonging to Mining Cadre in the Orissa Secretariat nor there is any post of Deputy Director. Ore Dressing in the Directorate to consider your case for promotion to the higher rank. There is no necessity now to upgrade the post of Ore Dressing Engineer (Ex.Cadre).

In view of above facts, your representations for upgradation of the post of Ore Dressing Engineer (Ex.Cadre) could not be considered at present.

Yours faithfully,

Sd/ Illegible
10.08.2007
Under Secretary to Government"

17. However after about an year vide Notification dated 1.9.2008 issued by the Steel & Mines Department Govt. of Orissa a post of Ore Dressing Engineer (Ex-Cadre) was temporarily upgraded and redesignated as OSD-cum-Deputy Director (Ex-cadre) for a period of six months or till receipt of recommendation of the Commissioner whichever earlier. The Notification dated 1.9.2008 reads as under:

"Government of Orissa
Steel and Mines Department,
No.XII (DG)SM-65/2006/SM Bhuvaneswar,

NOTIFICATION

The only post of Ore Dressing Engineer (Ex.Cadre) in the office of the Directorate of Geology carrying the pay scale of Rs. 8000-275-13,500/- is temporarily upgraded and re-designed as OSD-cum-Deputy Director (Ex-cadre) in the pay scale of Rs.9350-325-14550) from the date of issue of this order. Sri J.B. Panda, at present holding the post

of Ore Dressing Engineer (Ex.Cadre) is allowed to continue in the upgraded post of OSD-cum-deputy Director (ex-cadre) in the above pay scale for period of six month or till receipt of recommendation of OPSC whichever is earlier.

The post of OSD-cum-Deputy Director (ex-cadre) shall be co-terminus with the retirement of Sri J.B. Panda and thereafter the post of Ore Dressing Engineer (Ex.Cadre) will be reviewed automatically in the Directorate of Geology in the scale of pay of Rs. 8000-275-13500/-.

By order of Governor M. R. Pattanaik

Joint Secretary to Government Memo No.6269/dated 01.09.2008

Copy forwarded to the Directorate of Geology Orissa Bhubaneswar/ person concerned for information and necessary action.

Sd/- Illegible
Joint Secretary to Government

Memo No……./Dt.

Copy forwarded to the AG, Orissa/Spl, Secretary, OPSC, Cuttack, Finance Department/GA (SE) Department for information and necessary action.

Joint Secretary to Government"

18. After receipt of the Notification the respondent submitted another representation claiming that he was to be designated as Deputy Director (Steel) but instead of issuing Notification to that effect, it was wrongly notified that the post was temporarily upgraded as OSD-cum-Deputy Director (Ex-cadre).

19. The Government finally by communication dated 26-



12-2008 informed the respondent that after careful consideration of the earlier representations, the Notification was issued upgrading his designation. The respondent was advised to adhere to the order passed by the Government and stopped making unnecessary correspondence with the Government.

20. From perusal of the order passed by the Tribunal, it reveals that although the Tribunal noticed that neither in the advertisement nor in the appointment letter it was mentioned that the respondent was appointed to an ex-cadre post but from the notings produced from the Secretariat file, it does indicate that the respondent was a holder of ex-cadre post. The Tribunal further held that the prayer of the respondent to allow him to work in Administrative Department as OSD-cum-Deputy Director cannot be endorsed as to whether the services of a particular official against a particular post is required by the Government. It is for the Government to determine. The Tribunal, therefore, refused the prayer of the respondent for permitting him to work in the Administrative Department as OSD-cum-Deputy Director (Steel). However, as regards the promotional prospect the Tribunal held as under :-

"As regards his promotional prospects it is clear from the documents at Annexure 1 and 2 that the applicant was termed as a hold of ex-cadre post only after his actual appointment and no mention was made therein regarding his appointment against an ex-cadre post. We, therefore, suggest that the Directorate of Geology may consider the case of the applicant for career advancement vis-à-vis other comparable Class-I Engineers in service appointed in 1984 in the erstwhile Directorate of Mining an Geology (and later the Directorate of Geology) on the same footing as if he was appointed at par with other Engineers in 1984 and treating him as the junior most of that batch and consider him for promotion from the date his junior was so considered from time to time."

21. The aforesaid order of the Tribunal was challenged by

the appellant by filing a writ petition. The Division Bench dismissed the Writ Petition mainly on the ground that the post against which the respondent was appointed was described as an ex-cadre post only in September, 2005 and there is no office note prior to the said date indicating that the post of Ore-dressing Engineer has ever been treated as an ex-cadre post prior to 2005.

22. After giving our anxious consideration in the matter prima facie, we are of the view that the finding arrived at by the High Court that the post of Ore Engineer was for the first time treated as ex-cadre post in the year 2005, is absolutely perverse and erroneous. As noticed above, immediately after joining the post of Ore-dresser, the respondent started filing representations viz., 28.06.1985, 05.09.1985, 07.03.1986 and 16.04.1986. The respondent stated that only after joining he came to know that the post he was holding was an ex-cadre post. It is well within the knowledge of the respondent that the post which he was holding was an ex-cadre post and, therefore, by series of representations he requested the Department to upgrade the said post and to open up the promotional avenues.

23. It is not in dispute that the post of Ore-dressing Engineer was created on the basis of proposal initiated from the Commissioner level under a Scheme "Applied Mineral Research 1981-82". In the said proposal it was mentioned that the assessment of the mineral resources of the State constituted a most important objective of the Directorate of Mines. In order to take up the investigation with regard to the study of minerals it was proposed to create a post of Ore-dressing Engineer under a scheme. It is, therefore, clear that the post of Ore-dressing Engineer was created and appointment was made outside the existing cadre of mining engineers. It was so understood by the respondent that from the inception that he was holding an ex-cadre post there had been a special reason for recruiting an Ore-dressing engineer for a specific purpose temporarily outside the ex-cadre of mining engineer. It is well settled that a cadre may consist of



permanent as well as temporary post and there may be permanent vacancies in permanent as well as temporary post, but it does not follow that appointment made outside the very service and outside the cadre must be considered to be made to temporary post borne on the cadre merely because, the post was likely to continue indefinitely.

24. In *T.N. Administrative Service Officers Association and Another vs. Union of India and Others* (2000) 5 SCC 728 this Court was considering a case where the Members of the State Administrative Services made a claim that a number of ex-cadre or temporary posts which were temporary in nature and some of them were created under the State Enactments which required their manning by IAS Officers. It was contended that on account of failure of the Central Government to timely review the cadre strength as statutorily required, the promotion of the promotees got inordinately delayed and they lost their seniority in the promoted cadre. The rule does not confer any right on the petitioners to seek a Mandamus for encadring those ex-cadre/temporary posts. Any such Mandamus would run counter to the statutory provisions governing the creation of cadre and fixation of cadre strength which was held that asking the State or the Central Government for encadrement of the ex-cadre/temporary posts will amount to asking the Government to create more posts.

25. In the background of the law well settled by this Court, we are of the definite opinion that the direction issued by the Tribunal and the order of the High Court affirming the order of the Tribunal is wholly without jurisdiction. The impugned orders passed by the Tribunal as also by the High Court are, therefore, liable to be set aside.

26. For the aforesaid reasons, we allow this appeal and set aside the orders passed by the State Administrative Tribunal in O.A. No.97 of 2009 and the impugned order passed by the High Court.

**C.A. No.1968 of 2013 arising out of SLP(Civil) No.8676/ 2013**

27. Leave granted.

28. This Civil Appeal is disposed of in terms of judgment passed in Civil Appeal No. 1967 of 2013 arising out of SLP(Civil) No.20635 of 2011.

K.K.T. Appeals disposed of.



AYURVED SHASTRA SEVA MANDAL & ANR.

*v.*

UNION OF INDIA & ORS.

(Special Leave Petition (Civil) No. 31892 of 2012)

MARCH 06, 2013

**[ALTAMAS KABIR, CJI., ANIL R. DAVE AND VIKRAMAJIT SEN, JJ.]**

*Education/Educatinal Institutions - Admission - To medical institutions - In Graduate and Post Graduate courses - Refusal by the Department of 'AYUSH' to grant permission to the medical institutions to admit students for the academic year 2011-12 - On the ground of deficiencies in the infrastructure and teaching staff - Held: It is for the experts and not the Court to judge the eligibility of an institution to conduct classes - Since the experts opined that the institutions in question were not eligible to conduct classes and also because more than half of the session for first year course is over, the petitions dismissed - Indian Medicine Central Council Act, 1970 - Establishment of New Medical College, Opening of New or Higher Course of study or Training and Increase of Admission Cpacity by a Medical College Regulations, 2003 - Indian Medicine Central Council (Permission to Existing Medical Colleges) Regulations, 2006.*

**Department of 'AYUSH' refused to grant permission to the medical institutions teaching Indian form of medicines, to admit students for the academic year 2011-12, on the ground of deficiencies in the infrastructure and teaching staff. As the institutions did not remove the deficiencies, notices were sent to shut down the institutions. The institutions approached High Court and their petitions were dismissed. Hence the present petitions.**

**Dismissing the petitions, the Court**

**HELD: 1. It is not for the Court to judge as to whether a particular Institution fulfilled the necessary criteria for being eligible to conduct classes in the concerned discipline or not. That is for the experts to judge and according to the experts, the Institutions were not geared to conduct classes in respect of the year 2011-12. [Para 14] [1105-H; 1106-A]**

*Shri Morvi Sarvajanik Kelavni Mandal Sanchalit MSKM B.Ed. College vs. National Council for Teachers' Education and Ors.* **(2012) 2 SCC 16: 2011 (13) SCR 555 - referred to.**

**2. It is no doubt true, that applications have been filed by a large number of students for admission in the Institutions imparting education in the Indian form of medicine, with the leave of the Court, but it is equally true that such leave was granted without creating any equity in favour of the applicants. Those who chose to file their applications, did so at their own risk and it cannot now be contended that since they have been allowed to file their applications pursuant to orders passed by the Court, they had acquired a right to be admitted in the different Institutions to which they had applied. The privilege granted to the candidates cannot now be transformed into a right to be admitted in the course for which they had applied. More than half the term of the first year is over. Though it has been contended on behalf of the Institutions concerned that extra coaching classes would be given to the new entrants, it is practically impossible for a student to pick up the threads of teaching for the entire first year when half the course had been completed. [Para 13] [1105-D-G]**

**Case Law Reference:**

| | | |
|---|---|---|
| **2011 (13) SCR 555** | **referred to** | **Para 3** |



CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 31892 of 2012.

From the Judgment & Order dated 04.10.2012 of the High Court of Bombay at Aurangabad in WP No. 7854 of 2011.

WITH

S.L.P. (C) Nos. 33452, 33455, 33560, 34001, 34020, 34255, 34264, 30156, 30086, 31349, 23715, 33908, 33909, 33897 of 2012 1118-1119 of 2013, 35051, 39893, 381 of 2012.

Sidharth Luthra, ASG, R.N. Dhorde, Huzefa Ahmadi, Mahendra Singh Singhvi, M.Y. Deshmukh, Yatin M. Jagiap, Shrikant R. Deshmukha, Shree Prakash Sinha, Nawalendra Kumar, Shekhar Kumar, Janme Jay, Uday B. Dube, Gagan Sanghi, Rameshwar Prasad Goyal, Siddhesh Kotwal, Nirnimesh Dube, Satyajit A. Desai, Somnath Padhan, Anagha S. Desai, Shirish K. Deshpande, Sudhanshu S. Choudhari, Vijay Kumar, Vishwajit Singh, Shivaji M. Jadhav, Prity Kunwar, Shoeb Alam, Ashok Panigrahi, Apporva Bhivnesh, Ashok Kumar Gupta II, S. Mahale, Kuldip Singh, Mohana, Aditya Singla, Gargi Khanna, Vanshika, Sushma Suri, T.k. Joseph, Hemant, Dr. Kailash Chand, Sanjay V. Kharde, Asha Gopalan Nair, Anuradha Mutatkar, Gaurav Agrawal for the appearing parties.

The Judgment of the Court was delivered by

**ALTAMAS KABIR, CJI.** 1. These Special Leave Petitions have been filed against orders passed by the Aurangabad Bench and the Nagpur Bench of the Bombay High Court involving common issues. The matters relating to the Aurangabad Bench arise out of a common order dated 4th October, 2012, in regard to admissions to the various institutions teaching the Indian form of medicines such as Ayurvedic, Unani, Siddha, etc. for the academic year 2011-12.

Special Leave Petition (C) No. 35051 of 2012 has been filed by the Umar Bin Khattab Welfare Trust against the

judgment of the Aurangabad Bench of the Bombay High Court against an order dated 29th December, 2010, regarding admissions for the self-same period. The other Special Leave Petitions relate to the common orders dated 13th July, 2012 and 2nd August, 2012 passed by the Nagpur Bench of the Bombay High Court regarding admissions for the year 2011-12. Yet, another Special Leave Petition regarding admissions for the year 2012-13, has been filed by the Backward Class Youth Relief Committee and Another against the order dated 9th August, 2012, passed by the Nagpur Bench of the Bombay High Court.

2. The common issue involved in all the Special Leave Petitions is in regard to the refusal by the Government of India, in its Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy, hereinafter referred to as "AYUSH", to grant permission to the colleges to admit students for the academic year 2011-12, for the BAMS/ Post Graduate courses. Such permission appears to have been refused on account of various deficiencies relating to the infrastructure and teaching staff, which had not been rectified and brought into line with the minimum standard norms.

3. From the materials as disclosed and the submissions made on behalf of the respective parties, it appears that in the case of *Shri Morvi Sarvajanik Kelavni Mandal Sanchalit MSKM B.Ed. College v. National Council for Teachers' Education and Ors.* [(2012) 2 SCC 16], this Court, while rejecting the prayer of the institutions to permit students to continue in unrecognized institutions, observed that mushroom growth of ill-equipped, under-staffed and unrecognized educational institutions has caused serious problems with the students who joined the various courses.

4. As far as medical institutions are concerned, the procedure relating to the recognition of medical colleges as well as admission therein was governed by the Indian Medicine



Central Council Act, 1970, hereinafter referred to as "the 1970 Act", which was amended in 2003, to incorporate Sections 13A, 13B and 13C, which provided the procedure for establishing new colleges and making provision for seeking prior permission of the Central Government in respect of the same. The amendment also attempted to bring in reforms in the existing colleges by making it mandatory for them to seek permission from the Central Government within a period of three years from their establishment. Having regard to the said amendments, the Central Council of Indian Medicine, with the previous sanction of the Central Government, framed Regulations, in exercise of the powers conferred on it by Section 36 of the 1970 Act. The said Regulations were named as the Establishment of New Medical College, Opening of New or Higher Course of Study or Training and Increase of Admission Capacity by a Medical College Regulations, 2003, hereinafter referred to as "the 2003 Regulations". Regulation 6(1)(e) of the 2003 Regulations provides for applications to be made by a medical college owning and managing a hospital in Indian medicines containing not less than 100 beds with necessary facilities and infrastructure. The Central Council of Indian Medicine further framed Regulations in 2006 called as the Indian Medicine Central Council (Permission to Existing Medical Colleges) Regulations, 2006, hereinafter referred to as "the 2006 Regulations". Regulation 5(1)(d) of the 2006 Regulations provides that the applicant college would have to be owning and managing a minimum of 100 beds for undergraduate courses and 150 beds for post graduate courses, which conforms to the norms relating to minimum bed strength and bed occupancy for In-patients and the number of Out-patients.

5. When the 2003 Amendment was effected to the 1970 Act, three years' time was given to the existing colleges to remove the deficiencies. The 2006 Regulations provided a further period of two years to remove the deficiencies and even relaxed the minimum standards in that regard. Even after the

expiry of two years, the colleges were given further opportunities to remove the shortcomings by granting them conditional permission for their students for the academic years, 2008-09, 2009-10 and 2010-11. It is only obvious that the minimum standards were insisted upon by the Council to ensure that the colleges achieved the minimum standards gradually.

6. It may be noted that there was little or no response from the institutions concerned in regard to removal of the deficiencies in their respective institutions and it is only when the notices were given to shut down the institutions that they woke up from their slumber and approached the courts for relief.

7. In many of these cases, permission was given by the Courts to the institutions concerned to accept admission forms, but they were directed not to pass any orders thereupon till the decision of this Court in these Special Leave Petitions.

8. Appearing for the Petitioners, Mr. R.N. Dhorde, learned Senior Advocate, tried to impress upon us that the deficiencies had already been removed and that is why permission was subsequently given for the admission of students for the year 2012-13. Mr. Dhorde submitted that since the deficiencies had been removed, there could be no reason for permission for the academic year 2011-12 to be withheld, since a large number of applications had been received from students intending to obtain admission for the said year. It was submitted that, although, the academic year had come to an end, the college authorities would make all arrangements for the applicants to be able to complete the course for the entire year within six months so as to bring them up to the level of the second year. Mr. Dhorde also submitted that in the event such permission was not granted, the continuity of the courses would be disrupted. Giving examples of how the deficiencies had been removed, Mr. Dhorde contended that the Department of AYUSH had taken a prior decision to reject the application for permission to admit students for the year 2011-12. It is pursuant



to such decision that all the applications were rejected.

9. However, there is one matter (SLP(C) No. 31892 of 2012) filed by the Ayurved Shastra Seva Mandal and Another, wherein the prayer of the Petitioner-Institution had been rejected only on the ground that instead of recording the presence of 100 patients each day in the Out-Patient Department, the average had been found to be 98.55%.

10. Mr. Gopal Subramaniam, learned Senior Advocate, who had appeared with Mr. Dhorde, had submitted that the said figure was not absolutely accurate since the calculation had been based on 300 days and not 292 days, on account of certain holidays which had gone unnoticed. In the fact situation of the case, the said institution could be treated on a different level from the other institutions, whose applications had been rejected for various other deficiencies.

11. At this juncture, it may be noticed that we had occasion to dismiss SLP(C) No. 35367 of 2012, on 4th January, 2013, on the ground that orders as prayed for therein would have the effect of problems being created for the completion of semester, which was to end in the month of June, 2013, since more than six months had elapsed since the semester had begun.

12. The prayer made on behalf of the Petitioners was strongly opposed by Mr. Sidharth Luthra, learned Additional Solicitor General, who pointed out that despite a moratorium of five years since the amendment of the 1970 Act in 2003 and the framing of the 2006 Regulations in 2006, the institutions had failed to remove the deficiencies, as pointed out by the Council. The learned ASG submitted that the practice of medicine, in whatever form, which was recognised by the Central Government and was regulated by the 1970 Act and the Regulations framed thereunder, could not be compromised by lowering the standards required to maintain the excellence of the profession. The learned ASG submitted that once the

deficiencies had been removed, permission was once again granted to admit students for the academic year, 2012-13. The learned ASG submitted that the sympathy towards the students, who had been allowed to file their application forms, could not be a ground to grant permission where more than half the period of study was already over. The learned ASG submitted that where a certain degree of professionalism was required, there was no scope of conducting bridge courses to enable the students for that particular year to catch up with the students of the subsequent semester. The learned ASG submitted that in the interest of the medical profession and those who are the beneficiaries of the system, the Special Leave Petitions were liable to be dismissed.

13. It is no doubt true, that applications have been filed by a large number of students for admission in the Institutions imparting education in the Indian form of medicine, with the leave of the Court, but it is equally true that such leave was granted without creating any equity in favour of the applicants. Those who chose to file their applications did so at their own risk and it cannot now be contended that since they have been allowed to file their applications pursuant to orders passed by the Court, they had acquired a right to be admitted in the different Institutions to which they had applied. The privilege granted to the candidates cannot now be transformed into a right to be admitted in the course for which they had applied. Apart from anything else, one has to take a practical view of the matter since more than half the term of the first year is over. Though it has been contended on behalf of the Institutions concerned that extra coaching classes would be given to the new entrants, it is practically impossible for a student to pick up the threads of teaching for the entire first year when half the course had been completed.

14. It is not for us to judge as to whether a particular Institution fulfilled the necessary criteria for being eligible to conduct classes in the concerned discipline or not. That is for



the experts to judge and according to the experts the Institutions were not geared to conduct classes in respect of the year 2011-12. It is also impractical to consider the proposal of the colleges of providing extra classes to the new entrants to bring them upto the level of those who have completed the major part of the course for the first year.

15. We are not, therefore, inclined to interfere with the orders of the High Court impugned in these Special Leave Petitions and the same are, accordingly, dismissed.

16. Having regard to the facts involved, the parties will bear their own costs.

K.K.T. SLPs dismissed.

G.M. SIDDESHWAR
*v.*
PRASANNA KUMAR
(Civil Appeal Nos. 2250-2251 of 2013 etc.)

MARCH 08, 2013

**[R.M. LODHA, J. CHELAMESWAR AND MADAN B. LOKUR, JJ.]**

*Election Laws:*

*Election petition - Alleging resort to corrupt practice by the returned candidate - Whether imperative to file additional affidavit as required under Or.VI r.15(4) CPC, in addition to the affidavit as required by proviso to s.83(1) of the Representation of the People Act - Held: The Act does not mandate filing of an additional affidavit, but requires only verification - Hence additional affidavit u/Or. VI r.15(4) is not required - A composite affidavit, both in support of the averments made in the petition and with regard to allegation of corrupt practices would be sufficient - Representation of the People Act, 1951 - s.83(1) - Conduct of Election Rules, 1961 - Code of Civil Procedure, 1908 - Or. VI r.15(4).*

*Election Petition - Maintainability - Petition whether liable to summary dismissal if affidavit is not in statutory form - Held: If there is substantial compliance with the statutory form, petition cannot be dismissed summarily - Just because of the defective affidavit, the petition, will not cease to be election petition - The defects are curable - Representation of the People Act, 1951 - s.83 - Conduct of Election Rules, 1961 - r.94-A, Form No.25.*

**The questions for consideration in the present appeals were whether in order to maintain an election petition (wherein resort to corrupt practices were alleged**





**against the returned candidate), was it imperative for the election petitioner to file an affidavit in terms of Or. VI r.15(4) CPC, in support of the averments made in the election petition, in addition to an affidavit as required by the proviso to s.83(1) of Representation of the People Act, 1951; and that whether an election petition is liable to be dismissed summarily, if an affidavit filed in support of the allegations of corrupt practices of returned candidate was not in the Statutory Form No.25 as prescribed by the Conduct of Election Rules, 1961.**

**Dismissing the appeals, the Court**

**HELD: 1.1. A plain and simple reading of Section 83(1)(c) of the Representation of the People Act, 1951 clearly indicates that the requirement of an 'additional' affidavit is not to be found therein. While the requirement of "also" filing an affidavit in support of pleadings filed under the CPC may be mandatory in terms of Order VI Rule 15(4) of the CPC, the affidavit is not a part of the verification of the pleadings - both are quite different. While the Act does require a verification of the pleadings, the plain language of Section 83(1)(c) of the Act does not require an affidavit in support of the pleadings in an election petition. The Court is being asked to read a requirement that does not exist in Section 83(1)(c) of the Act. [Para 30] [1122-D-F]**

*P.A. Mohammed Riyas vs. M.K. Raghavan and Ors.* **(2012) 5 SCC511: 2012 (4) SCR 56 - disapproved.**

*Dhananjay Sharma vs. State of Haryana* **(1995) 3 SCC 757: 1995 (3) SCR 964;** *Mohan Singh vs. Amar Singh,* **(1998) 6 SCC 686: 1998 (1) Suppl. SCR 252 - referred to.**

*163rd Report of the Law Commission of India (LCI) on the Code of Civil Procedure (Amendment) Bill, 1997* **- referred to.**

**1.2. The procedure of filing a composite affidavit, both in support of the averments made in the election petition and with regard to the allegations of corrupt practices by the returned candidate, is not contrary to law and cannot be faulted. Such a composite affidavit would not only be in substantial compliance with the requirements of the Act but would actually be in full compliance thereof. The filing of two affidavits is not warranted by the Act nor is it necessary, especially when a composite affidavit can achieve the desired result. [Para 34] [1124-D-E]**

**1.3. The Court must make a fine balance between the purity of the election process and the avoidance of an election petition being a source of annoyance to the returned candidate and his constituents. Hence the salutary intention of the Law Commission to ensure purity in the litigation process must extend to an election petition notwithstanding the mandate of Parliament as expressed in Section 83 of the Act. [Para 35] [1124-F-G; 1125-C]**

*Azhar Hussain vs. Rajiv Gandhi* **1986 (Supp) SCC 315 : 1986 SCR 782 - relied on**

**1.4. It cannot be said that the Order VI Rule 15 of the CPC has been legislated by reference or by incorporation into the Act for the reasons that on a plain reading of Section 83 of the Act, only a verification and not an affidavit in support of the averments in an election petition is required, except when allegations of corrupt practices are made by the election petitioner. Any amendment in the CPC is of no consequence in this regard unless the meaning of 'verification' is amended to include an affidavit. [Para 37] [1126-B-D]**

*Girnar Traders (3) vs. State of Maharashtra* **(2011) 3 SCC 1: 2011 (3) SCR 1 - referred to.**



**2.1. As long as there is substantial compliance with the statutory form, there is no reason to summarily dismiss an election petition on this ground. However, an opportunity must be given to the election petitioner to cure the defect. Further, merely because the affidavit may be defective, it cannot be said that the petition filed is not an election petition as understood by the Representation of the People Act, 1951. [Para 3] [1113-E-F]**

**2.2. Section 86 of the Act makes no reference to Section 83 thereof and so, prima facie, an election petition cannot be summarily dismissed under Section 86 of the Act for non-compliance of the provisions of Section 83 thereof. [Para 42] [1129-G-H]**

*Ponnala Lakshmaiah vs. Kommuri Pratap Reddy* **(2012) 7 SCC 788:2012 (6) SCR 851;** *Hardwari Lal vs. Kanwal Singh* **(1972) 1 SCC214: 1972 (3) SCR 742;** *Sardar Harcharan Singh Brar vs. Sukh Darshan Singh* **(2004) 11 SCC 196: 2004 (5) Suppl. SCR 682;** *G. Mallikarjunappa and Anr. vs. Shamanur Shivashankarappa and Ors.* **(2001) 4 SCC 428 - relied on.**

**2.3. Although non-compliance with the provisions of Section 83 of the Act is a curable defect, yet there must be substantial compliance with the provisions thereof. However, if there is total and complete non-compliance with the provisions of Section 83 of the Act, then the petition cannot be described as an election petition and may be dismissed at the threshold. [Para 55] [1134-C-D]**

*Murarka Radhey Shyam Ram Kumar vs. Roop Singh Rathore and Ors.* **(1963) 3 SCR 573;** *Ch. Subba Rao vs. Member, Election Tribunal,Hyderabad* **(1964) 6 SCR 213 - followed.**

*T.M. Jacob vs. C. Poulose and Ors.* **(1999) 4 SCC 274: 1999 (2) SCR 659;** *V. Narayanaswamy vs. C.P. Thirunavukkarasu* **(2000) 2 SCC 294: 2000 (1) SCR 292;** *Anil*

*Vasudev Salgaonkar vs. Naresh Kushali Shigaonkar* **(2009) 9 SCC 310: 2009 (14) SCR 10 - relied on.**

**2.4. In the present case, the affidavit filed by the election petitioner in compliance with the requirements of the proviso to Section 83(1) of the Act was not an integral part of the election petition, and no such case was set up. It is also clear that the affidavit was in substantial compliance with the requirements of the law. Therefore, the High Court was quite right in coming to the conclusion that the affidavit not being in the prescribed format of Form No.25 and with a defective verification were curable defects and that an opportunity ought to be granted to the election petitioner to cure the defects. [Para 65] [1137-F-G]**

*Ponnala Lakshmaiah vs. Kommuri Pratap Reddy* **(2012) 7 SCC 788:2012 (6) SCR 851;** *Sahodrabai Rai vs. Ram Singh Aharwar* **(1968) 3SCR 13;** *M. Kamalam vs. Dr. V. A. Syed Mohammed* **(1978) 2 SCC 659: 1978 (3) SCR 446;** *F.A. Sapa and Ors. vs. Singora and Ors.***(1991) 3 SCC 375: 1991 (2) SCR 752 ;** *R.P. Moidutty vs. P.T. Kunju Mohammad and Anr.* **(2000) 1 SCC 481;** *Umesh Challiyill vs. K.P. Rajendran* **(2008) 11 SCC 740: 2008 (3) SCR 457 - relied on.**

*F.A. Sapa and Ors. vs. Singora and Ors.* **(1991) 3 SCC 395 - referred to.**

**Case Law Reference:**

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| **2012 (4) SCR 56** | **disapproved** | **Para 3** |
| **(2000) 1 SCC 481** | **referred to** | **Para 16** |
| **(1991) 3 SCC 395** | **referred to** | **Para 17** |
| **1995 (3) SCR 964** | **referred to** | **Para 32** |
| **1998 (1) Suppl. SCR 252** | **referred to** | **Para 33** |
| **2011 (3) SCR 1** | **referred to** | **Para 36** |



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| **2012 (6) SCR 851** | **relied on** | **Para 41** |
| **1972 (3) SCR 742** | **relied on** | **Para 42** |
| **1986 SCR 782** | **relied on** | **Para 43** |
| **(2001) 4 SCC 428** | **relied on** | **Para 45** |
| **2004 (5) Suppl. SCR 682** | **relied on** | **Para 46** |
| **(1963) 3 SCR 573** | **followed** | **Para 49** |
| **(1964) 6 SCR 213** | **followed** | **Para 51** |
| **1999 (2) SCR 659** | **relied on** | **Para 52** |
| **2000 (1) SCR 292** | **relied on** | **Para 53** |
| **2009 (14) SCR 10** | **relied on** | **Para 54** |
| **(1968) 3 SCR 13** | **relied on** | **Para 57** |
| **1991 (2) SCR 752** | **relied on** | **Para 61** |
| **2008 (3) SCR 457** | **relied on** | **Para 64** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2250-2251 of 2013.

From the Judgment & Order dated 24.02.2010 of the High Court of Karnataka at Bangalore in Misc. Civil No. 386 and 1431 of 2010 in Election Petition No. 2 of 2009.

WITH

Civil Appeal Nos. 2252-2255 of 2013.

V. Giri, G.V. Chandrashekar, N.K. Verma (For Anjana Chandrashekar) for the Appellant.

Basava Prabhu Patil, Rajesh Mahale, Krutin R. Joshi, Subramonium Prasad for the Respondent.

The Judgment of the Court was delivered by

**MADAN B. LOKUR, J.** 1. Leave granted.

2. The principal question of law raised for our consideration is whether, to maintain an election petition, it is imperative for an election petitioner to file an affidavit in terms of Order VI Rule 15(4) of the Code of Civil Procedure, 1908 in support of the averments made in the election petition in addition to an affidavit (in a case where resort to corrupt practices have been alleged against the returned candidate) as required by the proviso to Section 83(1) of the Representation of the People Act, 1951. In our opinion, there is no such mandate in the Representation of the People Act, 1951 and a reading of *P.A. Mohammed Riyas v. M.K. Raghavan & Ors.,* (2012) 5 SCC 511 which suggests to the contrary, does not lay down correct law to this limited extent.

3. Another question that has arisen is that if an affidavit filed in support of the allegations of corrupt practices of a returned candidate is not in the statutory Form No. 25 prescribed by the Conduct of Election Rules, 1961, whether the election petition is liable to be summarily dismissed. In our opinion, as long as there is substantial compliance with the statutory form, there is no reason to summarily dismiss an election petition on this ground. However, an opportunity must be given to the election petitioner to cure the defect. Further, merely because the affidavit may be defective, it cannot be said that the petition filed is not an election petition as understood by the Representation of the People Act, 1951.

**The facts:**

4. The challenge in these appeals is to a judgment and order dated 24th February 2010 passed by a learned Single Judge of the High Court of Karnataka in Miscellaneous Civil No. 386/2010 and Miscellaneous Civil No. 1431/2010 in Election Petition No.2/2009. The decision is reported as *Prasanna Kumar v. G.M. Siddeshwar & Ors.,* 2010 (6) KarLJ 78.

5. In Miscellaneous Civil No. 386/2010 the appellant



(Siddeshwar) sought the dismissal/rejection of the election petition challenging his election to the 15th Lok Sabha from 13, Davangere Lok Sabha Constituency in the election held on 13th April 2009. It was submitted in the application that the provisions of Section 81(3) and Section 83 of the Representation of the People Act, 1951 (hereinafter referred to as the Act) had not been complied with and therefore, in view of Section 86 of the Act read with Order VII Rule 11(a) of the Code of Civil Procedure (hereinafter referred to as the CPC), the election petition ought to be rejected/dismissed at the threshold.

6. For the present purposes, we are concerned with Section 83 and Section 86 of the Act and to the extent they are relevant, they read as follows:

**"83. Contents of petition.**-(1) An election petition-

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same

manner as the petition."

**"86. Trial of election petitions.-**(1) The High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117.

Explanation.-An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of Section 98.

(2) to (7) xxx xxx xxx [presently not relevant]"

7. Among the grounds urged in the High Court and reiterated before us were that the proviso to Section 83(1) of the Act requires an affidavit to be filed in the prescribed form in support of the allegations of corrupt practice and the particulars thereof. Rule 94-A of the Conduct of Election Rules, 1961 prescribes Form No. 25 as the format affidavit. According to Siddeshwar, the affidavit filed by the election petitioner (Prasanna Kumar) did not furnish the material particulars on the basis of which allegations of corrupt practice were made and also that it carried a defective verification and therefore it was not an affidavit that ought to be recognized as such.

8. On the issue of non-compliance with the format affidavit, the High Court was of the view that though there was no verbatim compliance, but the affidavit filed by Prasanna Kumar was in substantial compliance with the prescribed format. Consequently, this contention was rejected. The High Court subsequently dealt with the absence of material particulars in the affidavit along with the second application.

9. The High Court also considered the contention that the verification in the affidavit in Form No.25 was defective but concluded that it was a curable defect and therefore, an opportunity should be given to Prasanna Kumar to cure the defect. It was held that if the defect is not cured the election petition is liable to be dismissed.



10. It was also contended that in view of Section 83(1)(c) of the Act, an election petition is required to be verified in the manner laid down in the CPC for the verification of pleadings. Order VI Rule 15(4) of the CPC requires that the person verifying the pleadings shall also furnish an affidavit in support of the pleadings. In the election petition, such an affidavit was not filed despite the affidavit being an integral part of the election petition. For this reason also, the election petition ought to be dismissed at the threshold.

11. In this regard, the High Court was of the view that there was no necessity of the election petitioner filing any other affidavit in support of the election petition and that the affidavit filed by Prasanna Kumar in Form No.25 substantially complied with the requirements of Rule 94-A of the Rules.

12. It was finally contended that Prasanna Kumar had leveled allegations of corrupt practices against Siddeshwar without any material particulars. As such, the election petition did not disclose a complete cause of action and was liable to be rejected under Order VII Rule 11(a) of the CPC. This contention was considered with the second application.

13. In Miscellaneous Civil No. 1431/2010 Siddeshwar invoked the provisions of Order VI Rule 16 of the CPC for striking out some paragraphs of the election petition on the ground that allegations of corrupt practice were scandalous and vexatious. It was contended that on a deletion of the offending paragraphs, the election petition would not survive.

14. In regard to the objections raised, the High Court was of the opinion that some of the allegations made against Siddeshwar alleging corrupt practices did not contain material particulars apart from being vague and deficient. Consequently, a few paragraphs of the election petition were struck off by the Court under Order VI Rule 16 of the CPC. The remaining paragraphs were retained since the High Court was of the view that they required trial and could not be struck off at the initial

stage. Consequently, the objections regarding absence of material particulars and absence of a cause of action were rejected.

15. Feeling aggrieved by the judgment and order passed by the High Court, Siddeshwar has preferred these appeals.

**Reference to a larger Bench:**

16. These matters were earlier heard by a Bench of two learned judges when it was contended by learned counsel for Siddeshwar, relying upon *P.A. Mohammed Riyas* (decided by a Bench of two learned judges) that since Prasanna Kumar had not filed an 'additional' affidavit as required by Order VI Rule 15(4) of the CPC in support of the election petition, the High Court ought to have dismissed it at the threshold. Learned counsel placed reliance on *R.P. Moidutty v. P.T. Kunju Mohammad and Another,* (2000) 1 SCC 481 in support of his contention that an election petition could be dismissed at the threshold if it did not disclose a cause of action.

17. On the other hand, learned counsel appearing for Prasanna Kumar relied upon a larger Bench decision in *F.A. Sapa & Ors. v. Singora & Ors.,* (1991) 3 SCC 395 and contended that Mohammed Riyas was not in consonance with that decision. Reliance was also placed on *G. Mallikarjunappa & Anr. v. Shamanur Shivashankarappa & Ors.,* (2001) 4 SCC 428 to contend that an election petition is not liable to be dismissed at the threshold under Section 86 of the Act for non-compliance with the provisions of Section 83 of the Act. It was contended that any defect in non-compliance with the provisions of Section 83 of the Act is a curable defect which can be removed and judged at the trial of the election petition.

18. After hearing learned counsel for the parties and considering the view expressed in *Mohammed Riyas* which apparently proceeded on the basis that in addition to an affidavit in Form No.25, an election petitioner was also required to



furnish an 'additional' affidavit in support of the election petition in terms of Order VI Rule 15(4) of the CPC, it was felt that the issues raised ought be heard by a larger Bench of at least three Judges.

19. It was also noted that in Mallikarjunappa, a Bench of three judges of this Court held that an election petition was not liable to be dismissed *in limine* under Section 86 of the Act for non-compliance with the provisions of Section 83 thereof. It was observed that *Mallikarjunappa* had not been referred to or considered in *Mohammed Riyas*.

20. Accordingly, by an order passed on 19th July 2012 the issues raised were referred to a larger Bench of three judges. It is under these circumstances that the Special Leave Petitions were placed before us for consideration.

**(i) Affidavit in terms of Order VI Rule 15(4) of the CPC:**

21. The submission made by learned counsel is to the effect that in addition to an affidavit required to be filed in Form No.25 prescribed by Rule 94-A of the Rules in support of allegations made of corrupt practices by the returned candidate, an election petitioner is also required to file an affidavit in support of the election petition keeping in mind the requirement of Order VI Rule 15(4) of the CPC.

22. Order VI Rule 15 of the CPC reads as follows:

> **"15. Verification of pleadings.-** (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.
>
> (2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he

verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

(4) The person verifying the pleading shall also furnish an affidavit in support of his pleadings."

23. A plain reading of Rule 15 suggests that a verification of the plaint is necessary. In addition to the verification, the person verifying the plaint is "also" required to file an affidavit in support of the pleadings. Does this mean, as suggested by learned counsel for Siddeshwar that Prasanna Kumar was obliged to file two affidavits - one in support of the allegations of corrupt practices and the other in support of the pleadings?

24. A reading of Section 83(1)(c) of the Act makes it clear that what is required of an election petitioner is only that the verification should be carried out in the manner prescribed in the CPC. That Order VI Rule 15 requires an affidavit "also" to be filed does not mean that the verification of a plaint is incomplete if an affidavit is not filed. The affidavit, in this context, is a stand-alone document.

25. *Mohammed Riyas* dealt with the issue whether the election petitioner is required to file two affidavits - one affidavit in support of the allegations of corrupt practices and the second affidavit in compliance with the requirements of Order VI Rule 15(4) of the CPC. This is apparent from the submissions advanced by learned counsel appearing in the case.

26. It was contended by the election petitioner that two affidavits would be necessary in an election petition only where the election petitioner wanted the election of the returned candidate to be set aside on the ground of commission of corrupt practices under Section 100(1)(b) of the Act as well as on other grounds as set out in Section 100(1) of the Act. In other



words, the argument was that two affidavits were required to be filed by the election petitioner. It is important to note that it was not argued (as in the present case) that Order VI Rule 15(4) of the CPC does not require the filing of an affidavit as a part of the requirement of verifying the election petition. An alternative contention was put forward that a single affidavit, satisfying the requirement of the Act, could also be filed. The contention put forward was as follows:

"The learned counsel submitted that two affidavits would be necessary only where an election petitioner wanted the election to be set aside both on grounds of commission of one or more corrupt practices under Section 100(1)(b) of the Act and other grounds as set out in Section 100(1). In such a case, two affidavits could possibly be required, one under Order 6 Rule 15(4) CPC and another in Form 25. However, even in such a case, a single affidavit that satisfies the requirements of both the provisions could be filed. In any event, when the election petition was based entirely on allegations of corrupt practices, filing of two affidavits over the selfsame matter would render one of them otiose, which proposition was found acceptable by the Karnataka High Court in *Prasanna Kumar v. G.M. Siddeshwar* [2010 (6) KarLJ 78]."

27. It was argued on behalf of the returned candidate that the election petitioner is required to file an affidavit in support of the pleadings and another affidavit in support of the allegations of corrupt practices by the returned candidate. In other words, the election petitioner is required to file two affidavits. The contention urged was as follows:

"Mr Rao contended that Section 83(1)(c) of the above Act requires the election petition to be signed by the petitioner and verified in the manner specified in CPC for the verification of pleadings. Referring to Order 6 Rule 15 of the Code, Mr Rao submitted that sub-rule (4) requires that the person verifying the pleading shall also furnish an

affidavit in support of his pleadings, which was a requirement independent of the requirement of a separate affidavit with respect to each corrupt practice alleged, as mandated by the proviso to Section 83(1)(c) of the above Act."

28. The conclusions of this Court are given in paragraphs 45 and 46 of the Report in the following words:

"45. Of course, it has been submitted and accepted that the defect was curable and such a proposition has been upheld in the various cases cited by Mr Venugopal, beginning with the decision in *Murarka Radhey Shyam Ram Kumar* case [AIR 1964 SC 1545] and subsequently followed in *F.A. Sapa* case [(1991) 3 SCC 375], *Sardar Harcharan Singh Brar* case [(2004) 11 SCC 196] and *K.K. Ramachandran Master* case [(2010) 7 SCC 428], referred to hereinbefore. In this context, we are unable to accept Mr Venugopal's submission that despite the fact that the proviso to Section 83(1) of the 1951 Act provides that where corrupt practices are alleged, the election petition shall also be accompanied by an affidavit in the prescribed form, it could not have been the intention of the legislature that two affidavits would be required, one under Order 6 Rule 15(4) CPC and the other in Form 25. We are also unable to accept Mr Venugopal's submission that even in a case where the proviso to Section 83(1) was attracted, a single affidavit would be sufficient to satisfy the requirements of both the provisions.

46. Mr Venugopal's submission that, in any event, since the election petition was based entirely on allegations of corrupt practices, filing of two affidavits in respect of the selfsame matter, would render one of them redundant, is also not acceptable. As far as the decision in *F.A. Sapa* case is concerned, it has been clearly indicated that the petition, which did not strictly comply with the requirements of Section 83 of the 1951 Act, could not be said to be an



election petition as contemplated in Section 81 and would attract dismissal under Section 86(1) of the 1951 Act. On the other hand, the failure to comply with the proviso to Section 83(1) of the Act rendered the election petition ineffective, as was held in *Hardwari Lal* case [(1972) 1 SCC 214] and the various other cases cited by Mr P.P. Rao."

29. Unfortunately, the submissions made by the election petitioner were not discussed, but were simply rejected. No reasons have, unfortunately, been given by this Court for arriving at the conclusions that it did and rejecting the contentions of learned counsel for the election petitioner.

30. It seems to us that a plain and simple reading of Section 83(1)(c) of the Act clearly indicates that the requirement of an 'additional' affidavit is not to be found therein. While the requirement of "also" filing an affidavit in support of pleadings filed under the CPC may be mandatory in terms of Order VI Rule 15(4) of the CPC, the affidavit is not a part of the verification of the pleadings - both are quite different. While the Act does require a verification of the pleadings, the plain language of Section 83(1)(c) of the Act does not require an affidavit in support of the pleadings in an election petition. We are being asked to read a requirement that does not exist in Section 83(1)(c) of the Act.

**Recommendation of the Law Commission:**

31. To get over the difficulty posed by the plain language of Section 83 of the Act, learned counsel for Siddeshwar referred to the imperatives of an affidavit in support of statements of fact made in a plaint, which would hopefully give some sanctity to the averments made therein. Reliance was placed on judgments of this Court as well as on the 163rd Report of the Law Commission of India (LCI) on the Code of Civil Procedure (Amendment) Bill, 1997.

32. In this context, in *Dhananjay Sharma v. State of Haryana,* (1995) 3 SCC 757 it was held:

> "The swearing of false affidavits in judicial proceedings not only has the tendency of causing obstruction in the due course of judicial proceedings but has also the tendency to impede, obstruct and interfere with the administration of justice. …….. The stream of justice has to be kept clean and pure and anyone soiling its purity must be dealt with sternly so that the message percolates loud and clear that no one can be permitted to undermine the dignity of the court and interfere with the due course of judicial proceedings or the administration of justice."

A similar view was expressed in *Mohan Singh v. Amar Singh,* (1998) 6 SCC 686. The LCI referred to both these decisions and proposed the insertion of sub-section (2) in Section 26 of the CPC making it obligatory upon a plaintiff to file an affidavit in support of facts stated in the plaint. A similar provision was proposed in Order VI of the CPC by inserting sub-Rule (4) in Rule 15 thereof. In this context, the LCI had this to say:

> "2.6.1. The response of members of the Bench as well as the Bar has been uniformly against the above proposals. The general view expressed by them is that such a provision would only add to the delays in disposal of suits. It was submitted that there are enough provisions in the existing law to deal with false and malicious averments in the pleadings and that this additional requirement would not make any difference. …..
>
> "2.6.2. The Law Commission is, however, of the opinion that the proposed amendments are salutary and may, at least to some extent, check the tendency to make false averments in the pleadings. ……. This tendency has certainly to be checked. Even if the parties in two to five per cent cases could be dealt with appropriately for making false statements in the pleadings, it would greatly help in arresting this tendency……"



33. While the necessity of an affidavit in support of facts stated in a plaint may be beneficial and may have salutary results, but we have to go by the law as it is enacted and not go by the law as it ought to be. The CPC no doubt requires that pleadings be verified and an affidavit "also" be filed in support thereof. However, Section 83(1)(c) of the Act merely requires an election petitioner to sign and verify the contents of the election petition in the manner prescribed by the CPC. There is no requirement of the election petitioner "also" filing an affidavit in support of the averments made in the election petition except when allegations of corrupt practices have been made.

34. In any event, as in the present case, the same result has been achieved by the election petitioner filing a composite affidavit, both in support of the averments made in the election petition and with regard to the allegations of corrupt practices by the returned candidate. This procedure is not contrary to law and cannot be faulted. Such a composite affidavit would not only be in substantial compliance with the requirements of the Act but would actually be in full compliance thereof. The filing of two affidavits is not warranted by the Act nor is it necessary, especially when a composite affidavit can achieve the desired result.

35. The Court must make a fine balance between the purity of the election process and the avoidance of an election petition being a source of annoyance to the returned candidate and his constituents. In *Azhar Hussain v. Rajiv Gandhi,* 1986 (Supp) SCC 315 this Court observed (in the context of summary dismissal of an election petition):

> "So long as the sword of Damocles of the election petition remains hanging an elected member of the legislature would not feel sufficiently free to devote his whole-hearted attention to matters of public importance which clamour for his attention in his capacity as an elected representative of the concerned constituency. The time and attention

demanded by his elected office will have to be diverted to matters pertaining to the contest of the election petition. Instead of being engaged in a campaign to relieve the distress of the people in general and of the residents of his constituency who voted him into office, and instead of resolving their problems, he would be engaged in campaign to establish that he has in fact been duly elected."

In light of the above, it is not possible to accept the view that the salutary intention of the LCI to ensure purity in the litigation process must extend to an election petition notwithstanding the mandate of Parliament as expressed in Section 83 of the Act.

**Legislation by reference:**

36. The final contention urged under this subject was that in view of the language used in Section 83(1)(c) of the Act, the doctrine of legislation by reference would need to be invoked in as much as any amendment to the CPC would be applicable to the working of the Act. It was argued that since an amendment was made to Rule 15(4) of Order VI of the CPC, that amendment has been legislated by reference in the Act and so the election petitioner would be bound by the terms thereof and would, therefore, not only need to sign and verify the contents of an election petition, but also file an affidavit in support thereof. Reliance was placed on a Constitution Bench decision in *Girnar Traders (3) v. State of Maharashtra,* (2011) 3 SCC 1. In that case, after an analysis of the entire case law on the subject, the Constitution Bench held:

"Having perused and analysed the various judgments cited at the Bar we are of the considered view that this rule [of legislation by reference] is bound to have exceptions and it cannot be stated as an absolute proposition of law that wherever legislation by reference exists, subsequent amendments to the earlier law shall stand implanted into the later law without analysing the impact of such



incorporation on the object and effectuality of the later law. The later law being the principal law, its object, legislative intent and effective implementation shall always be of paramount consideration while determining the compatibility of the amended prior law with the later law as on relevant date."

37. We are not inclined to debate the contention whether Order VI Rule 15 of the CPC has been legislated by reference or by incorporation into the Act for the reasons already indicated above, namely, that on a plain reading of Section 83 of the Act, only a verification and not an affidavit in support of the averments in an election petition is required, except when allegations of corrupt practices are made by the election petitioner. Any amendment in the CPC is of no consequence in this regard unless the meaning of 'verification' is amended to include an affidavit.

**Defective affidavit:**

38. What exactly are the contents of an affidavit in Form No.25 as prescribed by Rule 94-A of the Rules? The format reads as follows:

**"Form 25**
(see Rule 94A)
**AFFIDAVIT**

I, ....., the petitioner in the accompanying election petition calling in question the election of Shri/ Shrimati ..... (respondent No..... in the said petition) make solemn affirmation/oath and say-

(a) that the statements made in paragraphs ..... of the accompanying election petition about the commission of the corrupt practice of* ..... and the particulars of such corrupt practice mentioned in paragraphs ..... of the same petition and in

paragraphs …….. of the Schedule annexed thereto are true to my knowledge;

(b) that the statements made in paragraphs …….. of the said petition about the commission of the corrupt practice of* …….. and the particulars of such corrupt practice given in paragraphs …….. of the said petition and in paragraphs …….. of the Schedule annexed thereto are true to my information:

(c)

(d)

(e)

(f)

etc.

Signature of deponent

Solemnly affirmed/sworn by Shri/ Shrimati …….. at ……..this……. day of …….. 20……..

Before me, Magistrate of the first class/

Notary/Commissioner of Oaths.

*Here specify the name of the corrupt practice."

39. Prasanna Kumar's affidavit accompanying the election petition reads as follows:

**"Form 25**
(Rule 94-A)
In The High Court of Karnataka at Bangalore
(Original Jurisdiction)
Election Petition No. 2/2009

Between:



Prasanna Kumar .... Petitioner

And

Sri G.M. Siddeshwar and Ors .... Respondents

**Affidavit**

I, Prasanna Kumar, the petitioner in the accompanying Election petition, catting in question the election of Sri G.M. Siddeshwar (1st respondent in the said petition) make solemn and affirmation on oath and say-

(a) That I am an elector in 13 Davanagere Lokasabha Constituency in Harihar Assembly Segment and I am fully aware and acquainted with the facts of the case and swear to this affidavit,

(b) That the statements made in paragraphs 1, 2, 3, 5, 7, 8, 11, 12 and 13 & 14 of the accompanying Election Petition about the violation of the law during the conduct of election and the particulars mentioned in the above noted paragraphs are true to my knowledge and contents of paras 18, 19, 20 and 21 are based on legal advise;

(c) That the statements made in paragraphs 3, 4, 6, 8, 9, 10, 15 and 16 of the accompanying Election Petition about the commission of electoral offence of corrupt practices and the particulars mentioned in the said paragraphs of the petition are true to my knowledge and partly on Information.

(d) That Annexures - 1 to 14 and 18, 19, 20, 22, 23, 24 are true copies and 15, 16, 17, 21 are original copies.

Sd/-
Signature of the Deponent
Solemnly affirmed/sworn to by Sri Prasanna Kumar
at Bangalore, this the 18th day of June 2009.

Sd/- Identified by me
Sd/- corrections: (nil).
sworn to before me"

40. A perusal of the affidavit furnished by Prasanna Kumar ex facie indicates that it was not in absolute compliance with the format affidavit. However, we endorse the view of the High Court that on a perusal of the affidavit, undoubtedly there was substantial compliance with the prescribed format. It is correct that the verification was also defective, but the defect is curable and cannot be held fatal to the maintainability of the election petition.

41. Recently, in *Ponnala Lakshmaiah v. Kommuri Pratap Reddy,* (2012) 7 SCC 788 the issue of a failure to file an affidavit in accordance with the prescribed format came up for consideration. This is what this Court had to say:

> "The format of the affidavit is at any rate not a matter of substance. What is important and at the heart of the requirement is whether the election petitioner has made averments which are testified by him on oath, no matter in a form other than the one that is stipulated in the Rules. The absence of an affidavit or an affidavit in a form other than the one stipulated by the Rules does not by itself cause any prejudice to the successful candidate so long as the deficiency is cured by the election petitioner by filing a proper affidavit when directed to do so."

We have no reason to take a different view. The contention urged by Siddeshwar is rejected.

**(ii) Summary dismissal under Section 86 of the Act:**

42. Undoubtedly, Section 86 of the Act makes no reference to Section 83 thereof and so, prima facie, an election petition cannot be summarily dismissed under Section 86 of the Act for non-compliance of the provisions of Section 83 thereof. This was briefly adverted to in *Hardwari Lal v. Kanwal Singh,* (1972) 1 SCC 214 but that was in the context of dismissal of the election petition under the provisions of the CPC. The contention urged in *Hardwari Lal* was to the effect that since Section 83 of the Act does not find a mention in Section 86 thereof, an election petition could not be summarily dismissed for non-compliance of Section 83. A three-judge Bench of this Court held that since an election petition is required to be tried as nearly as possible in accordance with the procedure applicable under the CPC to the trial of suits, an election petition could nevertheless be dismissed if it did not disclose a cause of action.



43. The issue was, again, specifically raised in Azhar Hussain. The question considered was:

> "Since the Act does not provide for dismissal of an election petition on the ground that material particulars necessary to be supplied in the election petition as enjoined by Section 83 of the Act are not incorporated in the election petition inasmuch as Section 86 of the Act which provides for summary dismissal of the petition does not advert to Section 83 of the Act there is no power in the court trying election petitions to dismiss the petition even in exercise of powers under the Code of Civil Procedure."

44. While answering this issue, this Court referred to *Hardwari Lal*. It was held, relying on that decision that since powers under the CPC could be exercised by the Court, an election petition could be summarily dismissed if it did not disclose a cause of action. This is what this Court had to say:

> "In view of this pronouncement there is no escape from the conclusion that an election petition can be summarily dismissed if it does not furnish cause of action in exercise of the powers under the Code of Civil Procedure. So also it emerges from the aforesaid decision that appropriate orders in exercise of powers under the Code of Civil Procedure can be passed if the mandatory requirements

enjoined by Section 83 of the Act to incorporate the material facts in the election petition are not complied with."

45. In *Mallikarjunappa* the issue was considered yet again and it was held:

"An election petition is liable to be dismissed in limine under Section 86(1) of the Act if the election petition does not comply with either the provisions of "Section 81 or Section 82 or Section 117 of the RP Act". The requirement of filing an affidavit along with an election petition, in the prescribed form, in support of allegations of corrupt practice is contained in Section 83(1) of the Act. Non-compliance with the provisions of Section 83 of the Act, however, does not attract the consequences envisaged by Section 86(1) of the Act. Therefore, an election petition is not liable to be dismissed in limine under Section 86 of the Act, for alleged non-compliance with provisions of Section 83(1) or (2) of the Act or of its proviso."

46. More recently, the issue was again considered in *Ponnala Lakshmaiah* and relying upon *Sardar Harcharan Singh Brar v. Sukh Darshan Singh,* (2004) 11 SCC 196 it was held:

"Even otherwise the question whether non-compliance with the proviso to Section 83(1) of the Act is fatal to the election petition is no longer res integra in the light of a three-Judge Bench decision of this Court in Sardar Harcharan Singh Brar v. Sukh Darshan Singh. In that case a plea based on a defective affidavit was raised before the High Court resulting in the dismissal of the election petition. In appeal against the said order, this Court held that non-compliance with the proviso to Section 83 of the Act did not attract an order of dismissal of an election petition in terms of Section 86 thereof. Section 86 of the Act does not provide for dismissal of an election petition



on the ground that the same does not comply with the provisions of Section 83 of the Act. It sanctions dismissal of an election petition for non-compliance with Sections 81, 82 and 117 of the Act only. Such being the position, the defect if any in the verification of the affidavit filed in support of the petition was not fatal, no matter the proviso to Section 83(1) was couched in a mandatory form."

47. The issue having been considered several times by this Court must now be allowed to rest at that.

**What is an election petition:**

48. However, another aspect of this contention is that if the provisions of Section 83 of the Act are not complied with, then the election petition that has been filed cannot truly be described as an election petition.

49. In *Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore & Ors.* [1963] 3 SCR 573, the Constitution Bench dealt with the issue whether non-compliance with the proviso to Section 83(1) of the Act was fatal to the maintainability of an election petition wherein allegations of corrupt practices were made. It was urged that the affidavit in respect of corrupt practices which accompanied the election petition was neither properly made nor in the prescribed form. A different facet of this argument was that an election petition must comply with the provisions of Section 83 thereof and if it did not, then it could not be called an election petition.

50. The Constitution Bench agreed with the Election Tribunal that a defect in the verification of an affidavit "cannot be a sufficient ground for dismissal of the petitioner's petition summarily, as the provisions of Section 83 are not necessarily to be complied with in order to make a petition valid and such affidavit can be allowed to be filed at a later stage also." In other words, non-compliance with the proviso to Section 83(1) of the Act was not 'fatal' to the maintainability of an election petition

and the defect could be remedied. It would follow that if an election petition did not comply with the proviso to Section 83(1) of the Act, it would still be called an election petition.

51. The broad principle laid down in *Murarka* was somewhat restricted by another Constitution Bench decision rendered in *Ch. Subba Rao v. Member, Election Tribunal, Hyderabad* [1964] 6 SCR 213. In that case, the Constitution Bench introduced two clear principles: firstly, that "if there is a total and complete non compliance with the provisions of Section 81(3), the election petition might not be "an election petition presented in accordance with the provisions of this part" within Section 80 of the Act" and secondly, that "if there is a substantial compliance with the requirement of Section 81(3), the election petition cannot be dismissed by the Tribunal under Section 90(3)."

52. In *T.M. Jacob v. C. Poulose & Ors.,* (1999) 4 SCC 274 this Court reiterated the doctrine of substantial compliance as mentioned in *Murarka Radhey Shyam Ram Kumar* and *Ch. Subba Rao* and also introduced the doctrine of curability on the principles contained in the CPC. It was held that the defect in the affidavit in that case was curable and was not of such a fatal nature as to attract dismissal of the election petition at the threshold.

53. The doctrine of substantial compliance as well as the doctrine of curability were followed in *V. Narayanaswamy v. C.P. Thirunavukkarasu,* (2000) 2 SCC 294. This Court held that a defect in verification of an affidavit is not fatal to the election petition and it could be cured. Following Moidutty it was held that if the election petition falls foul of Order VI Rule 16 and Order VII Rule 11 of the CPC and does not disclose a cause of action then it has to be rejected at the threshold.

54. Somewhat more recently, in *Anil Vasudev Salgaonkar v. Naresh Kushali Shigaonkar,* (2009) 9 SCC 310 this Court reiterated this position in law and held:



> "The position is well settled that an election petition can be summarily dismissed if it does not furnish the cause of action in exercise of the power under the Code of Civil Procedure. Appropriate orders in exercise of powers under the Code can be passed if the mandatory requirements enjoined by Section 83 of the Act to incorporate the material facts in the election petition are not complied with."

55. The principles emerging from these decisions are that although non-compliance with the provisions of Section 83 of the Act is a curable defect, yet there must be substantial compliance with the provisions thereof. However, if there is total and complete non-compliance with the provisions of Section 83 of the Act, then the petition cannot be described as an election petition and may be dismissed at the threshold.

**Integral part of an election petition:**

56. An issue arises whether an affidavit required to be filed under the proviso to Section 83(1) of the Act is an integral part of an election petition and, if so, whether the filing of a defective affidavit would be fatal to the maintainability of an election petition. This would, in a sense, be an exception to the general rule mentioned above regarding a defect under Section 83 of the Act being curable.

57. In *Sahodrabai Rai v. Ram Singh Aharwar* [1968] 3 SCR 13 the question raised was as follows:

> "Whether the election petition is liable to be dismissed for contravention of Section 81 (3) of the Representation of the People Act, 1951 as copy of Annexure 'A' to the petition was not given along with the petition for being served on the respondents."

58. It was noted that the contents of the pamphlet, in translation, were incorporated in the election petition. It was also noted that the trial of an election petition has to follow, as far

as may be, the provisions of the CPC. Therefore, this Court approached the problem by looking at the CPC to ascertain what would have been the case if what was under consideration was a suit and not the trial of an election petition.

59. It was held that where the averments are too compendious for being included in an election petition, they may be set out in the schedules or annexures to the election petition. In such an event, these schedules or annexures would be an integral part of the election petition and must, therefore, be served on the respondents. This is quite distinct from documents which may be annexed to the election petition by way of evidence and so do not form an integral part of the averments of the election petition and may not, therefore, be served on the respondents.

60. In *M. Kamalam v. Dr. V.A. Syed Mohammed,* (1978) 2 SCC 659 this Court followed Sahodrabai Rai and held that a schedule or an annexure which is an integral part of an election petition must comply with the provisions of Section 83(2) of the Act. Similarly, the affidavit referred to in the proviso to Section 83(1) of the Act where the election petition alleges corrupt practices by the returned candidate also forms a part of the election petition. If the affidavit, at the end of the election petition is attested as a true copy, then there is sufficient compliance with the requirement of Section 81(3) of the Act and would tantamount to attesting the election petition itself.

61. *F.A. Sapa and Others v. Singora and Others,* (1991) 3 SCC 375 a three-judge Bench of this Court reviewed the relevant provisions of the Act, Rule 94-A of the Rules, Form No. 25, the provisions of the CPC as well as the case law and arrived at the following conclusions:

> "28. From the text of the relevant provisions of the R.P. Act, Rule 94-A and Form 25 as well as Order 6 Rule 15 and Order 19 Rule 3 of the Code and the resume of the case law discussed above it clearly emerges (i) a defect in the verification, if any, can be cured (ii) it is not essential that the verification clause at the foot of the petition or the affidavit accompanying the same should disclose the grounds or sources of information in regard to the averments or allegations which are based on information believed to be true (iii) if the respondent desires better particulars in regard to such averments or allegations, he may call for the same in which case the petitioner may be required to supply the same and (iv) the defect in the affidavit in the prescribed Form 25 can be cured unless the affidavit forms an integral part of the petition, in which case the defect concerning material facts will have to be dealt with, subject to limitation, under Section 81(3) as indicated earlier. Similarly the court would have to decide in each individual case whether the schedule or annexure referred to in Section 83(2) constitutes an integral part of the election petition or not; different considerations will follow in the case of the former as compared to those in the case of the latter."

62. It was further laid down that even though a defective affidavit may not be fatal to the maintainability of an election petition, the High Court should ensure compliance before the parties go to trial so that the returned candidate can meet the allegations and is not taken by surprise at the trial.

63. What is the consequence of not curing the defect? In *Moidutty* a defect in verification of the election petition was pointed out by raising a plea in that regard in the written statement. Notwithstanding this, the election petitioner did not cure the defect. Under these circumstances it was held that until the defect in the verification was rectified the petition could not have been tried. Additionally, it was held that since there was a lack of material particulars regarding the allegations of corrupt practices, it was a case where the election petition ought to have been rejected at the threshold for non-compliance with the mandatory provisions of law as to pleadings.

64. This issue was again discussed in *Umesh Challiyill v. K.P. Rajendran,* (2008) 11 SCC 740 and this Court suggested the following solution:

> "However, in fairness whenever such defects are pointed out then the proper course for the Court is not to dismiss the petition at the threshold. In order to maintain the sanctity of the election the Court should not take such a technical attitude and dismiss the election petition at the threshold. On the contrary after finding the defects, the Court should give proper opportunity to cure the defects and in case of failure to remove/cure the defects, it could result into dismissal on account of Order 6 Rule 16 or Order 7 Rule 11 CPC. Though technically it cannot be dismissed under Section 86 of the Act of 1951 but it can be rejected when the election petition is not properly constituted as required under the provisions of CPC but in the present case we regret to record that the defects which have been pointed out in this election petition were purely cosmetic and do not go to the root of the matter and secondly even if the Court found them of serious nature then at least the Court should have given an opportunity to the petitioner to rectify such defects."

65. Applying these principles to the facts of the present case, it seems quite clear that the affidavit filed by Prasanna Kumar in compliance with the requirements of the proviso to Section 83(1) of the Act was not an integral part of the election petition, and no such case was set up. It also seems quite clear that the affidavit was in substantial compliance with the requirements of the law. Therefore, the High Court was quite right in coming to the conclusion that the affidavit not being in the prescribed format of Form No.25 and with a defective verification were curable defects and that an opportunity ought to be granted to Prasanna Kumar to cure the defects.

66. No submissions were made with regard to the striking out, in accordance with Order VI rule 16 of the CPC, of



specifically objectionable paragraphs in the election petition. In any event this is a matter for trial and we see no reason to take a view different from that taken by the High Court.

**Conclusion:**

67. There is no merit in these appeals and they are, accordingly dismissed, but without any costs.

K.K.T. Appeals dismissed.