

(2015) 03 SHI CK 0108
In the High Court Of Himachal Pradesh
Case No : CWP No. 3952 of 2012

Bansi Lal and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 26-03-2015

Acts Referred:

Public Premises (Eviction of Unauthorised Occupants) Act, 1971 — Section 4, 5

Citation : (2015) 03 SHI CK 0108

Hon'ble Judges : Rajiv Sharma, J;Sureshwar Thakur, J

Bench : Division Bench

Advocate : Hamender Chandel, for the Appellant; Ashok Sharma, ASGI,
Advocates for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—The petitioners were served with notices under sub-section 1 and cl. (b)(ii) of sub-section (2) of Section 4 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as the Act) on 25.12.2008, by the Estate Officer. They were directed to appear before him on 15.1.2009. The petitioners have put in appearance before the Estate Officer on 15.1.2009. The Estate Officer passed the orders on 30.9.2010 to vacate the premises within 15 days. The petitioners assailed the order dated 30.9.2010 by filing CWP No. 7002/2010 titled as Roshan Lal and Ors. Vrs. Union of India. It was decided on 10.11.2010. The petitioners were permitted to assail the order dated 30.9.2010 before the District Judge concerned. The petitioners assailed the orders dated 30.9.2010 by filing appeal(s) before the learned Addl. District Judge-I, Kangra at Dharamshala in Civil Appeal No. 39-I/2010. The learned Addl. District Judge-I, Kangra at Dharamshala, dismissed the same on 21.1.2012. Thereafter, the petitioners were issued notices to vacate the premises on 14.5.2012. The petitioners have challenged the order dated 21.1.2012 rendered by the learned Addl. District Judge-I, Kangra at Dharamshala, by way of present Writ Petition.

2. The notices were issued to the respondents on 25.5.2012. The petitioners were ordered not to be evicted. The respondents sought six weeks time to file reply on 14.6.2012. The second respondent sought more time to file reply on 22.8.2012. He sought further time on 15.11.2012. Respondents No. 1 to 3 were granted four weeks" time to file reply on 28.2.2013. The respondents were given further time to file reply-affidavit till 6.5.2013. Respondents No. 4 and 6 filed joint reply as per order dated 10.6.2013. The fact of the matter is that the respondents No. 1 to 3 have not chosen to file any reply, despite numerous opportunities granted to them, as noticed by us hereinabove.

3. Mr. Hamender Chandel, Advocate, for the petitioners has vehemently argued that the petitioners have been granted electricity connections and they were also paying house tax to the respective Gram Panchayat(s). He also contended that his clients are in peaceful and settled possession for more than 35 years. They have also been issued ration cards. He lastly contended that no reason has been assigned by the Estate Officer in the order dated 30.9.2010. On the other hand, Mr. Ashok Sharma, learned ASGI, has supported the orders dated 30.9.2010 and 21.1.2012.

4. We have heard Mr. Hamender Chandel, Advocate for the petitioners, Mr. Ashok Sharma, learned ASGI for Union of India and Mr. Ramesh Thakur, learned Asst. AG, for the respondent-State.

5. We have gone through Annexure P-3 dated 30.9.2010. It is a cyclostyled order. There is non-application of mind by the Estate Officer. The Estate Officer was required to assign reasons while ordering the eviction of the petitioners after discussing the evidence led by the parties. Rule 5 of the Public Premises (Eviction of Unauthorized Occupants) Rules, 1971 (hereinafter referred to as the Rules), reads as under:

"5. Holding of inquiries--(1) Where any person on whom a notice or order under this Act has been served desires to be heard through his representative, he should authorize such representative in writing.

(2) The Estate officer shall record the summary of the evidence tendered before him. The summary of such evidence and any relevant documents filed before him shall form part of the records of the proceedings."

6. It is evident from the phraseology applied in rule 5 that the Estate Officer was required to record the summary of the evidence tendered before him. The summary of such evidence and any relevant documents filed before him forms part of the records of the proceedings. The Estate Officer, without recording summary of evidence has ordered the eviction of the petitioners on 30.9.2010. He was required to hold enquiry as envisaged under Section 4 of the Act and Rule 5 of the Rules framed thereunder. The petitioners were required to be heard and permitted to lead the evidence. The Estate Officer has neither discussed the evidence of the petitioners nor of the department concerned. The petitioners were required to be given an opportunity to contradict the statements recorded

in the evidence forming the material to be relied upon by the department against them. The Estate Officer discharges quasi-judicial functions. His orders must be based on reasons after appreciation of facts in the right perspective. The orders are required to be passed after holding enquiry or investigation. The learned Addl. District Judge, Kangra at Dharamshala, has also failed to take into consideration the requirement of Section 4 of the Act read with Rule 5 of the Rules framed thereunder. He has been swayed by the fact that the petitioners had at one point of time given undertaking to vacate the premises of the defence department. The learned Addl. District Judge, Kangra at Dharamshala, should have gone into the entire gamut of the matter by taking into consideration the true import of Section 4 of the Act and Rules framed thereunder, more particularly, Rule 5 of the Rules. There cannot be any estoppel against the fundamental rights and legal rights.

7. Their Lordships of the Hon"ble Supreme Court in the case of Nar Singh Pal Vs. Union of India and Others, AIR 2000 SC 1401 : (2000) 85 FLR 458 : (2000) 3 JT 593 : (2000) 1 LLJ 1388 : (2000) 2 SCALE 685 : (2000) 3 SCC 588 : (2000) SCC(L&S) 362 : (2000) 2 SCR 752 : (2000) AIRSCW 1141 : (2000) 2 Supreme 667 , have held as under:

"13. The Tribunal as also the High Court, both appear to have been moved by the fact that the appellant had encashed the cheque through which retrenchment compensation was paid to him. They intended to say that once retrenchment compensation was accepted by the appellant, the chapter stands closed and it is no longer open to the appellant to challenge his retrenchment. This, we are constrained to observe, was wholly erroneous and was not the correct approach. The appellant was a casual labour who had attained the "temporary" status after having put in ten years" of service. Like any other employee, he had to sustain himself, or, may be, his family members on the wages he got. On the termination of his services, there was no hope left for payment of salary in future. The retrenchment compensation paid to him, which was only a meagre amount of Rs. 6,350/-, was utilised by him to sustain himself. This does not mean that he had surrendered all his constitutional rights in favour of the respondents. Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor can there be any estoppel against the exercise of Fundamental Rights available under the Constitution. As pointed out earlier, the termination of the appellant from service was punitive in nature and was in violation of the principles of natural justice and his Constitutional rights. Such an order cannot be sustained."

8. Their Lordships of the Hon"ble Supreme Court in Oil and Natural Gas Corporation Ltd. Vs. Western Geco international Ltd., AIR 2015 SC 363 : (2014) AIRSCW 5727 : (2014) 10 SCALE 328 : (2014) 9 SCC 263 have held that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Their Lordships have

further held that application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. Their Lordships have further held that perversity or irrationality of decisions is to be tested on the touchstone of the Wednesbury principle of reasonableness. Their Lordships have held as under:

"25. It is true that none of the grounds enumerated under Section 34(2)(a) were set up before the High Court to assail the arbitral award. What was all the same urged before the High Court and so also before us was that the award made by the arbitrators was in conflict with the "public policy of India" a ground recognised under Section 34(2)(b)(ii). The expression "Public Policy of India" fell for interpretation before this Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., AIR 2003 SC 2629 : (2003) 2 ARBLR 5 : (2003) 3 CompLJ 1 : (2003) 4 JT 171 : (2003) 4 SCALE 92 : (2003) 5 SCC 705 : (2003) 44 SCL 89 : (2003) 3 SCR 691 : (2003) 2 UJ 1035 and was, after a comprehensive review of the case law on the subject, explained in para 31 of the decision in the following words:

"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case 10 it is required to be held that the award could be set aside if it is patently illegal. The result would be award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- [pic](d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

35. What then would constitute the "Fundamental policy of Indian Law" is the question. The decision in Saw Pipes Ltd. does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this

country. Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi judicial determination lies in the fact so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge."

9. Mr. Ashok Sharma, learned Asstt. Solicitor General of India, has vehemently argued that though there may be some defect in the order dated 30.9.2010 passed by the Estate Officer but the same was got cured by the appellate order passed by the learned Addl. District Judge, Kangra at Dharamshala in Civil Appeal No. 39-I/2010 decided on 21.1.2012. The illegalities in the order passed by the Estate Officer will not be cured by the appellate authority at the appellate stage. It is settled law that once edifice goes, the structure constructed thereupon also falls. The inherent defect in the proceedings would not be cured at the appellate stage, more particularly, when there is violation of the principles of natural justice.

10. In the case of G. Rajalakshmi and Others Vs. Appellate Authority (Chief Judge, City Civil Court, Hyderabad) and Others , the learned Single Judge has held that when the Tribunal has not considered the objections filed, the orders passed by the appellate Court would not cure the defect. It has been held as follows:

"[10] The question thus posed has to be considered on first principles. There is very little authority in the decisions of this Court or in the Supreme Court touching this aspect of the question. It may be recalled that in *Redge v. Baldwin* (1) 1964 AC 40, the House of Lords and considered the scope of "notice" forming part of the principle of audi alteram partem. Lord Reid in his speech had stressed the principle of audi alteram partem is part and parcel of natural justice. That is not disputed. A similar question as in the instant case arose directly in *Leary v. National Union of Vehicle Builders* (2) (1970) 2 All ER 713 at pl 720. Leary the plaintiff in the suit was a member and organiser of National Union of Vehicle

Builders. The "Union" in the rules, Rule 26(2) had reserved authority to expel any member who had defaulted payment of contribution for six months. The Branch Committee of the Union by order on January 16, 1969 expelled Leary without hearing him for not paying the contributions for 27 weeks. The plaintiff (Leary) in vain attacked the order in appeal before the Appeals Council and urged 5 were paid by him. Before the Appeals Council Leary was heard and afforded all opportunities. Further in the appeal committee two council members were not served notice of the meeting and one M. Wattas, who was not a member, formed as member of the council. The order of the appeal council was challenged in a suit. Megary J., posed the question on the above facts:- "If a man has never had a fair trial by the appropriate trial body, is it open to appellate body to discard its appellate functions and itself give the man the fair trial that he has never had" and captioned the circumstance as "unjust trial and a fair appeal" and answered the question as a general rule. "I hold that a failure of natural justice in the trial body cannot be cured appellate body". The learned Judge held bodies differ much in their views and approach and referred to the rules of the Union as having "confined" in the Branch Committee for expulsion not in the fairness of appeal. I respectfully agree with the reasoning propounded in the decision. Adoption of such a course in my view curbs the tendency in "trial tribunals" to give a short shrift to proceedings. The explanation Ex. A-1 in the instant case was received by the Estates Officer yet it was said by that authority that no explanation was received. It is with reference to such devices Rt. Hon. Lord Hewart of Bury in his book "New despotism" at page 49 observed. Some such decisions are rendered in "hole and corner" fashion. Decisions of administrative tribunals are generally criticised even those in whose favour the decision is made, it is said as "mere piece of luck". How can it be said such decisions rendered as in these proceedings are rendered under rule of law. In my view the proper course for the appellate tribunal is to remit the subject to the trial tribunal and by doing so the principle of audi alteram partem and in turn the larger principle of natural justice stands vindicated and strengthened. I am aware that it is possible to take another view and such a view appears to have been taken in two of the commonwealth dominions, in three Canadian cases viz., *Posluns v. Toronto Stock Exchange and Gardiner* (3) (1964) 46 DLR (2d) 210, and in appeal of the same case in (4) CA (1965) 53 DLR (2d) 193, in *King v. University of Saskatchewan*, (5) (1969) SCR 678 and one in a decision in New Zealand case in *Denton v. Auckland City*, (6) (1969) NZLR 256, but I had not the advantage of reading these decisions. I have understood the question as one not governed by any authority of this Court or that of the Supreme Court of India. The field in that sense is untrodden. In view of the paucity of authority whether to adopt the view taken by the Courts in England as propounded by Megarry L. in (2) (above) or to have recourse to the adoption of procedure followed in Canadian and New Zealand Cases! A number of cases were cited during the debate. There is very little guidance on this aspect. There are observations, however, made by Ramaswami J. (as he then was) in *Sheopujan v. State of Bihar*, (7) , wherein the principle of audi alteram partem has been accepted to mean that the party

affected must be given sufficient opportunity "at any stage". The concept of natural justice, true it is, cannot be imprisoned in a strait-jacket or in a fixed formula. Whether a fair opportunity has been given to a party adversely affected or not, no general test can be formulated to apply in all circumstances. Ramaswami C.J. (the same learned Judge) in *Harduti Mut Jute Mills v. State of Bihar* (8) reiterated what is stated in the case (7) (above) and speaking again of "general requirement" observed-

"There is no such general requirement in the principles of *"audi alteram partem"*. On the contrary, the principle is satisfied if the party adversely affected is given sufficient opportunity to know the case he has to meet and to answer that case at some stage and not at all the stages of the administrative proceeding".

[12] The proceedings arose under Act 40 of 1971. The Estates Officer under the Act has to consider the objections and pass orders and not by the appellate tribunal. The analogy of Civil Courts having regard to the constitution, their power and the Code that regulates their procedure the analogy is not apposite.

[13] To sum up: the Estates Officer who had issued the notice under Section 4, did not consider the representation made by the tenant. The appellate authority on this question came to the conclusion that such a representation in Ex. A-1 was made but was not considered. In such circumstances following the view taken by Megarry J. in Leary's case (2) (above) in United Kingdom I think it is not open for the appellate authority to consider the question in the appeal on merits of the disputes. There are two views possible in this regard in my view would strengthen the principle of natural justice in adopting the course decided in Leary's case (2) (supra). Therefore the order of the appellate authority in C.M.A.N. 2 of 1978 dated July 6, 1978 and the order of the Estates Officer, Civil Aviation Department, Madras Region (the second respondent) dated December 15, 1977 in NOM/4 (2) ESJ are hereby quashed. The subject matter is remitted to the Estates Officer to consider the representation in Ex. A-1 made by the tenant on December 11, 1977 and to pass order in accordance with law. The writ petition is accordingly allowed. No order as to costs. Advocate's fee Rs. 150/-."

11. In the case of *Minoo Framroze Balsara Vs. The Union of India and others*, AIR 1992 Bom 375, the Division Bench of the Bombay High Court has held that the Estate Officer must be satisfied that the public premises are in unauthorized occupation and that person in unauthorized occupation should be evicted. He must have formed opinion on both counts. It has been held as follows:

"35. Under Section 5 the Estate Officer must consider the cause that is shown by the addressee. Plainly, he must consider the addressee's case on both grounds, viz. whether he is in unauthorised occupation of public premises and whether he should be evicted. Even if he finds that the addressee is in unauthorised occupation, the Estate Officer is not obliged to make an order of eviction; he "may" make it. It is, therefore, that he has to consider whether the addressee should be evicted. He is obliged, if he makes an order of eviction, to record his

reasons. The Estate Officer's order must, therefore, state why he is satisfied that the addressee is in unauthorised occupation of public premises and why he should be evicted therefrom. The validity of the Estate Officer's conclusions would be tested in appeal, which is before a District Judge or equivalent judicial officer.

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39. With great respect to the learned Judges of the Karnataka High Court, we are unable to agree. Their judgment takes no account of Section 4. In our view, it is imperative that Sections 4 and 5 be read together and harmoniously. Further, no account is taken of the use of the word "may" in Section 5. Thereunder, even if the Estate Officer is satisfied that the public premises are in unauthorised occupation he "may" make an order of eviction. The judgment does not hold that the word "may" should be construed to mean "shall". We have stated above that when Sections 4 and 5 are read together and harmoniously, it becomes dear that the word "may" in Section 5 does in fact mean "may" and that though the Estate Officer may be satisfied that the public premises are in unauthorised occupation, he is not obliged to make an order of eviction unless he is satisfied that the person in unauthorised occupation should be evicted."

12. The Estate Officer is required to issue notice under Section 4 of the Act. He has to record the evidence adduced before him and has to provide reasonable opportunity to the unauthorized occupants to represent their case before him. The Estate Officer must be satisfied that the public premises are unauthorisedly occupied. He has to record reasons while ordering eviction of the unauthorized occupants.

13. Accordingly, the Writ petition is allowed. Impugned Annexure P-3 dated 30.9.2010 is quashed and set aside. However, liberty is reserved to respondent No. 2 Estate Officer, Air Commodore, Air Officer Commanding, Air Force Station, Pathankot, Punjab, to proceed with the matter afresh. Respondent No. 2 is directed to initiate fresh proceedings against the petitioners in accordance with law and to complete the same within six months from today. Pending application(s), if any, shall stand disposed of.