
(1984) 04 RAJ CK 0014

In the Rajasthan High Court

Case No : Civil Special Appeal No. 580 of 1982

Mohd. Usman

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-04-1984

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Contract Act, 1872 — Section 63

Citation : AIR 1984 Raj 156 : (1984) RLW 516 : (1984) WLN 475

Hon'ble Judges : S.S. Byas, J;D.L. Mehta, J

Bench : Division Bench

Advocate : M.M. Singhvi, for the Appellant; A.K. Mathur, for the Respondent

Final Decision : Allowed

Judgement

D.L. Mehta. J.

1. The petitioner-appellant is a contractor and used to purchase scrap materials sold at railway auctions-The Controller of Stores. Northern Railway. New Delhi, published a public auction of scrap steel rails at Bilara and other places in Jodhpur Division of the Northern Railway. The auction was held at Bilara on Jan. 31, 1967, Pipar Road on Jan. 30, 1967 and at Marwar Bhinmal on Feb. 3, 1967. The terms and conditions of the auction were set out in the said auction notice dated Jan. 18, 1967. The highest bidder was required to deposit 25% of the sale price-on the spot and to pay the remaining amount to the Chief Cashier and Pay Master. Northern Railway New Delhi or Divisional Cashier and Pay Master concerned or the Station Master where there is no Divisional Cashier and Pay Master within seven days from the date of receipt of final acceptance of the bid's. The appellant was the highest bidder in respect of one lot of scrap steel rails sold by auction held at Bilara on Jan. 31, 1967. The appellant save the bid for Rs. 60,680/- and deposited 25% earnest money then and there on the closure of the auction and also deposited the balance 75% of the sale price within the prescribed time. Thereafter, on April 1, 1967. the Divisional

Superintendent, Northern Railway. Jodhpur Division informed the appellant and other similarly situated auction purchasers that the highest bids given by them for the sale of scrap steel rails were not accepted by the Controller of Stores. Northern Railway. New Delhi and that he had ordered the refund of the earnest money as also the balance of the sale price to the respective auction purchasers. The petitioner -- appellant approached the higher authorities of the Railway at Northern Railway Head-quarters. Baroda House. New Delhi and is said to have been orally assured that his bid would meet the same fate as would be decided by their Lordships of the Delhi High Court in the Writ Petitions filed by M/s. Chainsukhdass Sohanlal Jain and Abdul Shakoor, in respect of the highest bids given by the aforesaid persons for other lots. The appellant approached the General Manager. Northern Railway by means of a representation dated April 3, 1967 and to the Chairman of the Railway Board by a representation dated June 10, 1967 but nothing appears to have turned out of all these efforts.

2. On Dec. 21/22, 1967 the Track Supply Officer, Head-Quarters Office, Northern Railway. New Delhi sent pay orders in respect of the refund of the earnest money and the remaining sale price, deposited by seven auction purchasers including the appellant. Vide Annex. 11/1, the appellant accepted the amount of refund under protest. The relevant part of Annex. 11/1 is as under :

"As asked. I am sending the receipts duly signed, under protest and have to inform -you that I reserve my rights to proceed for recovery of my losses and damages due to wrongful cancellation of the auction sale."

On Jan. 31, 1972. the writ petition filed by M/s. Chainsukhdass Sohanlal was allowed by a learned single Judge of Delhi High Court and the order of the Controller of Stores. Northern Railway, New Delhi cancelling the auction sale was quashed and directions were issued to deliver the scraps to one of the bidders of the lot who filed the writ petition before the Delhi High Court. It may be mentioned here that the order by which the bid of the petitioner was cancelled is the same order which was quashed by the Delhi High Court vide its order dated Jan. 31, 1972 passed in Civil Writ petn. No. 374 of 1967 {M/s. Chain Sukhdass Sohanlal v. Union of India. The appellant, thereafter, approached the Controller of Stores vide his representation dated Aug. 14, 1973-It was submitted that the appellant, M/s. Chainsukhdass Sohanlal and Shri Abdul Shakoor stand on the same footing as they participated in the bid under the same public auction notice dated Jan. 18, 1967.

3. Learned counsel appearing for the appellant has invited our attention to letter (Annex. 6) dated Feb. 21, 1968 addressed to the Controller of Stores, Northern Railway. New Delhi, wherein, it was stated that Shri Gulshan Rai. after having heard him in person, assured to deliver the goods purchased by him if the decision of the High Court stands in favour of the purchasers and that his case shall be dealt with (on) the same lines. Learned counsel has further invited my attention-to the letter (Annex. 7) dated Aug. 14, 1973 addressed to the Controller of Stores, New Delhi. In para 6 of the letter (Annex. 7), it has

specifically been mentioned that the appellant and two other members of Parliament viz.. Shri N. K. Sanghi and Shri Amrit Nahta approached the then Railway Minister Shri G. M. Poonacha and apprised him of the full history of the case and Shri Poonacha after having gone through the entire case felt that the said action taken by the railway for the cancellation of the auction bid was not in consonance with the powers vested with the authority cancelling the said bid- It was, therefore, assured by the Hon"ble Railway Minister that the cases of the remaining bidders shall be decided as per the decision of the Court where some of the purchasers have already approached for legal remedy. In the said letter, the petitioner (appellant) prayed that he is the actual user of the material purchased and therefore, the delivery of the material purchased will considerably help him in the progress of his cottage industries and so, immediate delivery should be made. Learned Counsel has also invited our attention to letter (Annex. 9) dated June 23, 1973 addressed by the Controller of Stores to the S. E. N. (P). Northern Railway, New Delhi. It has been stated in the said letter that Hon"ble Mr. Justice Rajindar Sachar of Delhi High Court has decided the matter in favour of the writ petitioners in Civil Writ Petn. No. 543 of 1967 " (Abdul Shakur v. Union of India) by his Judgment dated Mar. 30, 1973 and the Controller of Stores has accorded sanction with the concurrence TA & CAO (Finance) to implement the order of the High Court. It has also been stated therein that the material in respect of lot No. 1/PPR/A/66 auctioned on Jan. 30, 1967 may be authorised to be released to the party after realising costs and Sales Tax etc. as appears to have been refunded by your office. Thus. Learned counsel submits that though the amount of refund was accepted by the writ petitioners who approached before Delhi High Court even then they succeeded and got the delivery in the year 1973 under the orders of the Court.

4. Mr. A. K. Mathur. learned counsel appearing for the (respondents has invited our attention to Annexure-R/1 the copy of the public auction notice and Annex. R-2 the Judgment of the Delhi High Court.

5. The learned single Judge after considering the submissions made by the learned counsel appearing for the parties dismissed the writ petition on two grounds viz.. (1) that the petitioner-appellant has approached the Court at a belated stage after two years of the decision of the Delhi High Court: and (2) that the petitioner is guilty of suppressing the material facts before the Court and as such, is not entitled to get the relief prayed for.

6. Being aggrieved with the Judgment of the learned single Judge, the appellant has preferred this special appeal.

7. We have heard Mr. M. M. Singhvi, learned counsel for the appellant and Mr. A. K. Mathur, learned counsel for the respondents and have also gone through the record carefully.

8. It was contended by the learned counsel for the appellant that the writ petition was presented on Dec. 14, 1973: that no stay order was obtained by the

petitioner-appellant and that the Writ Petition was admitted on May 9, 1979 subject to the objection regarding delay in filing the writ petition. He submits that there is an allegation that the refund was made to the appellant on Jan. 9, 1968. He further submits that this was a material fact and which should have been brought to the notice of the Court in the writ petition itself. According to the learned counsel, this was not a material fact at all and it is not a case of suppression of material facts. He further submits that even if it is assumed that it was a material fact even then this fact was brought to the notice of the Court on Jan. 16, 1976 by filing Rejoinder to the Reply to the writ petition. It was submitted that the refund was forced upon the petitioner (appellant) and it was not by his volition that he accepted the refund of the amount. Learned counsel submits that the receipt (Annexure-6) was produced in Court and he accepted before the stage of admission that the refund order has been passed in his favour and he accepted the refund. It may be under compulsion or voluntarily, it is altogether a different matter as for the question of suppression of material fact is concerned. Learned counsel submits that the submissions were made by the petitioner prior to the stage of admission without obtaining any stay order from the Court and this fact was brought to the notice of the Court at the stage of the admission and that the Opposite party was also well aware of the fact and as such, the writ petition should not be thrown on the ground of suppression of material facts.

9. On the other hand. Mr. A. K Mathur, Learned counsel appearing for the respondents has submitted that it was obligatory on the part of the petitioner-appellant to state the fact of refund in the main writ petition and the fact that this fact was brought on record prior to the stage of admission is not relevant at all. He has invited my attention to State of Haryana and Others Vs. Karnal Distillery Co. Ltd. and Another, wherein, their Lordships of the Supreme Court in para 9 of the report observed as under.

"9. The Distillery in filing the writ petition in the Punjab and Haryana High Court for renewal of licence at Kamal Distillery mislead the court and started proceedings for oblique and ulterior purposes".

Mr. Singhvi, learned counsel for the appellant submits that State of Haryana's case does not apply in the instant case. He submits that the appellant has never misled the Court and never started proceedings for oblique and ulterior purposes. In the instant case, the fact of the refund was brought to the notice of the Court even prior to the stage of admission and the receipt under which the refund was obtained was also produced before the Court and that the opposite party and the Court were aware at the time of the admission. It is not a case of misleading the Court and obtaining the stay order from the Court. The State of Haryana's case does not apply in the instant case.

10. Learned counsel for the respondents has further invited my attention to the case of S.H. Motor Transport Co. Vs. Motilal and Others, wherein their Lordships of the Bombay High Court observed as under (at p 26):--

"Petitioners who invoke the extraordinary jurisdiction of the High Court under Article 226 and/or Article 227 of the Constitution are required to exercise utmost care, inform themselves fully of every stage of the proceedings that has taken place up to the date the petition is filed, give a full and true account of these proceedings, file all the necessary documents in support of their averments and then claim relief on the basis of facts disclosed in the petition. It is not open to a petitioner under Article 226 or Article 227 of the Constitution to pick and choose his own facts or to determine in advance what is relevant and material omit to mention all material facts and proceedings and orders and then claim that he has acted bona fide even though he has made untrue statements, omitted to inform the Court of all the proceedings and the orders passed at different stages in the proceedings up to date and claim indulgence."

The propositions laid down by their Lordships of the Bombay High Court in S. H. M. Transport Co.'s case are not in dispute. The Bombay High Court considered that by no process of thinking or interpretation, it could be said that there is any indication in the orders of any authorities that the order of the Additional District Magistrate was ever set aside or even put in suspense. In that case, the order of the Additional District Magistrate directing reinstatement and payment of back wages on 4-8-1960 has never been set aside. The petitioner has also not made any reference to the second order of interim remand passed by the State Industrial Court on 14-11-1961. In such circumstances, their Lordships held that it is "not open to petitioner under Article 226 or Article 227 of the Constitution to pick and choose his own facts or to determine in advance what is relevant and material, omit to mention all material facts and proceedings and orders and then claim that he has acted bona fide even though he has made untrue statements, omitted to inform the Court of all the proceedings and the orders passed at different stages in the proceedings up to date and claim indulgence. In that case, there was an allegation of making untrue statement in the Writ Petition. In the facts and circumstances of the case, we are of the view, that the authority cited by Mr. A. K. Mathur, learned counsel for the respondents does not apply in the instant case as there is no allegation that the petitioner has made untrue statements.

11. It is correct that the petitioner has omitted to make a reference about the refund which was made to him in the writ petition. Admittedly, this omission was of a serious nature and the Court should take into consideration the omission. However, in the instant case, the fact that the refund was accepted by the petitioner-appellant was brought to the notice of the court at the earliest opportunity and that too, before the stage of admission. The appellant had not obtained any stay order or even the order of admission of the writ petition and as such, it can safely be said that the appellant has acted bona fide in the instant case. The appellant took the opportunity of putting all the facts before the Court at a proper stage before the admission of the writ petition. In number of cases, one may miss the facts in the writ petition inadvertently but the facts can be brought to the notice of the Court at any stage of the proceedings. The Question

of suppression of material facts is relevant specially when the stay, order is obtained or even on the basis of the writ petition, the admission order obtained. If no stay order is obtained or no admission order is obtained and the facts are brought to the notice of the Court in one way or the other then the question of suppression of material facts loses its importance.

12. Mr. A. K. Mathur, learned counsel for the respondents, cited before us the case of *Ganga Dutt v. Bhagwandas Taparia* RLW1958 255. Having gone through this authority, we are of the view that it does not apply in the instant case as the petitioner has not obtained any in-terim order by concealing the facts.

13. The law is well settled that when there is a conscious suppression of material facts and a party gets the advantage in one or the other way then the benefit of extraordinary jurisdiction under Article 226 or Article 227 of the Constitution should not be extended in his favour. There remains always a controversy in regard to the question of material fact and if a party brings to the notice of the Court all the facts prior to the stage of admission and also before the stage of obtaining any ad interim stay order then the party cannot be said to be guilty of suppressing the material fact. In the instant case, the appellant has brought to the notice of the Court all the facts of the refund and has admitted that the refund order was passed and he has accepted the refund. This admission of the petitioner-appellant before the stage of admission is more relevant and this will not amount to the suppression of material facts. The case would have been different if the appellant might have succeeded in obtaining the ad interim order in his favour. In such circumstances, the question of suppression of material fact loses its importance and it cannot be said that the appellant has acted in a way to take undue advantage in the matter.

14. For the reasons mentioned above, we are constrained to take a different view in taking into consideration the point of suppression of material fact as an important point for the purpose of dismissing the writ petition. We with due respect to our learned brother disagree with him on this point and we hold that the writ petition cannot be thrown away only on the ground that the petitioner-appellant has suppressed the material fact.

15. The next question which arises for our consideration is about the laches on which our learned brother dismissed the writ petition. Learned counsel for the appellant submits that the question of laches does not arise at all and should not be considered in a case like this. He submits that the impugned order of the Controller of Stores, Northern Railway has been set aside by the Delhi High Court. He submits that the Court should not deny the relief by perpetuating the illegal order passed by the respondents. He further submits that against the order passed by the Delhi High Court, no appeal has been filed and as such, it has become final order. According to the learned counsel, if no relief is granted to the appellant then it will amount to perpetuate the illegal order passed by the Controller of Stores and for this reason, the relief should not be rejected even if the Court comes to the conclusion that there is a delay in filing the writ petition.

Learned counsel for the appellant has invited my attention to Annexure-11 and has submitted that after the passing of the Judgment by the Delhi High Court, they were taking steps at the administrative level for the fulfilment of the assurances given to them. However, when they failed to succeed in getting the assurances fulfilled then they have approached this Court on Dec. 14, 1973 by filing a writ petition. Learned counsel, invited my attention to para 14 of the writ petition which, reads as under -

"14. That the petitioner did not file this writ petition earlier because the impugned order was already under challenge - and was sub judice and he was assured that he will meet the same fate "as others, and since it has been held by their Lordships of the Supreme Court also in several cases that in case there is an order which is illegal and without jurisdiction affecting many.

all must not challenge it and it has been further held that it is advisable for the Government to follow the decision for others in pursuance of the similar orders else the persons affected get right and limitation for challenging the same from the date it has been declared void by a Court of competent jurisdiction and it was for this reason, that the petitioner did not challenge the impugned order till date."

In reply to para 14 of the writ petition, the respondents have submitted that there cannot be any justification for waiting for the result of the writ petition filed by other persons. It was also denied that any assurance was given that the petitioner will also be treated in accordance with the Judgment of the Delhi High Court.

16. In State of Madhya Pradesh Vs. Bhailal Bhai and Others, their Lordships of the Supreme Court, observed as under :

"The provisions of the Limitation Act do not as such apply to the granting of relief under Article 226. However, the maximum period fixed by the Legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay, in seeking remedy under Article 226 can be measured. The Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable."

Mr. M R.. Singhvi. learned counsel appearing for the appellant has invited out attention to Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, wherein it was, observed as under :

"Many dealers challenged the levies as unconstitutional and this Court, in a series of appeals (C. A. Nos. 1083 of 1977- Kewal Krishan v. State of Punjab. decided on May 4, 1979) (reported in Kewal Krishan Puri and Others Vs. State of Punjab and Another, ruled that the excess of 1 per cent over the original rate of 2 per cent was ultra vires. This cost a consequential liability on the market committees to refund the illegal, portion. They were not so ordered probably because

they could not straightway be quantified. The petitioners who had, under mistake, paid larger sums which after the decision of this Court holding the levy illegal, have become refundable, demand a direction to that effect to the market committees concerned. There cannot be any dispute about the obligation or the amounts since the market committees have accounts of collections and are willing to discharge the excess sums. Indeed, if they file suits within the limitation period decrees, must surely follow. What the period of limitation is and whether Article 226 will apply are moot, as is evident from the High Court's Judgment, but we are not called upon to pronounce on either point in the view we take. Where public bodies, under colour of public laws, recover people's money, later discovered to be erroneous levies, the Dharma of the situation admits of no equivocation. There is no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belongs. Nor is it palatable to our jurisprudence to turn down the prayer for Huzh "alternative remedy", since the root principle of law married to justice, is ubi ius ibi remedium. Long ago Dicey wrote :

The law ubi ius ibi remedium, becomes from this point of view something more important than a mere tautological proposition. In its bearing upon constitutional law, it means that the Englishmen" whose labours gradually formed the complicated set of laws and institutions which we call the Constitution, fixed their mind far more intently on providing remedies for the enforcement of particular rights or for averting definite wrongs, than upon any declarations of the Rights of Man or Englishmen..... The Constitution of United States and the Constitution of the separate States are embodied in written or printed documents, and contain declaration of rights. But the statesmen of America have shown an unrivalled skill in providing means for giving legal security to the rights declared by American Constitutions. The rule of law is as marked a feature of the United States as of England."

It was further observed (at Pp. 1039-40 of AIR) :

"The Registrar of the High Court shall issue public notice and otherwise give due publicity to that fact that dealers and others who have contributed to or paid the excess one per cent covered by these writ petitions and appeals may make claims for such sums as are due to them from him within one month or such other period as he may fix. The Registrar shall scrutinise such claims and ascertain the sums so proved. He will thereupon demand of all the market committees concerned payment into the Registry of such sums in regard to which proof of claims have been made. On such intimation, the market committees shall pay into the Registry the amounts so demanded by the Registrar within one week of such intimation. The amount shall be paid together with interest at 10 per cent per annum from today up to the date of deposit with the Registrar."

"If parties eligible for repayment of amounts do not claim within one year from today, the Registrar will not entertain any further claims. It will be open to such

parties to pursue their remedies for recovery for any sums that may be due to them."

Learned counsel for the appellant submits that it is the obligatory duty of the respondents in the light of the Judgment given by their Lordships of the Supreme Court in M/s. Shiv Shanker Dal Mills's case to act suo motu and comply with the orders of the Delhi High Court and should give the same relief to those who have not approached the Court for one reason or the other. According to the learned counsel, in the light of the above decision of their Lordships of the Supreme Court the question of laches does not raise at all. He submits that the Supreme Court has directed the refund of the tax which has been illegally realised even to those persons who have not filed the writ petitions before the Court, He further submits that similar directions should have been issued by this Court and the respondents should have treated all those equally situated persons with the persons who approached the Delhi High Court. Learned counsel has invited our attention to Annex. 7 dated Aug. 73 and has tried to emphasise that the release order in favour of similarly situated persons was passed in Aug, 1973 on the basis of the judgment of Delhi High Court and that the petitioner-appellant was expecting that the same order will apply to similarly situated persons and for this reason it can not be expected from the appellant that he should have filed the writ petition before Aug, 1973. It was further contended that the petitioner has filed the writ petition in Dec, 1973 and as such, there is no delay whatsoever in filing the writ petition. Learned counsel invited our attention to Ramchandra Shankar Deodhar and Others Vs. The State of Maharashtra and Others, and has submitted that there was delay of 10 years and there was also an alternative remedy. However, their Lordships of the Supreme Court ruled as under :

"The rule which says that a Court may not inquire into belated or stale claims is not a rule of law but a rule Of practice based on sound and proper exercise of discretion, and there is no inviolable rule that whenever there is delay, the Court must necessarily refuse to entertain the petition. The question is one of discretion to be followed on the facts of each case.

It may also be noted that the principles on which the Court proceeds in refusing relief to the petitioner on ground of laches or delay is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there was reasonable explanation for the delay. It may be noticed that the claim for enforcement of the "fundamental right of equal opportunity under Article 16 is itself a fundamental right guaranteed under Article 32 and this Court which has been assigned the role of a sentinel on the qui vive for protection of the fundamental rights cannot easily allow itself to be persuaded to refuse relief solely on the genuine ground of laches, delay or the like."

Our attention was also invited on Punjab Engineering College Chandigarh through its Principal Vs. Sanjay Gulati and Others, The Supreme Court observed as under :

"It is strange that in all such cases, the authorities who make admissions by ignoring the rules of admissions contend that the seats cannot correspondingly be increased, since the State Government cannot meet the additional expenditure which will be caused by increasing the number of seats or that the institution will not be able to cope up with the additional influx of students. An additional plea available in regard to Medical Colleges is that the Indian Medical Council will not sanction additional seats. We cannot entertain this submission, those who infringe the rules must pay for their lapse and the wrong done to the deserving students who ought to have been admitted has to be rectified. The best solution under the circumstances is to ensure that strength of seats is increased in proportion to the wrong admissions made."

It was further held by their Lordships of the Supreme Court that only those students who have been refused admission unjustly, they alone cannot be preferred for admission in next session irrespective of merit but all candidates who had applied for admission in previous session should be considered on the basis of open merit irrespective of whether they had filed the writ petitions. Learned counsel for the appellant. thus, submits that all persons whether they have filed writ petitions or not should be given benefit of the Judgment of the Delhi High Court and that the benefit should not be limited to only these persons" who have filed the writ petitions before the Delhi High Court. He submits that extraordinary jurisdiction vests in the court for imparting justice to all those who are similarly situated. He further submits that the impugned order was under challenge and that the persons who succeeded in one lot or the other are similarly situated and their cases cannot be differentiated.

17. On the other hand. Mr. A. K Mathur, learned counsel appearing for the respondents submits that though the impugned order has been quashed by the Delhi High Court but no directions have been given that the persons who have not filed the writ petitions though they are similarly situated should be given the same relief and for this reason, the relief cannot be granted to the petitioner-appellant who have approached the Court after the lapse of a long period. According to the learned counsel, the laches on the part of the petitioner-appellant are fatal.

18. In *Dove v. Benhams Patent Locks Ltd.* 1983 2 All ER 833 it was held that the action was not time-barred since the cause of action had not arisen at the time the faulty work was completed but when the fault had first manifested itself, i.e. when the gate gave way after the burglar applied force to it. In *Vishundas Hundumal and Others Vs. State of Madhya Pradesh and Others*, their Lordships of the Supreme Court observed as under (Para 7) :

"Accordingly, we hereby direct that the order/conditions in permits curtailing the permits of the petitioners prohibiting them from passing over the over-lapping portion of their route with the notified route be quashed and declared to be of no consequence till all the operators including those excluded and similarly situated are similarly treated,"

Their Lordships of this Court in *Heera-lal Dungarpuria v. State of Rajasthan* 1975 WLN 37 held as follows:

"It is always a matter of discretion with the court when to entertain a writ petition which was not properly filed. Several considerations have to be applied. One is whether that explanation is convincing and the other is whether on account of the delay, the rights have become vested in other parties who will be deprived of such rights if the matter is entertained and decided in spite of the delay occasioned in the mean time."

In the instant case, on Nov. 9, 1983 learned counsel for the parties agreed that the delivery of the goods may be made to the petitioner on the open market value as it exists today. However, this Court directed that the petitioner shall pay the complete amount to the respondents within one month from the date of valuation and the parties will suggest three names of the valuers within a week and the Court shall appoint the valuer after the suggestion made by the parties. It was further directed that the petitioner shall pay the complete amount to the respondent as per valuation and shall take delivery of the goods and in case, the writ petition succeeds, the respondent shall refund the excess amount, if any, charged to the petitioner with 12% interest thereon. Thus, it is clear that the property is still lying with the respondents and no vested right has accrued in favour of any third party. This is an important consideration for condoning the delay if any. Apart from that the position of the law is that the illegality committed by any party should not be allowed to perpetuate and the relief should not be denied only on the ground that there is delay in filing the writ petition, if during the period of delay, if any interest accrues in favour of third party or if any third party vests the vested right then the delay cannot be condoned, as it will adversely affect the party in whose favour the rights are vested.

19. We have given considered thought in the matter and we are of the view that no rights have accrued in favour of any third party and in the interest of justice, the appellant should be placed on equal footing with those who have filed the writ petitions earlier before the Delhi High Court. The Delhi High Court has already accepted the similar writ petitions and quashed the impugned order. It was directed that the scrap fee delivered to the highest bidders.

20. From the perusal of Annexure-7, it is clear that the appellant has specifically stated that he and two members of parliament viz.. Shri N. K. Sanghi and Shri Amrit Nahta approached the then Railway Minister Shri C. M. Poonacha and apprised him the full history of the case and Shri Poonacha after having gone through the entire case felt that the said action taken by the railway for the cancellation of the auction bid was not in consonance with the powers vested with the authority cancelling the said bid and that it was therefore, assured by the Hon'ble Railway Minister that the cases of the remaining bidders shall be decided as per the decision of the Court where some of the purchasers have already approached for legal remedy. No reply has been given in relation to

Annexure-7 by the respondents. In the facts and circumstances of the case, we are in disagreement with the view taken by the learned single Judge in the matter of delay and we think it; proper that the writ petition should not be rejected on this ground.

21. Now, we shall deal with the case on merits. On Jan. 18, 1967. an advertisement appeared in the Indian Express indicating that auction of scrap steel Rails 12 long would be held at Pipar Rond Junction. Bhinmal and Bilara. The auction was held at Bilara and the petitioner (appellant) was the highest bidder for a lot. The petitioner (appellant) deposited 25% as the earnest money and the full remaining money within the prescribed time. The delivery not having been given by the respondents. The petitioner is said to have represented to the Controller of Stores, about it but was informed that the latter had ordered the cancellation of the order of sale and the impugned order was received by the petitioner which is to the effect that the Controller had not approved the bid. Thereafter, some of the persons presented a writ petition before the Delhi High Court challenging the action of the respondents in refusing to deliver the goods which according to the petitioner had become his property and for which full payment had been made. It was alleged that according to the conditions of sale, the bid was not subject to the approval of the Controller of Stores and therefore, he had no jurisdiction to stop delivery in the purported exercise of his power, which was not to be found in the conditions governing the sale.

22. Delhi High Court considered the matter in detail and held that the property under auction sale had passed to the highest bidder, the sale was of particular lot and therefore, it was a contract for the sale of goods which was ascertained one. S, 19 of the Sale of Goods Act provides that where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyers at such time as the parties to the contract intend it to be transferred. Sub-section (3) of Section 19 further lays down that unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyers. Section 20 lays down that where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyers when the contract is made and it is immaterial whether the time of payment of the price or the time of delivery of the goods or both is postponed. In the instant case, the property, therefore, should be deemed to have passed to the petitioner at least from the date when the payment in full was made by the petitioner-appellant. The intention of the parties also seems to be to deem the property as being transferred to the buyer on the acceptance of the bid. If reference is made to Clause 2 (a) of the General Conditions of Sale which provides that the balance of the money is not paid within 14 days from the receipt of final acceptance of the bid, the lot may be re-auctioned at any subsequent sale and the purchaser will have no lien on the lot, the property, reverting to the ownership of the Northern Railway Administration. Had that not been the intention, there was no need to provide that on the

balance of amount not having been paid the property will revert to the ownership of Northern Railway Administration. In the instant case, the appellant is not seeking to enforce the, contractual obligations. to prevent any breach of contract. The claim of the petitioner-appellant is that he had by means of acceptance of the bid became the owner of the goods and the refusal by the respondent in not delivering the goods results in depriving the appellant of his property, without any authority of law. It has also to be re-membered that under our system of jurisprudence where we are governed by law and not by whims of a man, the executive can only act in pursuance of power given to it by law and no member of the executive can interfere with the liberty or property of a citizen except on the condition that he can support the legality of his action before a court of justice. In the instant case, the respondents have failed to support their action in detaining the goods of the petitioner by reference to any authority of law or condition of auction. Their action is thus without authority of law and is liable to be quashed.

23. Learned counsel for the respondents has pointed out that the appellant has accepted the money of refund vide Annex. 11. In Annex. 11/1. it has specifically, been mentioned that the amount has been accepted under protest. The material portion of Annex. 11/1 is as under :

"As asked. I am sending the receipts duly signed, under protest and have to inform you that I reserve my rights to proceed for recovery of my losses and damages due to wrongful cancellation of the auction sale.

Thus, it is clear that the refund amount has been accepted by the appellant under protest and this fact has not been denied by the respondents. However, Mr. A. K. Mathur, learned counsel for the respondents, invited our attention to Kapur Chand Godha Vs. Mir Nawab Himayatalikhan Azamjah, Wherein their Lordships of the Supreme Court observed that the appellants having accepted payment in full satisfaction of their claim are not now entitled to sue the respondent for the balance. We have gone through this authority, we are of the view that in the case of Kapurchand v. Himayatalikhan, the appellant has not accepted the money under protest, as such, this Authority does not apply in the instant "case.

24. In Amarnath v. B. H. Electricals AIR 1972 AH 176 their Lordships observed as under :

"Acceptance under protest of payment in full satisfaction of amount due under contract is no accord of satisfaction in the sense of bilateral consensus of intertion and does not discharge the contract so as to disentitle the person accepting payment, to enforce the term in the con- tract to refer the dispute rising under the contract to arbitration,"

In Bhanwarlal v. Pali Electricity Co. Ltd, Pali RLW 1968 562. this Court had occasion to consider the matter of payment under protest. In that case, the defendant's Secretary sent a letter (Ex. 7) intimating that the matter was under

consideration and asking the plaintiff to make the payment if he wanted to avoid the disconnection of the supply. The plaintiff again wrote letter (Ex. 8) to the defendant's Engineer in which he clearly alleged a breach of the contract and threatened action in a Court of law. This shows that the plaintiff did not agree at any stage to the payment of annas 8 per unit and was, on the other hand, protesting against the increase. In these circumstances, this court took a view that the plaintiff made the payment only under protest and for the purpose of avoiding the threatened unpleasant consequences of disconnection of the supply, and the matter remained pending as a live issue between the parties until the date of the institution of the suit. In such circumstances this Court accepted the case of the plaintiff and directed the refund of the excess payment. In the instant case, the authorities cited by the learned counsel for the appellant reported in Amarnath's case and Bhanwarlal's case (supra) apply with full rigour. The appellant has accepted the payment under protest and there was no bilateral intention to repass the property. The appellant accepted the money only looking to the fact that the property is not being delivered to him by the authority concerned and thus, he will be deprived of his valuable money and as such, he will have to undergo heavy losses. The intention of the "appellant is clear that as soon as the property is delivered to him, he will repay the whole amount. A somewhat similar situation arose in Delhi High Court's case. This is evident from Annexure-9. The relevant part of Annexure 9 reads as under:

"The material in respect of lot No. I/ PPR/A/66 auctioned on 30-1-67 may be authorised to be released to the party after realising cost and sales tax etc. as It appears to have been refunded by your office."

Annexure-10 is further "evident to show that the petitioners in Delhi High Court also accepted the refund, amount and after the decision of the writ petition filed by them in the Delhi High Court, they paid the amount and took the delivery of their lots. In our opinion, the petitioner-appellant is entitled to take delivery after re-payment of total costs and sales tax etc. It will not be out of place to mention here that by accepting the appeal, we are putting the petitioner-appellant on the same footing on which the persons equally situated have been placed and it is expedient that there should not be discrimination between the persons equally situated.

25. For the reasons mentioned above, we accept this special appeal and set aside the order dated July 20, 1981 of the learned single Judge. The order dated April 1, 1967 is quashed and we also issue a mandamus directing the respondents to allow the petitioner to lift the property sold to him according to the terms and conditions of the sale. The petitioner-appellant shall make full amount refund-ed to him to respondent No. 4 within a period of two months and the respondents are directed to deliver the property sold to the petitioner-appellant within period of two months thereafter.

26. In the circumstances of the case, the parties are left to bear their own costs.