
(2003) 01 AP CK 0069

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 21111 and 22993 of 2001

P. Janardhan Reddy

APPELLANT

Vs

State of Andhra Pradesh and Another

RESPONDENT

Date of Decision : 24-01-2003

Acts Referred:

Commissions of Inquiry Act, 1952 — Section 3, 7

Citation : (2003) 2 ALD 170 : (2003) 2 ALT 579

Hon'ble Judges : G. Rohini, J; Bilal Nazki, J

Bench : Division Bench

Advocate : K.G. Kannabhiran and A. Rajashekar Reddy in WP No. 21111 of 2002 and Venkatarajaram, in WP No. 22993 of 2001, for the Appellant; A.A.G. in WP No. 21111 of 2001 and for respondent Nos. 1 and 2 in WP No. 22993 of 2001 and Gouri Shankar Sanghi, in WP No. 22993 of 2001, for the Respondent

Final Decision : Dismissed

Judgement

Bilal Nazki, J.—These two writ petitions raise same questions of fact and law therefore they are decided by this common judgment. Writ Petition No. 21111 of 2001 has been filed by Sri P. Janardhan Reddy, a former leader of the Congress Legislature Party challenging G.O. Ms. No. 544, Rev. (LA) Deptt. dated 4-8-2001. The same G.O has been challenged in the other writ petition being W.P. No. 22993 of 2001. This writ petition has been filed by one of the claimants whose land had been acquired. He also claimed the same relief which has been claimed in the first writ petition. The facts mentioned in Writ Petition No. 21111 of 2001 are taken for the disposal of these writ petitions.

2. There were reports that certain irregularities had been committed by various authorities in payment of compensation in land acquisition matters pertaining to Visakhapatnam District. This incident came to be known as "Yeleru scam". A writ petition being W.P. No. 1235/97 had been filed by one V. Madhusudhan Reddy before the High Court of A.P. seeking a direction for C.B.I, to investigate into the matter. A suo motu writ petition was also entertained by the High Court being

W.P. No. 26456/96 on the basis of a report given by the District Judge, Visakhapatnam to the Chief Justice. When these writ petitions came up for hearing the State Government expressed its willingness to appoint a sitting Judge of the High Court as Commission of Inquiry, u/s 3 of Commissions of Inquiry Act, 1952 which resulted in disposal of the writ petitions on 29-1-1997. In pursuance of the judgment the State Government with the concurrence of the High Court appointed Mr. Justice S.R. Nayak, the then sitting Judge of the High Court of A.P as Commission of Inquiry. Thereafter, Mr. Justice S.R. Nayak resigned and Mr. Justice B.K. Somasekhara, the then sitting Judge of the High Court of A.P was appointed as Commission of Inquiry vide G.O. Ms. No. 468 dated 2-6-1997. On 21-5-1998 a Writ Petition was filed before the High Court being W.P. No. 14282/98 by one P. Pothi Naidu who was one of the accused in the scam. He questioned the constitution and continuance of Mr. Justice B.K. Somasekhara as Commission of Inquiry, The Writ petition was opposed by the State. The petitioner in that writ petition contended that there were legal infirmities in setting up of the Commission. The Government maintained that there were no legal infirmities in appointment of the Commission, Consequently the Division Bench of the High Court allowed the writ petition filed by Mr. Pothi Naidu holding that the Commission had not been validly constituted in accordance with Section 3 of the Commissions of Inquiry Act. This order was passed on 23rd June, 1999. This judgment was neither challenged by Sri Pothi Naidu who was petitioner in that writ petition nor the State Government before the Supreme Court but it was challenged by the present writ petitioner by way of the SLP being SLP (C) No. 14350/99 before the Supreme Court. The petitioner contended before the Supreme Court that the State Government had played fraud on the High Court by concealing material facts which led to the formation and appointment of a Commission under the Commissions of Inquiry Act. This SLP was opposed by the State Government before the Supreme Court who filed counter affidavit on 26th February, 2000 and an additional counter-affidavit on 19th April, 2000, The Apex Court decided the matter by allowing Civil Appeal No. 4138/ 2001 arising out of the SLP mentioned above by judgment dated 13-7-2001. The judgment of the Division Bench of this Court dated 23-6-1999 in WP No. 14282/98 was set aside by the Supreme Court. After the judgment of the Division Bench was set aside by the Supreme Court a representation was made to the Chief Minister of Andhra Pradesh on 21st July, 2001 by the writ petitioner requesting him to take necessary steps to restore the Commission forthwith. Since there was no response a notice was given on 4-8-2001 to the Government of A.P through the Secretary to Government, Revenue (LA) Department. The State Government issued an order being G.O. Ms. No. 544, dated 4-8-2001 discontinuing the said Commission with retrospective effect from 1-12-1999 as unnecessary. So, the Commission which was set up by the Government under the Commissions of Inquiry Act had been discontinued because of the judgment of the Division Bench of this High Court. The Division Bench judgment having been reversed by the Supreme Court the Commission in law and in fact again came into existence but the Government purporting to have used its power

discontinued the Commission with effect from 1-12-1999. Now, this order of the Government which was passed on 4-8-2001 discontinuing the Commission with effect from 1-12-1999 has been challenged in this writ petition.

3. There are number of grounds taken in the writ petition but the main grounds which were agitated before this Court are narrated as below; (1) that the impugned order is arbitrary, illegal and mala fide (2) that there was no change in the circumstances and no new reasons which would warrant discontinuation of the Commission as the reasons which existed on its, formation continued to exist (3) that the Commission was discontinued with retrospective effect without obtaining concurrence of the High Court, and (4) that the discontinuance of the Commission was negation of the orders passed by the Supreme Court in Civil Appeal No. 1438/2001.

4. Before going to the assertions made in the counter-affidavit it may also be pointed out that G.O. Ms. No. 544, dated 4-8-2001 has been amended by G.O. Ms. No. 553, dated 8-8-2001 whereby the Government discontinued the Commission with effect from 1-3-1999. Although this order has not been challenged but we do not believe that this lapse on the part of the petitioner would go to the root of the case and the Court can also take judicial notice of the fact that the order discontinuing the Commission has become effective from 1-3-1999 and not from 1-12-1999. It is submitted in the counter that the period for which Mr. Justice B.K. Somasekahra had been appointed had expired on 1-12-1999 subsequent thereto there had been no extension and the Government in exercise of its power u/s 7 of the Act can issue a notice thereby informing that the Commission had ceased to exist from the date up to which the Commission had been appointed. The Government had discretion in the matter and formation of opinion by the Government was pre-requisite for exercise of the power u/s 7 of the Act. It is also contended that, appointment of Commission and its continuance beyond a particular date are the matters for Government to decide, therefore, the Government was well within its rights not to extend the Commission's term beyond 1-12-1999. It is further contended that the Commission of Inquiry does not adjudicate the matters and its report is merely advisory, its appointment by the Government is only "for formation of its mind". So, the Government is in better position to decide what course of action was necessary to be taken in a matter pertaining before it. Commission was a fact finding body and at best its recommendations would provide some vital inputs to the State Government for initiating or not initiating any civil or criminal proceedings in a matter. Since the Government had already started disciplinary proceedings, instituted criminal cases, filed Land Acquisition Appeals and these proceedings being in their advance stages it was felt unnecessary to continue with the Commission. The Government has in its affidavit given a resume of the disciplinary action initiated by the State against the officers who were alleged to have committed illegalities in the matter of acquisition of land. It has also given the punishments already given in certain cases and stages at which these matters are either before the Courts or before the disciplinary authorities. It is

also stated as to what was the position of the Criminal Appeals and Land Acquisition Appeals. It may not be out of place to mention that almost all Land Acquisition Appeals which were filed by the State have been decided by the High Court and the criminal matters are pending. Certain properties have also been attached. These all assertions have been made in response to the assertions made in the writ petitions with respect to certain specific omissions or commissions of various Officers of the Government or the Government itself.

5. In the light of these pleadings now it has to be considered whether the Government should have passed the impugned order or not. Therefore, a reference to the earlier judgment of the Division Bench, the judgment of the Supreme Court and the provisions of Commissions of Inquiry Act will have to be made. The Division Bench while deciding Writ Petition No. 14282/98 had also taken note of the order passed in W.P. No. 1235/97. The relevant portion of order in W.P. No. 1235/97 is quoted herein below:

"When the instant case was taken up, it was felt desirable to take up W.P. No. 26456 of 1996 along with it. Accordingly, the two matters are taken up together. In course of the hearing, it has transpired that the Government has been ready and willing for the appointment of a sitting Judge of the High Court as a Commission of Inquiry u/s 3 of the Commissions of Inquiry Act, 1952. Proceeding in W.P. No. 26456 of 1996 has been taken up on the basis of a report of the District Judge, Visakhapatnam and by order of this Court, issuance of cheques in Land Acquisition cases, pending at various stages in the Sub-Courts at Anakapalle and Chodavaram, Visakhapatnam District has been stayed. It is agreed at the Bar that until the completion of the enquiry and consequential actions, if any, the stay, as ordered by this Court on 10th of December, 1996 shall continue and the cases already registered and investigations taken up by CBCID shall continue on condition that materials collected in course of investigation and/or statements recorded in course of the investigation of the cases shall be made available to the Commission appointed for the purpose of enquiry into the matter.

Since a sitting Judge of this Court is proposed to be appointed as the Commission of Inquiry, it is felt that except notifying the appointment of the Secretary and other staff of the Commission of Inquiry, from amongst members of the Registry of the High Court and/or the Courts in the State including subordinate staff, no independent selection is required and no extra financial burden is involved. It is felt, however, that the Commission may need assistance of investigating agencies in matters, which in course of enquiry, may require special attention. A notification in this behalf, empowering the Commission to requisition the services of the officers in the police service of the State, including members of the Indian Police Service (IPS) allotted to the State, shall be necessary. All concerned, wherever they are, who have control and custody of the records pertaining to the matter, shall be directed accordingly to make all such records available and all persons, who are in the know of/or informed about

anything concerning the subject of enquiry shall be directed to appear and make themselves available for evidence, as and when required and/or for consultations as and when required by the Commission.

Learned Additional Advocate General has informed the Court that necessary notification in this behalf shall issue without delay.

The Registrar General is, however, required to make immediate communication of the name and consent of the learned Judge nominated for the said purpose by the Chief Justice.

The learned Additional Advocate General has also stated that terms of the reference shall be finalised in consultation with the Chief Justice of the Court within a couple of days.

The two petitions are ordered accordingly and disposed of."

Since the Commission had been appointed while the writ petitions were pending and certain orders had been passed by the High Court the Division Bench came to the conclusion that while appointing the Commission the Government had not formed its opinion which was a condition precedent for appointing a Commission. While referring to Section 3 of the Commissions of Inquiry Act it also came to the conclusion that no resolution had been passed by the State Legislature therefore the formation of the Commission itself was bad. The High Court further agreed that there could not be any direction for appointment of Commission under the Commissions of Inquiry Act. Had the High Court felt that fact finding was necessary, the High Court could have itself appointed a Committee or a Commission, The Division Bench also took note of the readiness and willingness of the Government to appoint Commission under the Commissions of Inquiry Act but was of the view that it did not amount to applying its mind independently and forming an opinion for appointment of a Commission. These reasons were not accepted by the Supreme Court. In para-11 of its judgment in Civil Appeal No. 4138/2001 the Supreme Court stated:

"The question that arises for consideration is whether on the facts and circumstances of the case the High Court was right in quashing the notification appointing the Commission of Inquiry on the sole ground that the State Government had not formed an opinion as required u/s 3 of the Act before issuing the notification. It is the settled position that appointment of a Commission is a matter at the discretion of the appropriate Government; such an appointment is meant primarily for the purpose of information of the Government; the Commission does not adjudicate on any matter; its report has no value per se excepting giving advice and providing guidance to the Government. It is mandated in Sub-section (1) of Section 3 of the Act that the appropriate Government may if it is of the opinion that it is necessary so to do, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification and the Commission so

appointed shall make the inquiry and perform the functions accordingly. The matter stands on a different footing if a resolution in this behalf is passed by each House of Parliament or State Legislature, as the case may be, in which case the appropriate Government shall appoint the Commission for the purpose. On a plain reading of the statutory provision it is clear that there is no prescribed form or particular manner for the appropriate Government to express its opinion that it is necessary to appoint a Commission of Inquiry. Such opinion may be expressed in any manner by which the public would get the information about such appointment. When the Chief Minister of the State expressed on the floor of the State Legislature that he has no objection to appointment of a Commission of Inquiry under the Act to inquire into the serious allegations regarding irregularities in payment of compensation for the acquired land, it is reasonable to presume that he had given necessary thought to the matter and on being satisfied that it is necessary so to do expressed his agreement for appointment of a Commission of Inquiry under the Act. The statement was made on behalf of the State Government. This was followed by the categorical statement of the Advocate-General representing the State before the High Court that the requisite notification will be issued without delay and indeed such notification was issued. It is relevant to note that it was not the case of the writ petitioners that the subject matter of inquiry was not a definite matter of public importance or that no inquiry into such matter was necessary. Indeed, there is little scope for doubt that the controversy is a matter of public importance and it is but appropriate that the State Government wanted a detailed inquiry in the matter for its information and guidance. The High Court, as noted earlier, has simply held that since there is no specific order in the file which would show that the State Government had formed such opinion as required u/s 3(1) of the Act, therefore, the notification appointing the Commission of Inquiry was not in accordance with law. On the facts and circumstances of the case noted above, we are of the view that the High Court took a hypertechnical view of the matter in which the State Government which is the repository of the authority had made the appointment. A serious matter of public importance which gave rise to criticisms from different quarters against public functionaries and also private persons is a matter which calls for proper inquiry and if the State Government in its wisdom thought it proper to entrust the inquiry to a sitting or a retired Judge of the High Court, no exception can be taken to such action. It is desirable that activities of public functionaries should be above board and if allegations and criticisms are received in that regard the matter should be promptly inquired into and appropriate follow-up action taken. The need is all the more important in matters relating to public money. The High Court, in our considered view, omitted to look to the main purpose of appointment of Commission of Inquiry under the Act and interfered with the notification issued by the State Government without firm basis in law and without justification on facts."

Then in para 16 the Supreme Court stated:

"Testing the case on hand on the touchstone of the principles laid down in the

aforementioned decided cases, we find that the High Court has not held that there was no material of an objective or real nature to form the basis for the subjective satisfaction of the State Government that the matter is one of definite public importance into which an inquiry is necessary to be made. In the present case the exercise regarding payment of compensation was mostly based on records. In such a matter there is little scope to contend that the criticisms are merely on some vague allegations or hearsay evidence or the intention is to make a fishing inquiry."

And finally the Supreme Court in para-17 stated;

"On a careful consideration of the entire matter, we are not persuaded to accept the view taken in the judgment of the High Court quashing the appointment of the Commission of Inquiry under the Act. Accordingly the appeals are allowed and the judgment under challenge is set aside. There will however be no order for costs."

6. So, the controversy has now to be seen in the light of the earlier litigation and the earlier judgments of the High Court and the Supreme Court. One of the grounds agitated before this Court was that the impugned order was a result of mala fide and arbitrary exercise of power by the Government. The officials and Officers of the State Government against whom allegations have been levelled in the writ petition are not parties before this Court and it would not be desirable for this Court to go into those allegations particularly when the matter is being heard in separate proceedings and when the persons concerned are not before this Court. The crux of the allegations, however, was that the State Government was trying to conceal something and protect some people, but in the counter-affidavit details have been given as to what action had already been taken in the matter and what are the proceedings that are still going on. Therefore, in the light of allegations and the reply made by the State we will not be in a position to decide at this stage about the genuineness of these allegations. Most of the Civil Appeals have also been decided. Criminal cases are pending. Therefore, expression of opinion by this Court would not be in any way appropriate but suffice it to say that mala fides have not been proved. Not even a single person has been named as respondent in the writ petition against whom mala fides could be attributed. Therefore, we are not going into the question of mala fides at all.

7. Now the question remains whether the impugned notification is result of arbitrary exercise of power. Section 3 of the Commissions of Inquiry Act lays down:

"3. Appointment of Commission :--(1) The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by each House of Parliament or, as the case may be, the Legislature of the State, by notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public

importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry and perform the functions accordingly:

Provided that where any such Commission has been appointed to inquire into any matter--

(a) by the Central Government, no State Government shall, except with the approval of the Central Government, appoint another Commission to inquire into the same matter for so long as the Commission appointed by the Central Government is functioning;

(b) by a State Government, the Central Government shall not appoint another Commission to inquire into the same matter for so long as the Commission appointed by the State Government is functioning, unless the Central Government is of opinion that the scope of the inquiry should be extended to two or more States.

(2) The Commission may consist of one or more members appointed by the appropriate Government, and where the Commission consists of more than one member, one of them may be appointed as the Chairman thereof.

(3) The appropriate Government may, at any stage of an inquiry by the Commission, fill any vacancy which may have arisen in the office of a member of the Commission (whether consisting of one or more than one member).

(4) The appropriate Government shall cause to be laid before each House of Parliament or, as the case may be, the Legislature of the State, the report, if any, of the Commission on the inquiry made by the Commission under Sub-section (1) together with a memorandum of the action taken thereon, within a period of six months of the submission of the report by the Commission to the appropriate Government."

Section 7 of the Act lays down:

"7. Commission to cease to exist when so notified :--(1) The appropriate Government may, by notification in the Official Gazette, declare that--

(a) a Commission (other than a Commission appointed in pursuance of a resolution passed by each House of Parliament or, as the case may be, the Legislature of the State, shall cease to exist, if it is of opinion that the continued existence of the Commission is unnecessary;

(b) a Commission appointed in pursuance of a resolution passed by each House of Parliament or, as the case may be, the Legislature of the State, shall cease to exist, if a resolution for the discontinuance of the Commission is passed by each House of Parliament or, as the case may be, the Legislature of the State.

(2) Every notification issued under Sub-section (1) shall specify the date from which the Commission shall cease to exist and on the issue of such notification,

the Commission shall cease to exist with effect from the date specified therein."

Section 3 lays down that a Commission can be appointed by the Government either on its own or on a resolution by the Legislative Assembly and Section 7 lays down the power of the Government to wind up the Commission, the appropriate Government has been authorised to declare that a Commission ceases to exist if it has been appointed on its own. Government can also pass an order notifying that the Commission has ceased to exist which had been passed on the resolution of a Legislature, on a resolution by the Legislature for discontinuance of the Commission. So, it is abundantly clear that when the Commission had been appointed by the Government on its own without there being a resolution by the Legislature, the Government has the power to declare that the Commission had ceased to exist. Now, once Commission is appointed and it has been declared u/s 7 of the Act that it ceased to exist whether such an order is amenable to judicial review and if so to what extent. Those would be the two important questions which will have to be addressed in this judgment. In order to appreciate the controversy and the arguments made at the Bar we are of the considered view that whatever parameters laid down by the Apex Court and various High Courts for appointment of a Commission would also apply to exercise of power by the Government u/s 7 declaring that the Commission had ceased to exist. Therefore, we will be referring to those judgments which dealt with the power of the Government and power of the Courts of Judicial Review in relation to Section 3 of the Act.

8. The petitioners relied on a judgment of the Orissa High Court in *State of Orissa and Others Vs. Janamohan Das and etc. etc.*, . In this judgment the High Court stated that the High Court has power to appoint a Commission u/s 3 of Commissions of Inquiry Act. It further laid down that, if Commission had been constituted under directions of the High Court, the directions could not be reduced to naught by taking recourse to Section 7 and power u/s 7 in a case when a Commission was appointed on the direction of the High Court would be exercisable only with the concurrence of the High Court.

9. Mr. Kannabhiran appearing for the petitioners stated that in the present case the Commission had as a matter of fact been constituted on the directions of the High Court and when this Commission was discontinued by a judgment of the High Court, the Supreme Court had reversed the judgment and therefore the status quo ante had to be restored and in any case the Commission could have not been disbanded without having taken concurrence from the High Court or from the Supreme Court. Mr. Kannabhiran has also stated that this was a fundamental right of every citizen of this country to have a corruption free clean Government. He referred Professor Upendra Baxi's book titled "Liberty and Corruption" to get his argument across. The relevant portion is extracted hereunder:

"What could be the elements of a new judicial discourse on corruption? As Justice Sabyasachi Mukharji puts it (though in the context of the overruling of *Antulay*

IV): "This is really a value perspective judgment". What value perspectives emanate from the text and the context of the Indian Constitution with which the nation's adjudicators must be wholly conversant and to which they have sworn allegiance?

First, a whole series of Supreme Court and High Court decisions since the late seventies have held that mala fide exercise of public power constitutes an abuse of power which is violative of Article 14. The declarations of mala fide produce virtually a jurisprudence of strictures; in some cases the concerned Ministers and Chief Ministers resign, in others they resign and sooner rather than later return to power, and in yet some others they appeal to the Supreme Court against strictures, either to have them expunged or to question the power of Courts in writ proceedings to make veiled pronouncements on allegations of "veiled corruption" *Dhronamrajti Satyanarayana Vs. N.T. Rama Rao and Others*,). When a High Court or the Supreme Court passes strictures, based on prima facie evidence, does a mandamus lie either for investigation of offences under the old or the new Prevention of Corruption Act? Is investigation power under these Acts coupled with a public duty or is it an autocratic power? Should the Courts construe it as autocratic power? Can they do so acting within jurisdiction?

Second, similar questions await solution to the problem of sanction under the Act of 1947 and Act of 1988. Is the power to grant or refuse sanction an autocratic or a democratic power? Do rules and principles of natural justice extend to the sanctioning process? Does the doctrine of official bias apply? Does the maxim *nemo judex sua causa* apply? Is there or is there not a duty to give reasons for grant or denial of sanction? Are or are not these reasons reviewable under Article 14 of the Constitution? Is or is not even the Act of 1988 subject to the command of the Constitution? Is or is not unreasonable consumption of time in reaching a decision on sanction arbitrary and violative of Article 14?

Third, what discursive strategies are appropriate to judicial power in relation to withdrawal from prosecution in offences under the Act of 1988? Insofar as corruption offences fall under a special regime of law, how far is it appropriate, notwithstanding *Paswan Sheonandan Paswan Vs. State of Bihar and Others*, and *Satpathy (Mohd Mumtaz v. Nandini Satpathy (1987) 1 SCC 269)* decisions, to extend the same judicial approach to withdrawal from prosecution which may extend to offences under the general laws of the land, which can be activated in the ordinary course without the special regime of sanction? When once sanction is granted by a competent Governmental authority for prosecution in corruption offences, which is not routinely done, is any authority within the Government justified, in principle, in directing withdrawal from prosecution? What should, if such power is at all to be recognised, be the special quality of reason to be judicially required in directing such withdrawal?

Fourth, granting that the Act of 1988 while devoid of perambulatory enunciation of the objective of achieving speedy trials does serve the same objective in requiring day-today trial of cases (Section 4(4)) and prohibiting stay of

proceedings (Section 19(3)), it still does not provide criteria for the exercise of the power for notification of Special Judges u/s 3 and continues to provide for incumbent as well as retired Sessions Judges. It is the Government which has to notify Special Judges: there are no guidelines for the exercise of this power under the Act of 1988 and none existed under the Act of 1952. Is this in conformity with the limits of discretionary power under Article 14 in its contemporary incarnation? Should not the provision explicitly require consultation, concurrence or consent of the High Court? Similarly, does not the provision enabling appointment of a retired Sessions level Judge as a Special Judge to try public servants on corruption offences raise Articles 14 and 21 eyebrows. By what criteria is the Government to choose out of the pool of retired Judges with requisite experience?

Fifth, no matter how Parliament may make laws, is not the command of Article 21, now crystallizing the right to speedy trial, to be read into the legislation? If it is, does not the mandate of Article 21, regardless of the *Antulay VIII* decision, which may or may not have a precedent value (and as so far analysed it does not have that status) extend to ensure that the trial of corruption offences shall be expeditious, regardless of what the accused or prosecution desires? And if it so does, should not the Supreme Court (whether under Articles 139A, 142, 32 or transferred criminal revision petition) have the power to direct transfer of the trial to the High Court? Is the law -whether special or general - to follow the command of the Constitution or is the Constitution to comply with the command of the law?

Sixth, how should Justices conceptualize corruption offences? Surely, they should pay heed to the legislative texts which define these. Courts must observe the limits of judicial activism. And these clear limits are that an activist discourse of judicial power may not create offences, not so declared by legislations, nor create new punishments, not prescribed by Legislature. But should not a judicial activist discourse, thus informed of its democratic limits, still not be able to work out the very logic of the special regime providing for investigation, trial and punishments of corruption offences?

Corruption offences stand now altogether excised from the general penal law of the land. No longer do Sections 160 to 165-A stand inscribed on the text of the Indian Penal Code; these have been omitted by the Act of 1988. Only the special regime of the Act of 1988 now rules the roost.

This is so and will remain so. But do any of the fundamental rights, or all of them put together, radiate a new component fundamental right; namely, the right to clean and incorruptible administration? Is it plausible, and possible, to contend that Article 14, *ex hypothesi*, carries a potential for enunciation of such a fundamental right and insofar as corruption, as defined in the Act of 1988, is violative of the rights to equality before the law and to personal liberty? Or should the Constitution of India be continually construed so as to recognize a right in the sense of Hohfeldian immunity against corruption in public and

political life? If the judicial power and process is able to give birth to a right to clean administration (Justice Pratap has already enunciated it, in granting to pro bono publico litigation a locus in the writ proceedings against Chief Minister, Antulay) what would be its impact on the judicial discourse construing the new Act of 1988?

Surely, at least, the new Act will need to be construed as effectuating the new right. The possibilities of the activist discourse of judicial power to illuminate the provisions of the Act of 1988 are indeed immense. These will extend to all the statutory duties, which would now stand construed as concretising the right to a clean administration.

In terms of the Constitutional logic, and its democratic, republican ends, the recognition of such a fundamental right is not merely immanent; it is overdue. Every single fundamental right as originally proclaimed, and every single fundamental right produced by the discourse of judicial power, depends for its efficacy on immunity from corruption in public and political life. The Constitution of India, envisaging a democratic culture, does not permit the extended regime of a bribal culture which has, given the dangers of its expansive folklore, the potential for destruction of the future of democratic life in India. The "vital role" of the judiciary, of which Justice Mukharji spoke so movingly, can only be discharged by enunciation of such a right."

We will deal with Orissa judgment a little later after dealing with other judgments, but we feel it necessary to make a mention with respect to the opinion of Professor Upender Baxi. In the last paragraph of the note quoted by us the author says that, recognition of a fundamental right to clean administration was overdue. That is a matter for the Parliament to consider but we are sure that the Courts have never denied access to persons in hearing the matters and gave directions wherever corruption of an individual or of an institution is brought before the superior Courts. The judgments which the author has referred to in his book particularly in the paras which we have extracted hereinabove bear testimony to the same fact. As a matter of fact the public interest litigation itself was a result of concern of the Courts in the country about the fair play, transparency and especially of corruption free society. Therefore, we have no quarrel with what Mr. Kannabhiran wanted to argue on the basis of the opinion of one of the eminent Jurists of this country.

10. The learned Additional Advocate General, however, submits that the anxiety of the petitioners was that, if there was any corruption on acquisition of land the corrupt should be brought to the book. If money was given as compensation in excess of what was due that should be stopped and for this purpose the Government has already initiated number of measures and almost all the appeals under the Acquisition against the judgments passed by the Sub-Judge have been decided by the High Court. Therefore, there would be futility of continuance of the Commission. Some people who have been found to be prima facie guilty are facing criminal judicial processes and some people who had gained wrongfully by

getting excessive compensations, according to the State, faced the High Court in appeals. Therefore, the factors which necessitated the appointment of Commission in the year 1995 do not exist in the year 2002. In 1995 the Government was not in know of the facts which it wanted to know through appointment of the Commission. Now these facts are already known to the Government and appropriate actions have already been initiated and certain matters even finalised. Therefore, in the opinion of the Government there was no need to continue the Commission.

11. Now, coming to the argument of the learned Additional Advocate General with respect to the law laid down by the Orissa Judgment (*supra*), he contends that the second part of the judgment would not apply to the present case because Justice B.K Somasekhara Commission had not been appointed on the directions of the High Court therefore no concurrence of High Court was necessary even if it is accepted that the law laid down by the Orissa High Court was correct. He submits that Supreme Court has in its judgment in Civil Appeal No. 4138/2001 dated 13-7-2001 finally come to the conclusion that the Commission had been appointed by the Government on its own, the High Court had only recorded in its order the willingness of the State Government to appoint a Commission. Therefore, at no stage there was a direction by the High Court to appoint a Commission but the Commission had been appointed by the Government itself and the High Court had merely taken note of it and disposed of the Writ petitions in view of the willingness of the Government to appoint a Commission. Coming to the first part of the Orissa High Court judgment, the learned Additional Advocate General submits that directions cannot be given by the High Court to appoint a Commission and as a corollary to that if the High Court is powerless to give directions to government to appoint a Commission under the Commissions of Inquiry Act the High Court should be equally powerless to examine the legality of exercise of power u/s 7 of the Act. He submits that in view of the judgments of various other High Courts and also the judgment of earlier Division Bench of this Court which was set aside by the Supreme Court, such direction could not be given. He submits that, even the Supreme Court did not set aside the finding of the High Court on the question of Court's power with regard to giving a direction for appointment of a Commission. He referred to para-9 of the Supreme Court judgment wherein the Supreme Court while referring to the findings of the Division Bench had said:

"The High Court accepted the contention that there cannot be any direction to appoint a Commission under the Commissions of Inquiry Act, but should the High Court feel that a fact-finding is necessary then it can itself appoint the Committee or Commission. The High Court, however, held that "readiness and willingness" for appointment of a Commission does not connote the formation of opinion by the Government to appoint a Commission. The High Court came to hold that it is the Government's absolute discretion either to appoint the Commission or not. It has to exercise such discretion by applying its mind independently and form an opinion that it is necessary to appoint a Commission

under the Act. On a perusal of the Government file the High Court found that there was no material to show that the Government had formed an opinion regarding necessity of setting up the Commission under the Act. The High Court summed up its findings in the following words:

"In view of what is stated supra, we hold:

(1) That the 2nd respondent-Commission has not been validly constituted in consonance with Section 3 of the Act and thus, cannot function any further.

(2) That the cases relating to Crimes Nos. 327 of 1996, 6 of 1997 and Crimes Nos. 7 and 10 of 1997 shall be tried and disposed of within a period of one year from the date of the receipt of a copy of this order.

(3) The disciplinary proceedings initiated, both against the Judicial Officer, Judicial Ministerial Staff and others and also others, shall be disposed of by the respective authorities, within a period of six months from the date of the receipt of a copy of this order.

(4) The remaining appeal suits arising out of the OPs enhancing the compensation amounts and pending before this Court shall be disposed of by constituting a Special Bench within a period of two months from the date of the receipt of a copy of this order.

(5) In the cases where the decrees passed enhancing the compensation amount had become final, the respective claimants shall be entitled to file execution petitions and the cheque petitions have to be duly verified by the Executing Courts concerned and the amounts have to be paid to the decree-holders by crossed demand drafts and depositing the same in the Banks by opening the accounts by the Presiding Officers of the executing Courts. Thorough and proper inquiry has to be conducted by the Presiding Officers of the Executing Courts with regard to identity of the decree-holders.

Writ Petition is allowed accordingly. No costs."

The learned Additional Advocate General submits that although the judgment was set aside but this finding of the High Court was not set aside by the Supreme Court.

12. In *Vijay Mehta Vs. State of Rajasthan*, , the question as to whether the Courts can order appointment of a Commission under the Commissions of Inquiry Act had directly come up before the High Court. The High Court while dealing with this question also dealt with right of seeking a mandamus from the Court and referred to the various judgments of the Apex Court. The Court while enunciating the well known principles which are followed in issuing a writ of mandamus held:

"Mr. Mridul vehemently argued that the Government was asked to exercise discretion u/s 3 of the Act by the appointment of the Commission of Inquiry as it was a matter of public importance which it failed to do. A demand was made but

the discretion was not exercised and that when a discretion is required to be exercised and is not exercised as required by law, the Court has power to compel the authority or, for that matter, the State Government, to exercise it u/s 3 of the Act. In this connection, he referred to Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another, and Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, . It is not necessary to discuss the aforesaid decisions in detail for the reason that if the petitioner has no right to get the Commission appointed, then the demand for the appointment of Commission by the political parties or by the M.L.As will not confer any right. There is no statutory duty on the appropriate Government to be discharged towards the petitioner. In these circumstances, the contention of the learned Counsel that discretion vested in the appropriate Government u/s 3 of the Act has not been exercised and, therefore, the petitioner has a right to maintain the writ petition, is devoid of force."

So, the High Court was of the opinion that the petitioners seeking a mandamus for appointment of a Commission had no right to seek such a writ from the Court. Therefore, even if the Government had failed to appoint a Commission on a matter of public importance a citizen has no right to approach the Court for such a direction because, the High Court found, four pre-conditions would have to be satisfied by the petitioners before they succeed in getting a mandamus. Those conditions were:

1. Whether the petitioner has a clear and specific right to relief demanded by him?
2. Whether there is a duty imposed by law on the respondent?
3. Whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of respondent? And
4. Whether petitioner has any remedy other than by way of mandamus for the enforcement of right which has been denied to him?"

13. The learned Additional Advocate General has also relied on a judgment in Dhronamraju Satyanarayana Vs. N.T. Rama Rao and Others, . This is a judgment of Full Bench of Five Judges of this Court. In para 32 of the judgment the Court held:

"We have to dispose of a point concerning the issue of a writ of mandamus directing the Central Government to appoint a Commission under the provisions of Section 3 of the Commissions of Inquiry Act, 1952 which, in essence and substance, is the prayer in W.P. No. 12426 of 1987. Sri Ram Jeth Malani for the 1st respondent and the learned Advocate General, appearing for the second respondent, submitted that this Court would not be justified in issuing a writ of mandamus as prayed for in view of the clear provisions of the Section which gives a discretion to the appropriate Government to appoint or not to appoint a Commission even when it is found that there was a definite matter of public

interest to be gone into by a Commission.

.....

Sri Ramachandra Rao, the learned Counsel for the petitioner, though persistent in his argument that where this Court was convinced that there was infraction of Constitutional or statutory rights or the rule of law, the procedural inhibitions should not stand in the way of issuing a writ of mandamus to the Central Government to appoint a Commission, if it on its own failed to do so, he hastened to add that in any event it was for this Court to mould the relief suitable so as to further the ends of justice. With respect to this, he has submitted that the learned Attorney-General himself had, during the course of his submissions, expressed this view. In our considered view, this Court would not be justified in issuing a writ of mandamus directing the Central Government to appoint a Commission to go into the charges levelled against the first and the second respondents. We are, however, of the definite view that it is the right and the duty of this Court to see that ends of justice should not be allowed to be frustrated, but this Court should exercise its discretion in moulding the relief in such manner as would meet the situation, particularly in view of the fact that the comprehensive provisions of Article 226 of the Constitution empower the High Court to issue orders "for any other purpose", apart from writs for the enforcement of any of the rights conferred by Part III."

In *Siddha Raj Dhadha Vs. State of Rajasthan*, the Rajasthan High Court held:

"We may at the very outset state that so far as the question of setting up Commission under the Act is concerned, u/s 3(1) of the Act, it is discretionary with the appropriate Government to set up a commission and it is only mandatory to set up a Commission if the resolution is passed by the House of People or as the case may be by the Legislature of the State. Where there is discretionary jurisdiction, no mandamus in our opinion, can be issued to the State Government to set up a Commission of Inquiry, for the purpose to make inquiry into the matter of public importance by notification in the official gazette."

The matter stands concluded by the Five Judge Bench judgment of this Court and we are bound by the judgment that the appointment of a Commission is a discretionary power of the State Government which has to be exercised by them on their own or on the resolution of the State Legislature and the High Court cannot direct appointment of a Commission although the matter brought before it might be of public importance, because ultimately what the Commission does is only collection of facts for the guidance of the Government for future action. Although we are of the opinion that if there is a matter of public importance and a request is made to the Government from every quarter for appointment of a Commission and it is rejected, the reasons for which it is rejected can be subject matter of judicial scrutiny, similarly if a Commission is appointed under the Commissions of Inquiry Act, Courts would be within their rights to examine whether reasons exist or whether an issue of public importance was there, but,

in view of the law laid down by the Five Judge Bench judgment of this Court we do not want to deal further on this issue. Particularly in view of the fact that at this point of time continuance of Commission would be an exercise in futility.

14. The learned Additional Advocate General has referred to some judgments to show as to what could be the parameters of the High Court while testing the exercise of the power of discretion by the Government including *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, and *Rampur Distillery and Chemical Co. Ltd. and Another Vs. Company Law Board and Another*, . The parameters are already fixed by this Court that this Court cannot give directions for appointment of a Commission u/s 3 of the Commissions of Inquiry Act. It is a discretion which has to be exercised by the Government. In our view, the same parameters would apply to exercise of power u/s 7.

15. Now, the only argument that remains is whether the Supreme Court had directed continuance of Commission. This was one of the arguments made by the learned Counsel for the petitioners. We have gone through the judgment of the Supreme Court. The Supreme Court was only dealing with the order of the High Court by which the Commission's appointment had been quashed. At no point of time the Supreme Court considered the desirability of continuance of the Commission. The controversy before the Supreme Court was in a short compass as to whether High Court had passed a correct judgment in quashing the appointment of the Commission and whether the High Court was right in coming to the conclusion that Government had not used its discretion in appointment of the Commission and it had only been appointed at the instance of the High Court and to those questions the Supreme Court answered that the High Court had taken a hyper technical view of the matter, the Chief Minister had stated on the floor of the Assembly that the Government was prepared to appoint a Commission and the learned Advocate General had made a submission to that effect before the High Court when High Court passed the order. The High Court by passing the order had merely recognized the willingness of the State Government to appoint a Commission, therefore, even when the Commission had been appointed in the first instance it had been appointed by the State Government alone and the High Court had only recognized the fact while disposing of the writ petition. Therefore, the Supreme Court set aside the judgment of the High Court. The Supreme Court did not set aside the judgment of the High Court on the ground that it was desirable to continue the Commission. After the Supreme Court passed its order the Commission did not automatically come into being again. Its term had expired on 1-3-1999 and it was again for the State Government to consider whether its life had to be extended or it had to be allowed to die. We have found sufficient reasons given by the State Government for coming to a conclusion that it was not necessary to continue the Commission beyond 1-3-1999.

16. For these reasons, the Writ Petitions are dismissed.