

(2005) 09 AHC CK 0071

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 23932 of 2001

Ram Kumar, Ram Kishore and Nanhey

APPELLANT

Vs

The State of U.P. and Others

RESPONDENT

Date of Decision : 29-09-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 15(4), 19(1), 226, 243G
General Clauses Act, 1897 — Section 3(26)
Handlooms (Reservation of Articles for Production) Act, 1985 — Section 3(1)
Stamp Act, 1899 — Article 35, 5
Transfer of Property Act, 1882 — Section 107, 117
Uttar Pradesh Minor Minerals Concession Rules, 1963 — Rule 53A, 9, 9(2), 9A
Uttar Pradesh Panchayat Raj Act, 1947 — Section 28A, 28B
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 11, 117, 122A, 122C(6), 122C(7)
Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 — Rule 115A, 115A(3), 115B, 115L, 115R

Citation : (2005) 09 AHC CK 0071

Hon'ble Judges : Ajoy Nath Ray, C.J.; R.K. Agarwal, J; Ashok Bhushan, J

Bench : Full Bench

Advocate : Kamlesh Chandra Srivastava, Rajesh Kumar Srivastava and Alok Kumar Yadav, for the Appellant; S.M.A. Kazmi, G.N. Verma, R.V. Singh, L.P. Tiwari and Sankatha Rai, for the Respondent

Judgement

Ajoy Nath Ray, C.J., R.K. Agarwal and Ashok Bhushan, JJ.—We have heard Sri Alok Kumar Yadav, learned counsel appearing on behalf of the writ petitioners, Sri S.M.A. Kazmi, learned Chief Standing Counsel and Sri R.V. Singh, learned standing counsel appearing on behalf of the State.

2. This Full Bench has been constituted on a reference made to it by a learned single Judge vide its referring order dated 25th September, 2001 passed in this writ petition.

3. Learned single Judge found conflict in judgment of Division Benches "which necessitated the reference. The following eight questions have been referred to

this Full Bench:-

(i) Whether judicial propriety demands that if a Bench of High Court is unable to agree with the decision already rendered by earlier Division Bench of co-ordinate jurisdiction, the question of disagreement should be referred to a Larger Bench under Chapter V Rule 6 of the Rules of the Court, 1952?

(ii) Whether the decisions rendered in former two Division Benches in the case of Ajai Shanker (supra), which were brought to the notice of learned Judges constituting Division Bench in case of Panchoo (supra), the latter Division Bench instead of disagreement with ratio decidendi of two former Division Benches, it ought to have referred the same to a larger Bench of this Court?

(iii) Whether Article 14 and Article 19(1)(g) of the Constitution postulate a reasonable classification to ameliorate the economic condition of weaker section of society of fishermen community enumerated under Paragraph 62 (2) (kha) of Gaon Sabha Manual and also for elimination of middlemen to save the said weaker section of society from exploitation as the Directive Principles embodied the ideal of socio economic justice as assured in the preamble of the Constitution and the Courts are to adopt the principle of harmonious interpretation of Article 14 and 19(1)(g) of the Constitution so as to give effect to the Fundamental rights as well as Directive Principles of State Policy?

(iv) Whether in view of the State List of Seventh Schedule Item No. 21 empowers State Legislature to enact on the subject of fisheries, placing U.P. Act No. 1 of 1951, "" with Ninth Schedule of the Constitution and the mandatory provisions enshrined under Article 243G read with Item No. 5 of Eleventh Schedule which includes settlement of fisheries of the ponds and tanks vested in Gaon Sabha with powers, authority and responsibility of Panchayat, the preparation of plans for economic development and social justice and the implementation of scheme for economic development and social justice as entrusted to them under Paragraph 60 (2) (Kha) of Gaon "Sabha Manual issued by the State Government in exercise of its power u/s 126 of U.P. Act No. 1 of 1951 and the Rules framed thereunder are sacrosanct being policy of affirmative action of the State Government giving Distributive justice to the weaker section of society and to protect them from social injustice and all forms of exploitation?

(v) Whether the decision rendered by learned Single Judge in case of Man Singh (supra) conferring jurisdiction upon Sub Divisional Officer and Collector both for cancellation of Patta of fishery right making the order of Collector revisable requires reconsideration in view of sub-sections (6) and (7) of Section 122-C of U.P. Act No. 1 of 1951 and decision rendered by Supreme Court in case of Dhulabhai (supra)?

(vi) Whether jurisdiction of Civil Court is expressly barred to cancel the fisheries rights granted under paragraph 60(2) (Kha) of Gaon Sabha Manual and the decision rendered by Division Bench of this Court in case of Todi (supra) requires reconsideration in view of decision rendered by Full Bench of this Court in case of

Similesh Kumar (supra) ?

(vii) Whether rights of appeals and revisions are creation of statute and once statutory provisions indicate the manner of u " settlement of dispute, no other authority including Civil Court has jurisdiction to re-adjudicate the matter covered thereby?

(viii) Whether leases of rearing of fishes "in ponds and tanks vested in Gaon Sabha u/s 11 of U.P. Act No. 1 of 1951 fall within the meaning of agricultural land as defined u/s 3(14) of the said Act and such leases are exempted from Registration as envisaged u/s 117 of Transfer of Property Act?

4. So far as first two questions are concerned, we answer those in the affirmative, i.e., a Division Bench seeking to disagree with an earlier Division Bench cannot do it itself, but it can record its desire to disagree and thereafter call for a reference to a Larger Bench. Following authorities might be-referred to in this regard; Mamleshwar Prasad and Another Vs. Kanhaiya Lal (Dead) through L. Rs., State Bank of India and Ors. v. Labour Enforcement Officer (Central) and Anr., (1997) 10 SCC 258) State of Bihar Vs. Kalika Kuer @ Kalika Singh and Others, and M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.,

5. Before the learned single Judge bunch of writ petitions were posted, Writ Petition No. 23932 of 2001 being leading writ petition, arising out of various orders passed by Sub Divisional Officers granting fishery leases, refusing to renew fishery leases and in some of the writ petitions question was involved as to which is the appropriate forum for cancelling the fishery lease granted under the provisions of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 and the rules framed thereunder. It is necessary to note the relevant provisions of Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as 1950 Act) and the rules and other relevant provisions relating to grant of fishery lease.

6. u/s 117 of 1950 Act, the State Government may declare that the things mentioned therein, which had vested in the State, shall vest in the Gaon Sabha or any other local authorities. In this writ petition we are concerned with fishery which has been vested in the Gaon Sabha by virtue of notification of the State Government u/s 117 of 1950 Act. According to Section 122-A of 1950 Act general superintendence, management, preservation and control of all the land, forests, fisheries, tanks, ponds., water channels, pathways, abadi site and hats, bazars and melas vested in the Gaon Sabha are under the charge of Land Management Committee. The functions and duties of the Land Management Committee include development of animal husbandry which include pisciculture. u/s 28-B of the UP. Panchayat Raj Act, 1947, Bhumi Prabandhak Samiti is charged with the general management, preservation and" control of all the properties as referred to u/s 28-A of the U.P. panchayat Raj Act, 1947 including the -maintenance and development of the fisheries and tanks. Section 126 of the 1950 Act is extracted below:-

"126. Gaon Panchayat or the Committee to carry on orders and directions of the State Government.- (1) The State Government may issue such orders and directions to the [Land Management Committee] as may appear to be necessary for purposes of this Act.

(2) It shall be the duty of the [Land Management Committee] and [its] office bearers to forthwith carry out such orders and comply with such directions.

7. Rules framed under the 1950 Act, namely, Uttar Pradesh Zamindari Abolition & Land Reforms Rules, 1952 (hereinafter referred to as 1952 Rules), provide for mode of settlement of land, abadi sites and other properties vested in Gaon Sabha. Rule 115-A of 1952 Rules empowers the State Government to issue direction to Bhumi Prabandhak Samiti. Rule 115-A of 1952 Rules is extracted below:-

"[115-A. The State Government may issue directions to the Bhufyi Prabandhak Samities (Land Management Committees) established u/s 28-A of the U.P. panchayat Raj Act, 1947, on the following among other matters:-

(1) land management, including preservation of land for purposes of within utility public utility;

(2) expenditure of the amount placed at the disposal of the Bhumi Prabandhak Samiti by the Gaon Panchayt; and

(3) matters relating to the functions of the Bhumi Prabandhak Samitis as laid down in Section 28-B of the U.P. panchayat Raj Act, 1947, in so far they appear necessary for the purposes of the Act]"

8. Rule 115-S of 1952 Rules provides for manner and procedure for grant of lease and licence in respect of any property vested in the Gaon Sabha. Rule 115-S(1) specifically provides that no lease or licence shall be made in favour of a person except by public auction held in accordance with the procedure given thereunder. However, Rule 115-S(1) has a proviso which is of following effect:-

[115-Section (1)...

Provided that the provisions of this rule shall not apply to

(i) cases of allotment of agricultural land and abadi sites covered by Rules 173 to 177 and Rules 115-L to 115-R, respectively; and

(ii) cases in which the State Government issue directions u/s 126 of the Act read with Rules 115-A and 115-B]:

Provided further that in case of perennial tanks of three or more acres in ara, the Land Management Committee may, with the previous, permission of the Assistant Collector- in- Charge of the sub- division concerned, grant a lease for a period not exceeding seven years in favour of one or more than one fisherman residing within the circle of the Gaon Sabha or in favour of a co operative society of such fisherman registered under the Co-operative Societies Act, 1912 (Act No.

2 of 1912), and registered place whereof situate within such circle.]"

9. The State Government in exercise of its power u/s 126 of 1950 Act read with Rule 115-A and 115-B of 1952 Rules had issued various Government orders providing for regulating the settlement of fishery lease in the ponds and tanks vested in the Gaon Sabha. The provisions of Uttar Pradesh Gram Sabha Manual contains procedure for regulating fishery in tanks, ponds and water channels. The said settlement is made in accordance with various Government orders issued from time to time. Learned standing counsel has placed before us, the Government orders dated 24th April, 1990, 4th January, 1994 and 17th October, 1995 issued by the State Government in exercise of its power u/s 126 of 1950 Act read with Rules 115-A and 115-B of 1952 Rules. A procedure is provided for settlement of fishing right in the tanks and ponds vested in the Gaon Sabha. According to Government order separate provisions have been made for "settlement of fishing right in ponds and tanks more than two hectares and in ponds and tanks less than two hectares. The grant of lease is provided to various categories of persons which include cooperative societies of fishermen. An order of preference is provided under the Government order according to which the lease is to be granted.

10. Now at this juncture conflicting views expressed by various Division Benches are to be noted for answering the remaining questions referred to us. A Division Bench of this Court in *Ajai Sonkar v. State of U.P.* ; 1997 RD 157, had occasion to consider the preference given to the Fishing Cooperative Society. The Division Bench held that giving preference to Cooperative Societies does not amount to discrimination attracting Article 14 of the Constitution. Following was observed in paragraph 5:-

"5. Pursuant to above Rules notice dated 17.6.96 (Annexure-1) was published, in clause 2 of which it has been specifically mentioned that in granting lease cooperative matsya societies of same village or Gaon Sabha are to be given preference. The idea behind it is to promote the cooperative movement. Thus, if by giving preference to cooperative societies applications for granting lease are invited, it is settled that it does not amount to discrimination attracting Article 14 of the Constitution but it is in consonance with the cooperative jurisprudence. Therefore, the submission made by the learned counsel for the petitioner that the petitioner who belongs to a general category has been discriminated, has no legs to stand.

11. Another Division Bench of this Court in *Gram Panchayat, Kama Gulzarpur, Unnao v. Collector, Unnao and Ors*; 1997(3) A.W.C. 1665 (L.B.) again considered the directions issued by the State Government u/s 126 of 1950 Act. The Division Bench also noticed the provisions contained in the Gaon Sabha Manual providing for renewal of lease for a period of five years. The Division Bench also observed that direction issued by, the State Government u/s 126 of the Act are in consonance with the constitutional provisions of Article 38(2) and Article 39(c) of the Constitution of India. The Division Bench, I however, took the view that

renewal of lease cannot be granted without first considering the directions issued u/s 126 of 1950 Act since, the renewal is also a grant of lease. While noticing the directions issued by the State Government u/s 126 of 1950 Act, following observations were made by the Division Bench in paragraphs 21 and 22:-

"21. If the State Government under the provisions of Article 15(4) of the Constitution and directive principle of the State Policy passed 11 Government orders which are contained in Gaon Sabha Manual or other orders, it cannot be said that it amounts to discrimination because the State can make any special provision for the advancement of any socially tend educationally backward classes of citizens.

22. It has also been contended that neither any Cooperative Society nor any person belonging to the caste of Mallah and Nishad, etc., were available in the village in question, hence the lease in favour of respondent cannot be faulted. But this Court cannot ignore that one community, i.e., Kahar, was available and, therefore, it was incumbent upon the authorities to have followed the provision pertaining to preferences contained in Gaon Sabha Manual or other Government Orders, while renewing the Theka in favour of the respondent No. 3 but even when persons belonging to other preferential categories were not considered and t the lease deed was renewed in favour of the respondent. No. 3."

12. The above Division Benches have held that directions issued by the State Government u/s 126 of 1950 Act, i.e., by various Government orders for providing preference for grant of fishery lease are not not discriminatory and the same have been issued in consonance with the directive principle of State policy.

13. The contrary view to the aforesaid Division Benches have been expressed by several other Division Benches, namely, Ashok Kumar v. State of U.P. and Ors., 1995 ACJ 1066, Abdul Gaffar v. State of U.P. and Ors., 1997 (88) RD 656, Desh Kumar v. State of U.P.; 1990 RD 385, 1999 RD 186; Panchoo v. The Collector/ D.M., Gorakhpur and Ors. The Division. Bench in Panchoo's case (supra) also noted earlier two Division Benches in Ajay Sonkar's case (supra) and Gram Panchayat Kant's case (supra}."The Division Bench also held in the above case that fishery lease has to be granted after advertising it in widely circulated newspapers and after holding public auctions. The Division Bench held that unless the above procedure is followed, it will be violative of Articles 14 and 19(1) (g) of the Constitution. Following was observed in paragraph 4 of the said judgment:-

"4. Shri Swaraj Prakash learned counsel for petitioner has relied upon the decision of a division bench of this court Ajai Singh v. State of U.P., and the decision in Gram Panchayat v. Collector. In our opinion these decisions are distinguishable as they have not dealt with Article 19(1)(g) of the Constitution. Article 19(1)(g) states that every citizen has freedom to do business or trade. Hence in our opinion every citizen of any community or caste can do business of fishery, and it cannot be restricted to any particular caste or community. Any

Rule or G.O. to the contrary is in our opinion violative of. Article 19(1)(g) and wholly unconstitutional. We are of the opinion that i/ the lease in question has been granted without advertisement in well known newspapers having wide circulation and thereafter. holding public auction that lease will also be invalid. Hence if as yet no fishery lease after 1997 has been granted after advertisement in well known newspapers and holding public auction/tender then we direct the authorities concerned to grant it only after following the aforesaid procedure otherwise it will be violative of Articles 14 and 19(1)(g) of the Constitution."

14. Noticing the above conflict, learned single Judge has made this reference. Before proceeding to consider the correctness of the views expressed by judgments of various Division Benches, as noted above, it is relevant to note that with regard to one aspect there is no conflict in the views of the abovenoted Division Benches, i.e., renewal of lease. All the Division Benches have held that renewal of lease is not permissible. With regard to renewal of lease the matter was already referred to a Full Bench and a Full Bench of this Court has answered the same which judgment is reported in 2004(96) RD.645; *Feru v. State of U.P. and Ors.* The Full Bench formulated the question, which arose for consideration in paragraph 8 of the judgment, which is extracted below:-

"8. - On the facts and circumstances of the case, the following questions of law arise for consideration:-

Whether para 60(2)(kha) is violative of Article 14 of the Constitution.

Whether period of lease can be extended under the renewal clause of the patta."

While answering the above two questions, the Full Bench held that Clause (2) (kha) of paragraph 60 is ultra vires to Article 14 of the Constitution and Patta cannot be renewed for fisheries rights by the Land Management Committee/Sub Divisional Officer after expiry of the period for which it was granted. Before proceeding to examine the question any further, it is relevant to note various observations made by the Full Bench in *Feru's* case (supra) to examine as to whether the Full Bench in *Feru's* case (supra) had also expressed any opinion with regard to the questions which have been referred to this Bench. As noted above before the Full Bench only two questions were referred. Clause (2)(Kha) of paragraph 60 of Gaon Sabha Manual provided that the Collector in his discretion after the expiry of 10 years of lease can grant Patta for next five years if the conduct of the lessee was satisfactory. The Full Bench declared the renewal clause in Gaon Sabha Manual in Paragraph 60(2)(kha) as ultra vires on three reasons, namely, (i) it creates monopoly in favour of a person holding fishery right; (ii) under the renewal clause increase of the rent is only 20% while after the expiry of 10 years the amount may increase by 100% or more; and (iii) after the issuance of the Government order dated 17.10,1995 certain preferential rights has been given to the fishing Cooperative Societies and that subsequent Government order has to be taken into account for settlement of fishing rights in a pond after the expiry of period of lease granted to a person. It is relevant to

quote paragraph 10 to 15 of the Full Bench to find out as to what was actually decided by the Full Bench. Paragraph 10 to 15 of the Full Bench judgment in Feru's case (supra) are extracted below:-

"10. The renewal clause as provided under Clause (2)(kha) creates a monopoly in favour of a person holding fisheries rights under a patta. The only condition for its renewal is that his conduct should be satisfactory and if the Collector finds that his conduct was satisfactory, he can grant it for the next 5 years. This will create a monopoly in favour of the lessee. After the expiry of the lease every one is entitled to apply for grant of lease of fisheries rights. This equal opportunity is denied when a monopoly is created in favour of a person by renewal of the lease. The fishing is connected with the livelihood of a person. Everybody can participate in a public auction or submit his tender for settlement of fisheries rights. The person, who is a highest bidder, is entitled for consideration for settlement of fisheries rights.

11. Secondly, under the renewal clause increase of the rent is only 20% while after the expiry of 10 years, the amount may increase by 100% or more of the amount which was fixed 10 years ago. It will be loss of revenue of the Gaon Sabha. The revenue of the Gaon Sabha depends upon the realization of the amount by settlement of pond for fishing, growing "singhara" etc.

12. Thirdly, after the issuance of the Government order dated 17.10.1996 certain preferential rights has been given to fishing Cooperative Societies and that subsequent Government order is to be taken into account for settlement of fishing rights in a pond after the expiry of period of lease granted to a person.

13. The settlement of the fisheries rights afresh on the ground that such person has a right of renewal either under the agreement or under para 60(2)(kha) will be in violation of Article 14 of the Constitution for the reason it denies equal opportunity to all the persons concerned. The Division Bench in Ashok Kumar's case (supra) took the view that after the expiry of the lease, the fisheries rights should be settled only by public auction or public tender and the same view has been expressed in Abdul Gaffar's case (supra).

14. The clause for renewal of the lease under the agreement will be invalid as we have held that para 60(2)(kha) is ultra vires of Article 14 of the Constitution. Even otherwise the agreement will be arbitrary without giving an opportunity of equal participation to others as held in Ramana Dayaram Shetty v. The International Airport Authority of India and Ors.

15. From the perusal of the abovequoted judgment, it is clear that Full Bench only examined the clause for renewal of lease and observations made by the Full Bench were for purposes of holding the renewal clause as ultra vires. With respect, we are of the same view with regard to renewal clause as expressed by the Full Bench in Feru's case (supra). The renewal of lease is impermissible and renewal clause as contained in paragraph 60(2)(kha) of Gaon Sabha Manual has correctly been held to be ultra vires to Article of the Constitution. However, the

observations of the Full Bench make it clear that Full Bench already took notice of the Government order dated 17th October, 1995 and also observed that preferential right given to fishing Cooperative Societies has also to be taken into account for settlement of fishing right. The Full Bench in Feru's case (supra), however, was not concerned with the conflicting views expressed by two set of Full Benches as noted above. Further two questions which have been answered by the Full Bench, as already been quoted by us, did not decide or express any opinion on the questions which have been referred to this Bench and the judgment of Full Bench is only confined to the renewal clause of the fishery lease as contained in paragraph 60(2)(kha) of the Gaon Sabha Manual.

16. The Division Bench in Panchoo's case (supra), Desh Kumar's case (supra) and Abdul Gaffar's case (supra) held that every individual has right to be given opportunity to have a fishery lease and grant of lease cannot be restricted to any particular caste or community and any rule or Government order to the contrary is violative of Article 19(1)(g) of the Constitution of India.

17. The question for our consideration is as to whether the directions issued by the State Government u/s 126 of 1950 Act and Rule 115-A(3) of 1952 Rules are violative of rights guaranteed under Article 19(1)(g) of the Constitution. Before proceeding further, it is also relevant to note the provisions of Part IX of the Constitution of India inserted by 73rd amendment in 1982. Article 243G contemplate giving Panchayats such power and authority as may be necessary to enable them to function as institutions of self- government. The provisions further provides that power and responsibility of a Panchayat shall be with respect to preparation of plan for economic development and social justice and the implementation of scheme for economic development and social justice as may be entrusted to them including those in relation to the matter listed in Eleventh Schedule. Article 243G of the Constitution is quoted below:-

"243- G. Powers, authority and responsibilities of Panchayats.- Subject to the provisions of the Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein, with respect to-

(a) The preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule.

18. The Eleventh Schedule of the Constitution, which is referred to under Article 243G includes fishery at Item No. 5. The directions issued by the State Government contained in Government orders dated 8th July, 1987, 24th April, 1990, 4th January, 1994 and 17th October, 1995 have been issued in exercise of

power given to the State Government by Section 126 of 1950 Act read with Rule 115-A(3) of the 1952 Rules. From the aforesaid Government orders, it is to be noted that separate procedures have provided for ponds and tanks of more than two hectares and ponds and tanks of less than two hectares. The Government orders further specifically provides that ponds and tanks of less than 0.5 (half) acre should be reserved only for community use and shall not be let out for fishery. The Government orders provide for a preference in granting lease of fishery. With regard to tanks and ponds up to two hectares the category of preference is different from the ponds of tanks of more than two hectares. With regard to ponds and tanks up to two hectares first category of preference is the persons of same village belonging to Machhua, Kewat, Nishad, Mallah, Bind, Dheever, Dhhmar, Kashyap, Vatham, Raikawar, Manjhi, Godia, Kahar, Tureha or Turaha community. The preference proceed from Gaon Sabha to Nyaya Panchayat and thereafter to Block. With regard to ponds and tanks of more than two hectares the Cooperative Societies even of district level and State level are contemplated and individual of the same village/Nyaya Panchayat/Vikas Khan/district is also included as last preference. From the scheme of the directions issued u/s 126 of 1950 Act, it is clear that first emphasis is on the Gaon Sabha concerned where tank or pond is situated and individual belonging to fishermen community and other similar communities are preferred for ponds and tanks up to two hectares and thereafter Cooperative Societies of fishermen. Giving preference to fishermen of the village concerned is with object to provide livelihood to the fishermen who are traditionally engaged in fishing and to other similar communities who are socially and economically weak. Preference to cooperative Societies of fishermen is also with the same object i.e., to provide means of livelihood to fishermen who form cooperative society.

19. The Government order dated 17th October, 1995 specifically notes that the scheme is framed keeping in view that the benefit of the scheme be availed by the persons of fishermen community and leases of ponds and tanks could not be made in favour of middlemen and unsocial elements. The scheme has been framed as a measure of social justice to provide means of livelihood to fishermen and other similar communities who had been traditionally engaged in fishing. Preference of Gaon Sabha concerned is also with object that person of Gaon Sabha should get livelihood in the same village.

20. The category of preference further reveals that an individual of any caste or community of the same Village/Nyaya Panchayat/Block/District is also included in the preference and it cannot be held that a persons belonging to other communities have been completely denied from consideration for grant of lease.

21. The apex Court in 1988 UPLBEC 487; Gulshan and Anr. v. Zila Parishad and Ors., had occasion to consider a similar policy decision taken by the State Government providing for creating cooperative society of the persons traditionally engaged in work of disposal of carcasses of dead animals. The apex Court approved the policy of the State which was framed in the larger interests

of the sizeable segment of the weaker sections of the society. Under the scheme of the Government the work of collecting carcasses of dead animals was to be entrusted to cooperative societies of such persons. The apex Court made following observations in paragraphs 5, 6 and 7 of the said judgment:-

"5. After the matters were heard before us at quite some length, our attention was drawn to Circular No. 2670- G dated June 7, 1986 issued by the Special Secretary to the Government of Uttar Pradesh addressed to the Commissioner in the State to the following effect:

"I have been directed to invite your attention to the above subject and state that the disposal of carcasses of animals is performed by the District Boards under their own Bye-laws and the District Boards generally get this work performed by taking recourse to auction. With a view to safeguarding the interests of the persons, who are Traditionally engaged in this work, the Government after due consideration have decided that in future the licences for disposal of carcasses of animals should be granted only to registered industrial cooperative societies formed by the persons engaged in this work and for this purpose the average income of such society during the last three years enhanced by 158 thereof should be treated its potential income. Apart from this, care should be taken to ensure that orthodox contractors are not allowed to enter this society in pseudo-form."

It is plain upon the reading of the aforesaid Circular that the contract system envisaged by the impugned bye-law framed by the different Zila Parishads in the State has been virtually abandoned, and the State Government proposes to replace the system of auction by a system of licensing, giving preferential right to co-operative societies consisting of members of the traditional occupation, for the disposal of carcass of dead animals.

6. In view of the subsequent policy decision taken by the State Government, the present controversy no longer survives and it would be open to different Zila Parishads, in view of the directive of the State Government, to frame the appropriate bye-laws consistent with and for the implementation of the policy declared by the State Government. Zila Parishads while considering the question, shall keep in view the directions issued by this Court in Writ Petition No. 49"9 of 1983 decided on April 15, 1983. I shall also keep in view the order passed by this Court in Gulshan"s case introducing the licence-system in the Zila Parishad, Etawah on an experimental basis.

7. For a meaningful effectuation of the policy- decision of the Government, which is taken in the larger interest of the sizeable segment of the weaker sections of the society, it is of the utmost importance that the work of formation of cooperative society of the members of the traditional- occupation, who owing to their illiteracy, penury, and social disadvantages lack the will and the ability to organise themselves, should be taken- up by the social welfare department of the State Government and every effort should be made to bring the members of

the traditional occupation within the fold of these cooperative societies. The social welfare department shall take effective steps to organise such cooperative Societies."

22. In *Pathumma and Others Vs. State of Kerala and Others*, , the apex Court had examined the constitutional validity of Section 20 of the Kerala Agriculturist (Debt Relief) Act, 1970. The challenge was made before the Supreme Court that the restriction contained in Section 20 are violative of Article 19(1)(f) of the Constitution. The apex Court observed the restrictions which have been made to give effect to the directive Principles of State Policy have to be treated as reasonable restrictions. Paragraphs 12 and 13 of the said judgment are extracted below:-

"12. In the case of *Fatehchand Himmatlal v. State of Maharashtra* (supra) the Constitution Bench of this Court observed as follows (SCC p. 680, para 22):

Incorporation of Directive of Principles of State policy casting the high duty upon the State to strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice-social, economic and political- shall inform all the institutions of the national life, is not idle print but command to action. We can never forget, except at our peril, that the Constitution obligates the State to ensure an adequate means of livelihood to its citizens and to see that the health and strength of workers, men and women, are not abused, that exploitation, moral and material, shall be extradited. In short, State action defending the weaker sections from social injustice and all forms of exploitation and raising the standard of living of the people, necessarily imply that economic activities, attired as trade or business or commerce, can be de- recognized as trade or business.

13. In the instant case, therefore, we are not able to see any conflict between the directive principles contained in Articles 38 and 39(b) and the restrictions placed by the Act. In the case of *the State of Bombay v. P.M. Balsara* this Court observed as follows:

"In judging the reasonableness of the restrictions imposed by the Act, one has to bear in mind the directive principles of State policy set forth in Article 47 of the Constitution."

23. In *Parvej Aktar and Others Vs. Union of India (UOI) and Others*, , the apex Court had occasion to consider the orders issued u/s 3(1) of Handlooms (Reservation of Articles for Production) Act, 1985 reserving certain articles of exclusive production of handlooms. Challenged was made to the order of reservation for exclusive production of handlooms on the ground of violation of Article 19(1)(g) by certain persons. The apex Court noticed the provisions of Article 45 of the Constitution which require the State to promote with special care the educational and economical interests of the weaker sections of the people. The protection was given by the Government to handloom weavers because the livelihood of handloom weavers was threatened due to production of

all types of items and varieties by the powerloom industry. Following observations were made by the apex Court in paragraphs 56, 58 and 59 of the said judgment:-

"56. The protection has been given by the Government to handloom weavers because the livelihood of handloom weavers is threatened due to the production of all types of items and varieties by the powerloom industry. It is common knowledge that the handloom weavers are economically very poor and will have no alternative employment in the rural areas unless protected through reservation of varieties for them. So poor is the weaver that he could well say in the words of Karl Marx:

"Half a century on my back and still a pauper."

...

58. No doubt, there are restrictions under the impugned order but the question would be whether they are reasonable. The Act, as seen above, has come to be enacted for the protection of the interests of the handloom weavers, mostly concentrated in rural areas. They are pitted against a powerful sector, namely, the mills and the powerloom. As such, they face unequal competition. The restrictions are not only reasonable but also fully justified. Further, the objectives sought to be achieved by way of these restrictions should derive support from Article 43 of the Constitution which reads as follows:-

"43. Living wage, etc., for workers.- The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas."

The said article ordains that the State shall endeavour to promote cottage industries on individual or cooperative basis in rural areas. It is a welcome measure. We can usefully refer to *Orient Weaving Mills P. Ltd. v. Union of India*:

"...The Directive Principles of the Constitution, contained in Part- IV, lay down the policies and objectives to be achieved, for promoting the welfare of the people. In this context of the present controversy, the following words of Article 43 are particularly apposite:

"...and in particular, the state shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas."

It has rightly been pointed out in the affidavit filed on behalf of respondents 1-4 that the exemption granted by the impugned notifications is meant primarily for the protection of petty producers of cotton fabrics not owing more than four power looms, from unreasonable competition by big producers, like the petitioner- Company. The State has, therefore, made a valid classification

between goods produced in big establishments and similar goods produced by small powerloom weavers in the mofussil, who are usually ignorant, illiterate and poor and suffer from handicaps to which big establishment like the petitioner-Company are not subject."

59. Equally, Article 46 inter alia requires the State to promote with special care the educational and economical interests of the weaker sections of the people. Therefore, these restrictions can easily be sustained as reasonable since it is in furtherance of the objectives laid down in the directive principles."

24. Another judgment of the apex Court in *State of Kerala Vs. Joseph Antony*, which had arisen before the apex Court essentially as a dispute between the fishermen in the State of Kerala who use traditional fishing crafts such as catamarans, country crafts and canoes which use manually operated traditional nets and those who use mechanised crafts which mechanically operate sophisticated nets. The Kerala Marine Fishing Regulation Act, 1980 was enacted to regulate fishing vessels in the sea along the coastline of the State. Section 4 empowered the Government to regulate, restrict or prohibit fishing in any specified area by such class or classes of fishing vessels as may be prescribed. The Government issued notification prohibiting fishing by mechanised vessels in the territorial waters except for small specified zones. The notification was challenged as violative of Article 19(1)(g) of the Constitution. The apex Court observed following in paragraph 28:-

"28. By monopolising the pelagic fish stock within and by indiscriminate fishing in the territorial waters they are today denying the vast masses of the poor fishermen their right to life in two different ways. The catch that should come to their share is cordoned off by the giant and closely meshed gears leaving negligible quantity for them. Secondly, the closely meshed nets kill indiscriminately the juvenile with the adult fish and their eggs as well. That is preventing breeding of the fish which is bound in course of time to lead to depletion and extinction of the fish stock. There is thus an imminent threat to the source of livelihood of the vast section of the society. The State is enjoined under Article 46 of the Constitution in particular to protect the poor fisherman - population. As against this, the respondent-operators are not prohibited from fishing within the territorial waters. They are only prohibited from using certain types of nets, viz., purse seines, ring seines, pelagic and mid- water trawls. There is, therefore, no restriction on their fundamental right under Article 19(1) (g) to carry on their occupation, trade or business. They cannot insist on carrying on their occupation in a manner which is demonstrably harmful to others and in this case, threatens others with deprivation of their source of livelihood. Since, in the circumstances, the protection of the interests of the weaker sections of the society is warranted as enjoined by Article 46 of the Constitution and the protection is also in the interest of the general public, the restriction imposed by the impugned notifications on the use of the gears in question is a reasonable restriction within the meaning of Article 19(6) of the Constitution.

25. From the above pronouncements made by the apex Court, it is well settled that restrictions imposed to give effect to the constitutional goals as laid down in Directive Principles of State Policy are restrictions with intention to give certain benefits to weaker section of the society which are reasonable restrictions which does not infringe any right of individual citizen under Article 19(1)(g). The rights under Article 19(1)(g) are not absolute rights. As noted above, every individual has also right of consideration but according to preference laid down in the Government orders issued u/s 126 of the 1950 Act. The preferences have been provided in the scheme of the Government with object of providing livelihood to fishermen and fishermen cooperative societies. The view of the Division Bench in Panchoo's case (supra) and other cases that unless fishing right is not settled by auction it will violate Article 19(1)(g) is not correct. The settlement of fishing right by auction will necessarily be in favour of a person giving highest bid. The big contractors and moneyed persons will steal a march over poor fishermen and other poor people of the village who are unable to organise themselves and the result, would be that a sizeable section of fishermen and other communities will be deprived of their livelihood. To stop the settlement from going into the hands of big contractors and middlemen, the scheme was enforced by the State Government. The scheme has rational nexus with the object sought to be achieved and the persons for whose benefits the scheme has been framed definitely falls in a separate class having intelligible differentia. The settlement of fishing right in ponds and tanks by public auction cannot be held to serve the purpose and object nor the same can carry forward the goals as laid down in the Directive Principles of State Policy. Mere getting more revenue by public auction is not only object for letting out the fishing right. The objective as displayed from the directions of the State Government u/s 126 of 1950 Act is to provide livelihood to fishermen and other similar communities and also to give preference to the cooperative societies of such fishermen so that they may organise themselves and carry on their traditional vocation for the benefit of large part of weaker section of the society.

26. We are, thus, of the clear opinion that the directions issued by the State Government u/s 126 of 1950 Act read with Rule 115-A of 1952 Rules, as noted above, does not violate rights of any person under Article 19(1)(g) and Article 14 of the Constitution of India and the view expressed by the Division Bench in Panchoo's case (supra) and Abdul Gaffar's case (supra) in so far as they hold the settlement of fishing right only by way of public auction does not lay down the correct law. As noted above, the view in the aforesaid judgments as well as the view expressed in Ajai Sonkar's case (supra) and in Gram Panchayat Kanta's case (supra) that the renewal of lease is not permissible is absolutely correct and the same view has found favour with the Full Bench judgment of this Court in Feru's case (supra).

27. However, it is relevant to note that the directions issued u/s 126 of 1950 Act itself provides that settlement of fishing right shall be done with proper and extensive publicity so that all who are eligible to participate may be aware of

such proposed settlement and may participate. It is true that without information or knowledge of all concerned who are eligible to participate the settlement will be arbitrary. The Division Bench of this Court in 1992 A.L.J. 482; Gaon Sabha, Tuja v. The Sub Divisional Officers and Ors., had noted the proviso to Rule 115-Sand observed that public auction for settlement of fishery right is not mandatory. The Division Bench, however, in the said judgment has observed that although there is no requirement to the Sub Divisional Officer to settle the fishery lease by auction but the said procedure of auction can be exercised by the Sub Divisional Officer when there are more than one person claiming entitlement for grant of lease. Following was laid down by the above Division Bench in paragraph 5:-

"5. ...While laying down order of preference for the grant of Patta it has been provided that if there are more than one person of one group the Patta shall be granted by auction in favour of the highest bidder. The normal rule laid down by aforesaid Government order is the grant of Patta by Sub Divisional Officer without any public auction, unless the case falls within the last part of Clause-2 which has provided for public auction, if there are more than one person of one group. It may, however, be observed that though there is no statutory requirement requiring the Sub Divisional Officer to settle the land by auction, there is no prohibition either and if he is of the opinion that in view of the facts and circumstances of a particular case it will be expedient to grant the Patta of the fisheries right by means of public auction, he may do so. But if he has settled the fisheries by means of other than the auction his order cannot be set-aside on the ground that he has not settled it by holding public auction."

28. The settlement of fishery according to the directions u/s 126 of 1950 Act is settlement of property vested in the Gaon Sabha which should be done in a prescribed manner giving opportunity to all eligible persons to participate. The Revenue Officers, who are entrusted with duty, shall ensure proper advertisement of the date of settlement so that all persons who are eligible to participate have sufficient notice of the proposed settlement. The Government order itself contemplate "wide publicity". The Sub Divisional Officer himself should see that wide publicity is made. Now a days newspapers having wide circulation in the area is surest mode to publish a proposed settlement. As a general rule the Sub Divisional Officer should publish in a newspaper having wide circulation of the settlement of fishing right to enable all concerned to participate. As observed above, in the event there are more than one person in one particular category of preference, the Sub Divisional Officer is not prohibited to award the said fishing right by inviting bids by tender or auction.

29. Before concluding the discussion on the above issues, Full Bench judgment of this Court in Writ Petition No. 256 (M/B) of 1997 (Ram Chandra v. The State of U.P. and Anr.) needs to be noted. Before the Full Bench validity of Rule 9A and Rule 53A of U.P. Minor Minerals (Concession) Rules, 1963 (hereinafter referred to as 1963 Rules) was challenged. Rule 9 of 1963 Rules lays down preference for

grant of mining lease. Rule 9-A inserted by amendment, provided as follows:-

"9- A. Preferential right of certain persons in respect of sand etc.:-

(1) Notwithstanding anything contained in rule 0, in respect of mining lease for sand or morrum or bajari or boulder or any of these in "mixed state exclusively found in the river bed, preference shall be given in the following order to a person or group of persons, whether or not incorporated, who:

(a) Belong to socially and educationally backward classes of citizens are engaged in carrying on the occupation of excavation of sand or morrum as a profession and are resident f the same district in which the area in respect of which the lease is applied for, is situate ;

(b) Have established or intend to establish the aforesaid minor mineral based industry in the State.

Explanation:- For the purpose of Clause (a) the persons belonging to socially and educationally backward classes of citizens engaged in carrying on the excavation of sand or morrum as profession means Mallah, Kewat, Bind, Nishad, Manjhi, Batham, Dhiwar, Themer, Chai, Sorahia, Turha, Raikwar, Kaiwat, Khulwat, Tiyaar, Gaudia, Godia and Kashyap and includes such other persons as are specified as such by the State Government, by notification, in the official Gazette.

(2) Where two or more persons or group of persons belonging to any of the categories specified in sub-rule (1) have applied for a mining lease in respect of the same land the applicant whose application was received earlier shall have the preferential right :

Provided that where such applications are received on the same day preference shall be decided by draw of lots."

30. Similarly Rule 53-A relates to right of certain persons for grant of permit. The Full Bench of this Court held the Rules 9A and 53A of 1963 Rules arbitrary. The reasons given by Full Bench for holding the said provision arbitrary were, "the provisions deems that members of the communities mentioned therein would be carrying out the profession of excavating sand or morrum, which is arbitrary and unreasonable". The Full Bench in the aforesaid judgment further observed, "Further, Rule 9-A does not attach any significance to the guidelines such as special knowledge of excavation experience in mining operation, financial resources and nature and quality of the technical staff employed. It was held by the" Hon"ble Supreme Court in " Prem Nath Sharma Vs. State of U.P. and another, " that the conditions specified in Rule 9(2) are "conditions necessarily to be incorporated for ensuring selection of most deserving candidates." A perusal of Rule 9(2) would reveal that the Government while considering the matter regarding grant of mining lease have to scrutinise as to whether the applicant has any experience or special knowledge in mining operations or not. His financial resources have also to play a vital role in considering his candidature. Sub-clause (c) of the aforesaid rule further provides that the Government will

have to consider the nature and quality of the technical staff employed or to be employed by the applicant. Sub-clause (d) says that the conduct of the applicant in carrying out mining operations on the basis of previous lease or permit and in complying with the conditions of such lease or permit or provisions of any law in connection therewith have also to be scrutinised. However, for special reasons the State Government may relax the aforesaid rules. The impugned Rule 9-A completely ignores the guidelines referred to above." The Full Bench further in the said judgment observed, "The crux is that the reservation, authorising preferential right under the impugned Rule 9-A is totally on caste basis and not based on any rational experience, financial resources, special knowledge or expertise in the field of excavation of sand or morrum. The Full Bench lastly observed that "the emphasis is on regulation of mines and development of minerals. It is not, as observed above, a legislation for promotion of social justice or for better distribution of wealth within the meaning of Article 39(b) and (c) of the Constitution of India."

31. From the aforesaid, it is clear that the provisions of Rules 9A and 53A of 1963 Rules were struck down for the reasons as given by the Full Bench in Ram Chandra's case (supra). The emphasis has been given by the Full Bench that the legislation is not for promotion of social justice or for better distribution of wealth within the meaning of Article 39(b) and (c) of the Constitution. Whereas in the present case, as held by us, the direction issued by the State Government u/s 126 of 1950 Act is a scheme for promotion of social justice and providing for employment to large section of weaker section of the society. Thus the judgment of Full Bench in Ram Chandra's case (supra) is clearly distinguishable and is not attracted in the present case.

32. Although the Act is in the Ninth Schedule of the Constitution and is not challengeable for Part III violations, yet action taken by promulgating an order under the Act is not necessarily under the constitutional protection; although it is not so protected, it is otherwise cleared by us. As such questions No. 3 and 4 both are answered in affirmative.

33. The question No. 5 as framed by learned single Judge is as to whether the judgment of this Court in Man Singh and Ors. v. Board of Revenue and Ors. ; (1994)1 CRC 53, which held that the Sub Divisional Officer and Collector have jurisdiction to cancel the fishery lease and the order of Collector is revisable, requires reconsideration in view of sub-sections (6) and (7) of the Section 122-C of 1950 Act. The learned single Judge in Man Singh's case (supra) took the view that Sub Divisional Officer who grants a fishery lease has jurisdiction to recall his order if the said grant was obtained surreptitiously and fraudulently in breach of the provisions and directions contained in the Government order. Every administrative authority has jurisdiction to recall its order if it was obtained surreptitiously or fraudulently. We only clarify that the power to recall the grant by Sub Divisional Officer of a fishery lease can only be exercised on accepted ground of recall, i.e., when it is obtained by fraud or misrepresentation. Apart

from fraud or misrepresentation, the Sub Divisional Officer can neither suo moto nor on the application of any interested person cancel the lease. According to the scheme of the directions u/s 126 of 1950 Act itself Collector has been given power to cancel the lease. As per the scheme of the Government order any aggrieved person can approach the Collector for cancelling the lease. The question for consideration is as to whether the grant of lease by Sub Divisional Officer under the directions of the State Government or an order of the Collector cancelling the lease is subject to revision by revisional jurisdiction of the revisional authority under the Act. The learned single Judge of this Court in 1986 AII.L.J. 188; Matsya Jivi Sahkari Samiti, Semari v. Addl. Commissioner (Admn.), Gorakhpur Division and Ors. had occasion to consider as to whether order of Sub Divisional Officer granting permission to fishery lease is revisable u/s 333 and 333-A of 1950 Act. The learned single Judge held that revisional jurisdiction extended to any suit or proceeding decided by any Court subordinate to him. The learned single Judge in the said case held that the grant of lease by Sub Divisional Officer is proceeding within the meaning of Act and jurisdiction of Sub Divisional Officer is subject to revisional jurisdiction u/s 333 of 1950 Act. The proceeding by Sub Divisional Officer is certainly a proceeding for grant of lease in favour of other persons. In Man Singh's case (supra) the learned single Judge took the view that order of cancellation passed by Collector is amenable to revisional jurisdiction u/s 333 and 333-A of 1950 Act. The learned single Judge in Man Singh's case (supra) also took the view that the order of Sub Divisional Officer cancelling or refusing to cancel the lease under the relevant Government orders although open to judicial review under Article 226 but is neither appealable nor revisable under 1950 Act.

34. The Collector when considers an application for cancellation of fishery lease, it decides a lis between parties and act as revenue Court. The order passed by Collector cancelling a fishery lease or refusing to cancel a fishery lease is, thus, clearly amenable to revisional jurisdiction as provided under 1950 Act. 1950 Act being a complete code, the remedy with regard to fishery lease has to be first obtained under the four corners of the Act and Rules. Learned single Judge has referred to Section 122-C sub-sections 6 & 7 which has no applicability in the present case. Section 122-C relates to allotment of land for housing site to member of scheduled caste, agricultural labour etc. The said provision is not attracted.

35. The case of Dhulabhai decided by the Supreme Court has to be read in the light of subsequent decision in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, The decision given in Man Singh's case (supra) does not require any reconsideration. The question No. 5 is answered accordingly.

36. Questions No. 6 and 7 both are answered in affirmative. The Civil Court, meaning thereby, Courts dealing with suits and such matters would not have jurisdiction to consider matters regarding settlement of fisheries rights. In Similesh Kumar Vs. Gaon Sabha Uskar Ghaziapur and Others, , a Full Bench of

this Court took the view that validity of lease granted under 1950 Act is final which bars civil suit or any other proceeding in the civil Court.

37. While considering the question No. 8, it is necessary to take note of an earlier Five Judges Full Bench judgment of this Court in *Smt. Guddi v. State of U.P. and Ors.*, (1997)2 UPLBEC 872. The Full Bench in *Smt. Guddi's* case (*supra*) considered one of the questions as to whether right created under the instrument in question of catching the fish, in favour of the petitioner from Pachaura Tank reservoir for a period of five years on payment of premium is a lease within the meaning of Section 2(16) of the Act, chargeable to stamp duty in accordance with Article 35 of Schedule 1-B of the Stamp Act in the light of the pronouncement of the Supreme Court referred to therein or it is a licence chargeable to stamp duty under Article 5(c) of Schedule 1-B of the Act as held by the three Judge Special Bench of this Court in *Board of Revenue v. Mulak Raj* (*supra*). The Full Bench in paragraph 10 of the said judgment held that right to catch any carry away fish from a tank/reservoir for a specified period for consideration is immovable property as defined in Section 3(26) of the General Clauses Act and it may be made only by a registered instrument u/s 107 of Transfer of Property Act and as such requires stamp duty under Article 35(b) of Schedule 1 - B of the Indian Stamp Act.

38. The settlement of fishery rights is settlement of property and is a right in immovable property in the nature of a "profit a prendre" These rights have always been held as registrable and do not cease to be so merely because the grant is being made by or at the instance of the State Government. Question No. 8 is accordingly answered in the affirmative. However, we also make it clear that fishery right being obviously for purposes which are agricultural within the meaning of Section 117 of the Transfer of Property Act, it would be open to the State Government to issue appropriate notification for taking those outside the purview of compulsory registration. If such notification is issued, the same would be followed, but without such notification the necessity of registration remains.

39. With these answers, the matter will go back to the respective Benches having jurisdiction for disposal thereof in accordance with the views that we have expressed.