

(2009) 01 AHC CK 0083
In the Allahabad High Court
Case No : Special Appeal No. 1942 of 2008

Sheet Gupta

APPELLANT

Vs

State of U.P.And Others

RESPONDENT

Date of Decision : 27-01-2009

Acts Referred:

Allahabad High Court Rules, 1952 — Chapter 8 Rule 5
Essential Commodities Act, 1955 — Section 3, 5, 6
Uttar Pradesh Scheduled Commodities Distribution Order, 2004 — Paragraph 28

Citation : (2009) 01 AHC CK 0083

Hon'ble Judges : R.K.Agrawal, J and S.P.Mehrotra, J

Final Decision : Dismissed

Judgement

1. The present special appeal, under Chapter VIII, Rule 5 of the Rules of the Court, has been filed against the judgment and order dated 26th November, 2008 passed by the learned single Judge in Writ Petition No. 20138 of 2008 (Sheet Gupta v. State of U.P. and others).

2. It appears that the petitionerappellant was having a licence for fair price shop in Gram Panchayat Lahilpar alias Ratanpura, Nyay Panchayat Pangara, Vikas Kshetra Deoria, Tehsil and District Deoria. The licence of the petitionerappellant in respect of the fair price shop was suspended on 14th July, 2004; a copy of the said suspension order dated 14th July, 2004 has been filed as Annexure 1 to the aforesaid writ petition.

3. It further appears that the petitionerappellant was called upon to show cause and produce documents and thereafter, an enquiry was held in the matter. Ultimately, by the order dated 13th June, 2007 the SubDivisional Magistrate, Sadar, Deoria cancelled the licence of the petitionerappellant in respect of the fair price shop; a copy of the said order dated 13th June, 2007 has been filed as Annexure 7 to the aforesaid writ petition. Thereupon the petitionerappellant filed an appeal before the Commissioner, Gorakhpur Division, Gorakhpur being Appeal No. 53/D of 2007. By the order dated 20th December, 2007 the Commissioner,

Gorakhpur Division, Gorakhpur dismissed the said appeal filed by the petitionerappellant; a copy of the said order dated 20th December, 2007 has been filed as Annexure 9 to the writ petition.

4. The petitionerappellant thereupon filed the aforesaid writ petition, inter alia, praying for quashing the order dated 13th June, 2007 passed by the Sub Divisional Magistrate, Sadar, Deoria and the order dated 20th December, 2007 passed by the Commissioner, Gorakhpur Division, Gorakhpur. By the aforementioned judgment and order dated 26th November, 2008 the learned single Judge has dismissed the writ petition filed by the petitionerappellant. Against the said judgment and order dated 26th November, 2008 the petitionerappellant has filed the present special appeal.

5. We have heard Sri Manish Deo Singh, learned counsel for the petitionerappellant and the learned Standing Counsel appearing for the respondents, and perused the record.

6. A preliminary objection has been raised by the learned Standing Counsel regarding maintainability of the special appeal against the said judgment and order dated 26th November, 2008 passed by the learned single Judge. It is submitted by the learned Standing Counsel that the writ petition was filed against the appellate order passed by the Commissioner, Gorakhpur Division, Gorakhpur, as such, the special appeal will not lie against the judgment and order passed in the writ petition. The learned Standing Counsel has placed reliance on a Division Bench decision of this Court in *Vajara Yojna Seed Farm, Kalyanpur (M/s.) and others v. Presiding Officer, Labour Court II, U.P., Kanpur and another*, 2003 (1) ESC 492. It is submitted by the learned Standing Counsel that the provision for appeal has been made in paragraph 28 of the UP. Scheduled Commodities Distribution Order, 2004 (hereinafter referred to as the "Distribution Order, 2004") which has been issued by the State Government in exercise of its power conferred under Section 3 of the Essential Commodities Act, 1955 read with the order of the Government of India, Ministry of Consumer Affairs, Food and Public Distribution, Department of Food and Public Distribution, dated August 31, 2001. Therefore, the appeal which was filed before the Commissioner, Gorakhpur Division, Gorakhpur under paragraph 28 of the Distribution Order, 2004 was in essence an appeal under the provisions of the Essential Commodities Act, 1955. The writ petition before the learned single Judge having been filed against the order passed in exercise of appellate jurisdiction under the Essential Commodities Act, 1955, which is a Central Act referable to Entry in the Concurrent List in the Seventh Schedule to the Constitution of India, the special appeal against the judgment and order of the learned single Judge is not maintainable.

7. In reply Sri Manish Deo Singh, learned counsel for the petitionerappellant has submitted that the provision for appeal has been made in paragraph 28 of the Distribution Order, 2004 and not in the Essential Commodities Act, 1955. It is submitted that the special appeal under Chapter VIII, Rule 5 of the Rules of the

Court is prohibited if an order is passed in exercise of the appellate jurisdiction under the provisions of any Uttar Pradesh Act or under any Central Act referable to the Entries in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India. In the present case the appellate jurisdiction is being exercised neither under any Uttar Pradesh Act nor under any Central Act. In the circumstances, the special appeal against the judgment and order passed by the learned single Judge is maintainable. Sri Manish Deo Singh, learned counsel for the petitionerappellant has placed reliance on a Division Bench decision of this Court in the case of Ram Dhyani Singh v. State of U. P. and others, 2004 (3) AWC 2559.

8. We have considered the submissions made by the learned counsel for the parties.

9. Chapter VIII, Rule 5 of the Rules of the Court, which makes provision for special appeal, provides as follows:

"5. Special appeal. An appeal shall lie to the Court from a judgment not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award (a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or (b) of the Government or any Officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge."

10. From a perusal of the aforesaid provisions we find that the special appeal shall lie to the Court (i.e. the High Court of Judicature at Allahabad) from a judgment of one Judge of the Court. However, such special appeal will not lie in respect of the following judgments/orders:

(1) the judgment passed by one Judge in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court subject to the Superintendence of the Court;

(2) the order made by one Judge in the exercise of revisional jurisdiction;

(3) the order made by one Judge in the exercise of the power of superintendence of the High Court;

(4) the order made by one Judge in the exercise of criminal jurisdiction;

(5) the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution of India in respect of any judgment,

order or award by the tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India;

(6) the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution of India in respect of any judgment, order or award of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act, i.e. under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India.

11. The Essential Commodities Act, 1955 has been enacted by the Parliament in exercise of its powers under Article 246(2) read with Entry 33 of List III, i.e. Concurrent List in the Schedule VII to the Constitution of India. Section 3 of the Essential Commodities Act, 1955 gives power to control production, supply, distribution, etc., of the essential commodities. Subsection (1) of Section 3 gives power to the Central Government to issue orders for the said purpose. Section 5 of the Essential Commodities Act, 1955 gives power to the Central Government to delegate power to make orders under Section 3, inter alia, to the State Government. Section 6 of the said Act provides that an order made under Section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Essential Commodities Act, 1955 or any instrument having effect by virtue of any enactment other than the Essential Commodities Act, 1955. A conjoint reading of Sections 3, 5 and 6 of the Essential Commodities Act, 1955 shows that the orders which are issued by the Central Government or by the State Government under Section 3 of the said Act have statutory force, and such orders have overriding effect on any enactment other than the Essential Commodities Act, 1955 or any instrument having effect by virtue of any enactment other than the Essential Commodities Act, 1955.

12. The Distribution Order, 2004, as recital in the preamble to the said Order shows, has been issued by the State Government of Uttar Pradesh in exercise of the powers conferred under Section 3 of the Essential Commodities Act, 1955 read with the order of the Government of India, Ministry of Consumer Affairs, Food and Public Distribution, Department of Food and Public Distribution, dated August 31, 2001. We are of the opinion that the Distribution Order, 2004, like other orders issued under Section 3 of the Essential Commodities Act, 1955 has statutory force in view of the provisions contained in Sections 3, 5 and 6 of the said Act. Paragraph 28 of the Distribution Order, 2004 makes provision for appeal before the Divisional Commissioner concerned, and such appeal evidently will be a statutory appeal under the provisions of the Distribution Order, 2004 read with the provisions of the Essential Commodities Act, 1955.

13. The question arises as to whether the appeal under paragraph 28 of the

Distribution Order, 2004 filed before the Divisional Commissioner will be an appeal under the provisions of the Essential Commodities Act, 1955 which is a Central Act referable to an Entry in the Concurrent List or the same will be an appeal merely under the Distribution Order, 2004 and not under the provisions of the Essential Commodities Act, 1955.

14. It is true that paragraph 28 of the Distribution Order, 2004 makes provision for an appeal before the Divisional Commissioner concerned and there is no provision under the Essential Commodities Act, 1955 in this regard. However, the Distribution Order, 2004 has been issued in exercise of the powers conferred under Section 3 of the Essential Commodities Act, 1955 and the same has overriding effect in view of the provisions of Section 6 of the said Act. All the provisions of the Distribution Order, 2004 including the provision for appeal in paragraph 28 of the said Order are referable to and, in essence, are under the provisions of the Essential Commodities Act, 1955, therefore, the provision for appeal though contained in paragraph 28 of the Distribution Order, 2004 is evidently an appeal under the provisions of the Essential Commodities Act, 1955.

15. As noted above, Rule 5 of Chapter VIII of the Rules of the Court bars a special appeal against an order made by one Judge in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution of India in respect of any judgment, order or award of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate jurisdiction "under any such Act" i.e. under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India. The appeal provided in paragraph 28 of the Distribution Order, 2004 being in essence an appeal under the provisions of the Essential Commodities Act, 1955, i.e. a Central Act in respect of an Entry in the Concurrent List and the impugned order dated 20th December, 2007 having been passed by the Commissioner, Gorakhpur Division, Gorakhpur in exercise of appellate jurisdiction and the judgment and order dated 26th November, 2008 having been passed by the learned single Judge in the aforesaid writ petition directed against the said order of the Commissioner, the present special appeal, in our view, is not maintainable under the provisions of Rule 5 of Chapter VIII of the Rules of the Court.

16. The above view taken by us is supported by the Division Bench decision in Vajara Yojna Seed Farm case (supra). One of the questions involved in the said case was as to whether in a case where the order is passed by the Joint Director of Education in exercise of his appellate power under the statutory regulations framed under the U.P. Intermediate Education Act, 1921 and the writ petition filed against such appellate order is decided by the learned single Judge, the special appeal under Rule 5 of Chapter VIII of the Rules of the Court would lie or not. The Division Bench observed as under (paragraphs 35, 39, 56 and 57 of the said UPLBEC):

"35. From the aforesaid discussion, it is clear that provisions of special appeal

which contained in Clause 10 of the Letters Patent dated 17th March, 1866 had undergone various changes by Acts passed by State Legislature. Letters Patent Appeals pertaining to some categories have been abolished by Uttar Pradesh High Court (Abolition of Letters Patent Appeals) Act, 1962 and further some more categories of Letters Patent Appeals have been abolished by U.P. High Court (Abolition of Letters Patent Appeals) (Amendment) Act, 1981. In consequence the Letters Patent Appeals as contained in Chapter VIII, Rule 5 of the Rules of the Court is permissible subject to category of cases in which special appeals have been abolished by the aforesaid Act, 1962 as amended in 1981.

39. From what has been stated aforesaid, it is clear that unless the special appeal is excluded/abolished by any competent Act, the special appeal can be filed against the judgments of Single Judge. The question to be considered is as to what are the categories of the special appeal which have been abolished by U.P. Act No. 14 of 1962 as amended in 1981 and whether the present appeals fall in the excluded appeals or not.

56.....The last submission of Counsel for the appellant is that since appellate power has not been exercised by the Joint Director of Education under the U.P. Act but under regulations framed under the Act, bar of Chapter VIII, Rule 5 of the Rules of the Court will not be attracted needs consideration. The words used in Chapter VIM, Rule 5 of the Rules of the Court refers to the words "in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act." The Regulations under which appellate power has been exercised by the Joint Director has been framed under the provisions of U.P. Intermediate Education Act, 1921. The pertinent words under Chapter VIII. Rule 5 of the Rules of the Court are "exercise of appellate or revisional jurisdiction under any such Act." The exercise of appellate power under regulation has to be treated exercise of power under U.P. Intermediate Education Act. The regulations framed under the U.P. Intermediate Education Act, 1921 are statutory regulations. Regulations making power has been expressly conferred under Section 9 of the U.P. Intermediate Education Act and since the regulations have been framed under the Act they have force of law and are legislative in character. Apex Court in 2001 (1) SCC 728, State of Karnataka and another v. B. Suvarana Malini and another, while considering the rules framed under Section 8 of Karnataka State Civil Services Act, 1978 held that rules would have the force as State legislation have framed the rules. The Apex Court in Paragraph 4 of the aforesaid judgment laid down as under:

"4.....The Karnataka State Civil Services Act is an Act to regulate the recruitment and the conditions of service of persons appointed to civil services of the State of Karnataka and posts in connection with the affairs of the State of Karnataka. Section 3 authorises the State Government to make rules, regulating recruitment and the conditions of service. Section 8 is the rulemaking power of the State Government to make rules to carry out the purposes of the Act. Under subsection (3) of Section 8, every rule made under the Act is required to be laid

as soon as may be, after it is made before each House of the State Legislature, while it is in session for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and any modification in the rule, as desired by the House, could be carried out or if both House agree that the rule should not be made, in which case the rule will not be effective and it is only when the House agrees, with or without any modification, then the rules shall have the effect in such modified form. The Absorption rules being the rules made in subsection (3) of Section 8, having been duly complied with, the rule is legislative in character and would have the force, as if the State Legislature has framed the rules."

Thus, appellate power exercised by Joint Director of Education under statutory regulations is also a power exercised under the Act and it cannot be said that the said power is not a power exercised under the U. P. Act. In view of the above, the bar contemplated under Chapter VIII, Rule 5 of the Rules of the Court is fully applicable and the above submission of Counsel for the appellant has no substance.

57.....As held above, if the order is passed by Appellate Authority in exercise of power under U. P. Act the bar of special appeal will come into play irrespective of the fact whether the Appellate Authority passed order as Tribunal or not....." (Emphasis supplied)

17. In the above case, the Division Bench has thus held that the appellate power exercised by the Joint Director of Education under the statutory regulations framed under the UP. Intermediate Education Act, 1921 is in fact the power exercised under the said Act, therefore, the bar contemplated under Chapter VIII, Rule 5 of the Rules of the Court regarding filing of the special appeal would be attracted.

18. One more aspect may be taken note of. Rule 5 of Chapter VIII of the Rules of the Court, inter alia, uses the words "under any such Act" i.e. "under any Uttar Pradesh Act or under any Central Act". The use of the word "under" in place of the word "by" is significant. Therefore, the provisions for appeal may be contained either under the Act itself or under the rules, regulations or the orders which are issued under the Act.

19. In *Dr. Indramani Pyarelal Gupta and others v. W.R. Natu and others*, AIR 1963 SC 274, their Lordships of the Supreme Court explained the distinction between the words "by the Act" and "under the Act". It was observed as under (paragraphs 15 and 16 of the said AIR):

"15.....Learned Counsel is undoubtedly right in his submission that a power conferred by a byelaw is not one conferred "by the Act", for in the context the expression "conferred by the Act" would mean "conferred expressly or necessary implication by the Act itself." It is also common ground that a byelaw framed under Section 11 or 12 could not fall within the phraseology "as may be prescribed", for the expression "prescribed" has been defined to mean "by rules

under the Act", i.e., those framed under Section 28 and a byelaw is certainly not within that description. The question therefore is whether a power conferred by a byelaw could be held to be a power "conferred under the Act". The meaning of the words "under the Act" is well known. "By" an Act would mean by a provision directly enacted in the statute in question and which is gatherable from its express language or by necessary implication there from. The words "under the Act" would, in that context signify what is not directly to be found in the statute itself but is conferred or imposed by virtue of powers enabling this to be done; in other words, byelaws made by a Subordinate lawmaking authority which is empowered to do so by the parent Act. The distinction is thus between what is directly done by the enactment "and what is done indirectly by rulemaking authorities which are vested with powers in that behalf by the Act. [vide *Hubil Electricity Co. Ltd. v. Province of Bombay*, 76 Ind. App 57 at p. 66: (AIR 1949 PC 136 at p. 139), and *Narayanaswamy Naidu v. Krishna Murthi*, ILR (1958) Mad 513 at p. 547: (AIR 1958 Mad 343 at p. 359)]. That in such a sense byelaw would be subordinate legislation "under the Act"....."

16.....Undoubtedly, there is some little tautology in the use of the expression "as may be prescribed" after the comprehensive reference to the powers conferred "under the Act", but in order merely to avoid redundancy you cannot adopt a rule of construction which cuts down the amplitude of the words used except, of course, to avoid the redundancy. Thus the utmost that could be said would be that though normally and in their ordinary, signification the words "under the Act" would include both "rules" framed under Section 28 as well as "byelaws" under Section 11 or 12, the reference to "rules" might be eliminated as tautologous since they have been specifically provided by the word that follow. But beyond that to claim that for the reason that it is redundant as to a part, the whole content of the words "under the Act" should be discarded, and the words "by the Act" should be read in a very restricted and, if one may add, in an unnatural sense as excluding a power conferred by necessary implication, when such a power would squarely fall within the reach of these words would not, in our opinion, be any reasonable construction of the provision." (Emphasis supplied)

20. In view of the above decision of the Supreme Court it is evident that the Rules, Regulations, Orders, Byelaws etc. are covered within the ambit of the words "under the Act", therefore, an appeal filed under paragraph 28 of the Distribution Order, 2004 is an appeal "under the Act" that is under the Essential Commodities Act, 1955. Hence, the bar to the maintainability of a special appeal, as discussed above, will apply in the present case.

21. The question may be examined from another angle also. It is well settled that an appeal is a creature of Statute. Right of appeal is a statutory right. There is no inherent right of filing an appeal. Reference in this regard may be made to the following decisions:

22. In *Durga Shankar Mehta v. Raghuraj Singh*, AIR 1954 SC 520, the Apex

Court has held as follows (paragraph 4 of the said AIR):

"4 It is well known that an appeal is a creature of statute and there can be no inherent right of appeal from any judgment or determination unless an appeal is expressly provided for by the law itself. The powers given by Article 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in case whether the needs of justice demand interference by the Supreme Court of the land. The Article itself is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting of special leave, against any kind of judgment or order made by a Court or tribunal in any cause or matter and the powers could be exercised in spite of the specific provisions or for appeal contained in the Constitution or other laws. The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this Article in any way...." (Emphasis supplied)

23. In *Pranab Kumar Mitra v. State of W.B. and another*, AIR 1959 SC 144 the Apex Court has observed as follows (paragraph 6 of the said AIR):

"6. In our opinion, in the absence of statutory provisions, in terms applying to an application in revision, as there are those in Section 431 in respect of criminal appeals, the High Court has the power to pass such orders as to it may seem fit and proper, in exercise of its revisional jurisdiction vested in it by Section 439 of the Code. Indeed, it is a discretionary power which has to be exercised in aid of justice. Whether or not the High Court will exercise its revisional jurisdiction in a given case, must depend upon the facts and circumstances of that case. The revisional powers of the High Court vested in it by Section 439 of the Code, read with Section 435, do not create any right in the litigant, but only conserve the power of the High Court to see that justice is done in accordance with the recognised rules of criminal jurisprudence, and that subordinate criminal Courts do not exceed their jurisdiction, or abuse their powers vested in them by the Code. On the other hand, as already indicated, a right of appeal is a statutory right which has got to be recognised by the Courts, and the right of appeal, where one exists, cannot be denied in exercise of the discretionary power even of the High Court. The Legislature, has therefore, specifically provided, by Section 431 of the Code, the rules governing the right of substitution in case of death of an appellant, but there is no corresponding provision in Chapter XXXII, dealing with the question of abatement and the right of substitution in a criminal revision....." (Emphasis supplied)

24. In *Shankar Kerba Jadhav and others v. State of Maharashtra*, AIR 1971 SC 840, the Apex Court observed as follows (paragraph 10 of the said AIR):

"10. Let us look at the question apart from the authorities. An appeal is a creature of a statute and the powers and jurisdiction of the appellate Court must be circumscribed by the words of the statute. At the same time a Court of appeal is a "Court of error" and its normal function is to correct the decision appealed

from and its jurisdiction should be coextensive with that of the trial Court. It cannot and ought not to do something which the trial Court was not competent to do. There does not seem to be any fetter to its power to do what the trial Court could do. In this case the trial Magistrate was competent to pass a sentence of imprisonment up to two years and the High Court's jurisdiction hearing an appeal would therefore be limited to a sentence up to that period and no mores." (Emphasis supplied)

25. In *Smt. Ganga Bai v. Vijay Kumar and others*, AIR 1974 SC 1126, the Apex Court has observed as follows (paragraph 15 of the said AIR):

"15. It is thus clear that the appeal filed by defendants 2 and 3 in the High Court was directed originally not against any part of the preliminary decree but against a mere finding recorded by the trial Court that the partition was not genuine. The main controversy before us centres round the question whether that appeal was maintainable. On this question the position seems to us well established. There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute." (Emphasis supplied)

26. In *V.C. Shukla v. state through C.B.I.*, AIR 1980 SC 962, the Apex Court has held as follows (paragraph 111 of the said AIR):

"111. If framing of a charge is an interlocutory order excluding the non obstante clause, no appeal would lie against such an order under Section 11 because there is a specific provision in subsection (2) of Section 11 that except as provided in Section 11 (1) no appeal or revision shall lie to any Court from any judgment, sentence or order of a Special Court. It is a well settled proposition of law that there is no inherent or common law right of appeal in a subject and the appeal is the creature of statute and therefore the right to appeal can only be enjoyed within the strictly demarcated limits conferring such right of appeal. (See *Shankar Karba Jadhav v. State of Maharashtra*, (1970) 2 SCR 227). The order under challenge being one passed by the Special Court set up under the Act, an appeal from such an order would only be competent if it squarely falls within Section 11 (1). The controversy is not that an appeal would lie even against an interlocutory order, but the contention is that the order framing charge is not an interlocutory order within the meaning of Section 11(1). Therefore, there is no gainsaying the fact that if the order sought to be appealed against is an interlocutory order, excluding the non obstante clause, by the main provision of Section 11 (1), the present appeal would be incompetent. (Emphasis supplied)

27. In *State (Delhi Administration) v. V.C. Shukla and another*, AIR 1980 SC 1382, the Apex Court observed as follows (paragraph 101 of the said AIR):

"101. We shall now deal with the contention that the procedure prescribed by the Act is harsh. In the first place, it was submitted that under Section 7 an appeal pending in the High Court stands transferred to the Supreme Court and that thus the appellant is deprived of a valuable right of having the appeal heard and decided by the High Court which is vested in him the moment he is convicted. Secondly, it was urged that if the appeal in the High Court was decided against the appellant, he would still have a right to move the Supreme Court under Article 136 of the Constitution against conviction but that by reason of the appeal having been transferred to the Supreme Court, that right also has been taken away. In our opinion, there is no substance in this grievance. To begin with, an appeal being a creature of statute, an accused has no inherent right to appeal to a particular tribunal. The legislature may choose any tribunal for the purpose of giving a right of appeal. Moreover, an appeal to the High Court is less advantageous than an appeal to the Supreme Court for the following reasons:

(1) The right of appeal given to an accused from the order of a Session Judge or Special Judge to the High Court is not totally unrestricted. Section 384 of the Code of Criminal Procedure empowers an Appellate Court to dismiss an appeal summarily if it is satisfied that there is no sufficient ground for interference." (Emphasis supplied)

28. In *Nand Lal and another v. State of Haryana and others*, AIR 1980 SC 2097, the Apex Court has held as follows (paragraph 19 of the said AIR):

"19. It is well settled by several decisions of this Court that the right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory (vide the latest decision in *Anant Mills Ltd. v. State of Gujarat*, AIR 1975 SC 1234). Counsel for the appellants, however, urged that the conditions imposed should be regarded as unreasonably onerous especially when no discretion has been left with the appellate or revisional authority to relax or waive the condition or grant exemption in respect thereof in fit and proper cases and, therefore, the fetter imposed must be regarded as unconstitutional and struck down. It is not possible to accept this contention for more than one reason. In the first place, the object of imposing the condition is obviously to prevent frivolous appeals and revision that impede the implementation of the ceiling policy; secondly, having regard to subsections (8) and (9) it is clear that the cash deposit or bank guarantee is not by way of any exaction but in the nature of securing mesne profits from the person who is ultimately found to be in unlawful possession of the land; thirdly, the deposit or the guarantee is correlated to the land holdings tax (30 times the tax) which, we are informed, varies in the State of Haryana around a paltry amount of Rs. 8 per acre annually fourthly, the deposit to be made or bank guarantee to be furnished

is confined to the land holdings tax payable in respect of the disputed area i.e. the area or part thereof which is declared surplus after leaving the permissible area to the appellant or petitioner. Having regard to those aspects, particularly the meagre rate of the annual land tax payable, the fetter imposed on the right of appeal/revision, even in the absence of a provision conferring discretion on the appellate/revisional authority to relax or waive the condition, cannot be regarded as onerous or unreasonable. The challenge to Section 18 (7) must, therefore, fail." (Emphasis supplied)

29. In *Vijay Prakash D. Mehta and Jawahar D. Mehta v. Collector of Customs (Preventive)*, Bombay, AIR 1988 SC 2010, the Apex Court has held as follows (paragraph 9 of the said AIR):

"9. Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasijudicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant." (Emphasis supplied)

30. In *State of Maharashtra v. Mahboob S. Allibhoy and another*, AIR 1996 SC 2131, the Apex Court has held as follows (paragraph 3 of the said AIR):

"3. The preliminary question which has to be examined as to whether in the facts and circumstances of the case an appeal is maintainable against an order dropping the proceeding for contempt. It is well settled that an appeal is a creature of a statute. Unless a statute provides for an appeal and specifies, the order against which an appeal can be filed, no appeal can be filed or entertained as a matter of right or course. Section 19 of the Act says:

"Appeals (1) An appeal shall lie as of right from any order or decision of High Court in the exercise of its jurisdiction to punish for contempt

(a) where the order or decision is that of a single Judge, to a Bench of not less than two Judges of the Court;

(b) where the order or decision is that of a Bench, to the Supreme Court:

Provided that where the order or decision is that of the Court of the Judicial Commissioner in any Union Territory, such appeal shall lie to the Supreme Court.

(2) Pending any appeal, the appellate Court may order that

(a) the execution of the punishment or order appealed against be suspended;

(b) if the appellant is in confinement, he be released on bail; and

(c) the appeal be heard notwithstanding that the appellant has not purged his contempt.

(3) Where any person aggrieved by any order against which an appeal may be filed satisfies the High Court that he intends to prefer an appeal the High Court may also exercise all or any of the powers conferred by subsection (2).

(4) An appeal under subsection (1) shall be filed

(a) in the case of an appeal to a Bench of the High Court, within thirty days;

(b) in the case of an appeal to the Supreme Court; within sixty days, from the date of the order appealed against".

On a plain reading of Section 19 provides that an appeal shall lie as of right from any order or decision of the High Court in exercise of its jurisdiction to punish for contempt. In other words, if the High Court passes an order in exercise of its jurisdiction to punish any person for contempt of Court, then only an appeal shall be maintainable under subsection (1) of Section 19 of the Act. As subsection (1) of Section 19 provides that an appeal shall lie as of right for any order, an impression is created that an appeal has been provided under the said subsection against any order passed by the High Court while exercising the jurisdiction contempt proceedings. The words "any order" has to be read with the expression "decision" used in said subsection which the High Court passes in exercise of its jurisdiction to punish for contempt. "Any order" is not independent of the expression "decision". They have been put in an alternative form saying "order" or "decision". In either case, it must be in the nature of punishment for contempt. If the expression "any order" is read independently of the "decision" then an appeal shall lie under subsection (1) of Section 19 even against any interlocutory order passed in a proceeding for contempt by the High Court which shall lead to a ridiculous result." (Emphasis supplied)

31. In *Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad and others, etc. etc.*, AIR 1999 SC1818, the Apex Court has held as follows (paragraphs 7 and 8 of the said AIR) :

"7. We may refer to the reasons which led this Court to uphold the constitutional validity of clause (e) read with proviso which was added by Gujarat Act 5 of 1970. This Court said (para 40 of AIR 1975 SC 667):

"After hearing the learned Counsel for the parties, we are unable to subscribe to the view taken by the High Court. Section 406(2)(e) as amended states that no appeal against a rateable value or tax fixed or charged under the Act shall be entertained by the Judge in the case of an appeal against a tax or in the case of an appeal made against a rateable value after a bill for any property tax assessed upon such value has been presented to the appellant, unless the amount claimed from the appellant has been deposited by him with the Commissioner. According to the proviso to the above clause, where in any particular case the Judge is of opinion that the deposit of the amount by the appellant will cause undue hardship to him, the Judge may in his discretion dispense with such deposit or part thereof, either unconditionally or subject to such conditions as he may deem fit. The object of the above provision apparently is to ensure the deposit of the amount claimed from an appellant in case he seeks to file an appeal against a tax or against a rateable value after a bill for any property tax assessed upon such value has been presented to him. Power at

the same time is given to the appellate Judge to relieve the appellant from the rigour of the above provision in case the Judge is of the opinion that it would cause undue hardship to the appellant. The requirement about the deposit of the amount claimed as a condition precedent to the entertainment of an appeal which seeks to challenge the imposition or the quantum of that tax, in our opinion, has not the effect of nullifying the right of appeal, especially when we keep in view the fact that discretion is vested in the appellate Judge to dispense with the compliance of the above requirement. All that the statutory provision seeks to do is to regulate the exercise of the right of appeal. The object of the above provision is to keep in balance the right of appeal, which is conferred upon a person who is aggrieved with the demand of tax made from him, and the right of the Corporation to speedy recovery of the tax. The impugned provision accordingly confers a right of appeal and at the same time prevents the delay in the payment of the tax. We find ourselves "unable to accede to the argument that the impugned provision has the effect of creating a discrimination as is offensive to the principle of equality enshrined in Article 14 of the Constitution. It is significant that the right of appeal is conferred upon all persons who are aggrieved against the determination of tax or rateable value. The bar created by Section 406(2)(e) to the entertainment of the appeal by a person who has not deposited the amount of tax due from him and who is not able to show to the appellate Judge that the deposit of the amount would cause him undue hardship arises out of his own omission and default. The above provision, in our opinion, has not the effect of making invidious distinction or creating two classes with the object of meting out differential treatment to them, it only spells out the consequences flowing from the omission and default of a person who despite the fact that the deposit of the amount found due from him would cause him no hardship, declines of his own volition to deposit that amount. The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in Section 30 of the Indian Income-tax Act, 1922. The proviso to that section provided that".....no appeal shall lie against an order under subsection (1) of Section 46 unless the tax has been paid". Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the legislature to impose an accompanying liability upon a party upon whom legal right is conferred or to prescribe conditions for the

exercise of the right. Any requirement for the discharge of that liability or the fulfillment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of Article 14 in it. A disability or disadvantage arising out of a party's own default or omission cannot be taken to be tantamount to the creation of two classes offensive to Article 14 of the Constitution, especially when that disability or disadvantage operates upon all persons who make the default or omission."

8. By the Amending Act 1 of 1979 discretion of the Court in granting interim relief has now been limited to the extent of 25% of the tax required to be deposited. It is, therefore, contended that earlier decision of this Court in Anant Mills case may not have full application. We, however, do not think that such a contention can be raised in view of the law laid by this Court in Anant Mills case (AIR 1975 SC 1234). This Court said that right of appeal is the creature of a statute and it is for the legislature to decide whether the right of appeal should be unconditionally given to an aggrieved party or it should be conditionally given. Right of appeal which is statutory right can be conditional or qualified. It cannot be said that such a law would be violative of Article 14 of the Constitution. If the statute does not create any right of appeal, no appeal can be filed. There is a clear distinction between a suit and an appeal. While every person has an inherent right to bring a suit of a civil nature unless the suit is barred by statute. However, in regard to an appeal, position is quite opposite. The right to appeal inheres in no one and, therefore, for maintainability of an appeal there must be authority of law. When such a law authorises filing of appeal, it can impose conditions as well (see *Smt. Ganga Bai v. Vijay Kumar*, (1974) 2 SCC 393: AIR 1974 SC 1126)." (Emphasis supplied)

32. In *Sadhana Lodh v. National Insurance Co. Ltd. and another*, AIR 2003 SC 1561, the Apex Court has held as follows (paragraph 6 of the said AIR):

"6. The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Article 226/227 of the Constitution on the premises that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under Section 149(2) of the Act (See *National Insurance Co. Ltd., Chandigarh v. Nicolletha Rohtagi and others*, 2002 (7) SCC 456). This being the legal position, the petition filed under Article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under

Section 115 of CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of an illustration, where a trial Court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected, and a State enactment has barred the remedy of filing revision under Section 115, C.P.C., in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State legislature has barred a remedy of filing a revision petition before the High Court under Section 115, C.P.C., no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of High Court under Article 226 of the Constitution." (Emphasis supplied)

33. In the present case, provision for appeal is contained in paragraph 28 of the Distribution Order, 2004. An appeal is creature of Statute. The Distribution Order, 2004 is evidently statutory in character. The Distribution Order, 2004 owe its origin to the Essential Commodities Act, 1955, hence, the appeal filed under paragraph 28 of the Distribution Order, 2004 is in essence an appeal under the Essential Commodities Act, 1955. In view of this also the present appeal is not maintainable under Chapter VIII, Rule 5 of the Rules of the Court.

34. Let us now consider the Division Bench decision relied upon by the learned counsel for the petitionerappellant.

35. In Ram Dhyani Singh's case (supra) relied upon by the learned counsel for the petitionerappellant, the Division Bench of this Court held as under (paragraph 4 of the said AWC):

"4. There is an office report that the special appeal is not maintainable in view of the decisions of this Court in Vajara Yojna Seed Farm, Kalyanpur (M/s.) and others v. Presiding Officer, Labour Court II, U.P., Kanpur and another, (2003) 1 UPLBEC 496 and Sita Ram Lal v. District Inspector of Schools, Azamgarh and others, 1994 ACJ 180. These decisions have referred to Chapter VIII, Rule 5 of the Allahabad High Court Rules which states that an appeal lies against the judgment of a learned single Judge under Article 226 of the Constitution except when the writ petition was filed against such judgment or order or award (a) of a Tribunal, Court or statutory arbitrator, (b) of the Government or any Officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act mentioned in Chapter VIII, Rule 5. In this case, the writ petition filed before the learned single Judge was against the order of the Commissioner who decided the appeal provided for under the Government order dated 3.7.1990. Thus, the impugned judgment before the learned single Judge, was not against an order of a Tribunal or Court or statutory arbitrator. It was also not against an order passed in exercise of appellate or revisional jurisdiction "conferred by some Act". In fact, the appellate jurisdiction was conferred by a Government order and not by an Act. Hence, in our opinion this special appeal is maintainable." (Emphasis supplied)

36. This decision, thus lays down that the order passed by the Commissioner in an appeal under Government order dated 3.7.1990 could not be said to be an, order passed in exercise of appellate jurisdiction conferred by some Act. It has been held that the appellate jurisdiction was conferred by a Government order and not by an Act.

37. With deep respect to the learned Judges who decided the case in Ram Dhyan Singh (supra) we regret our inability to agree with the above view taken in the said decision. In our opinion, an appeal provided under any Government order is, in essence, an appeal under the provisions of the Act. However, sitting in a Division Bench we cannot take a view contrary to that taken by the Division Bench in Ram Dhyan Singh case (supra). The decision in Ram Dhyan Singh case (supra), in our view, requires reconsideration by a larger Bench, particularly in view of the Division Bench decision in Vajara Yojna Seed Farm case (supra) which appears to have taken a contrary view to that taken in Ram Dhyan Singh case (supra).

38. In view of the above, we refer the following question for decision by a larger Bench:

"Whether a special appeal under the provisions of Rule 5 of Chapter VIII of the Rules of the Court lies in a case where the judgment has been given by a learned single Judge in a writ petition directed against an order passed in an appeal under paragraph 28 of the UP. Scheduled Commodities Distribution Order, 2004?"

39. Let the papers be placed before the Hon''ble Chief Justice for passing appropriate orders.