NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE

ADVANCED TRAINING PROGRAMME FOR THE OFFICERS OF ESTATE AND LEGAL DEPARTMENT OF LIFE INSURANCE COPRORATION OF INDIA

21st – 23rd JUNE, [illegible] 2010

READING MATERIAL

Assembled and Edited
By

Dr. S.B.N. PRAKASH

Advanced Training Programme for Officers of Life Insurance Corporation of India

Schedule

Day & Date	Time		Topic	Resource Person
Monday 21.6.2010	9.00 – 9.30 A.M	Registration		
	9.30 – 11.00 A.M	Inauguration		
	11.00 – 11.15 A.M.	***Tea***		
	11.15 A.M. – 1.30 P.M.	I Session	Updates regarding PP Act and aspects there to with reference to Appeal and Drafting	Shri. N.S. . Prasad, Advocate, Bangalore
	1.30 – 2.15 P.M.	***Lunch***		
	2.15 – 4.00 P.M.	II Session	Moot Court	
	4.00 – 4.15 P.M.	***Tea***		
	4.15 – 5.00 P.M.	III Session	Interactive Session	
Tuesday 22.6.2010	9.30 – 11.00 A.M.	I Session		
	11.00 – 11.15 A.M.	***Tea***	Moot Court	
	11.15 A.M. – 1.30 P.M.	II Session	Law & Justice	Justice H. Rangavittalachar Former Judge, High Court of Karnataka
	1.30 – 2.15 P.M.	***Lunch***		
	2.15 – 4.00 P.M.	II Session	Introduction with reference to RTI Act, Judicial and Quasi Judiciary Proceedings	Dr. Sairam Bhat Assistant Professor, NLSIU
	4.00 – 4.15 P.M.	***Tea***		
	4.15 – 5.00 P.M.	III Session	Interactive Session	
Wednesday 23.6.2010	9.30 – 11.00 A.M.	I Session	Provisions Relating to Limitation	Dr. S.B.N. Prakash Adjunct Professor, NLSIU
	11.00 – 11.15 A.M.	***Tea***		
	11.15A.M.-1.30 P.M.	II Session	Provisions of Transfer of Property Act, Equity, Trust and Fiduciary Relationship	Dr. S.B.N. Prakash Adjunct Professor, NLSIU
	1.30 – 2.15 P.M.	***Lunch***		
	2.15 – 4.00 P.M.	III Session	Moot Court	
	4.00 – 4.15.P.M.	***Tea***		
	4.15 – 5.00 P.M.		Valedictory	

COURTS AND THE CONSTITUTION*

H.M. SEERVAI
Former Advocate General of Maharashtra

Once a law has been passed by the Parliament of the United Kingdom and has received Royal Assent, no question of its validity can arise in British courts, because Parliament is supreme and sovereign. However, in Federal Constitutions, the question not infrequently arises whether the law passed by a legislature is valid having regard to the distribution of legislative powers and other Constitutional limitations. When such a question arises, the courts of the country must decide it. The grave responsibility of declaring a law unconstitutional has made courts reluctant to refuse to give effect to the will of the legislature. The judiciary is a branch of the Government co- ordinate with the legislature and the executive, although it may appear to occupy a position of superiority. In deciding upon the validity of laws, judges have borne in mind that the function of making laws has been entrusted to the elected representatives of the people and the function of the courts is to interpret those laws and not to act as a third or revising Chamber. Accordingly, the courts are guided by the following rules in discharging their solemn duty to declare laws passed by a legislature unconstitutional:

(1) There is a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; "to doubt the constitutionality of a law is to resolve it in favour of its validity."

(2) Where the validity of a statute is questioned and there are two interpretations, one of which would make the law valid and the other void, the former must be preferred and the validity of the law upheld.

(3) The court will not decide Constitutional questions if a case is capable of being decided on other grounds.

(4) The court will not decide a larger Constitutional question than is required by the case before it.

(5) The court will not hear an objection as to the constitutionality of a law by a person whose rights are not affected by it.

(6) A Statute cannot be declared unconstitutional merely because in the opinion of the Court it violates one or more of the principles of liberty, or the spirit of the Constitution, unless such principles and that spirit are found in the terms of the Constitution. Thus, in *A.K. Gopalan v. State*, (1950 S.C.R. 88, 120. ('50) A. SC. 27) Kania C.J. cited with approval the following observations of Gwyer C.J.:

> "... especially is this true of a Federal Constitution with its nice balance of jurisdictions. I conceive that broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the interest of any legal or constitutional theory or even for the purpose of supplying commissions or of correcting supposed errors."

and then continued:

> "Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature we cannot declare a limitation under the nation of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument.... But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the

*Excerpts from H.M. Seervai's **Constitutional Law of India**, N.M. Tripathi (Second Ed.) (Volume I) pp. 54–71.*

> authority of the Courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private rights."

(7) In pronouncing on the constitutional validity of a statute, the Court is not concerned with the wisdom or unwisdom, the justice or injustice of the law. If that which is passed into law is within the scope of the power conferred on a Legislature and violates no restrictions on that power; the law must be upheld whatever a Court may think of it.

(8) Ordinarily, courts should not pronounce on the validity of an Act, or part of an Act, which has not been brought into force, because till then the question of validity would be merely academic. Article 143 confers advisory jurisdiction only on the Supreme Court, which therefore can exercise that jurisdiction as provided in Article 143.

We have seen that where two interpretations are possible, a Court will accept that interpretation which will uphold the validity of the law. If, however, this is not possible, it becomes necessary to decide whether the law is bad as a whole or whether the part which is bad can be severed from the part which is good. The question of construction, and the question of severability are thus two distinct questions.

The whole question of construction and severability was exhaustively considered in *R.M.D. Chamarbaugwalla vs. Union*, (1957 S.C.R. 930, ('57) A. SC.628). There the question to be decided of the Prize Competitions Act, 1955, which was wide enough to cover both competitions of skill and gambling competitions, could be limited, by construction, to gambling competitions, and the literal meaning of the words was relied upon to show that it could not be so limited. Venkatarama Aiyar J. held that the literal meaning had only a *prima facie* preference in a Court, but to arrive at the real meaning:

> "... 'it is always necessary to get an exact conception of the aim, scope and object of the whole Act; to consider, according to Lord Coke: (1) What was the law before the Act was passed; (2) What was the mischief or defect for which the law had not provided; (3) What remedy Parliament has appointed; and (4) The reason for the remedy. The reference here is to *Heydom's Case* (1584 3 W. Rep. 16,76 E.R. 637). These are principles well settled, and were applied by this Court in *Bengal Immunity Company Ltd. v. Bihar.*" (1944 2 S.C.R.603, 633 ('55) A.SC. 661. 1957 S.C.R.930, 936).

Applying the above rules of construction he held that the words "prize competition" must be interpreted to mean "prize competitions of a gambling nature."

Assuming that the above view was wrong, he considered the question of severability. There are two kinds of severability: a statutory provision may contain distinct and separate words dealing with distinct and separate topics, as for example, one sub- section may provide a rule of law for the future and another sub- section may apply it retrospectively. The first sub-section may be valid and the second void. In such a case, the Court may delete the second sub-section by treating it as severable.

There is however a different kind of severability recognized by the Courts, and that is severability in application, or separability in enforcement. The question of severability in application or enforcement arises when an impugned provision is one indivisible whole, as for instance, the definition of a word. Here severability cannot be applied by deleting an offending provision and leaving the rest standing. It becomes necessary therefore to inquire whether the impugned definition embraces distinct classes of categories of subject-matter in respect to some of which the Legislature has no power to legislate or is otherwise subject to a Constitutional limitation. If it is found that the definition does cover distinct and separate classes or categories, the Court will restrain the enforcement of the law in respect of that class of subjects in respect of which the law is invalid. This might be done by granting a perpetual injunction restraining the enforcement of the law on the forbidden field. The judgment of the Supreme Court in *Chamarbaugwalla's Case* (1957 S.C.R.930, ('57) A.SC 628) applied this principle to the definition of prize competition as

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will presently appear.

The principle of severability in application was first adopted by our Supreme Court when dealing with the contention that a tax law must be declared wholly void if it was bad in part as transgressing Constitutional limitations. Patanjali Sastri C.J., delivering the majority judgment, observed: "It is a sound rule to extend severability to include separability in enforcement... and we are of the opinion that the principle should be applied in dealing with taxing statutes...." He referred to the decision in *Bowman v. Continental Oil Co.* (1920 256 U.S. 642, 65 L.ed. 1139). In *Chamarbaugwalla's Case* (1957 S.C.R. 930, ('57) A.SC 628) it was argued that this rule was exceptional and applied only to taxing statutes. But Venkatarama Aiyar J. rejected this contention. After a careful scrutiny of English, American and Indian authorities on severability, he summarised the effect of the authorities thus:

> "1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. *Vide Corpus Juris Secundum*, Vol.82, p.156; Sutherland on Statutory Construction, Vol. 2, pp. 176–177.
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> 2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of the portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide Cooley's Constitutional Limitations, Vol.1, at pp.360–361; Crawford on Statutory Construction, pp.217–218.
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> 3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as whole then also the invalidity of a part will result in the failure of the whole. Vide Crawford on Statutory Construction, pp. 218–219.
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> 4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.
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> 5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections (vide Cooley's Constitutional Limitations, Vol.1, pp.361–362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.
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> 6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. Vide Sutherland on Statutory Construction, Vol.2, p.194.
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> 7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide Sutherland on Statutory Construction, Vol. 2, pp.177–178."

Applying these tests Venkatarama Aiyar J. held that competitions fell into two distinct classes, competitions of skill and competitions of a gambling nature; the difference between the two was as clearcut as the difference between commercial and wagering contracts. On the facts, it might be difficult to say whether a competition fell within one class or the other, but when the true character of the competition was determined, it must fall within one class or the other. If the Court were to ask itself, would the Parliament have enacted the law if it did not apply to competitions of skill, there could be no doubt having regard to the history of the legislation that the answer must be in the affirmative. The restriction of the Act to competitions of a gambling

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nature did not affect either the texture or colour of the Act nor did it require any of its provisions to be rewritten and accordingly they must be treated as severable in their application and the enforcement of the law to competition of skill would be restrained by an appropriate order. It is submitted that the acceptance of severability in application is clearly right. The time has long gone by when mere technicalities were permitted to defeat the ends of justice. There is no reason why a law should be invalidated as a whole, when there are large parts of it which are valid. Nor can the citizen legitimately complain of a procedure which protects him by restraining the enforcement of the invalid portion of the law by a permanent injunction.

A Legislature lacking legislative power or subject to a Constitutional prohibition may frame its legislation so as to make it appear to be within its legislative power or to be free from the constitutional prohibition. Such a law is "colourable" legislation, meaning thereby that while pretending to be a law in the exercise of undoubted power, it is in fact a law on a prohibited field.

The question of colourable legislation was fully discussed by the Supreme Court in *K.C. Gajapati Narayan Deo v. Orissa*, (1954 S.C.R. 1, ('53) A.SC. 375) a decision which has been treated as settling the law on the subject. However, before discussing that case, it would be convenient to refer to the decisions of the Privy Council in appeals from Canada and Australia, where the same question had been raised, because the Supreme Court has referred to some of those decisions with approval, and adopted the principles there laid down.

In *Gajapati's Case* (1954 S.C.R. 1, ('53) A.SC. 375) already referred to, the challenge on the ground of colourable legislation, or fraud on the Constitution, was based on the following facts:

> "The Bill relating to the Orissa Estates Abolition Act, 1952, was published in the Gazette on the 3rd January, 1950. It contained a provision that any sum payable for agricultural income-tax for the previous year should be deducted from the gross asset of an estate for the purpose of arriving at its net income on the basis on which compensation was payable to the estate owners. On the 8th January, 1950, a Bill to amend the Orissa Agricultural Income Tax Act, 1947, so as to enhance the highest rate of tax from 3 annas in the rupee to 4 annas and reduce the highest slab from Rs. 30,000 to Rs. 20,000 was published in the Gazette. This Bill was dropped by the next Chief Minister who introduced a revised Bill on the 22nd July, 1950, enhancing the highest rate of 12 annas 6 pies in the rupee and reducing the highest slab to Rs. 15,000 and this was passed into law in August 1950. It was contended that the Orissa Agricultural Income Tax (Amendment) Act of 1950 was a fraud on the Constitution and as such invalid as it was a colourable legislation to effect a drastic reduction in the compensation payable under the Estates Abolition Act."

The appellant's contention was that the Agricultural Income Tax Act was a fraud on the Constitution and was a colourable law because its object was to reduce the compensation payable for the acquisition of land, contrary to the requirements of the Constitution as regards the payment of compensation. The argument appears to have been that as compensation was to be calculated on the basis of capitalising income, the tax was designed only to reduce the compensation to a small fraction of what would otherwise be payable. It may be mentioned that the impugned law was covered by Article 31(4) with the result that it could not be questioned on the ground that it was not for a public purpose or that it did not provide for compensation. Mukherjea J., observed that the doctrine of colourable legislation did not involve any question of *bona fides* or *mala fides* on the part of the legislature. The whole doctrine resolved itself into a question of the competency of a particular legislature to enact a particular law. The idea conveyed by the expression 'colourable legislation' was that although apparently the Legislature, in passing a statute purported to act within the limits of its powers, yet in substance and in reality, it transgressed those powers, the transgression being veiled by what appears on a proper examination to be mere pretence or disguise.

Gajapati's Case has been repeatedly cited and followed by the Supreme Court as laying down the correct principles for determining colourable legislation. Applying those principles, it has been held (i) that Ch. IV-A, Motor Vehicles Act, was not a colourable device to transfer the business of citizens to the State or a Corporation owned or controlled by the State; (ii) that s.22(1), Vidhya

Pradesh Abolition of Jagirs and Land Reforms Act, 1952, was not a colourable legislation; (iii) that a tax on prize competitions was not void on the ground that it was colourable; (iv) that the imposition of a sales tax on cane jaggery was not colourable; (v) that the Kerala Agrarian Relations Act, 1961, was not a colourable device to take away the moneys of the land owners or the persons from whom excess land was taken away for the purpose of adding to the revenue of the State; (vi) that the tax levied by the U.P. Large Land Holdings Tax Act, 1957, was not confiscatory and was not colourable; (vii) that a tax on lands and buildings imposed by s. 4, M.P. *Nagariya Sampatti Kar Adhiniyam,* 1964 was not colourable legislation. However, in *Maharani Shri Jayavantsinghji Ranmalsinghji v. Gujarat* (1962 Supp. 2 S.C.R. 411, 441, ('62 A.SC. 821) S.K. Das J. (for himself and Sinha C.J.) held, applying the principle of *Gajapati's Case,* that ss. 3, 4 and 6 of the Bombay Land Tenure Abolition Laws (Amendment) Act, 1958, were colourable legislation, since under the guise of defining a permanent tenant or changing a rule of evidence, they reduced the purchase price which had become payable to tenure holders on April 1, 1959; (viii) that the Excise duty levied under s.2 of the Iron Ores Mines Labour Welfare Cess Act, 1961, was not colourable as Entry 84, List I, Sch.7 directly covered the duty.

The principle of colourable legislation was applied to subordinate delegated legislation in *Assam Co. Ltd. v. Assam,* (1970, A A & N. 40).

WRIT JURISDICTION OF THE HIGH COURTS

Dr. S.N. JAIN
Late Director, Indian Law Institute

Historical

Article 226 empowers the High Courts to issue, throughout the territories in relation to which it exercises jurisdiction, "to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs in the nature of *habeas corpus*, mandamus, prohibition, *quo warranto* and *certiorari*" for the enforcement of Fundamental Rights as for any other purpose. These writs are known as prerogative writs because they were originally available only to the Crown and not to the subjects, and the idea was to keep the public authorities and inferior tribunals within their jurisdiction through these writs. Later the "Crown lent its legal prerogatives to its subjects in order that they might collaborate to ensure good and lawful government." These writs are a great bulwark against arbitrary or wrong use of administrative action. The writs are an important mechanism to maintain the rule of law and democratic values in society in the common law world. The Constitution makers being conscious of their great importance in the democratic functioning of the society and affording protection to the individual against governmental action, they expressly incorporated them in the Constitution.

Though the High Courts are old institutions dating back to 1861, yet the enactment of Article 226 was an event of great legal importance. Before the Constitution, only the three High Courts of Calcutta, Bombay and Madras had the power to issue the writs and that too in the exercise of their ordinary original civil jurisdiction, that is, within the limits of the Presidency Towns. These three High Courts enjoyed this power as the successors of the Supreme Courts which were earlier established by the Royal Charters conferring on the judges the same jurisdiction and authority as the judges of the court of King's Bench under the Common Law in England. There were also a few statutory provisions which gave same powers to the High Courts in the matter of writs. S. 45 of the Specific Relief Act, 1877, specifically recognised the power of the three High Courts to issue orders, in the nature of mandamus, to public authorities within the local limits of its ordinary original civil jurisdiction. No other High Court could issue such an order. The year 1923 is significant from the point of view of the writ of *habeas corpus*. In that year changes were made in the Criminal Procedure Code, 1898, by which each High Court was empowered to issue the writ throughout the territory under its jurisdiction.

The framers of the Constitution took a momentous step in empowering all the High Courts to issue the prerogative writs.

Before examining the interpretation of Article 226 by the Supreme Court, it may be mentioned that the court had created an anomalous position. It was held by the court in *Election Commission v. Saka Venkata Rao* (A.I.R. 1953 S.C. 210) also *Khajoor Singh v. Union of India* (A.I.R. 1961 S.C. 532) that a High Court could not issue a writ unless the person or the authority concerned was present either by residence or location within its territorial jurisdiction. Thus the Madras High Court could not issue a writ to the Election Commission having its office in Delhi. This very much diluted the writ jurisdiction of all the High Courts as only the Punjab High Court could issue a writ against the Central Government situated in Delhi. As a result of the recommendations of the Law Commission, Article 226 was amended in 1963 to remedy the situation. The Amendment provided that a High Court could issue a writ if the cause of action arose within its territorial jurisdiction notwithstanding that the seat of the concerned government or authority or the residence of the person is not within its territory.

Article 226 was again amended in 1976 by the Constitution (Forty- second) Amendment, 1976, this time in a substantial manner with a view to limit and restrict the powers of the High Courts in the matter of writs. The position was, however, soon restored, more or less, through the

Constitution (Forty-fourth) Amendment, 1978. As the Constitution (Forty-second) Amendment is only a matter of historical significance, no reference need to be made to it. The net result of the Forty-second Amendment has been that some limitations have been placed on the inherent powers of the High Court to issue interim orders. This matter is examined under the relevant section.

Scope of Article 226

Article 226 is couched in broad language. The High Courts are empowered to issue not only prerogative writs but also other "directions, order or writs". In spite of this broad language, the courts are to keep, while exercising their jurisdiction, to broad and fundamental principles underlying the prerogative writs in the English law, without importing the procedural technicalities of these writs, (*Basappa v. Nagappa*, A.I.R. 1954, S.C. 440) which had developed in England. In other words, the scope of judicial review under Article 226 is the same as of the English courts while exercising the writ jurisdiction, but the procedural technicalities of the English law are not to be applied by the courts. For instance, in England the applicant had to be careful in choosing his remedy. The different remedies were not interchangeable and the remedy selected must suit the case of the individual. The anomaly was removed by the Rules of the Supreme Court brought into force in January 1978. Order 53 introduced a comprehensive system of judicial review. Rules 1(1) and 1(2) enable an applicant to cover, under one umbrella, all the remedies of *certiorari, mandamus* and prohibition and also declaration and injunction.

Since we did not import the above procedural technicalities of the English law, the result has been that we have a sort of single remedy to control administrative action. The courts enjoy a broad discretion in the matter of giving proper relief as warranted by the circumstances of the case. The court cannot only issue writs but also make any order or give any directions as it thinks appropriate (*K.K. Kochunni v. State of Madras*, A.I.R. 1959 S.C. 725); (*P.J. Irani v. State of Madras*, A.I.R. 1961, S.C. 1731). It can grant declaration or injunction if that be the proper relief. It would not throw out the petition simply on the ground that the proper writ or direction has not been prayed for (*Charanjit Lal v. Union of India*, A.I.R. 1951 S.C. 41). In practice, it has become customary not to pray for any particular writ, but merely to make a general request to the court to issue an appropriate order, direction or writ.

The writs explained.

Habeas Corpus: It is the great writ to secure the freedom of an individual from arbitrary detention by the executive. The value of the writ is that it enables the individual to move the court for the immediate determination of the legality of his detention. *Habeas Corpus* cannot be granted where a person has been committed to custody under an order from a competent court when *prima facie* the order does not appear to be without jurisdiction or wholly illegal (*B.R. Rao v. State of Orissa*, A.I.R. 1971 S.C. 2197).

The writ is issued to the authority which has the aggrieved person in its custody. A prayer for the writ may be made by the prisoner himself or in case he is unable to do so, by someone else on his behalf (*Calcutta Gas Co. (Prop.) Ltd. v State of West Bengal*, A.I.R. 1962 S.C. 1044; *Vidya Verma v. Dr. Shiv Narain*, (1955) 2 S.C.R. 983).

Habeas Corpus literally means "bring or produce the body". In *Kanu Sanyal v. District Magistrate* (the first case) (A.I.R. 1973 S.C. 2684), the important question arose whether it is essential to produce the person alleged to be unlawfully detained before an application for a writ of *habeas corpus* can be heard and disposed of by the court. Emphasising the most important feature of the writ that it provides a speedy and effective remedy to an individual to secure his freedom from detention, the court rejected that it was essential to produce the individual before the court. The court thought that it would be anomalous and strange that

> when in England and the United States the remedy by way of a writ of *habeas corpus* is shorn of its superfluous element and made more convenient and effective from a functional viewpoint by dropping the requirement of production of the person detained, we in India should still hold ourselves bound by the old form of procedure and pay homage to a superfluity which has been discarded long ago in these two countries. Why should the ghost of the past—and that too not ours but that of another

country — be allowed to continue to haunt us and cloud our vision of rationality (*University of Mysore v. Govinda Rao*, A.I.R. 1965 S.C. 491).

Habeas Corpus can also be issued against a private person if it is alleged that he has illegally detained the applicant (*K.N. Sadanandan v. India*, A.I.R. 1970 Del. 29). Through the writ conflicting claims as to the custody of an infant can also be determined (*Goha Begum v. Suggi*, A.I.R. 1960 S.C. 93). The court may grant an interim bail while dealing with a *habeas corpus* petition (*State of Bihar v. Rambalak Singh*, A.I.R. 1966 S.C. 1441).

Quo warranto: The writ means what is your authority. Through the writ a person can challenge the validity of appointment of a person to a public office. The writ determines the question of legality of authority by which a person is holding a public office. If he is not entitled to the office the court may restrain him from holding the office and declare it vacant (*University of Mysore v. Govinda Rao*, A.I.R. 1965 S.C. 491). The writ lies in respect of a public office of a substantive character and not a private office such as membership of a school managing committee (*Amarendra v. Narendra*, A.I.R. 1953, Cal. 114).

It has been held by the Delhi High Court in *P.L. Lakhanpal v. A.N. Ray*, A.I.R. 1975 Del. 66, that *mala fides* of appointing authority is not relevant in issuing *quo warranto* as the writ is issued against the usurper of the office and not against the appointing authority, and that the writ will also not be issued if a holder of public office is not qualified to hold the office initially but acquires the necessary qualifications during the pendency of the writ petition.

The writ can be maintained by a private citizen even though his own right might not have been infringed thereby (*Karkare v. Shevde*, A.I.R. 1952 Ng. 330; *Maschullah v. Abdul Rehman*, A.I.R. 1953 All. 193).

It appears that appointment to a public office cannot be challenged through *quo warranto* in a collateral proceeding. It has, however, been held that a person can challenge the appointment of the presiding officer of a labour tribunal while challenging the award of a tribunal on account of the disqualifications of the holder of the office (*State of Haryana v. Haryana Co-op. Transport*, A.I.R. 1977, S. C. 237.

Mandamus: The writ is a command issued by a court asking a public authority to perform a public duty imposed upon it by law. It is issued to both administrative and quasi-judicial bodies. Through the writ the public authority is commanded to do a positive duty imposed by law or is refrained from doing an illegal act. It can be issued when the authority denies to itself a jurisdiction which it undoubtedly has under the law or where an authority vested with a power improperly refuses to exercise it (*E.A. Co-op. Society v. State of Maharashtra*, A.I.R. 1966 S.C. 1449; *Carborundum Universal v. Union of India*, A.I.R. 1966 Mad. 365; *K.L. Modi v. Union of India*, A.I.R. 1970 Del. 76).

Mandamus is used to enforce an imperative duty and not discretionary duty. Thus where the government has power to grant dearness allowance to its employees, there is no duty on the government to grant the same and a government employee has no right to ask for its enforcement (*State of M.P. v. Mandawar*, A.I.R. 1954 S.C. 493). However, the court may interfere through mandamus in the exercise of discretionary power by an authority if the discretion has not been exercised in accordance with law, *e.g.*, on irrelevant considerations, etc.

Mandamus is not issued to enforce a civil liability arising out of contract (*Kulchhinder Singh v. Hardayal*, A.I.R. 1976 S.C. 2216) or tort. It will also not normally lie to command the authority to refund money illegally collected by the government (*Suganmal v. State of M.P.*, A.I.R. 1965, S.C. 1740) except in some exceptional situation, *e.g.*, where the constitutionality of law itself is in question (*State of M.P. v. Bhailal Bhai*, A.I.R. 1964 S.C. 1006) or where the statute expressly provides for refund of the tax collected illegally (*Burmah Construction Co. v. Orissa*, A.I.R. 1962 S.C. 1320).

Certiorari and prohibition:
These writs go to courts and quasi-judicial bodies, and not to purely administrative bodies. The grounds for the issue of these two writs are practically the same except the stages at which they

are issued differ. *Certiorari* is issued when the body has disposed of the matter but prohibition when the matter is still under the consideration of the body. Through prohibition the body is prevented from proceeding into the matter further. The two writs are issued only on specified or limited grounds. These are: when the authority acts or applies the law which is invalid, when it violates principles of natural justice; when it commits an error of jurisdiction, that is, when it fails to exercise jurisdiction or acts in excess of its jurisdiction; when there is an error of law on the face of the record, and where there is no legal evidence to support a finding of fact arrived at by the authority. Whether an administrative authority is to act judicially, or is a quasi-judicial body, raises complex issues as there is no sure test to determine this question. The character of a body, whether quasi-judicial or not, depends upon "the cumulative effect of the nature of the right affected, the phraseology used, the nature of the power conferred, the objective criteria to be adopted, of the duty imposed on the authority and the other indicia afforded by the statute" (*Dwarka Nath v. I.T.O.*, A.I.R. 1966 S.C. 81, 86; also *Board of High School v. Ghanshyam*, A.I.R. 1960 S.C. 1110). This is a broad generalisation and it would depend upon each situation or case if the authority is quasi-judicial or not. A large amount of case law has arisen around this question. In recent years the tendency on the part of the courts has been to regard more and more functions as quasi-judicial.

Procedural aspects of the writ jurisdiction:
The writs provide an expeditious remedy. The writ jurisdiction is an extraordinary kind of jurisdiction of the High Courts. It is discretionary with the High Courts to issue a writ or not, but this discretion has to be exercised on certain well-recognised principles. There are a few procedural technicalities which guide the courts in exercising their writ jurisdiction.

Exhaustion of remedies: Since the writ jurisdiction is a special and extraordinary jurisdiction of the High Courts, ordinarily a person ought to exhaust his alternative legal remedy before coming to the High Court. This general proposition is subject to several exceptions.

A distinction has to be made between enforcement of Fundamental Rights and non-fundamental rights. In the case of the former, existence of an alternative legal remedy is not regarded as a bar to move a writ petition. In the case of enforcement of Fundamental Rights the petitioner need not establish that he has exhausted all such remedies as the law provides (*Mohd. Yasin v. Town Area Committee*, A.I.R. 1952 S.C. 115; *State of Bombay v. United Motors*, A.I.R. 1953 S.C. 252; *Himmatlal v. State of M.P.*, A.I.R. 1954 S.C. 403).

In the case of other rights the general rule is that the High Court would refuse the writ if an alternative legal remedy was available to the petitioner, provided the alternative remedy was adequate, efficacious, proper and not onerous (*Veerappa v. Raman*, A.I.R. 1952 S.C. 192; *C.A. Abraham v. I.T.O.*, A.I.R. 1961 S.C. 609; *Shivram v. I.T.O.*, A.I.R. 1964 S.C. 1095; *Champalal v. C.I.T.A.*, A.I.R. 1970 S.C. 745).

However, the rule of exhaustion of remedies is not an inflexible rule and the court may grant the relief even if the petitioner has not utilised the alternative legal remedy. The rule of exhaustion of remedy is characterised as "a rule of policy, convenience and discretion rather than a rule of law" (*State of U.P. v. Mohd. Nooh*, A.I.R. 1958 S.C. 86; *Baburam v. Zilla Parishad*, A.I.R. 1969 S.C. 556). An alternative legal remedy does not affect the High Court's writ jurisdiction as such. It is a factor to be taken into consideration by the court in entertaining the writ petition.

The court may grant the relief if the alternative remedy is onerous or burdensome, for then it would not be regarded as adequate and bar the jurisdiction of the court. Thus if an assessee can appeal to a higher authority under the statute only after depositing the tax assessed it is an onerous remedy and the petitioner could take recourse to the High Court under Article 226 (*Himmatlal v. State of M.P.*, A.I.R. 1954 S.C. 403; *M.C. Abrol v. Shantilal*, A.I.R. 1966 S.C. 197). Similarly, an alternative legal remedy will not be a bar if it is illusory, *e.g.*, where the adjudication by the various bodies is in pursuance of "a settled policy of the entire hierarchy of the department", depriving a person of any hope of getting relief from the appellate administrative authorities (*Venkateswaran v. Wadhwani*, A.I.R. 1961 S.C. 1506).

Certain other well recognised exceptions to the rule of exhaustion of remedies are: an

administrative authority violating the principles of natural justice (*Venkateswaran v. Wadhwani*, A.I.R. 1961 S.C. 1506); *State of U.P. v. Md. Nooh*, A.I.R. 1958 S.C. 86; *Orient Paper Mills v. Dy. Collector*, A.I.R. 1971 Ori. 25); authority acting under an *ultra vires* law of rules (*Carl Still v. State of Bihar*, A.I.R. 1961 S.C. 1615; *Tata E&I Co. v. Asstt. Commissioner*, A.I.R. 1967 S.C. 1401; *J.K. Mfg. v. Sales Tax Officer*, A.I.R. 1970 All. 362), authority improperly constituted (*Rangaraj v. Gram Panchayat*, A.I.R. 1952 Raj. 144), or action of an authority palpably wrong or going to the root of the jurisdiction (*S.T.O. v. Shiv Ratan*, A.I.R. 1966 S.C. 143; *S.C. Prashar v. Dwarkadas*, A.I.R. 1956 Bom. 530).

There is no rule of law that the High Court should not entertain a writ petition where an alternative legal remedy was available. It is always a matter of discretion and if the discretion is exercised by the High Court not unreasonably or perversely, it is the settled practice of the Supreme Court not to interfere with the exercise of discretion (*State of U.P. v. Indian Hume Pipe Ltd.*, A.I.R. 1977 S.C. 1138).

Through the 42nd Amendment of the Constitution in 1976, it was expressly provided in Article 226 that no writ petition for the redress of any injury (other than enforcement of a Fundamental Right) "shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force". The bar of exhaustion did not apply to Fundamental Rights. The Constitution (Forty-fourth) Amendment Act, 1978, has deleted the provision and restored the original position.

Laches: A petitioner has to be diligent in pursuing his writ remedy. He should file a writ petition against the wrongful administrative action within a reasonable period of the date of the impugned order. The court may reject a petition if the petitioner has been guilty of laches (*Durga Pd. v. Chief Controller*, A.I.R. 1970 S.C. 769; *Kamini Kumar v. State of West Bengal*, A.I.R. 1972 S.C. 2060). However, like the rule of exhaustion of alternate remedies, the rule that "the court may not inquire into belated and stale claims is not a rule of law, but a rule of practice based on sound and proper exercise of discretion, and there is no inviolable rule that whenever there is a delay, the court must necessarily refuse to entertain the petition (*R.S. Deodhar v. State of Maharashtra*, A.I.R. 1974 S.C. 259, 265). In suitable cases the High Court may condone the delay. When the High Court has condoned the delay in filing a petition under Article 226, the Supreme Court will not interfere with the High Courts' discretion even if the ground of condonation may not be adequate (*Corporation of Nagpur v. Nagpur Handloom*, A.I.R. 1963 S.C. 1192).

What is the measure of delay? There is no fixed criterion of delay and it will depend upon the facts and circumstances of each case whether the petitioner was diligent in pursuing his remedy or not. It has been laid down by the Supreme Court that this is a matter for the High Court but "like all matters left to the discretion of the court, in this matter too discretion must be exercised judiciously and reasonably (*Durga Prasad v. Chief Controller of Imports*, A.I.R. 1970 S.C. 769, 770).

The courts have leaned to the view that if a writ petition is filed under Article 226 after the period of limitation provided under the Limitation Act for filing suits under similar circumstances, then "it will almost always be proper for the court to hold that it is unreasonable". (*State of M.P. v. Bhailal Bhai*, A.I.R. 1964 S.C. 1006, 1012). However, it does not mean that a petition filed within such a period of limitation will not be thrown out by the court; the court may consider the delay to be unreasonable even in such a case. It will depend upon the facts of a case whether it is so or not (*Kamini Kumar v. State of West Bengal*, A.I.R. 1972 S.C. 2060).

Locus standi: An application for the writ of *habeas corpus* can be made not only by the person who is illegally detained or imprisoned but any other person as well, provided he is not a complete stranger. Similarly, a private citizen can maintain a petition for *quo warranto* to challenge appointment to a public office even though his own right as such might not have been infringed thereby.

However, the writs of *certiorari*, prohibition and mandamus could be invoked only by an "aggrieved person". A complete stranger has no legal right to file the writ (*Maganbhai v. Union of India*, A.I.R. 1969 S.C. 783). The "aggrieved person" is not a fixed concept. In *J.M. Desai v.*

Roshan Kumar, A.I.R. 1976 S.C. 578) the Supreme Court has stated the position thus: "The expression 'aggrieved person' denotes an elastic, and to an extent, an elusive concept. It cannot be confined within the bounds of rigid, exact and comprehensive definition... Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the prejudice or injury suffered by him.

A person can be aggrieved only if his legal right is affected and not a right which is not recognised legally, *e.g.*, the injury suffered by him due to the business competition of his rival which may have its origin in an illegal order of an administrative authority. However, the law may specifically recognise the right of such a person, or of a member of community who has suffered along with others, to challenge the wrongful administrative action resulting in an undertaking by a third person and thereby adversely affecting him. The rate-payer of a municipality has special interest in municipal funds and he can challenge its action if it was contrary to law, though he may not be directly affected (*K.R. Shenoy v. Udipi Municipality*, A.I.R. 1974 S.C. 2177). In Britain the courts are leaning towards a liberal approach in the matter of standing. As has been stated by Schwartz and Wade:

> Restrictive rules about standing are in general inimical to a healthy system of administrative law. If a plaintiff with a good case is turned away merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the public interest. Litigants are unlikely to expend their time and money unless they have some real interest at stake. In the rare cases where they wish to sue merely out of public spirit, why should they be discouraged.

Bodies against who writs can be issued: As stated earlier, *habeas corpus* can be issued to anyone, be he a public official or a private person, who detains a person, to secure the freedom of the detenu. *Quo warranto* is issued to the holder of a substantive office but not private office.

The writs of *certiorari*, prohibition and mandamus are issued to public authorities. What are public authorities? In modern times the answer to this question has become difficult due to the widening government operations and the government discharging some of its functions through incorporated bodies, and also in turn essentially private bodies discharging what may be characterised as "public" functions.

As a rule, a writ can be issued to a government department or government (*Rajasthan Electricity Board v. Mohan Lal*, A.I.R. 1967 S.C. 1857). Similarly, statutory bodies on whom powers are conferred by law are subject to the writ jurisdiction. Thus, the writs lie to a university established by a statute (*Akshaibar Lal v. Vice Chancellor B.H.U.*, A.I.R. 1961 S.C. 619) or a public corporation (*Life Insurance Corporation v. S.K. Banerjee*, A.I.R. 1964 S.C. 847; *Mafatlal v. Div. Controller, State Transport Corporation*, A.I.R. 1966 S.C. 1364; *Sukhdev Singh v. Bhatram*, A.I.R. 1975 S.C. 1331; *Ramana Dayaram Shetty v. International Airport Authority*, A.I.R. 1979 S.C.), which is created by a statute to carry on certain functions mainly commercial in nature.

There are innumerable bodies incorporated or registered under such statutes as the Companies Act, 1956, the Societies Registration Act or the Co-operative Societies Act. As these are not statutory bodies, they are not amenable to the writ jurisdiction. A modern innovation is a government company, incorporated under the Companies Act in which the government controls the majority shares. In *Praga Tools Corporation v. C.V. Imanual*, A.I.R. 1969 S.C. 1306), the Supreme Court refused to issue mandamus to a government company in which the government had 88 per cent shares and private individuals only 12 per cent shares.

In some cases, however, the High Courts have issued writs to private bodies as well if they were exercising special powers and privileges, *e.g.* educational institutions, a government company (the Cashew Corporation of India), a non-government company because it was exercising public utility functions. There is no Supreme Court judgment issuing a writ to a non-statutory body, but in *Praga Tools* the court did observe, while laying down the proposition that no writ lay against a government company, that it is not necessary for the issue of mandamus that the person or

authority on whom a statutory duty was imposed must be a public official or an official body and that

> Mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings.

On the question of the issue of the writ to non-statutory bodies, it has been commented: *"The Corporation of Nagpur* and *Ambir-Jamia* cases depict the correct approach. It is only when special powers and privileges, not ordinarily enjoyed by individuals, are conferred by statute on a body that it acquires the character or status of public authority. The issue of the writ should be confined only to such cases. Too broad an application of the writ to private bodies or individuals in the modern era of vast state regulation of human activity will rob the writ of its essential character as a public law remedy.

Interim stay: The courts possess inherent powers to grant interim stay in matters pending before them under the writ petitions. The reason for granting interim stay is that otherwise an irreparable injury may result to the petitioner of ultimately the Court gives him the relief after hearing the case on merits. there is no hard and fast rule for granting interim stay. It would depend upon the circumstances of each case whether an interim stay can be granted. There had been complaints that at times writ petitions were filed mainly to gain time and ultimately it was found that such petitions were frivolous. The grant of easy interim stays by the High Courts unnecessarily delayed governmental action and also justified claims of private parties, which was not in public interest. In 1976 the Forty-second Amendment of the Constitution placed considerable restrictions on the High Courts' power to grant interim stay. It was provided that no interim order would be made unless all the relevant documents have been furnished to the other party and opportunity of being heard given to him. This requirement could be dispensed with for a maximum period of fourteen days in exceptional situations where the court for reasons to be recorded in writing was satisfied that it was necessary to do for preventing any loss being caused to the petitioner which could not be adequately compensated in money. These provisions did not apply to Fundamental Rights. Further, it was provided that no interim order whether involving Fundamental Rights or not would be issued where such order would have the effect of delaying any inquiry into a matter of public importance, or any investigation or inquiry into an offence punishable with imprisonment, or any execution of any work or project of public utility including acquisition of property for such execution by the government or any corporation owned or controlled by the government. The provisions relating to interim orders did not apply to petitions to the Supreme Court under Article 32. However, the position was changed by the Constitution (Forty-fourth) Amendment Act, 1978. It provides that where an *ex parte* interim order has been made, whether involving Fundamental Rights or other rights, the party against whom such an order has been made may make an application to the High Court for vacation of such order. If the High Court fails to dispose of the application within two weeks, the interim order shall stand vacated. The provisions for the non-issue of interim orders in certain cases was dropped.

Res Judicata: The principle of *res judicata* applies to writ petitions. Thus, when the High Court has decided a writ petition on merits, it bars a subsequent writ for the same cause of action and between the same parties. On the same basis, after the disposal of a writ petition by the High Court on merits, no regular suit can be filed by the petitioner pertaining to the same matter.

Grounds of judicial review under writs

The scope of judicial review under writs is limited, restrictive and technical. Article 226 does not confer an appellate jurisdiction on the High Courts but it is a special jurisdiction, the underlying purpose being to keep the administrative and judicial authorities within the bounds of their jurisdiction. The writ jurisdiction provides a kind of half way review between review on appeal and no review at all. The basic doctrine applicable in judicial review under writs is the doctrine of *ultra vires*, that is, the jurisdictional principle. However, the courts, both in England and India, have expanded their power of review by over-stretching this doctrine and also developing a few

exceptions to the doctrine itself.

One basic limitation of the writ jurisdiction is that the courts do not go into the merits of the case or substitute their judgement over the judgement of the authority making the decision. Just by way of illustration, in *Arora v. State of U.P.*, A.I.R. 1964 S.C. 1230) land of the petitioner was acquired by the state government under the Land Acquisition Act, 1894, for a company for construction of its factory for manufacturing textiles machinery parts. He challenged the acquisition on the ground that he himself intended to erect a factory on the land, and the said land which was intended to be used for one public purpose should not be acquired for another public purpose. The court refused to intervene for so long the acquisition satisfied the requirements of the law, it was for the government to decide whether to acquire that particular piece of land or not. Again, where an authority issued a transport permit for one year, while the statute required renewal of the permit for a period between three and five years, the Court directed the authority to grant the permit for a period of three to five years without itself specifying the period.

The grounds of review are considered under the heads mentioned below.

Error of jurisdiction: A distinction is made between error of jurisdiction and error of law for purposes of judicial review. In *Ebrahim Aboobaker v. Custodian General (A.I.R. 1952 S.C. 319) the Supreme Court stated:*

> It is plain that such a writ *certiorari* cannot be granted to quash the decision of an inferior court within its jurisdiction on the ground that the decision is wrong. Indeed, it must be shown before such a writ is issued that the authority which passed the order acted without jurisdiction or in excess of it.

A jurisdictional error may arise when an authority has no jurisdiction over the subject matter or the parties, or a body having jurisdiction fails to exercise the same, or if the authority is not properly constituted, or exceeds its authority.

To determine whether an authority has exceeded its jurisdiction or not, it is often necessary for the courts to interpret the law and to intervene if the authority has not acted in accordance with their interpretation. A distinction is accordingly made between an "error of law going to the merits of the case". The former is reviewable in all cases on the ground of *ultra vires*, but latter only when the error is apparent on the face of the record. However, the distinction between the mistake of law, pure and simple, and mistake of law going to the root of the jurisdiction of the body concerned is a highly mystifying part of the law as it is not easy to find out the distinction between the two types of mistakes. This is very well illustrated by the undernoted Supreme Court cases (*Ujjambai v State of U.P.*, A.I.R. 1962 S.C. 1621; *State Trading Corporation v. State of Mysore*, A.I.R. 1963 S.C. 548; *Tata Iron and Steel Co. v. S.R. Sarkar*, A.I.R. 1961 S.C. 65; *Pioneer Traders v. Chief Controller of Imports & Exports*, A.I.R. 1963 S.C. 734).

Error of law apparent on the face of the record: If a quasi- judicial authority commits an error of law which is on the face of the record, the decision can be quashed through the writ of *certiorari*. This is an exception to the doctrine of *ultra vires* or the jurisdictional principle. The concept of error of law apparent on the face of the record is not capable of precise or exhaustive definition. According to the Supreme Court, the concept "is comprised of many imponderables; it is not capable of precise definition, as no objective criterion can be laid down, the apparent nature of the error, to a large extent, being dependent upon the subjective element".

Whether or not an error is an error of law, and one which is apparent on the face of the record, must always depend on the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened. A general test is that no error of law can be said to be apparent on the face of the record if it is not self-evident or manifest; or if it requires an examination or argument to establish it; or if it has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions. It may be that an error is self- evident to one judge but not to the other. There is thus a lot of indefiniteness in judicial review of the decision of a quasi- judicial authority on the ground that

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there is an error of law apparent on the face of the record.

Findings of fact: Judicial review through writs over questions of fact is much more limited than questions of law. The courts intervene in matters of facts only rarely and in exceptional situations. A finding of fact by an authority can be questioned before the courts only when the finding is based on no evidence or *completely* unsupported by evidence. Sometimes the courts express this proposition also by saying that they will not disturb the findings of an authority under Article 226 unless it is perverse or devoid of common sense. Under this rule, the courts do not go into the sufficiency or adequacy of the evidence, or review, reassess, reappreciate the same or draw its own inferences from the evidence. Similarly, reliability of evidence is not a matter to be canvassed before a court in a writ petition. In view of these significant limitations on the courts' power to review findings of fact, not many cases have occurred where findings of fact may have been quashed.

At times, however, the courts have expended their power of review in the area of fact findings by applying the concept of "jurisdictional facts". a jurisdictional fact is a fact which must exist before an authority could exercise jurisdiction in a matter. Such a fact is also known as collateral fact. It has been held in a few cases that in the case of jurisdictional facts the power of judicial review will extend to a consideration of evidence by the court upon its own independent judgement, as if it was an appeal. The law here is still in the developing stage.

Procedural defects: If an authority does not observe procedural requirements which are considered to be mandatory, then its decision is liable to be quashed on the ground of procedural *ultra vires*. However, if a procedural requirement is only regarded as directory its non-observance will not invalidate the decision. It will depend upon the facts of a case whether the court regards a procedural requirement as directory or mandatory. For a quasi-judicial authority it is essential to observe principles of natural justice, and its failure to do so will lead the court to quash the decision.

Review of discretionary powers: Though as stated earlier, mandamus is issued to enforce a public duty, yet the important use of mandamus has been to control the discretionary administrative powers. A discretionary power is not completely discretionary in the sense of being entirely uncontrolled. The courts have expounded certain propositions, and taken recourse to certain principles or tests, to control discretionary powers in certain situations and contingencies. The task of the courts primarily is to ensure that discretion is exercised by an administrative authority according to law. The courts will not go into the merits of the exercise of discretion or substitute their judgement over the judgement of the authority, but they have to see that the authority has not abused its powers. Under the rubric "abuse of power" comes the following grounds: *mala fides*, improper purpose and irrelevant considerations. In other words, power must not be exercised *mala fide* or in bad faith, or for an improper purpose or after taking into account irrelevant or extraneous considerations, or after leaving out relevant considerations. All these categories of abuse of power fall under *ultra vires*, or are regarded as jurisdictional errors. While examining whether an authority has acted on irrelevant considerations or not, the courts often give their own interpretation of the statutory provision, and also at times read implied limitations into the statutory power by taking into account the objects and purposes of the statute. Thus, through their interpretative process the courts are enabled to play a significant role in controlling administrative discretion. However, it has to be borne in mind that the courts are concerned with legality rather than merits or reasonableness of an administrative order, which to that extent limits their role.

Power of superintendence of the High Courts

Article 227 confers power of superintendence over all courts and tribunals within its territorial jurisdiction. The High Court has such a power on all subordinate courts and tribunals. Besides, clauses (2) and (3) of the article specifically gives power of administrative superintendence over subordinate courts. Thus the High Court may call returns from such courts; make rules and prescribe forms for regulating the practice and proceedings of such courts and also in which books, entries and accounts shall be kept by their officers; settle table of fees of advocates etc. Such rules, forms or tables shall not be inconsistent with the provision of any law for the time being in force,

and shall require the previous approval of the Governor. The power of superintendence does not extend over any court or tribunal constituted under any law relating to armed forces.

Though the power of superintendence is broad, yet the High Court does not sit as a court of appeal over a court or tribunal. The ground of interference by the High Court with the order of a court or tribunal are practically the same as those under *certiorari*. The main function of the court is keep a court or a tribunal within its jurisdiction. It is not to be used for correcting errors of law or fact. The High Court will usually intervene, under Article 227 is a tribunal acts arbitrarily, or it declines to do what is legally incumbent on it to do and thereby refuses to exercise jurisdiction vested in it by law, or it exceeds its jurisdiction or acts without jurisdiction or it acts against natural justice, or its findings are based on no evidence or are otherwise perverse, or there is an error of law apparent on the face of the record. The High Court would not reappreciate evidence when the tribunal has decided a question of fact.

If there is an alternative legal remedy, it would not be proper for the High Court to entertain an application under Article 227. This is, however, not a rigid rule and in special circumstances the High Court may intervene even if there is an alternative legal remedy.

In spite of declaration finality of the decision of a tribunal by a statute, the High Court's jurisdiction under Article 227 is not ousted.

If the High Court refused to exercise its power of superintendence, the Supreme Court may on appeal exercise the same powers in a suitable case.

A few points of distinction between Article 226 and Article 227 may be noted. The jurisdiction of the Court under Article 226 extends to judicial, quasi-judicial and administrative bodies, but under Article 227 the jurisdiction extends only to courts and tribunals. Under Article 227 the High Court may interfere *suo motu* but under Article 226 it will interfere only on the application of a party. Further, under Article 226 the High Court merely annuls the decision, but under Article 227, it can do that and also issue further directions in the matter, and to this extent judicial review under Article 227 is broader than Article 226.

In spite of some of these distinctions between the two articles, there does not appear to be any substantial reason for enacting Article 227 so far as administrative bodies (tribunals) are concerned. It has been pointed out by Seervai: "It is difficult to resist the conclusion that the effect of Article 226 was not fully realised, for the Article conferred supervisory jurisdiction of the most extensive kind against any person, body or authority, including in appropriate cases any Government and that the supervisory power resorted to the High Courts under Article 227 was by comparison much narrower, it being limited only to courts and tribunals."

ARE THE TRADITIONAL RULES OF EVIDENCE OBSOLETE?

R.L. FISHER
Judge of the High Court
Hamilton, New Zealand

I Introduction

An essential function of Court proceedings is to ascertain the facts. There are many methods by which that might be achieved. The legal systems of the Commonwealth are for the most part based upon adversarial hearings at which the facts are decided by a Judge or by some form of jury. This paper starts from the timid premise that that system will remain. It does not follow that the traditional rules of evidence will remain with it. Much has changed since those rules were created. Has the time come to jettison them and start again? This paper addresses that question.

II The traditional rules of evidence

For present purposes the traditional law of evidence is assumed to have evolved by the end of the nineteenth century. It was largely a child of the jury system.[1] Jurors were for the most part poorly educated. The accused could not give evidence.[2] There was a strong emphasis upon the adversary system at the expense of mutual disclosure.[3] The potential for illogical reasoning and prejudice was considerable.

An elaborate system of exclusionary rules developed. Evidence was excluded not because it lacked relevance but because competing considerations were thought to be more powerful. Hearsay was excluded principally because the evidence was not given on oath, it was not subjected to cross-examination and it was not "the best evidence". Experts were tightly controlled lest they usurp the function of an impressionable jury. Bad character, general propensity, similar facts and repulsive photographs were excluded because the risk of prejudice was thought to out-weigh probative value. The probative value of privileged communications and evidence unfairly obtained was not questioned but evidence in those categories was excluded in the interests of other policy objectives. Quality control was promoted by excluding evidence which did not satisfy the "best evidence" rule. A feature of these exclusions was that they tended to be defined with specificity ("dying declarations") rather than by reference to the underlying principle (inherently reliable and maker of statement unavailable).

Central to the presentation of evidence was the notion that the truth would emerge if equal adversaries were left to present and test the evidence of their choice. Witnesses were required to give evidence orally on oath without leading questions and be subjected to cross-examination. Intricate rules governed such diverse matters as the manner in which a witness could be cross-examined on documents and the processes for inspection and tender during trial.

III Forces for change

Since development of the traditional rules of evidence the forces for change have gathered:

Technological developments

The law of evidence now operates in a technological environment undreamed of when the traditional rules were developed. The subject matter of the proceedings might be a contract formed by facsimile machine or breach of copyright in computer software. Investigators have a new range of devices and techniques with which to investigate and record, eg, devices for resting blood and breath alcohol, DNA profiling,[4] concealed electronic listening devices and audio-tapes,[5] identification by "photofit", "identikit" or photographs with or without conventional identification parades,[6] body-searches for drugs,[7] and the videotaping of police interviews[8] and scene

reconstructions.[9] Legislation in some form is normally needed to set protocols and standards for the use of these devices and techniques. Special methods of proof are often called for to ensure accuracy and avoid the unnecessary court attendance of expensive experts. In the courtroom, the presentation of evidence is assisted by new technological aids. The humble photocopier has almost single-handedly emasculated the best evidence rule for documents. The potential is there to insulate vulnerable witnesses from the courtroom or the accused by closed circuit television, videotaped interviews and rooms with one-way mirrors and audio-links.[10] Even when evidence has been presented, there are new aids to its comprehension and analysis. Computers are the obvious example but others include transcripts of audio-tapes (if the tape is played to the Court the transcript is a mere aid to comprehension), charts, tables and computer-designed visual displays.[11]

Time and cost

Increasing complexity in society is reflected in the increased length, complexity and cost of trials. There were no earlier counterparts to the corporate fraud trial involving the computerised records of a multi-national company or the airborne courier services of an international drug ring. Yet there is understandable pressure from all quarters, particularly from the commercial community, to hear cases promptly. The high cost of lengthy proceedings is not limited to the parties. The community often provides not only the court but also legal aid for representation. New evidentiary methods are needed to shorten trials wherever possible.

Change in the judges of fact

In most jurisdictions, civil litigation and minor prosecutions are now conducted largely before judges sitting alone. Even for serious crime, the juries involved are better educated and more sophisticated than their earlier counterparts. The danger that they will be swayed by prejudice or over-awed by experts is reduced.

Changed policy objectives

The list of incidental policy objectives to be promoted through the law of evidence has grown. In the control of state abuse of investigatory powers, confessions have now been joined by the taking of body samples, conduct of body searches, procedure for identifying suspects and access to a lawyer for those in custody. Privilege is now extended to new forms of confidential communication, eg, communications to journalists. Greater thought is given to the special needs of child abuse complaints while giving evidence. Rape victims are to be protected against public humiliation and distress (by a presumptive exclusion of cross- examination as to prior sexual experience).

Competing evidence systems

Dispute resolution is no longer the exclusive preserve of the Courts. Arbitrators and administrative tribunals have demonstrated that relaxing the traditional rules of evidence does not necessarily lead to anarchy. The administrative law requirement that a tribunal must act upon evidence which is "logically probative" and "good evidence notwithstanding that there might be... some technical objection to its admissibility"[12] is an uncomfortable acknowledgement that good evidence is not necessarily traditional evidence. Even in the Courts themselves there is a growing list of circumstances in which, with the exception of privilege, the traditional rules have been waived in favour of more pressing goals, eg, the welfare of a child in a custody case, difficulties of proof as to a deceased's reasons for his will, or expedition in interlocutory matters.[13] While liberty of the subject and matters of similar seriousness must be the last candidates for liberalisation, models for change abound.

For these and other reasons, the assumptions upon which the traditional rules of evidence were originally founded require reappraisal.

IV What are we trying to achieve?

Reassessment of the law of evidence must start with a clear view of ultimate objectives.[14] What do we want the law of evidence to achieve for us?

Ascertain the truth

The dominant function of the law of evidence must be to assist in ascertaining the truth. The

innocent should not be convicted. A plaintiff should not fail merely on the ground that the facts are unclear. But ultimate justice is an ideal to aim for in the certain knowledge that it will never be achieved. A more realistic, if cynical, view is that Court proceedings are no more than a tool of society for maintaining law and order by deterrence (criminal proceedings) and resolving disputes in a peaceable manner (civil litigation). Without losing sight of truth as the principal quarry this pragmatic view leaves room for the recognition of a number of other objectives.

Receive the significantly probative

Ideally the rules of evidence would ensure that all significantly probative evidence is admitted. To the extent that the law excludes evidence which is not only relevant but significantly probative, the search for the truth is impeded and the law brought into disrepute. The layman finds it difficult to understand the exclusion of such evidence as hearsay, propensity, similar fact and certain forms of expert opinion. The rest of the community regularly and quite logically relies on such sources for the most weighty of decisions. One should begin with the assumption that strong grounds must be shown before there could ever be a case for excluding significantly probative evidence.

Exclude the irrelevant and peripheral

Evidence of little weight (eg, because it is peripheral, concerns a collateral issue or adds little to the existing knowledge of the average juror) should be excluded not because it is irrelevant but because it lacks sufficient probative force. The difference between relevance and weight is critical. Relevance is, of course, the threshold. Evidence is relevant if in any way at all it renders a fact in issue probable or improbable. But relevance has never been enough. The real law of evidence starts at the point that relevance has already been demonstrated. The law of evidence is then concerned with resolving the tension between probative force on the one hand and competing considerations on the other. Competing considerations include time, cost and the undesirability of red herrings. The irrelevant and the peripheral should therefore be excluded on those grounds alone.

Quality control

The Courts are more likely to produce the right decision if they are provided with the best evidence available. Ideally, where parties have a choice they should be required to prove a fact by the best evidence they can procure ("the best evidence rule"). Direct evidence is better than hearsay. Originals are better than copies. But this consideration must compete with the dictates of time and cost. In the age of the photocopier, nothing is usually lost by relying upon copies. Moreover, the best evidence rule cannot have any application to hearsay in circumstances where the original maker of a statement is unavailable or cannot be expected to recall.

Speed and economy

Reference was previously made to the increased length, complexity and cost of modern trials to the detriment of both the parties and the taxpayer alike. Modern techniques for the presentations of evidence will assist – certificates of authorised experts as *prima facie* evidence, exchanged written briefs, videotaped examination of witnesses etc. But of course this will not necessarily accord with the ideal model of an adversary system.

Elicit best from adversary system

The adversary system is likely to work best if there is mandatory mutual disclosure, absence of surprise, evidence given orally on oath with non-leading questions and opportunity for cross-examination.

Exclude the disproportionately prejudicial

Evidence as to general propensity, bad character and similar facts may create a risk of irrational misuse disproportionate to the probative value. The exclusion of certain forms of expert evidence as to human behaviour, credibility, propensity, child abuse characteristics and ultimate issues may well have been influenced in part by fears of this nature. But it is suggested that a very strong case is needed before logically relevant evidence is excluded solely upon the ground that the tribunal of fact cannot be trusted to use it in a rational manner.

Promote other social values

The law of evidence has been freighted with such diverse objectives as the protection of confidential communications and state secrets (privilege and immunity), control over the state abuse of investigatory powers (Judges' Rules, identification parades, body searches, access to lawyers etc), the collection of revenue (exclusion of unstamped documents), and consideration for the feelings and reputation of child abuse complainants (insulation while giving evidence) and rape victims (restriction on cross-examination as to sexual history).

V Priorities for the law of evidence

It will be apparent that the foregoing objectives conflict with each other. One cannot simultaneously accept similar fact evidence (often significantly probative) and still expect to avoid at least the risk of prejudice (exclude disproportionately prejudicial). If all evidence is to be subject to testing by cross-examination (elicit best from adversary system) one would need to exclude all hearsay (cf receive the significantly probative). Priorities between the objectives must be established. The priorities will differ according to the purpose of the proceedings.

Criminal proceedings

The purpose of criminal proceedings is to promote law and order by enforcing the criminal law. Isolation, rehabilitation and retribution are recognised purposes but deterrence is dominant. Deterrence is served so long as some, not necessarily all, guilty persons are publicly punished. Consequently, in the criminal law a strong emphasis can be placed upon acquitting the innocent at the expense of freeing some of the guilty. This is also warranted by the extreme seriousness of accidentally convicting the innocent.

Consistent with those purposes, the law of evidence applied in criminal cases in general should place a high priority upon certainty of proof (beyond reasonable doubt), the best quality of evidence (cf hearsay), the opportunity to test evidence by cross-examination (cf hearsay, and certain forms of insulated child complainant evidence) and the exclusion of disproportionately prejudicial evidence (general propensity, previous convictions etc). The importance of these safeguards is highlighted by the paradox that the more serious the potential outcome to the accused, the more likely it is that the facts in his or her case will be decided by amateurs (a jury) rather than by a professional (a Judge alone).

However, even in criminal cases these considerations should not be seen as absolutes. Hearsay should be admitted where it is inherently reliable and direct evidence impracticable.[15] The opportunity to cross-examine can take new forms. We should not per se oppose changes in the methodology of trials (computers, closed circuit television videotapes etc). The real question is whether the objectives of cross-examination may be attainable in other forms, for example perhaps the questioning of a child complainant in different setting. The traditional suspicion of expert evidence also warrants reappraisal. Major advances have been made in the study of human behaviour. Statistics has developed as a science. The popular pedestal upon which professional witnesses may have been placed in the past has crumbled in proportion to the growing education and independence of jurors. the time has come to re-examine the ultimate issue rule,[16] expert evidence as to disposition[17] and the exclusion of certain expert evidence in child abuse cases.[18] The safeguards in a criminal trial should not extend to the exclusion of significantly probative evidence unassociated with a serious risk of disproportionate prejudice. There should be no dilution in safeguards against wrongful conviction but the safeguards may be better expressed in new ways.

Civil proceedings

Civil litigation has a different purpose. The rules of evidence should reflect the difference.[19] The purpose of civil litigation is to resolve disputes. One of the main aims is to arrive at a determination which will be sufficiently acceptable to the parties that they will not disrupt the public order by resorting to more disruptive remedies. Without regressing to trial by combat, there is more room for the notion that if equal adversaries are bound by the same rules, neither is at a disadvantage if modifications to traditional forms of advocacy apply to both. In the interests of mutual disclosure and trial expedition, evidence in chief should be accepted in the form of previously served written

briefs of evidence read by witnesses on oath. Any document in the possession or power of an opponent or his witness should in the absence of privilege be available for inspection in all circumstances and without obligation to tender in evidence. Agreement on noncontentious facts and signed statements as *prima facie* evidence subject to availability for cross-examination should be encouraged.

The impact of a civil decision based upon an incorrect view of the facts is also likely to be less serious than its criminal counterpart. Greater emphasis can therefore be placed upon economy and expedition at the expense of optimum quality in the evidence received. The approach to hearsay in civil litigation could perhaps be reversed. All hearsay could be admitted except in carefully defined cases of inherent unreliability and direct evidence availability (eg, exclude double oral hearsay, hearsay by interested persons when proceedings in contemplation etc). If the evidence of experts is relevant and significantly probative, it should be admitted whether or not it deals with any particular subject or goes to any ultimate issue.

Other classes of proceedings

In a third category are those areas of jurisdiction in which the outcome is likely to turn less upon the facts surrounding a particular event than a value judgment based upon innumerable details (typically the case in family law). Frequently this is associated with broad questions of social policy (as in administrative law), the public interest (as in litigation under the *Commerce Act*) or other interests not necessarily represented by the primary litigants (child custody). The model of two equal adversaries competing under the same rules may then be inappropriate. The best quality of evidence may be less critical since the decision is unlikely to hinge upon any single error of fact. In such cases there may be grounds for wholly or partly removing the traditional rules of evidence altogether.[20]

VI Expression of the rules of evidence

The traditional rules of evidence were entirely judge-made. In most jurisdictions, the current law is to be found in a patchwork of common law and statute. This has certain disadvantages. The task of reform and rationalisation is too vast to be left to the Courts. The existing law of evidence is complicated and unclear. Yet it must be applied on the wing. The evidentiary world populated by appellate Courts and text writers long ago parted company with daily practice in the trial courtroom. The contrast has been likened to the difference between the Queen's English and pidgin English.[21] Codification would make the task easier. Reform and rationalisation could be tackled on a scale unavailable in the Courts. The attempt could also be made to express the law more clearly and simply.

VII Conclusion

Most of the objectives underlying the traditional rules of evidence are not, and never will be, obsolete. Equally, we should not rely on the notion that a system which has stood the test of time should be left in peace. The original foundations for traditional rules have now changed.

Any reappraisal must start by identifying and ascribing priorities to competing objectives in the law of evidence. The priorities must be attuned to the differing purposes of protecting the accused in criminal trials, resolving disputes on a fair and economic footing in civil trials and recognising the distinctive requirements of certain other forms of proceeding.

In all forms of proceeding a stronger emphasis should be placed upon relevance and weight at the expense of arbitrary exclusions, particularly those exclusions associated with the poorly educated juries of yester year. Safeguards for the criminal accused must be retained but we should be open to new forms in which they might be achieved. The categories of exclusion in civil proceedings should be significantly reduced in favour of relevance, weight and expedition.

We should be receptive to novel methods for the presentation, comprehension and analysis of evidence in Court. The traditional rules of advocacy may need to take new forms – to a minor degree in criminal trials and to a greater degree in civil proceedings. We must gain the benefit of rapidly developing technological aids if the business of the Courts is to be efficiently despatched.

Codification of the law of evidence would provide an opportunity to clarify, simplify and more

rapidly adapt to a new age.

Notes:

1. Per Thayer: A *Preliminary Treatise On Evidence At The Common Law* (Rothman Reprints 1969) p 266, generally supported by *Phipson On Evidence* (13th Ed) 1982 para 1-02; *Wigmore On Evidence* (3rd Ed) 1940, 250 and 17 *Hals* (4th Ed) para 1. For greater emphasis upon the adversary system as a moulding force see *Australian Law Reform Commission Issues* Paper No 3 "Reform of Evidence Law" (1980) paras 81 and 82.
2. The accused became a competent but not compellable witness in New Zealand in 1889 and in the United Kingdom in 1898.
3. Cross on Evidence (4th NZ Ed; Matheson; 1989) para 1.3; Morgan: *Some Problems of Proof Under The Anglo-American System of Litigation* Columbia University Press (1956) pp 106- 117.
4. Stringer and Cordiner: *DNA Profiling* (1989) 2 Family Law Bulletin 10.
5. In New Zealand, for example, see *Misuse of Drugs Amendment Act* 1978 s 25; *Evidence Act* 1908 s 23B; *Crimes Act* 1961 ss 312A-312Q.
6. For recent English Court of Appeal decisions see *R v Cooke* [1987] Crim LR 402 and *R v Constantinou* [1989] Crim LR 571 (photofit) and as to photographs used for identification see *R v Taylor & Dunford* (1989) 4 CRNZ 201; *R v Fraser-Jones* CA 150/88 14.9.88; *R v Byrne & Trump* [1987] Crim LR 689, CA.
7. In NZ see Misuse of Drugs Act 1975 ss 13 A-13M.
8. *Li Shu-ling v R* [1989] Crim LR 58, PC; *R v Admore* NZ Court of Appeal CA 55/85 22.8.88.
9. For a novel use of video-taped reconstruction of driver's view while driving recklessly see *R v Thomas* [1986] Crim LR 682.
10. These are included in a battery of options introduced in New Zealand as from 1 January 1990 (*Evidence Act* 1908 s 23E) but the topic is controversial – see for example Spencer: "Child Witnesses, Video-Technology and the Law of Evidence" [1987] Crim LR 76; "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations" [1985] 98 *Harvard Law Review 806; PE & SM Hill: "Video-Taping Children's Testimony: An Empirical View" [1987] Michigan Law Review* 809.
11. The potential in the hands of professionals is illustrated by the work of Computer Aided Court Presentations, a commercial venture in Melbourne.
12. Per Pearson LJ in *R v Deputy Industrial Injuries Commissioner ex parte Moore* [1966] 1 All ER 81 at p 92 and see further Diplock LJ at p 94.
13. For examples in New Zealand see *Family Proceedings Act* 1980 s 164; the *Matrimonial Property Act* 1976 s 36, the *Domestic Protection Act* 1982 s 33, the *Guardianship Act* 1968 s 28 (although significantly, in the last three cases not for the purpose of criminal proceedings); *Commerce Act* 1986 s 79; *Family Protection Act* 1955 s 11 and *Inland Revenue Department Act* 1974 s 21.
14. For an excellent survey of objectives and purposes see *Australian Law Reform Commission Issues* Paper No 3 "Reform of Evidence Law" (1980).
15. The NZ Law Commission Options Paper *Hearsay Evidence* (June 1989) identifies options for reform ranging from clarification of existing legislation to outright abolition. But query whether the Commission will be overtaken by the Courts; *R v Baker* (NZ CA 27/89 20.4.89) per Cooke P: "At least in a case such as the present it may be more helpful to go straight to basics and ask whether in the particular circumstances it is reasonably safe and of such sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards" (deceased's statements of attitude to accused charged with her murder admitted).
16. *North Cheshire and Manchester Brewery Co v Manchester Brewery Co* [1899] AC 83, 85; *R v Wright* (1821) Russ & Ry 456, 458.
17. The so-called "Rule in Rowton's Case" (1865) Le & Ca 520. For useful discussion see Cato: *Psychiatric Testimony: The Ultimate Issue Rule and the Rule in Rowton's case* [1980] NZLJ 288.
18. *R v B* (an accused) [1987] 1 NZLR 362; *R v Accused* (1989) 4 CRNZ 193 (NZ CA); *Clark v Ryan* (1960) 103 CLR 486; [1960] ALR 524.
19. There are already some differences which, in New Zealand, include hearsay: see *Evidence Amendment Act* 1980 ss 3, 7 and 8.
20. See footnote 13.
21. A remark of Sir Patrick Devlin in an address to the Oxford University Law Society 1960.

THE WRITING OF REASONS FOR JUDGMENT

Mr. Justice Wilson
Supreme Court of Canada

... Where judgment has been reserved, written reasons should be got out promptly while the evidence and argument are fresh in the judge's mind. Each day of delay makes the task harder.

A really first-rate written judgment in any but the most difficult and technical cases should generally be intelligible to an educated layman. You are not writing for a law journal nor are you writing entirely for the Court of Appeal. It is desirable that the defeated litigant should be able, on reading your judgment, to know why he lost. It is desirable that your writing should be comprehensible by news reporters. It is desirable that the workings of the law should not be a mystery, but clear to the public. This ideal may not always be attainable but it is always to be attempted.

Usually it is a good idea to begin by following the method normal to all forms of literary compositions: first to draw an outline of the matters you propose to deal with. In writing most judgments this general approach should serve:

1. state the nature of the litigation;
2. state the central issue to be resolved;
3. make your findings of fact;
4. state the law applicable to those facts and give your rulings.

Some judgments are too brief, many more are too long. To avoid prolixity these suggestions are made:

The quotation of long passages of evidences may in some cases be necessary, but in general it is not, and the purpose of the judgment can be served by giving the purport or essence of the evidence.

It is not usually necessary to recite and discuss every authority referred to by counsel — normally the area of decision can be reduced to the consideration of what you find to be the effective authorities. If out of politeness to counsel or to show due diligence, you want to name other cases considered and rejected as inapplicable this can normally be done compendiously by saying "I have also considered" and thereafter listing the citations.

Also the excessive quotation of long passages from judgments relied on is to be avoided. Try to find shorter passages which express the meat of the matter.

A very experienced judge, Mr Justice McFarlane of the British Columbia Court of Appeal, has said this:

> "The first requisite must surely be clarity of thought. We should understand clearly what we intend to say before we start to say it, whether orally or in writing. This is of special importance in the case of oral judgments. An hour's concentrated study and thought is more valuable than a ready draft and any number of revisions. A pencil and a piece of paper provide no substitute for careful thought and for at least one simple reason such scribbling invites too much attention to words and form and diverts the mind from critical analysis of facts and argument."

We must certainly agree that one must think before one writes but in our opinion it is best to get your thoughts, tentative as they may be at first, on paper as soon as you can because nothing better exposes any fallacies in your ideas than reading them in cold type — what appeared at midnight to be inspiration may, when read in the clear light of the morning, disclose itself as error. The process of writing a good judgment requires generally repeated corrections, deletions

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The article comprises of extracts drawn from a book by Mr Justice Wilson of the Supreme Court of Canada written as a training manual for Justices and entitled "A Book for Judges".

and additions as your ideas develop ...

... Hyperbole, the extravagant use of adjectives and adverbs, is to be avoided. Look out for cliches, when you find yourself writing one try to find another method of expressing the same thoughts.

One regrettable phrase often used in judgments is "I have carefully considered". Surely it is assumed that all judicial opinions are the product of careful consideration: the use of the cited phrase implies that some are not and the adverb "carefully" should be deleted.

We quote a phrase from a purposely unidentified judgment: "The question would seem to be ...". There are two weakening qualifications here, the words "would" and "seem". If the judge had not yet arrived at the state of mind where he could write "the question is", he was not ready to deliver judgment ...

... We cite and approve this passage from the *American State Trial Judges Book* at p. 375 (2nd Edition).

> "Limit the use of italics for the purpose of emphasis. Their frequent use implies that the reader is not alert enough to catch the point without special help."

We recommend against the extensive use of Latin phrases save such words as "prima facie" which are now part of our own language.

The *American State Trial Judges Book* says (p. 375): "Minimise the use of Latin phrases, it looks too pretentious." Pretentious or not, the use of such phrases is common in the judgments of the English Courts. English judges are normally the products of a classical education and the use of Latin comes naturally to them. This is not always true of Canadian judges, lawyers or laymen and the over-use of Latin is to be avoided not through fear of pretentiousness, but for the sake of comprehensibility. And in England, the excessive use of Latin has been deprecated by Du Parcq L.J. in *Ingram v. United Automobile Services Ltd.* (1943) 2 All E.R. 71 where he said at p. 73:

> "I think the cases are comparatively few in which much light is obtained by a liberal use of Latin phrases. Nobody can derive any assistance from the phrase *novus actus interveniens* until it is translated into English."

One of the purposes of written or, for that matter, oral reasons for judgment is to state the facts you have found and your reasons for finding those facts. In this process when credibility is a factor it is not ordinarily good enough just to say that you accept the evidence of witness A and reject that of witness B. You should give your reasons for the choice and, while demeanour may be an element, it is not necessarily acceptable as the only basis. The gaps, the contradictions, the uncertainties in the evidence rejected should be stated, as well as the strength of the evidence accepted.

We suggest that for a trial judge, the findings of fact may be even more important than his rulings on law. This is because, generally speaking, appellate courts will not overrule him on facts, but will not hesitate to do so on law. Thus it may be more important to the litigant that the judge should be right on fact than it is that his law should be correct. If his findings of fact are incorrect he may have done the litigant a wrong that cannot be righted by a higher court, as could an erroneous ruling in law.

Some judges, notably Lord Denning M.R., make frequent use of subject headings in their judgments, similar to chapter headings in books. There is merit in this usage in long involved matters.

It will be noted also that such experts as Lord Denning do not always follow exactly the order of statement we have outlined. In *Thakrar v. Secretary of State* (1974) 2 All E.R. 261 at p. 264 His Lordship begins a judgment as it might appear, almost *in medias res* with this dramatic statement:

> "In 1972 a sword fell on the Asians living in Uganda. It was the sword of the President General Amin."

But thereafter, it will be observed, the arrangement followed by the Master of the Rolls was the

conventional one we have suggested.

This trenchant and useful paragraph is from an article by Lord Macmillan on *The Writing of Judgments* in (1948) 26 Can. Bar Rev. 491 at p. 499:

> "The judgment of a judge of first instance is properly framed on different lines from the judgments delivered in a court of appeal. The first judgment rightly covers the whole ground. In the court of appeal much is usually shed, but the first judge cannot foretell what points may commend themselves on appeal and he ought to provide all the material which may conceivably be regarded as relevant on a reconsideration of the case. In a court of appeal it is desirable, if possible, that there should be a single agreed narrative of the facts in the leading judgment and that the other appellate judges should not repeat them, but should confine themselves to dealing with any particular aspect of the case which they desire to emphasise or develop. The Law Reports are too often cumbered with unnecessary repetitions which add little of importance. A dissenting judge may of course find it necessary to give his own version of the facts as he sees them and to support his dissent by an independent argument."

We do not like the straight narrative style of writing a judgment which never really poses the question to be answered until near the end. Indeed, in some judgments the question is never clearly stated but you are left to discover it from the narrative and the answer. A judgment is not a detective story; it consists really of the posing of a question or questions and thereafter of findings of facts germane to the questions and the stating of the answers to those questions, based on applicable law ...

... You can, of course, from the bench or in a written judgment say what you think of a person's conduct without fear of being sued for libel. This power carries with it a responsibility to be careful and to be sure of your facts before you describe a person or his acts in perjorative terms. Harsh words are only to be used when fully justified by the facts and a recognition of the common frailties of mankind may often temper the denunciation.

But the judge need not fear to denounce when conduct has been so grossly wrong as to warrant severe words ...

A FIRESIDE CHAT WITH JUDICIAL OFFICERS

Justice SATISH CHANDRA
Former Chief Justice of U.P. and West Bengal

Nerve Resistance

In your day to day work you will find, specially in the beginning, many situations which will irritate you (situations created by advocates, witnesses and the staff). But if you lose your head or temper then God alone help you. These days the lawyers and the class IV employees are in a militant mood. If you lose temper or use anything except the most courteous language you are in for trouble. This also is acquired. You will acquire it after some experience.

Status And Prospects

You are entering the Judicial Service. Believe me, it is the best of all state services. You have fixed hours of work, which no other service has. The tradition of the service has always been that you do your work and go back to your home and you are free. You are not expected to give *Paishee* whenever a senior officer, or even a High Court Judge, visits your town. That thing is not known. The promotional avenues are plenty — in some respects much better than any other service. The I.A.S. can aspire to reach the level of the Chief Secretary. That is only one post. In the Judicial Service you can, and most of you should reach up to High Court Judgeship. It is much higher. There are many deputation posts also. They are bound to increase. I wish to dispel the impression that the Judicial Service is second rate. It's not.

Brushing up your Law

There is a very old saying that "ignorance of law is no excuse". You must have read about it. That goes for every body. Be he an illiterate villager, be he a doctor or any body, he must know the law. But there is an equally old cliche that judges are supposed to be ignorant of the law. At first sight it gives a very wrong impression. But it does not mean that the judges are supposed to be or expected to be really ignorant of the law. Not that this cliche means that the person, who sits to decide, knows the law thoroughly but by his training, he keeps his mind open till the end. He hears the parties and then makes up his mind though he, of course, knows the law. Gone are the days when a Judicial Officer could survive without knowing the law thoroughly. There are very very many different ways of doing it. You will have sufficient spare time. You must devote it to acquiring knowledge of law. Don't think you will get it on the case by case method. You will be hoodwinked many a time, if you are not prepared in advance. That is why I have been advising, directing officers to seriously take to digest-making. You should acquire this habit well from the first day. You will love it, I tell you. Some of the most successful judges have been those, both in the subordinate judiciary as well as at the High Court level, who have maintained a good digest.

Quotations

You should also maintain a note book in which you write *in extenso* passages which you come across either while reading some law reports, passages from judgments or any other book. Passages which appeal to you and which you would like to use in your judgment , to make it more readable and to embellish it. There is no copy right of any one in respect of a judgment. You can freely use passages. That's one sure way of improving one's vocabulary as well as judgment.

Interlocutory Orders

Another topic I would like to mention is the interlocutory orders. There is a feeling amongst new officers that the power to issue interlocutory orders is an index of status. This is a misconception.. The power to issue orders interim, does not give you any higher status or respectability. Principles which will guide you are laid down of course. You have to act according to the well known settled principles. Moreover, interim orders whenever granted should not be allowed to drag on. Some day of course after 3 months, 6 months, will come an occasion to pass the final orders after hearing

(Compiled from his valedictory address to probationers at A.T.I. April 1978)

the parties. Whenever you decide any injunction application finally, you can rest assured that there will invariably be an appeal to the District Judge. Whoever loses goes up and in 80% of these matters decided by the District Judge, there is a revision in the High Court. You can by one stroke obviate this work. I suggest that you acquire the technique of combining the hearing of the interlocutory application with the suit itself. You will experience that in 80% cases the controversy is the same in the interlocutory application as in the suit. When the plaintiff files a suit along with an application for injunction, you issue notices in both. Normally the same date is fixed for filing the written statement as for objections. First thing for you is to insist on the filing of the written statement along with the objection or near about that time. In most cases it is better to take the suit along, step by step, just as the interlocutory application is got ready. If the written statement comes, there is no difficulty. Whatever he says in the objection is virtually the same material which he will put in the written statement except one or two formal paragraphs at the end. It is not difficult to get both the written statement and objection filed about the same time. You have to be alert. Lawyers won't do it in the beginning. It does not pay them, but they will do it when you insist. When the written statement has been filed, frame the issues early at a convenient date. You will find that with the plaint and the application for interim injunction the plaintiff usually files his documentary evidence. With the objections, the defendant files his documents. They normally do so because otherwise they would not be able to argue their injunction application. Only thing remaining is the oral evidence, and here lies a little bit of diplomacy or technique. If the written statement has come, issues have been framed, then you have only to tell the lawyers — "Well look here, bring your oral evidence, it will help me understand your documents better." In most cases they may agree to dispense with formal proof of the documents. In some they may even dispense with oral evidence. In most cases, the witnesses are local, you can easily handle such cases. Once the evidence has been recorded then only arguments remain. See to it that the injunction application and the suit are heard at the same time. It is not much difficult because the argument is the same.

Traditions of the Judiciary

Long long time ago one Mathew Hale wrote a commentary on Laws. One chapter deals with these few points namely — conduct, discipline removal of judges and things necessary to be had in remembrance. There it is written that the administration of justice is execution of a trust in the name of God, the King and the country, that it must be done uprightly, deliberately and resolutely. Now the meanings of these words are very different. Uprightly refers to integrity, deliberately means learning, resolutely open-mindedness. Bear in mind that in the execution of the judgment, you carefully lay aside your own passions and not give way to them however provoked. Even in the 17th century it was essential for a judicial officer not to give vent to his passions while deciding a case, no matter, how much he was provoked or irritated by the lawyers or by the litigants. That is of the essence, that I be wholly intent upon the business — I am about remitting away all the cares and thoughts and unreasonable interruptions, that I suffer not myself to be prepossessed with any judgment at all till the whole business and both parties be heard. Same thing that I will not be biased with compassion to the poor or favour of the rich in point of justice, that popular applause or distaste have no influence on any thing I do in point of distribution of justice and that I will not be solicitous of what man will say or think so long as I keep myself according to the rule of justice.

You will be invited to dinners by local people. Never go to them. Your own immediate relations and very very dear friends apart, never go to any dinner parties, be he a lawyer or a business man. Judicial service is the most sensitive in one respect and the most weak. Whenever a person becomes a litigant, no matter he is a villager or a University professor or even the Prime Minister, his entire mentality changes. He looks at every thing with suspicion. Whoever loses a case, first imputes motives to the officer. You have to live in this world. If you are seen at such places and per chance if he or any of his relations become a litigant, you will not know. No body will come and tell you, but the public at large with which you have to do business, their thinking counts. You may feel wholly upright and be wholly uninfluenced by any considerations. That's immaterial. The real thing is the public mind. You have to safeguard the position of your office *qua* public mind.

I would like to emphasise because the first thing that you will come across when you go in an invitation to cinemas by being presented with passes for cinemas. You may think, it is a very minor thing, but I tell you it is a major thing now-a-days. Don't indicate to the Daroga who will be attached to your court from the very beginning, that you want anything. Discourage him, if you want to live with honour in the service. You should realise that if the public sees you going to a cinema, escorted by a Daroga or a policeman, you are looked upon with contempt. You may think that you have become a great officer because you are being escorted by a policeman to a picture house, but you remember that you will leave a trail of derision behind, in the mind of every one that sees you going. For the judicial service, it will bring a bad name.

Similarly, never indulge in raising subscriptions for any cause, even for the civil court club or for the magazine that even the judicial service may issue or your Association may like to issue; Never. These are age-old conventions and the better thing is to follow them without questioning their propriety.

Court-Craft

From the very first day, you will work in isolation. Especially in the beginning there will be nobody to help you, to guide you. You will have to be friend to yourself for five or six hours. You will of course learn by experience. But there are a few small things which you might as well note. Never lose temper. Equally important, while sitting in court do not look bored. Especially inside a court room don't indulge in any loose talk. That is not the place for either political or social remarks, no matter, how much you are provoked by lawyers. Outside court, keep aloof. Don't encourage many visits by lawyers. They are the first to take advantage without your knowing it. I need not say more.

Punctuality

The image of judiciary is largely based upon the high sense of punctuality displayed by the judges. When the litigant public, even an illiterate villager comes and sees that you are in your chair on time, even though the lawyers have not come, he feels a strange satisfaction.

Image

The age-old image of a Judicial Officer is that of a lotus shining in a pond of dirty water. Keep it up.

JUDICIAL INTERRUPTIONS

Justice LORD DENNING
Master of the Rolls, Former Chief Justice of England

Is the presiding officer during the course of hearing evidence or arguments to keep mum throughout? He may sometimes feel that the witness before him is not coming out with a candid answer to the question put to him. Or that he is constantly shifting his position. Or that the cross examining counsel is trying to take unfair advantage of the simplicity of the witness. Or that he is trying to put into the mouth of the witness something which he is not prepared to say. Or that the counsel is putting forward a patently absurd or misleading argument. Or that he is misinterpreting a ruling cited by him. And so on and so forth. The dilemma of the Judge is whether he should speak out his mind at that stage or not. Should he sit merely as a dumb doll? Will his interruption be misunderstood by the party or counsel to whom it may seem unfavourable?

There is no stock answer to this. The conduct of the presiding officer would depend on the situation. Any observation of the Judge at that stage need not amount to an expression of his having made up his mind. Often his expressing, his tentative view and putting question to counsel during the course of arguments enables the counsel to place other aspects of the matter which he might not have otherwise placed. The judge's interruption might reveal doubts in his mind which the counsel did not earlier suspect. The silence of the Judge may mislead him.

Advocates through experience have their own assessment about the fairness and the intelligence of each Judge. They do not necessarily rush to the conclusion that an observation made by the Judge is evidence of his prejudice. If a proposition advanced by the counsel is clearly correct, the Judge may then and there tell him that he agrees, so that the counsel may not waste any time in elaborating it or citing further authorities in support of the same. Even when the Judge expresses his disagreement, then a reasonable counsel, if he knows that the view of the Judge is correct, may not pursue it further. There are no doubt advocates who would try even in such cases to hammer a wrong point. In such a situation it is often more expedient for the presiding officer to keep his mouth shut instead of putting on further questions to the counsel and thereby provoking him to repeat the same untenable arguments endlessly.

In an English case a Judge intervened too much during the cross- examination of witnesses, so much so that counsel for both the parties were unhappy about it. The matter went up to the "Court of Appeal". i.e. the Appellate Branch of the High Court of England. This is reported as *Jones v. National Coal Board*, (1957) 2 QB 59, Lord Justice Denning (who after earldom was conferred on him became Lord Denning) made some very apt observations (reproduced below) which every judicial officer must always remember:

A Judge is not a mere umpire to answer the question 'how is that'? The object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon, L.C. who said in a notable passage that 'truth is best discovered by powerful statements on both sides of the question'? And Lord Greene, M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputation? If a Judge, said Lord Greene, should himself conduct the examination of witnesses, 'he, so to speak,descends into the arena and is liable to have his vision clouded by the dust of conflict'.

"Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth and the less dust there is about the better. Let the advocates one after the other put the weights into the scales the 'nicely calculated less or more – but the judge at the end decides which way the balance tilts, be it every so slightly. So also it is for the advocates, each in his turn, to examine the witnesses, and not for the Judge to take it on himself, lest by so doing he appear to favour one side or the other. And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his

argument be lost. The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that 'patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal'.

"How, it cannot, of course, be doubted that a Judge is not only entitled, but is indeed bound, to intervene at any stage of a witness evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination. It is only by cross-examination that a witness evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief. Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue, and to which it is by no means easy sometimes to return."

LAW AND ETHICS

Professor. N.R. MADHAVA MENON
Director, NLSIU

To discuss on ethics at a time when it seems to be fast disappearing from public discourse and the patterns of behaviour of leaders of public life, may be taken as a futile academic exercise with little relevance to the course of events in contemporary society. However, a little reflection may convince any discerning observer that in the final analysis, social order and solidarity are still dependent on a sense of fair play and on a degree of moral consciousness on the part of every human being, educated or uneducated, rich or poor. To rejuvenate that element of human consciousness and to lift it above competing forces destructive of civilized life, are the legitimate functions of right-thinking members of every generation.

Ethics in Law and Life of Ancient India

There was a time in human evolution when law was part of ethics and religion, of morals and values, of philosophy and consciousness. Ancient civilizations, particularly that of India, conceived a legal order based on the compendious Sanskrit expression *'Dharma'*. An inspiring and all-embracing concept of Nature evolved principles of Natural Law which all right-thinking human beings everywhere could advisedly follow for the welfare of themselves as well as of others. One aspect of Nature, common to all philosophies and basic to human life, is its view of 'Man' as a creature endowed with the capacity of reasoning as well as choosing between alternative courses of action, rejecting those that by some standard he regards as bad and accepting those that by the same standard he accepts as good. This is often explained as a sense of values or right reason which is a manifestation of the divine side of human nature. It is this sense of values again, that commands men to perform their duties and to restrain from doing wrong. Indeed it is through this standard that Natural Law philosophy enabled societies to evolve norms of positive conduct, arguing in the process that such norms which do not conform to right reason are unjust laws which deserve to be ignored even if they come as commands of political sovereigns. Thus in ancient philosophies, Law and Politics depended essentially on ethics for their nourishment and support.

Ethical ideals, according to Hindu religion, can be pursued at least at three different levels. On the *objective level,* it leads to the discovery of social laws which sustain order and progress. On the *subjective level,* it is a continuing search for God-realisation or self-fulfilment or enjoyment of bliss which is attained at the highest level of cosmic consciousness. It is a product of direct personal experience, a state of liberation or

Moksha and on the transcendental level, ethics leads to a perception of the moral structure of life itself, in the overall scheme of Nature and Creation. Hinduism does not have a science of morals fashioned after the Greek or the European models. However, it does provide a scheme of moral life and the means to achieve it. *Dharma,* in essence, contains the basis of such a scheme.

The cosmic order which ancient Indian thinkers derived from their concept of Nature provided the foundation of ethical values, of law and of life itself. They called that eternal order as *Rta*. In the beginning, *Rta* related to the physical universe and the natural phenomena. Then it led to the development of the concept of Natural Law. The societal application of this Natural Law philosophy is what we understand today as Ethics or the moral law. In fact, the idea of *Rta* as moral law assumed such a dominant influence in Vedic thought that it gave birth in later periods to the principles of *Dharma*. All epics of Hindu religion do contain infinite examples of the existence of good and evil invariably leading to the ultimate victory of good over evil. Even the moral character of Gods and Goddesses is depicted in relation to truth and virtue. This stream of ethical thought developed through the Vedic period characterised the endeavours of ancient thinkers to realize *Rta* in Nature.

The evolution of ethical notions in later periods as depicted in *Smrithi* (that which is remembered) literature, particularly the *Dharma Sastras,* teach general principles of Dharma or moral conduct.

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Of course, the sanctions supporting virtuous conduct or ethical behaviour were largely religious and not strictly judicial. Hindu ethics reflected in Hindu law is thus born out of the Vedic perspective of man in Nature, where harmony is inherent and righteous conduct is the natural result of human disposition. Unlike legal theories of the West, Hindu legal theory based on the concept of *Dharma* envisages ethical behaviour not out of experience of fear but out of preference and self-respect.

Law, Ethics and Society

The role of ethics and philosophy in explaining social problems and giving directions for social action is not adequately appreciated today. However, in making and interpreting law, no society can afford to ignore Ethics. After all, legal theory is only applied ethics. All issues, be they political or social, in the final analysis are ethical problems in as much as their resolution depends on a choice between alternate values. Whether the question involves freedom or equality, war or peace, treatment of women, children or Scheduled Castes and Tribes, it ultimately boils down to a choice of one of several alternative courses of action based on different set of values.

Modern law in many spheres has attempted to make fine distinctions between private and public morality, individual and collective responsibility as well as different standards of such responsibility. Certain set of values have been legislated as fundamental to the governance of the society and are even incorporated as part of the basic structure of the Constitution. Nevertheless, when it comes to individual behaviour, it comes down to the sense of fairness and righteousness inherent in the level of moral consciousness of the individual concerned. As such, no civilised society can now be structured without developing its moral fibre and consciousness either through law, religion, education or other instruments of social control.

The society evolved in Europe based on Christian ethics and the Natural Law Philosophy of that period had an ethical theory based on the greatest good of the greatest number of persons. Good was understood in this context as that which satisfies the impulses of human nature. The ethics of that period has been predominantly utilitarian and individualistic. It bases all values relative to experience and self-realization. The nature of polity, government and legal system were justified or opposed in relation to that standard of ethics. A theory of basic human right and a set of principles founded on democracy and limited government emerged out of the ethical theory which, in turn, led to many political revolutions in Europe and elsewhere. The feudal structure of the society, the absolute hold of organised religion on man, and the practice of slavery got transformed in the process in many societies. The philosophy of public service and the emergence of the so-called noble professions have added new dimensions to the ethics of the times.

In jurisprudence, the concepts of law, rights, justice, sovereignty etc. were subjected to fresh analysis and elucidation in the context of changing values and perceptions. The growth in education, communication and international contacts at several levels provided fresh inputs to the interaction between law, ethics and society. The rationalist and secular movements and the advance of science and technology gave new meaning to concepts of right and wrong, good and bad. Law distinguished from Justice, Natural Law distinguished from positive law, and private morality distinguished from public morality, induced a type of dualism in ethical theory which resulted in more problems than it could solve. Whatever be the final outcome of this trend in different Societies, one thing is certain: that standards of ethics in individuals or institutions will no more be taken for granted. Law based on fear and punishment will have to assume a dominant role in regulating conduct in the future, perhaps in all societies.

Justice, Freedom and Responsibility

When one looks at standards of ethics in a given society, one necessarily has to examine a variety of values reflected in the Constitution, the laws and the system of administration of justice in that society. Freedom and equality are values cherished in the legal systems of most societies today. Nevertheless, the scope of human rights standards guaranteeing freedom and equality vary widely in different systems. Even when a certain norm in this regard is enacted in the laws, they often do not obtain in practical terms to many sections of people. Herein lies the importance of administration of justice.

Normally, law is supposed to incorporate Justice. Sometimes law is evaluated in terms of justice which is taken as a superior value. Conformity to law is supposed to be the mark of a just society, which in others, disobedience to what are called unjust laws in accepted as justice. In any case, by making the distinction between legal and ethical justice, the problem is not solved since what is taken as 'superior justice' is open to different interpretations.

The problem can be illustrated by certain events of Indian legal and political history. When Gandhiji launched the civil disobedience movement against the British and called upon Indians to violate the infamous Salt law, he was appealing to a higher justice in the conscience of the people rather than anything prevailing in the British legal order. The ideas of democracy and republicanism introduced a number of new principles in legal and political theory challenging the old ones. And interestingly enough, the new ethical standards were invoked from the very same ethical foundations, namely the sense of fairness and the level of consciousness of the moral man. Justice is indeed the source and the result of ethics,. Law is just an attempted approximation to the revealed standard of ethics.

It is interesting in this connection, to appreciate the concept of 'Freedom', another value of legal theory.

Is freedom, self-control, absence of controls or limited control? In Hindu philosophy freedom essentially means the situation in which the baser instincts and impulses of man are brought under the control of the higher and nobler faculties which he possesses. The rationale underlying this theory is that freedom is related to consciousness and greater the level of consciousness the larger the scope ;of freedom. As one commentator puts it, "freedom emerges when the senses are made dependent on the mind. Freedom is enhanced when the mind is yoked with intelligence. Greatest freedom is achieved when intelligence is informed by the consciousness of the Self .... The highest level of consciousness leads to the maximisation of freedom." According to this line of reasoning 'equality' can prevail in a society only if everyone in that society has an equal level of consciousness.

Freedom is understood differently in different societies. Related equality of status and of opportunity, freedom has become a concept with varying content in practical politics. While the Indian Constitution has accepted equality as a fundamental right guaranteed to all citizens in Article 14, it has, in the very next Article, compromised that value in the name of social justice through adoption of what is called compensatory discrimination or reservation in favour of certain sections of people. While interpreting the provisions, the judiciary imported the principle of reasonable classification to justify what is apparently unethical and unjust application of legal norms. Similarly, in the interest of what is perceived at a given time as just or fair, ethical standards have been legislated re- drawing the parameters of certain values which were once considered as absolute and universal. This is where law becomes decisive in making a society 'moral' or 'right'. Some people therefore describe law as the minimum of morals. Ethics and Law may have the same object and the same Centre (man), but have different circumferences. The area of ethics is indeed wider than that of law.

A related ethical as well as legal concept which needs reference in this context is the notion of obligation or responsibility inherent in every individual. It is the relation of human self to events outside. It is a response of individual will to actions of others. What is the proper response in each situation is dictated by will, the sense of justice and the environment. When such patterns of responses are put together we get a set of obligations or responsibilities which we consider ethical, moral and just. Obligation in one creates right in the other. Thus one's rights are founded on the obligations of others. The balance between the two reflects the character of the ethical and legal order of a given society.

Responsibility for purposes of legal enforcement is divided into civil and criminal responsibility. The nature of ethical standards is nowhere better expressed than in its criminal laws and criminal justice system. The ethics of punishment tells us that no one ought to be subjected to it unless the person is *responsible*for the conduct prohibited. Thus it is for the violation of an obligation. Of course, an ethical question may be raised as to how the obligation itself is justified. That is

another issue which also calls for examination. The two main theories advanced from time to time with varying degrees of emphasis are the retributive and the utilitarian. Both justify punishment for crime, though for different reasons. If punishment leads to deterrence or prevention it is justified under the utilitarian principle. Of course, the nature and quantum of punishment are still not free from ethical questions. For example, death penalty is considered wholly unethical in several legal systems and constitutionally proscribed. Similarly, corporeal punishments are abandoned in most legal systems. In any case, the utilitarian reasoning is a matter for empirical verification for its justification and if a given punishment is neither deterrent nor reformative, it may be discarded as unjustified or unethical. Retribution, on the other hand, is justified as a method of correcting a wrong. On that theory, punishment is a deserved response of a righteous society to a wrong done against it.

If the administration of punishment is morally justified, it becomes imperative that only those who are proved responsible for the prohibited conduct alone are subjected to it. This takes us to a series of difficult ethical questions on how to prove a person responsible in order to deserve punishment. Criminal procedure and law of evidence have established standards to prove the innocence or guilt of persons accused of crime. Presumption of innocence, onus of proof, benefit of doubt to the accused, prohibition against self-incrimination, rule against double jeopardy, right to legal representation, system of appeals and revisions etc., are some of the accepted safeguards supposedly guaranteeing what is called "fair trial" in criminal proceedings. Even the substantive criminal law has built-in safeguards such as defences to criminal prosecution, degrees of culpability based on intention, knowledge, rashness etc., to avoid undeserved punishment. Of course, all legal systems have not uniformly accepted the value of these safeguards. Nor are the safeguards equally available to all persons involved in the criminal process. These are continuing challenges to the justice system of societies which claim superior moral standards. Indeed, criminal justice system is the true mirror of the degree of civilisation and the standard of ethics of a given society.

Ethical values of the Indian Constitution

The Indian Constitution is not just a legal document. It is the Bible of an ethical civilisation committed to human values and directed towards the building up of a just social order in which—

Justice: Social, economic and political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and/or opportunity; and

Fraternity assuring the dignity of the individual will be secured to all citizens of the Republic.

Throughout the Chapters on Fundamental Rights, Fundamental Duties and Directive Principles of State Policy, the Indian Constitution elucidates the quintessence of a socio-political order which can well be the pride of any nation. Realising the difficulty of guaranteeing equality in an unequal society, the Constitution authorises the State to adopt policies which may dismantle age- old institutions of inequality and promote equality wherever necessary through reverse discrimination strategies. Legal protections to guarantee freedom and personal liberty are mounted as fundamental rights with a view to avoid arbitrariness on the part of State authorities. Traffic in human beings and other forms of forced labour are prohibited. Untouchability is abolished and its practice in any form is made punishable. Employment of children in hazardous occupations is declared unconstitutional. Freedom to practise the religion of one's choice and uninterrupted maintenance of the cultural and educational rights of minorities are provided for.

A set of principles of State policy, declared fundamental for the governance of the country is also included as part of the Basic Law of the land. Among these principles are the duties of the State to secure equal justice and free legal aid, right to public assistance in cases of undeserved want, provision for just and humane conditions of work, welfare of disadvantaged sections of the people, safeguarding of environment, forests and wild life and, finally, the promotion of international peace and security. The State is obliged to secure a social order in which justice, social, economic and political, shall inform all the institutions of national life. The ethics of a civilized society are

beautifully articulated by the Constitution makers and put as part of the agenda for State action.

The Constitution, by way of an afterthought, also adopted a set of Fundamental Duties on the part of citizens with a view to complete the vision of a just social order. It is the duty of every citizen to promote harmony and the spirit of common brotherhood amongst all the people and to renounce practices derogatory to the dignity of women. To have compassion for all living creatures and to protect the natural environment including forests, lakes, rivers and wild life is another fundamental duty of citizens under the Indian Constitution. By all standards, the basic Charter of Indian Society is a compendium of ethical principles designed for individual and State action in private and public life. Actions of the executive government and laws passed by the legislature have to conform to the Constitutional standards outlined above and, if they do not, courts have been given the power to strike down such laws and orders as null and void. The Constitutional culture thus projects a value system which embodies the best of human endeavour and accomplishment.

The legal profession and Ethical Standards in Administration of justice

It is generally said that 'law is what law does'. And what law does, is to a large extent structured and influenced by the activities of the legal profession, including the Judges. In any discussion on law and ethics therefore, one has to examine closely the standard of ethics of the legal profession and role of lawyers in administration of Justice.

What makes Law, a Profession? Profession involves service of a high order which demands skill, specialisation and ethical conduct. In return, communities have authorised members of the profession to have monopoly of the service rendered, vested public trust on them, and endowed high status in them. The professions' ethical code is part formal and written. The informal is the unwritten code, which nonetheless carries the weight of formal prescriptions. It is characteristic of professional codes to be altruistic in sentiment and service-oriented in content and concerns. The ethical code of lawyers is full of such commitments and obligations. It is instructive to make an assessment of the formal code of ethics the Indian legal profession has adopted to realise the high moral principles laid out by the Indian Constitution.

The Bar Council of India under powers vested in it under Section 49(1)(c) of the Advocates Act, formulated certain rules relating to standards of professional conduct and etiquette. They relate to the duties of the advocate which he owes to the public, to the court, to his client, to his opposite Counsel and to colleagues in the profession. As in other professions, an Advocate who is established in the profession is expected to impart training to juniors without accepting fees therefor. Every lawyer, according to the code of ethics has also a duty to render free legal aid to those indigent persons in need of legal services. An Advocate is also prohibited from taking other employment or engaging himself in other trade or business while practising law.

The Bar Councils are elected bodies and the code of ethics constitutes what they consider as essential to preserve the dignity and status and to fulfil the role as officers of court of the profession. The Advocates Act provides power to the Bar Councils to inquire into cases of misconduct of its members through Disciplinary Committees constituted by them. Section 42 of the Advocates Act provides that the disciplinary committee of a Bar Council shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure. The disciplinary committee at the end of hearing may dismiss a complaint, reprimand the advocate, suspend the advocate from practising law for a prescribed period, withdraw his licence altogether or otherwise deal with him. Costs can also be awarded in such proceedings. An appeal lies from the disciplinary committee of the State Bar Council to the Bar Council of India and, in selected cases, to the Supreme Court of India.

Interestingly, the nature of the rules and the way they are administered seem to suggest that the profession is concerned mainly to preserve its monopoly over legal services with little concern for the consumers of justice. The Indian legal profession is organised like a pyramid with concentration of work in few hands at the top who charge unlimited fees and show little respect to the rules concerning free training of juniors and free legal aid to the poor. According to the Report of the Gujarat Legal Aid Committee (1971), the so-called noble, learned profession of law

allows "the market forces of demand and supply to operate with naked fury" bringing discredit to the system of administration of justice and denial of equal justice to majority of litigants.

A number of astonishingly unethical practices have been reported even at the highest levels of legal profession which, in business, can easily come within the definition of "unfair trade practices". These include what is called 'bench fixing' under which through a strange abuse of norms of ethics, 'inconvenient' judges are avoided or 'convenient' judges are adopted by the lawyers to hear one's petition. In some places it is reported that strong-arm methods including anonymous petitions against presiding officers are adopted to force their transfer from one station to another when they do not oblige an influential member of the Bar. The role of advocates in corrupting the courtroom bureaucracy has assumed menacing proportions in some places particularly at lower levels of the judiciary. Again, advocates have to share a large part of the responsibility for unpardonable delay in the adjudicative process. Adjournments are obtained on flimsy grounds and judges who deny such a privilege to accommodate advocates are put to serious hardships, sometimes by the majority of members of the local Bar.

Another unethical practice that is becoming an increasingly widespread menace threatening the foundations of fair and objective justice is the relations of judges practising in the court in which the concerned judge is a member. The relevant rule in the Code of Ethics is being interpreted narrowly to mean the 'Bench' in place of the 'Court' by which all types of relatives of judges are allowed to build up roaring practice mainly on the basis of contact and relationship, vitiating the purity of administration of justice.

Time and again, there was public outcry against the escalating cost of justice through the court system. Despite this, many leaders of the profession have become notorious for charging unconscionable fees wholly disproportionate to the services rendered. Rules of court, prescribing the schedule of professional fees, are openly flouted with total impunity and a situation has reached wherein quality legal services are now beyond the reach of the majority of litigants in the country. It is indeed paradoxical that the legal system requires the services of professional lawyers for its effective use and at the same time keeps such services beyond the reach of the average man. Although normatively, the law is the same for all citizens, functionally it varies according to the socio-economic status of the persons involved. It is not that the person who needs the services most get them, but that the person who can buy the best available legal talents gets maximum services. People living in the far-flung countryside and in locations geographically handicapped including tribal areas have a whole range of unmet legal needs for which the existing professional set-up has little relevance. The monopoly on legal practice granted to the professional has accentuated the problem and marginalised a large section of Indian people in terms of availability of legal services and access to justice. There is no scheme of legal aid systematically administered by the private Bar and, individual practitioners, if they render legal aid, it is at the instance of the court or as a matter of charity. Even the Rules of Professional Ethics adopted by the Bar Council of India require the lawyers to give legal aid only subject to their economic circumstances!

The State-sponsored legal aid schemes have not yet made any substantial improvement in the condition of the poor in need of legal services. There are complaints that the schemes are not picking up least partly because of the unhelpful attitude of some sections of the Bar. People have therefore enthusiastically welcomed the advent of "Lok Adalats" to settle disputes out of court even without the involvement of legal practitioners. Sensing the mood of the people and realising the inevitable drawbacks of the adjudicatory process in the formal court system, legislatures have increasingly tended to exclude appearance of lawyers by way of right. Today, there is a conscious and deliberate search for alternate dispute resolution mechanisms wherein the procedure can be less formal and the lawyer involvement can be minimal or avoidable. Without passing any judgment on this trend in the legislative and adjudicative processes, one can argue that professional re-organisation could go a long way in better delivery of legal services in and outside the court system.

The case for restructuring the profession is canvassed by a section of the professionals themselves. It is common knowledge that work is unduly concentrated in a few hands at the top of the

professional pyramid keeping a large bottom layer underemployed and underpaid. Concentration of work leads to demands for adjournments and delays in the judicial process. It further tends to the uneven distribution of professional competence resulting in the poor people receiving the least competent personnel in the organisation. The mounting fees charged by the lawyers on the top is also a direct result of undue concentration of work maintained by a vicious system of cornering "legal business" through methods legitimate and otherwise.

If equal justice under law is to become a more realistic goal there is need for a rational reorganisation of the private Bar. In England and the United States the problem appears to have been tackled to large extent by a massive programme of State-funded legal aid schemes. In socialist countries it is tackled by greater social control of the profession and by statutory creation of lawyers' collectives for defined regions with pre- determined service charges. In some other places legal insurance is being attempted. Specialisation, division of work among different classes of practitioners, assignment of juniors with senior lawyers, and professional bodies themselves regulating work and fee distribution are steps in the same direction. Which of these strategies or combination of them will serve the conditions in India, is a matter which require serious and urgent consideration of the Bar Councils and the Government. Since access to legal services is a constitutional requirement and a professional necessity, it is advisable to evolve strategies which will help re-organise the delivery system in a manner conducive to professional values and to consumer needs. It is clear that the present pattern of professional organisation cannot continue for long without damaging the efficacy of the justice system itself.

Professional Competence and Equal Justice

Admittedly, there is wide variation in the quality of services offered by members of the profession. To a certain extent, it is inevitably so. However, the problem is the increasing erosion of even a minimum level of professional competence expected of members of the Bar. Whether it is because of the uncontrolled expansion in admission to the Bar or because of the extremely deplorable state of legal education in many Universities in the country, the fact remains that the average citizen is left with ill-equipped and poorly trained legal practitioners who enjoy a monopoly without commensurate social accountability. Unfortunately, neither the disciplinary jurisdiction of the Bar Councils nor the negligence liability in Common Law are effective means to enforce accountability or extract competent services from individual practitioners. The ignorance of the common man and the corruption in the system have put a discount on dishonesty and indifferent delivery of services. The effect is unmistakably felt on the justice system and its credibility amongst the people.

Dilution of professional standards and consequent weakening of the administration of justice have reached disturbing proportions at some levels and in some regions. If the ignorant, unsuspecting public are not protesting, it is only because of the overall performance of the system and a sense of helplessness in doing anything about it. As such, the profession must view the malaise seriously and take all possible steps to arrest the decline and redeem the promise for which society has reposed trust and gave monopoly of services on it. On different occasions, knowledgeable people and professional bodies have recommended a variety of steps in this direction but the implementation has been far from satisfactory.

Admittedly, there is inadequate enforcement of professional discipline and standards of ethical conduct. Very few people outside the profession are aware of the existing system of punishing erring advocates. Peer group justice has not been a success if one were to go by the statistics of violations and the extent of indiscipline often noticed among the advocates. Punishments administered are said to be too mild which in many cases had to be corrected by the Supreme Court. The cases are not publicised and the public are the dark about the misdeeds of many lawyers on whom they depend for their life, liberty and property. A number of unholy practices many of which are not even recognised as unethical conduct continue unabated at different levels of the Bar. Besides, strike and boycott of courts at State and local levels have become a regular feature with advocates who are getting unionised on political and regional grounds. The fond hope of the All India Bar Committee (1954) for an integrated Bar with high professional standards is steadily being eroded by the actions and omissions of a certain section of advocates themselves.

The situation calls for a revision of the rules of professional conduct and etiquette keeping in mind not only the interest of members of the profession but also those of the litigating public. There is need for greater openness and wider public participation in the discipline enforcement mechanism of the Bar Councils. The severity of punishments need an upward revision in case of repeated violations or gross misconduct particularly when the lawyer involved is a senior member of the Bar. The electoral process by which Bar Council members are elected also need changes with a view to let public-spirited, profession-minded lawyers assume charge of the decision-making bodies of the organised Bar. The supervisory role of the High Courts on disciplinary matters may have to be revived at least in a limited manner to enforce accountability from indisciplined members of the Bar.

An efficient Bar alone can strengthen administration of justice. Mediocrity, indifference and incompetence on the part of members of the profession can seriously vitiate the course of justice and undermine public confidence in the system. As such, standards at the Bar can no more be left to the exclusive jurisdiction of few elected members of the Bar. A more effective system of monitoring, development and accountability will have to be evolved, if necessary, by a thorough revision of the Advocates Act and the rules thereunder. In the context of judicial reforms, a thorough study of the organisation of professional services, the needs of the Bar at the turn of the century and its role in a people-oriented scheme of administration of justice is urgently required.

Lawyers Strike

An issue which has assumed importance not only on ethical grounds but also on the basis of contractual obligations in a civilized society, is the frequent paralyzing of judicial administration by lawyers resorting to strike and boycott of courts. Mandal Commission implementation, arrest of or assault on a lawyer, implementation of Family Courts Act increase in the pecuniary jurisdiction of civil courts, division of courts for easier access to justice, transfer of judges are some of the issues on which lawyers have gone on strike from one day to three months or more. By resorting to strike for whatever reasons, the lawyers, in fact, cause immense problems for the general public besides positive harm to the interests of their clients. It is contended that by frequent resort to prolonged strikes and boycotts, the advocates are holding the society to ransom contrary to all principles of professional ethics.

Justice Wadhwa of the Delhi High Court in a recent report on police-lawyer conflict criticised the lawyers' strike stating that "militancy has no place in the legal profession committed to rule of law and bar association is not a trade union and strike by lawyers amounts to denial of justice to the litigants". A former Chief Justice of India suggested that lawyers are committing professional suicide by resorting to strikes and it does amount to professional misconduct. Unfortunately, the Bar Councils which lays down professional discipline under the Advocates Act have a different opinion on the issue and sometimes themselves call upon advocates to go on strike! Strikes aggravate the problem of delays and contribute to the further weakening of an otherwise tottering judicial system.

Judicial Ethics and Accountability

No discussion on law and ethics can be complete without reference to the ethics of judges and their accountability to judicial functions. In the recent past there have been reports of alarming increase in judicial improprieties and corruption even in the highest judiciary of the country. According to some, the question of judicial accountability causes serious concern on account of the irresponsible conduct of certain judges under the cover of judicial independence provided by the Constitution and the laws. In the higher judiciary there is no way of proceeding against a corrupt judge excepting through a long drawn out process of impeachment in Parliament. Recent incidents involving sitting judges of the Supreme Court and a few High Courts have shaken the faith of the public in the integrity and fairness of our judicial system and unless something drastic is done without delay, the system may receive such a shock from which it may become difficult to recover.

Law, Lawyers and Public Interest

Legal profession is by and large a private sector activity. As its role in society is heavily oriented

towards the cause of public interest, the people have reposed trust on the members of the profession to govern themselves and conferred monopoly protection on the services offered. With the decline in the quality of services, the increase in the cost and delay in litigation and the non-accountability of some sections of lawyers, a situation has reached for a thorough re-appraisal of the role of the profession in society. A people-oriented profession rooted in public service has to reflect public accountability and concern for the common man in need of legal services. The legal profession took a leading role in the Freedom Movement and took public responsibilities in a spirit of service to the nation and its people. Today it has become a market place where the highest bidder gets the services and the common man is totally neglected. For nearly a generation or two, the Indian Bar, excepting some honourable exceptions failed to respond to issues of access to justice to the disadvantaged, equal justice to all, law reform in public interest, communal harmony and peace within the country and outside. On some occasions, there is evidence to argue that members of the profession have gone against public interest prompted by pure selfish interests. Does the same rule of ethics which they adopt in litigation between private parties apply with same emphasis to issues involving public interest? Are there not issues in a developing and unequal society like India which warrant public interest advocacy where the adversary model of adjudication has very little or no relevance? Is there not a need for a public sector in the legal profession with a new set of ethics articulated largely on meeting the unmet legal needs of the rural and urban poor? Can any professional, even under the adversary system, deny the need for a certain level of personal responsibility not necessarily subsumed in what is conceived as professional responsibility?

It was Gandhi who was himself a lawyer who articulated a different role for lawyers both in the profession and in society. Uniting parties through conciliatory methods, reaching compromises without compromising truth and conscience, winning clients cases only if it so deserved according to one's own conscience and keeping the purity of administration of justice in all that one does was the message of the Father of the Nation to his professional colleagues. Gandhiji would not subscribe to the theory that it is the duty of an advocate to defend a client whom he knows to be guilty. This is the Indian understanding of professional ethics which unfortunately has been ignored with the decline of the indigenous legal system. An agonising re-appraisal of professional obligations is high on the agenda of the nation. Profession for the people and not *vice versa* has to inform the organisation and functioning of the profession at every level.

The relationship between Law and Ethics ultimately comes down to the norms and standards of conduct practised by lawyers, judges and other functionaries of the legal system. While a substantial majority of law persons are still keeping up the ethical demands of the profession, an increasing number of professional deviants are creating serious problems which leads society to question the very ability of the profession to correct the distortions and to serve the public interest. It is time that all right thinking members in society within the profession and outside take an active interest in the organisation and functioning of the legal system lest posterity should accuse the present generation for being silent conspirators to the murder of democracy, rule of law and Constitutional Government.

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CHAPTER 1

THE NATURE OF LAW

2. The purpose of legal theory

Since legal theory is in general an attempt to answer the question "What is law?", we may first inquire why it is that so much time and energy should be devoted to this problem. It has been truly observed that no vast literature has been dedicated to answering the analogous question "What is chemistry?" (*a*). What then, we may ask, are the reasons that have motivated this investigation into the nature of law? For these may well throw light on the kind of answer that is sought and the method that is most appropriate to the inquiry.

In the first place it is clear that attempts to define law are not simply the result of that sort of desire for formal elegance which requires that a treatise should begin with a short definition of its subject-matter. True, some writers such as Austin (*b*) and Kantorowicz (*c*) appear to have regarded the definition of law in this way as merely preliminary to their further work on jurisprudence. In the event however the former devoted six lectures and the latter eighty-nine pages to the task. The need for formal elegance alone will hardly explain this sort of treatment.

It could be argued that the need to provide a definition of law springs from the necessity of clarifying the most basic of all legal concepts, the concept of law itself. For if jurisprudence is concerned with the analysis of legal concepts, surely the first problem is to analyse the basic concept. Further, it might be argued that this is no mere theoretical matter but one of practical legal significance. Perennial questions such as whether international law is really law and whether an unjust law can really be

(*a*) H. L. A. Hart, *The Concept of Law* 1. The analogy is not altogether appropriate, for chemistry is but one branch of science, and a vast literature is dedicated to the nature of science itself.

(*b*) Austin regarded it as necessary to define law in order to establish the province of jurisprudence. His introductory lectures on this topic were eventually published as *The Province of Jurisprudence Determined*, in 1832.

(*c*) Kantorowicz, *The Definition of Law* (ed. A. H. Campbell, 1958) was written as the first part of an introduction to a projected co-operative comprehensive *Oxford History of Legal Science*.

law can only be solved, it is sometimes claimed, by reference to the definition of law (*d*).

This argument, however, is misconceived. The fact is that "law" itself is not a legal concept any more than "geometry" is a geometrical concept (*e*). In geometry the mathematician calculates or operates with certain geometrical concepts such as "circle," "triangle," "parallel" and so on, but the concept of geometry itself is not included within this framework, nor does he perform any operations with it. Likewise in law we find such legal concepts as "consideration," "possession," and so on, used by the lawyer to draw conclusions and solve legal problems, but the concept of law itself is not one that figures in legal argument or gives rise to conclusions of practical significance: no legal judgment ever hinges on the definition of law. "What constitutes consideration?" is a typical legal question of practical importance; "what is law?" is a theoretical question, not a question of law but a question about law. Consequently the standard procedure used to construct a definition of a legal concept, mapping out its boundaries by references to statutes and judicial decisions, will not apply to the problem of defining law itself. Conclusions of law do not depend on the definition of law, and legislators and courts, concerned as they are with practice rather than theory, have not therefore sought to lay down definitions or clarifications of this concept.

Nevertheless, it could be argued, this merely means that the vast majority of legal problems entail no reference to the concept of law; it does not mean that the concept is entirely without practical significance. How, without a definition of law, can we decide such practical matters as whether international law is law and whether an unjust law is law? And are not these questions of more than theoretical importance? Yet the existence of this kind of problem does not entail that the definition of law has itself a practical *legal* use. This would only be the case if lawyers and courts were to decide actual legal cases by reference to a definition of law. Now we do on occasion find courts faced with the task of

(*d*) This claim is made by Goodhart in "*An Apology for Jurisprudence*" in *Interpretations of Modern Legal Philosophies* (ed. Sayre, O.U.P., New York, 1947), Chap. 12.

(*e*) "Law is no more a legal concept than courage is a courageous concept" —Buckland, *Some Reflections on Jurisprudence*, p. vii. But Buckland's comparison is unfortunate because the term "courageous concept" has little meaning.

deciding whether or not to apply for example a rule of international law. In such cases, however, courts do not begin by defining law in order to decide whether or not international law is law. What they do in fact is to inquire whether there exists within the framework of international law such a rule as is claimed (*f*); and if the court is a national court, this may be followed by a further inquiry whether such a rule must be applied by the national court (*g*), and this will depend on those rules of the national law that govern the application of international law. Similarly, we occasionally find courts urged to refuse application to some law on the ground of injustice. Here again, however, courts do not begin by defining law in order to determine whether an unjust law can qualify as law. If a court does refuse to apply the rule in question, this may be because its injustice contravenes a fundamental rule of the state constitution, as may happen for instance when the United States Supreme Court declares a statute to be void (*h*). Or it may be because its injustice runs counter to the fundamental policy of the state's own legal system, as where an English court refuses to apply foreign laws repugnant to the distinctive policy of English law (*i*). Or again a court may be able to avoid the injustice of a rule by modifying it in accordance with established canons of statutory interpretation (*j*). But in none of these cases is the concept of law itself used as a touchstone of the legality of legal rules.

This type of question, then (whether international law or an unjust law can really be law), has practical significance; but its significance lies outside the law and law courts, and the answer is connected with, but not dependent on, the definition of law.

But if law is not a legal concept, it is nevertheless the basic concept of jurisprudence (*k*), and its analysis is relevant to that

(*f*) See for example the *Asylum Case*, I.C.J. Rep. 1950, p. 276, where the International Court of Justice investigated whether an alleged custom showed a general practice accepted as law.

(*g*) English courts regard international law as part of English law, subject to certain qualifications, one of which is that international law must yield before an Act of Parliament. See Oppenheim, *International Law* (8th ed.), 39–41.

(*h*) See the discussion of *Marbury* v. *Madison*, 1 Cranch 137; 2 L.E.D. 60, (1803) in Evans, *Cases on Constitutional Law* (7th ed. 1957) 48 *et seq.*

(*i*) See Cheshire, *Private International Law* (7th ed.), 134–142.

(*j*) According to the "Golden Rule" of statutory interpretation (*infra*, § 25), the court may depart from a literal interpretation of a statute, if adherence to the literal meaning would lead to an absurd or wholly unreasonable result.

(*k*) See B. E. King, "The Basic Concept of Professor Hart's Jurisprudence" [1963] C.L.J. 270.

of all other legal concepts. Such legal notions as "right", "possession" and so on can largely be explored without reference to the concept of law, but in the end completeness involves reference to this. For legal rights have to be distinguished from other (non-legal) rights, possession in law from possession in fact and so on; and this leads back to the definition of law itself.

But the desire to define law springs also from a desire for generalisation. Having learnt to define various specific crimes, we find it natural to ask for a general definition of the notion of a crime. Likewise, knowing how to tell whether a proposition is a valid proposition of English law, French law or any other system of law, we feel it natural to take the further step of looking for a general test of legality and searching for some abstract criterion by which to determine the validity of a rule of law (*l*). In so doing we are also in fact trying to set up an abstract model of a legal system at work in society, just as an economist for example seeks to construct a model of an economic society (*m*). And the model so produced may, if not oversimplified and misleading, afford insight into the workings of concrete legal systems.

Furthermore, the word "law" is one high in emotive content (*n*). Refuse to classify unjust laws as law, and the citizen will feel more free to disregard them; cease to describe international law as law, and much of its prestige and effectiveness is gone; designate a rule of constitutional law a mere convention, and its obligatoriness diminishes. Accordingly, whether or not to apply the term "law" to such phenomena may not be a strictly legal question, but it is one of considerable non-legal or political importance.

Now one reason why the definition of law has consumed so much time and energy is that this notion is itself surrounded with philosophical perplexities (*o*). In the first place the traditional method of definition is inadequate for the concept of law. The traditional method is to define something by specifying the class to which it belongs and by describing the features which distinguish it from other members of this class. For example, we

(*l*) See R. Wollheim, "The Nature of Law" in (1954) 2 *Political Studies* 128; see Lloyd, *Introduction to Jurisprudence* (2nd ed.), 46–48.

(*m*) See G. Sawer, *Law in Society*, 1–2.

(*n*) See Glanville Williams, "International Law and the Controversy concerning the word 'Law'" (1945) 22 B.Y.I.L. 146.

(*o*) See Hart, *op. cit.* 6–17.

may define a man as a rational animal, locating him within the animal kingdom but differentiating him by his rationality from the other members of that kingdom. Of course we could define law as a species of rule and set out what distinguishes legal from non-legal rules. But such a definition would be largely inadequate simply because so much of the difficulty in defining law stems from the problem of explaining exactly what rules are. We know what law is and what rules are, but yet we find it hard to explain their nature. Like a traveller who knows his way from point A to point B but lacks a complete grasp of the geography of the country, we need a logical map to orientate us in this conceptual territory. We need to learn to distinguish between conduct enjoined by law and conduct compelled by force; we need to discover the inter-relation between law and morality, to ascertain whether conformity with morality is an essential part of the nature of law.

What emerges then is that no neat and simple definition of law will do. If law were a legal concept, it might be useful to lay down clear boundaries between what shall and what shall not count as law, just as in the law relating to burglary it is useful to draw up a precise definition of the term "night time"(*p*). But the fact that the concept of law has no practical application precludes the need for this kind of definition. Nor on the other hand would such a definition solve any of the perennial problems, such as whether international law is law. To this question it is no answer to say that it all depends on how you define law, that international law is law in A's sense and not law in B's; for the question remains whether it is law in the ordinary sense of the word. Nor again would a short, simple definition provide an adequate analysis of a rule, an examination of the difference between legally obligatory conduct and conduct coerced by force, or an investigation into the connection between law and morality.

What we need is an analysis to unravel the confusions surrounding the concept of law, to highlight the salient features of a legal system and to furnish us with an insight into the nature, function and operation of law. Here the various theories of law advanced by legal theorists are of particular value, for they not only constitute a starting-point for our investigation but also

(*p*) "Night" is defined by s. 46 of the Larceny Act, 1916, as the hours between 9 p.m. and 6 a.m.

serve to emphasise the different facets of law and so build up a complete and rounded picture of the concept.

It should be noted, however, that these different theories are not necessarily all attempts to answer the same question. Some theories try to define law by reference to its formal characteristics and to state what distinguishes law from other related phenomena. Others concentrate rather on the content of law and inquire what law ought to be rather than what it is. Yet others stress the operation of law in society and attempt to describe the function of law as it works in actual practice. Conflicts between such theories then are not altogether real, in so far as each theory is dealing with a slightly different aspect of law.

Nevertheless real conflict does arise. Obviously a theory defining law as the command of the sovereign is diametrically opposed to one which defines law as a rule in accordance with right reason. Less obviously, however, this kind of conflict cannot be solved in the same way as ordinary conflicts. For the disagreement here is not one of fact but one of attitudes. o matter how many examples we provide of rules commonly designated legal albeit not laid down by a sovereign, the adherents of the "command" theory will not budge from their allegiance but will reply that such counter-examples are not really law. Conversely, however many unjust laws have been enacted, the supporters of the "right reason" theory remain unmoved and they in their turn will discount all such examples as violations of law rather than true law. Yet since both sides are agreed as to the facts about society and about legal systems, to treat the dispute as one to be resolved by further evidence is to mistake its nature. Rather we should reflect that whatever the theory the facts remain the same; and we should ask, therefore, what has led different writers to put forward such different pictures of law, and which features of law are illuminated, and which obscured, by each theory

In an elementary textbook we cannot investigate each different theory of law. Indeed this would reduce the text to nothing but a catalogue of what all other writers on jurisprudence have said. Instead, we shall consider three particular approaches to law on account of the influence which they have had and the insight which they provide into the nature of the law. These are the theory of natural law, which defines law according to its

content and looks to the problem of what law ought to be; the imperative theory, which defines law according to formal criteria; and the realist theory, which defines law in terms of its actual functioning and operation. The discussion of these three theories will be followed by an examination of the problem from the standpoint of modern linguistic philosophy and in the light of Hart's analysis.

3. Law as the dictate of reason: natural law

The idea that in reality law consist of rules in accordance with reason and nature has formed the basis of a variety of natural law theories ranging from classical times to the present day (*q*). The central notion is that there exist objective moral principles which depend on the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only truly law in so far as it conforms to these principles. These principles of justice and morality constitute the natural law, which is valid of necessity, because the rules for human conduct are logically connected with truths concerning human nature. This connection enables us to ascertain the principles of natural law by reason and common sense, and in this the natural law differs from rules of ordinary human law (positive law) which can be found only by reference to legal sources such as constitutions, codes, statutes and so on. But since law can only be true law if it is obligatory, and since law contrary to the principles of natural law cannot be obligatory, a human law at variance with natural law is not really law at all, but merely an abuse or violation of law.

The attractions of the theory are self-evident. Ordinary laws all too often fall short of the ideal, and from the celebrated protest of Antigone (*r*) against the tyrant's unjust decree to the rejection at Nuremberg (*s*) of the defence of superior orders, men have felt the need of an appeal from positive law to some higher standard. Just such a standard is provided by natural law, which

(*q*) There is a vast literature on Natural Law. For a general view see d'Entrèves, *Natural Law*; Friedmann, *Legal Theory* (4th ed.), Chaps. 5–12; Jolowicz, *Lectures on Jurisprudence*, Chaps. 2–5; Lloyd, *The Idea of Law*, Chaps. 3–4; Hart, *The Concept of Law*, Chap. 9; Diss, *Jurisprudence* (2nd ed.), Chap. 20.

(*r*) Sophocles, *Antigone*, 453–457.

(*s*) See Lord Wright, "War Crimes in International Law" (1946) 62 L.Q.R. 40.

with its battle-cry "*lex injusta non est lex*" has served to criticise and restrict positive law.

Natural law also serves as a defence against ethical relativism. Indeed the idea of natural law (*t*) originated in answer to a philosophical theory which challenged the obligatoriness of all human rules and even of law itself. This theory arose out of the celebrated distinction drawn by Greek philosophers between occurrences regulated by laws of nature, *e.g.*, the growth of plants, the movements of the heavenly bodies and so on, and conventional phenomena dependent on human choice, *e.g.*, human customs, manners and fashions. On this view, rules of law, like those of language or etiquette, appeared ultimately to depend not on natural necessity but rather on pure historical accident and convention; and, being arbitrary and contingent rather than necessary and obligatory, they seemed to have no special claim to obedience. It was in answer to this that Aristotle pointed out that while some laws seemed to be purely conventional, others seemed to be common to all states (*u*). The laws relating to ransom for example varied from city to city, an arbitrary sum being set by the law of each state, whereas the law that heralds were inviolable was common to all city states, as though it were natural for all men to have such a law. The very distinction which had threatened to discredit law was shown in fact to apply within the context of law itself, which was accordingly distinguishable into conventional and natural law.

This, however, was but the germ of a natural law theory. The real construction of a theory was the work of the Stoic philosophers of the following centuries. Their philosophy was that man should live according to nature and that since the distinctive feature of man's nature was his endowment with reason, this meant that he should live according to the dictates of reason (*v*).

(*t*) See Jolowicz, *op. cit.* Chap. 2

(*u*) Aristotle, *Nicomachean Ethics*, 1134b-1135a; Lloyd, *Introduction to Jurisprudence* (2nd ed.), 70.

(*v*) *Cf.* Cicero, *De Republica*, III, 22–23, "There is indeed a true law (*lex*), right reason, agreeing with nature, diffused among all men, unchanging, everlasting. . . . It is not allowable to alter this law, nor to derogate from it nor can it be repealed. We cannot be released from this law, either by the praetor or by the people nor is any person required to explain or interpret it. Nor is it one law at Rome and another at Athens, one law to-day and another hereafter; but the same law, everlasting and unchangeable, will bind all nations at all times; and there will be one common lord and ruler of all, even God the framer and proposer of this law"; Lloyd, *op. cit.* 70–71.

Now one attraction of natural law theory is the possibility which it promises of finding common moral ground for different religions and different outlooks. Though Christianity, like Judaism, derived many of its moral tenets from divine revelation, nevertheless St. Paul had taught that conscience unaided could arrive at moral truths (*w*). On this foundation the medieval theologians were able to synthesise Christian doctrine with much of the teaching of non-Christian philosophers. According to Aquinas, for example, all things are governed by God's eternal law, man differing from all else in that he alone can choose whether or not to obey that part of the eternal law which applies to him (*x*). This latter part of the eternal law is the natural law, discoverable by reason and quite distinct from the revealed portion of divine law. This means that Christian and non-Christian alike can arrive at the same moral truths, since discovery of the natural law is independent of belief in the existence of a divine being. Indeed later philosophers considered the validity of natural law to be independent of the existence of the deity (*y*). But whereas the medievalist had viewed natural law from the standpoint of man's function and duties, later philosophers such as Hobbes and Locke were concerned rather with man's rights, and sought to derive from the characteristics of human nature certain natural or fundamental rights (*z*).

The idea of natural law, however, raises formidable difficulties. These centre round the problem whether moral propositions can be derived from propositions of fact, whether an "ought" can be deduced from an "is." The value of being able to make such a derivation is that factual propositions can be established as true and are therefore less open to disagreement than moral propositions. Men may disagree about whether euthanasia is justifiable, but not for example about whether arsenic is poisonous. Accordingly, if moral propositions could be deduced from factual propositions, we could establish moral truths commanding general agreement.

The difficulty is that the inference of a moral proposition from

(*w*) See *Romans*, II. 14–15.

(*x*) Aquinas, *Summa Theologica*, 1a-2 ae. xci. 2, and 1a-2 ae. xcv. 2; Lloyd, *op. cit.* 76—79.

(*y*) Grotius, *De Jure Belli ac Pacis*, proleg. 11.

(*z*) See Hobbes, *Leviathan*, Chaps. 14–15; Locke, *Treatise of Civil Government*, Bk. II; Lloyd, *op. cit.* 79–82; Hume, *Treatise of Human Nature*, Bk. III, part 2; Hart, *op. cit.* 189–195.

a factual statement is not apparently one of strict logical necessity (*a*). In a strict logical inference it is impossible to affirm the premise and deny or even question the conclusion. For example it is impossible to affirm that an object is red and at the same time deny that it is coloured without arriving at a self-contradiction, because the notion of being red includes, as it were, the notion of being coloured. By contrast, whatever factual proposition is used as the premise for an ethical conclusion, the premise can be affirmed and the conclusion denied without producing a self-contradiction. Take for example this argument: " if anyone shows you kindness, you ought to repay him with kindness ". Here the conclusion seems to follow naturally enough from the premise, but we can affirm the latter and deny the former without illogicality: " Smith has always shown me kindness but I am not morally obliged to repay him with kindness" may strike us as odd but hardly self-contradictory. Further examination, however, of the problem of bridging the gap between factual and moral propositions is outside the scope of the present discussion, which is confined to the way in which natural law theory seeks to bridge this gap.

The way in which natural law seeks to do this is by arguing that if it is a natural law for man to act in a certain way—and this is something which observation can reveal—then he ought morally to act in this way. If for example it is a natural law for mankind to reproduce itself, then men should beget children. It would be no more right for men to act contrary to this law than for trees not to bear fruit, for each would be acting contrary to their nature.

Bentham (*b*), who regarded natural law as nothing but a phrase, and natural rights as " nonsense on stilts " considered that natural law reasoning resulted from confusing scientific laws with moral and legal laws. Scientific laws describe what generally does occur; moral or legal laws prescribe how men *should* behave. The law of gravity, for instance, is a general description of how things do behave, and any discrepancy between the law and

(*a*) The *locus classicus* on the gap between " ought " and " is " propositions is Hume, *op. cit.* 469; see Toulmin, *The Place of Reason in Ethics*, Chaps. 7–8, for a criticism of the view that moral arguments are defective, because they are not deductive: Toulmin points out that scientific arguments too are not deductive but are nonetheless valid. Lloyd, *op. cit.* 23.

(*b*) See Bentham, *A Fragment on Government*, Chap. 4; Lloyd, *op. cit.* 127–128.

observed phenomena means, not that the law of gravity has been broken, but that our theory of gravity must be revised to fit the facts. Accordingly, it is fallacious to argue from natural laws of a scientific type to natural laws of a moral type. To say that it is natural law for man to have children, means merely that this is his general tendency, not that he is under any moral or legal duty to conform to this tendency.

But this attack is not altogether well founded. Even if scientific laws are descriptive, it is still open to the natural lawyer to contend that they describe not merely how things do behave, but the manner in which it is ordained that they must behave. In other words he may argue that the creator has imposed a law on things, a law to which they (unlike men) are under perfect obedience. Discrepancy between observed phenomena and the law of gravity would then mean simply that we had not yet succeeded in accurately discovering the law actually ordained. Here then is no necessary confusion of scientific and moral law.

Moreover, such criticisms overlook the teleological flavour of natural law thinking (*c*). To the Greeks, it seems, regular occurrences, such as the growth of acorns into oaks, were more than just examples of regular behaviour patterns; they exemplified the fulfilment of a natural function. It was regarded as the function of an acorn to develop into an oak, this development being the natural goal or end towards which it had to strive. Likewise it was the function of smoke to rise, fire to burn, stones to fall and so on. Man, too, according to this view had his own proper function, his own end or goal, which, whether it be regarded as divinely given or not, could be discovered by reason and reflection. Indeed it is worth noting how much of these teleological overtones still remain in our ordinary language today. We consider it the *function* of the white blood corpuscles to kill harmful bacteria, of the kidneys to cleanse the blood of waste matter, of the lungs to oxygenate the blood and so on.

Natural law arguments then are of the following pattern. Everything has its proper function, and so to be good of its kind it must fulfil this function. For instance, the proper function of a watch is to indicate the time correctly, and so to be any good as a watch it must do this. Likewise, man too has his own proper

(*c*) See Jolowicz, *op. cit.* Chap. 2; Hart, *op. cit.* 182–189.

function which can be ascertained by reflection on the nature of man, his needs and his wants, and so to be a good man he must fulfil this particular function. How man must act in order to do this is laid down in moral principles discoverable by reason and common sense.

But the analogy between man and an object like a watch is misleading. To ascribe a function to a watch is to say that it was made or is used for some particular purpose. This analogy can only hold, if we can say that man has been given a purpose by his maker. But any argument based on this premise is in one respect disappointing. Part of the attraction of natural law was its guarantee that pure reason could arrive at moral truths which are indisputable. But a natural law theory based on the idea of a God-given function must begin by either proving or assuming the existence of God; and the problem of proving God's existence by reason alone is as difficult as that of deducing an "ought" from an "is", while to found the theory on an assumption rules out the hope of finding truths beyond dispute, because assumptions need not be universally accepted.

On the other hand we do use the term "function" without necessarily implying the existence of a maker or user; we may use the term to refer merely to the job which a thing performs. We speak of its being the function of the heart to pump blood, meaning only that the heart does in fact pump blood. Likewise to say that it is man's function to reproduce could mean merely that the human species is in fact self-reproducing. But this purely factual statement does not entail any moral proposition; there is no necessary truth of morals that what is should continue to be. Sometimes, it is true, the term "function" may be used to denote the job which a thing *ought* to perform, but statements using the word "function" in this sense are really concealed "ought" propositions and not indisputable factual propositions.

The attempt to derive natural law from a metaphysical theory based on the notion of function cannot it seems, succeed. An alternative argument is that the propositions of natural law are self-evident. Certainly such propositions as "it is wrong to make others suffer", "it is wrong to kill", do seem to be self-evident, the sort of things we know, as it were, by instinct. But this is a retreat from the more attractive claim that such propositions can be proved. For here the argument is that everyone knows such

moral truths as "killing is wrong", just as everyone knows such logical truths as "if A=B and B=C then A=C" Anyone who could not see that the latter statement is true would be judged abnormally stupid, if not wholly irrational. Likewise, so runs the suggestion, anyone contending that there is nothing wrong with killing would be reckoned for that very reason lacking in moral sense. In both cases, exceptional dissention is no refutation of the self-evident truth of the statements. There is, however, an important difference. With logical truths it is only the exceptional individual who fails to see their validity; otherwise they seem to enjoy a continuity of general acceptance. In morals, no such continuity of thought and no such general agreement is to be found. Indeed whole societies may differ on such questions: for example modern Western European society would not accept the ancient Greek view that slavery is justifiable. Attitudes to moral propositions, unlike attitudes to the truths of logic, vary with time and place, and this makes it difficult if not impossible to contend that such principles are in fact self-evident.

One attempt to salvage the theory involves the idea of natural law with a varying content (*d*). On this view the basic principles remain the same, but their detailed application would depend on the special circumstances of each society. The fact that ancient Greek society was largely unmechanised as compared with society in present-day Europe would affect the application of any general principle to the effect that a man is an end in himself and ought not to be used as an instrument by others. One difficulty here, however, is that the chief social difference for which allowance may have to be made may be a difference in moral attitude. The greatest difference between one society and another might well be simply the fact that the one accepts, and the other rejects, slavery, the colour bar, and so on. In such cases to allow the content of natural law to vary according to social differences would be to abandon any hope of objectivity in ethics or law.

Yet another approach is to start from a consideration of man's needs, desires and nature, and from this to construct a set of appropriate principles, *i.e.*, principles necessary to satisfy those needs (*e*). Human nature has certain obvious characteristics. For

(*d*) The chief exponent of this view was Stammler. See Stammler, *Theory of Justice*; Lloyd, *op. cit.* 84–85.

(*e*) *Supra*, p. 17 n. (*z*).

example, man is peculiarly vulnerable; he requires food, shelter and clothing in order to survive; he needs to live in societies. Given man's general commitment to survival and to the continuance of society, we can work out a rudimentary set of principles to satisfy these needs and support survival. Rules prohibiting violence, rules to protect the institution of family life, rules concerning property and so on will obviously be necessary. But such a basic theory of natural law does not carry us very far. It provides us only with a series of blank cheques, as it were: some rules about violence, some rules about family law, some rules about property are required, but we are not told which. All that the theory really does is to indicate topics of law rather than to provide actual legal rules.

Despite these objections to natural law, there remains a wide measure of agreement between natural lawyers and many of their opponents. Many positivists, *i.e.*, those who consider the existence of law to depend on its meeting certain formal requirements rather than on its conforming to ideal moral standards, would concede the existence of objectively valid moral propositions, but would part company from natural lawyers when the latter start contending that these propositions constitute a superior law failure to conform to which deprives ordinary positive law of all legality.

Now to describe moral propositions as natural law is in a way to get the best of both worlds. The term "law" furnishes that additional prestige which stems from the emotive power of the word, while the term "natural" suggests that these laws are in some way superior to ordinary positive law which is contingent and owes its origin to historical accident. But the temptation, to assimilate morals to law, though understandable, should be resisted, because this assimilation obscures certain vital distinctions between legal and moral rules and so prevents real appreciation of the nature of either.

Legal rules differ from moral rules in certain important respects. Legal rules admit in principle of alteration by legislation. Most legal systems provide legislative procedures for changing the law, and even where such procedures are absent, as in the case of international law, this absence is purely contingent: there is nothing illogical or self-contradictory in the notion of international law possessing a legislature. Moral rules on the

other hand do not even in principle admit of change by legislation; to change moral rules by legislation is not only factually impossible, it is unimaginable. What sense could it make to say that certain acts which have always been morally wrong shall from now on by decree be morally permissible? Moral attitudes may and do change, but not in this fashion.

Secondly, there is a difference relating to the settlement of disputes. Legal disputes are essentially amenable to adjudication: a dispute about the existence, meaning or application of a legal rule can be decided with finality by a tribunal. In moral arguments final settlement is unattainable not on account of some factual defect, but by virtue of the very nature of moral disputes; for the notion of adjudication is logically inconsistent with that of a moral conflict. If two people disputing about the morality of euthanasia were to agree to accept the verdict of a third party, any finality so obtained would be illusory. For even after judgment was given either party could still question the moral correctness of the "judge's" verdict. Moral disputes, unlike legal disputes, remain permanently open.

But apart from this, further difficulty arises from the claim that positive law contrary to natural law is void. This sort of contention has been advanced in connection with the trials of the war criminals at Nuremburg (*f*). Sometimes indeed an individual is so placed that the demand of the law and the requirement of morals run counter to each other. In such a case the natural lawyer's view is that the positive law is not really law and should not be obeyed; consequently obedience to the positive law should not necessarily avail as a defence if the individual is later prosecuted. To this the positivist replies that laws are man-made and can be unjust as well as just; "the existence of law is one thing, its merit and demerit another" (*g*).

In this dispute, both sides would agree as to the existence of a conflict between the positive law and the dictates of morality. Likewise, both would agree that in such a conflict law must give way to morality. The natural lawyer, however, would settle the conflict by designating the positive law as not really law, while the positivist would argue that this law can be criticised and

(*f*) See the discussion between Hart and Fuller on the morality of using the notion of natural law to secure retrospective convictions in (1958) 71 H.L.R. 593–629, 630–672. See also Pappe in (1960) 23 M.L.R. 260.

(*g*) Austin, *The Province of Jurisprudence Determined* (ed. Hart), 184.

rejected without any such theory, and that natural law theory has no monopoly of legal criticism.

Now this is not simply a factual dispute, to be settled by further evidence, but rather a conflict over how best to describe this situation (*h*). Is it better with the positivist to describe it by stating that here law says one thing and morality another? Or would there be some advantage in adopting natural law terminology and refusing to classify unjust laws as law? Any advantage must be either theoretical or practical. Theoretical considerations suggest no advantage, for if unjust laws were no longer classified as law, a complete study of a legal system would nonetheless still necessitate their investigation. Even if the Roman law relating to slavery is no longer classified as law, no study of Roman law would be complete without taking the rules on this topic into account.

From a practical standpoint, however, natural law terminology might seem to offer advantages. First, as an antidote to legal rigidity, it could provide flexibility, allowing rules of law to be changed from what they are to what they ought to be, on the ground that the law always is what it ought to be. But surely this is no more than a serviceable device which detracts from the certainty and predictability of law and which in modern times should surely be replaced by more explicit methods of alteration, *e.g.*, legislation. Secondly, the natural lawyer's terminology, it is claimed, would weaken the authority of unjust and immoral laws. Yet surely it may be better in such cases to highlight the conflict between law and morals and to stress that mere formal legality alone is no title to obedience, rather than to conceal the very existence of the conflict. Indeed, adoption of natural law terminology could even weaken our capacity to criticise the law. It is easy to move from the premise that if a rule is unjust it is not law to the conclusion that if a rule is law it is just, and this without realising that in the conclusion we may be determining in the first place that the rule is one of law by purely formal criteria. Starting from the position that *lex injusta non est lex* we slide easily to the position that what is on the statute book is morally right.

Moreover, natural law terminology tends to obscure the

(h) For a discussion of this type of non-factual dispute see Wisdom, *Philosophy and Psychoanalysis*, 51–101.

possibility of criticising law on other than purely moral grounds. For law must be evaluated by reference to its efficacy, general convenience, simplicity and many other factors, as well as by reference to the demands of justice and morality. Finally, to use natural law terminology to secure a conviction of those whose actions at the time of the performance contravened no rules of positive law, by finding them guilty of violating the natural law, runs counter to the highly important moral principle that no one should be held criminally liable for acts legally innocent at the time of their commission (*i*). Even in the trials of men like Eichmann this principle should not be lightly abandoned, and if it is abandoned then we should be quite clear what we are surrendering and why we are doing so rather than ignore the fact of surrender.

4. Law as the command of the sovereign: imperative law

Diametrically opposed to the theory of natural law is the positivist, or imperative, theory of law (*j*). This theory distinguishes the question whether a rule is a legal rule from the question whether it is a just rule (*k*), and seeks to define law, not by reference to its content but according to the formal criteria which differentiate legal rules from other rules such as those of morals, etiquette, and so on. Though this approach is often criticised as sterile and inadequate because it fails to take moral considerations into account, it was never intended by such exponents as Austin to exclude the problem of evaluating law: on the contrary, analysis was regarded as a necessary preliminary to the task of critical assessment, which in Austin's view should be made according to the principle of utility, a principle that serves as an index to such divine laws as are unrevealed (*l*).

According to Austin, whose version of the theory will be considered here, positive law has three characteristic features. It is

(i) On the principle *nulla poena sine lege* see *infra*, p. 127.

(j) The idea that law is the command of the sovereign was advanced by such writers as Bodin, Hobbes and Bentham, but found its chief expression in Austin, whose theory of law is contained in *The Province of Jurisprudence Determined*, first published in 1832. References here are to the 1954 edition by H. L. A. Hart. See also Dias, *op. cit.*, Chap. 14; Lloyd, *The Idea of Law*, Chaps 5, 8; Friedmann, *op. cit.*, Chaps. 19–20; Hart, *op. cit.*, Chaps. 2–4. The term "positivism" covers a variety of positions; see Hart, *op. cit.* 253 (note 10 p. 181).

(k) See p. 23. n. (*g*).

(l) Austin, *op. cit.*, Lecture II.

a type of command, it is laid down by a political sovereign and it is enforceable by a sanction. A typical example would be the Road Traffic Act, 1960, which could be described as a command laid down by the sovereign under the English legal system, *i.e.*, the Queen in Parliament, and enforceable by penalties for violation.

Now first we must clarify the term "command". How do commands differ from requests, wishes and so on? To Austin all these are expressions of desire, while commands are expressions of desire given by superiors to inferiors. This agrees with ordinary usage which allows us, for instance, to speak of officers commanding their subordinates but not of subordinates commanding their officers. This relationship of superior to inferior consists for Austin in the power which the former enjoys over the latter, *i.e.*, his ability to punish him for disobedience. Conversely, the subjection of the inferior to the superior consists in his liability to suffer a penalty for disobedience. In a sense, then, the idea of a sanction is built into the Austinian notion of command; logically it might be more correct to say that law has two rather than three distinguishing features.

We must now distinguish commands which are laws from commands which are not. Imagine a state governed by an absolute ruler R. Here the law is what R commands. But is the converse true? Are all R's commands law? Suppose he orders his servants to make preparations for a banquet; would this qualify as a law? Would we really wish to designate as law his every instruction, *e.g.*, to close the window, to turn up the heating and so on, even though R being an absolute ruler could have his servants executed for disobedience (*m*)? Now Austin distinguishes laws from other commands by their generality, laws being general commands; and indeed laws seem much less like the transitory commands barked out on parade grounds and obeyed there and then by the troops, and much more like such things as the standing orders of a military station which remain in force generally and continuously for all persons on the station. But there are, however, exceptions, for there can exist laws, such as

(*m*) Unless some distinction could be drawn, R would be in an analogous position to that of King Midas, whose touch turned everything without exception into gold. In fact there are various ways of ensuring that the laws of such a ruler can be distinguished from his non-legal utterances; to be law, they may have to be uttered in some solemn form, in some special place, according to some special procedure, etc.

acts of attainder, which lack this type of generality. Generality alone, then, is neither necessary nor sufficient to serve as the distinguishing feature of law.

Now if particular commands can qualify as laws, how can we distinguish laws from commands which are not law? Everyday life is sprinkled with examples of people giving commands to others: masters give orders to servants, teachers to pupils, parents to children and so forth. Sometimes commands are unlawful, as would be that of a bank robber who points his gun at the bank clerk and orders him to hand over the contents of the till. Indeed some have criticised the positivist theory as a theory of "gunman law", on the ground that it makes no real distinction between a law and the command of a bank robber (*n*).

Such criticisms overlook the importance of Austin's second requirement: for to qualify as law a command must have been given by a political superior, or sovereign. To Austin a sovereign is any person, or body of persons, whom the bulk of a political society habitually obeys, and who does not himself habitually obey some other person or persons. The latter proviso serves to exclude viceroys, colonial governors, satraps and so forth, who are obeyed by those whom they rule, but who are not their own masters but are subordinate to a higher ruler. Accordingly, one difference between the order of a gunman and the decree of a dictator (both of which depend on brute force and may be contrary to morality) is that the latter enjoys a general measure of obedience while the former secures a much more limited compliance.

One great virtue of this definition of sovereignty is to stress the fact that law is only law if it is effective, and this it can only be by being generally obeyed. Obviously perfect obedience is unnecessary, for many sometimes, and some continually, contravene the law without depriving it of all effectiveness. On the other hand without general obedience the law-maker's commands are as empty as a language no longer spoken or as a monetary currency no longer in use: they have the appearance but no longer the reality of law. Now the causes of this general obedience, whether fear, habit or love of order, are questions for the social scientist; how the sovereign came to enjoy this obedience, whether through conquest, usurpation or election, is a question for the historian.

(*n*) See Goodhart, *Law and the Moral Law*, 20.

For the legal theorist it is enough that such obedience exists: the fact of obedience is his starting point.

In our present world, given human nature, a sovereign without the means of enforcing obedience to his commands would have little hope of continuing to rule. Law stands in need of sanctions —Austin's third distinguishing mark of law. Nor for the positivist is this a mere practical need; law to him is something for the citizen to obey, not as he pleases but whether he likes it or not, and this it cannot be without some method of coercion. Sanctions then are a logical part of the concept of law; they consist of the penalties inflicted on the orders of the sovereign for the violation of the law—in other words of institutionalised punishments.

Now against this theory several attacks can be mounted. First there are the natural lawyer's objections which have been discussed above (*o*). Secondly there is the objection that the theory conflicts with ordinary usage by denying the name "law" to rules which are generally classified as legal, *e.g.*, rules of customary law, international law and much of constitutional law. None of these rules originate from a sovereign command: customary law springs from habitual behaviour rather than from precept, international law is a system of customary rules originating from state practice, and constitutional law consists in part of conventions which have evolved without legislation or judicial decision. Indeed many of the rules of common law originate from custom, though for the positivist these become law only by transformation into law by legislative or judicial acceptance.

Clearly then the positivist theory proceeds by first defining "law" in a special way and then using the definition to refuse application of the term to various phenomena generally included within the category of law. But would it not be more correct first to identify the phenomena termed law and thereafter to frame a definition accordingly, fitting the definition to the facts rather than the facts to the definition? The positivist is sometimes defended on the ground that he is defining law for his own purposes and that, in jurisprudence just as in other disciplines, precision justifies arbitrary definitions (*p*). This defence, however,

(*o*) *Supra*, § 3.

(*p*) According to Austin international law is not law *properly so called*; *op. cit.* 142, 201. Glanville Williams in "International Law and the Controversy Concerning the Word 'Law'" (1945) 22 B.Y.I.L. 146 would argue that there is no such thing as the proper sense of the word; and in this he seems to be followed by Dias, *op. cit.* 360–361.

will not suffice. In the first place, any arbitrary definition of law still leaves us with such problems as that of deciding whether international law is law, not just in Austin's or anyone else's sense, but in the ordinary sense of the word (*q*). More important it is questionable how far any arbitrary definition which fails to take into account borderline and untypical examples of law can achieve the positivist's aim of providing an understanding of legal phenomena. Moreover, a theory defining law in terms of "command", "sovereignty" and "sanction" alone, cannot provide an adequate analysis of the ordinary standard type of legal system.

To define law as a command can mislead us in several ways. First, though this may be a not inappropriate way of describing certain portions of law such as the criminal law, the greater part of a legal system consists of laws which neither command nor forbid things to be done, but which empower people by certain means to achieve certain results: *e.g.*, laws giving citizens the right to vote, laws conferring on lease-holders the right to buy the reversion, laws concerning the sale of property and the making of wills: indeed the bulk of the law of contract and of property consists of such power-conferring rules. At this point the theory could be saved by arguing that a rule conferring a right on one person is really an indirect command addressed to another: a law empowering the citizen to vote is really an order to the returning officer to register the vote. But this saves the theory at too high a price. To regard a law conferring power on one person as in fact an indirect order to another is to distort its nature. It would be analogous to arguing that the rule in chess which allows a player to take a pawn *en passant* is really a rule enjoining his opponent to recognise this type of move. Of course in both cases a restriction is imposed on the other person, but in both cases the main feature of the rule is not this so much as the increase in the ambit of the enabled party's activities. This distinguishes such rules from simple commands or prohibitions such as "do not steal", and nothing is gained by a definition of law that blurs this distinction.

Secondly, the term "command" suggests the existence of a

(*q*) See Wisdom, *op. cit.* at 96 *et seq.* for an analogous problem concerning the use of the word "round".

personal commander. In modern legal systems the procedures for legislation may well be so complex as to make it impossible to identify any commander in this personal sense. This is especially so where sovereignty is divided, as in federal states.

Thirdly, " command " conjures up the picture of an order given by one particular commander on one particular occasion to one particular recipient. Laws differ in that they can and do continue in existence long after the extinction of the actual law-giver (*r*). Here again an attempt to save the definition can be made by arguing that laws laid down by a former sovereign remain law only in so far as the present sovereign is content that they should, and that since the latter can always repeal them, his allowing them to remain in force is tantamount to adopting them as his own laws: what the sovereign permits, he impliedly or tacitly commands (*s*). But it is not always true that the present sovereign can repeal any law: in certain states the law-making powers of the sovereign are limited by the constitution, which prevents the repeal by ordinary legislation of " entrenched " clauses; in such cases no question arises of the present sovereign's allowing or adopting such clauses. At this stage the only argument left to the positivist is to contend that such limited sovereigns are not really sovereigns at all, a contention which will be considered later. Quite apart from this, the notion of an implied or tacit command is suspect; an implied command seems not to be a command at all (*t*). It would be better to accept the possibility of laws which are not commanded by the present sovereign, to jettison the notion of " command " and to adopt some different analogy, *e.g.*, the rule of a religious order, which can continue in force long after the death of its founder.

But whether we define law as a command or a rule, we must still distinguish commands (or rules) which are law from those which are not. For Austin, as we saw, a command can only be law if it emanates from the sovereign. This raises the question how far there can exist laws other than those made by the sovereign. Obviously in a complex modern state it would be impossible for the

(*r*) What Hart refers to as the " persistence " of law, *op. cit.* 60 *et seq.*

(*s*) See Austin's use of the notion of a tacit command to explain how customary and judge-made law is in reality the command of the sovereign: Austin, *op. cit.* 30–32.

(*t*) See Hart, *op. cit.* 43–46, 62–64.

sovereign legislature to enact every legal rule: much law-making will in fact be done by subordinates to whom legislative powers have been delegated. A good deal of English law consists of such delegated legislation, *e.g.*, regulations made by Ministers under Acts of Parliament. Here Austin finds no problem, since he sees no difficulty in the notion of a sovereign conferring law-making powers on others (*u*).

The bulk of English law, however, has been created neither by ordinary nor by delegated legislation, but by the decisions of the courts. Austin would argue that this too is really the creation of the sovereign, since the judges too are delegates of Parliament which has conferred upon them law-making powers (*v*). It is of course true that in England the judiciary are appointed by a government answerable to Parliament and that there are parliamentary procedures for their removal. But to describe the judges as delegates is wholly misleading, for this obscures the fact that their law-making powers co-exist with those of Parliament and are neither based on nor derived from any parliamentary enactment. The fact that Parliament can always overrule any judicial decision of the courts does not entail that judicial law-making is of a delegated nature. This would be to confuse subordinate with derivative powers (*w*).

There is yet another area of law which again owes nothing to sovereign legislation and whose existence is of crucial difficulty for the positivist theory. Let us take the case of a country ruled by a hereditary monarch with absolute power. Now when this present monarch dies, we do not need to wait and see who next will enjoy obedience from the population in order to ascertain the identity of the next sovereign. Since the rules of succession prescribe who shall inherit the throne, we already know his identity before he issues any commands and before any question of obedience arises. What we have here then is a rule laying down who shall be the sovereign, so that the extinction of the present sovereign is no bar to the continuance of legislation (*x*). In modern complex states, the rules defining sovereignty will obviously be more intricate than this: the relevant English rule involves, in fact, a number of

(*u*) Austin, *op. cit.* 225–232.

(*v*) *Op. cit.* 31–32.

(*w*) See Cross, *Precedent in English Law*, 162–163.

(*x*) See Hart on the " continuity " of law, *op. cit.* 50 *et seq.*

separate rules about the monarchy, about both Houses of Parliament and about parliamentary procedures of legislation. In many modern states such rules are contained in written constitutions, but whether written, as in the United States, or unwritten, as in England, they clearly cannot be the commands of the sovereign himself. A special parliamentary statute to the effect that all enactments of Parliament are law will not render such enactments law unless the statute is already law itself, in other words, unless Parliament is already sovereign; but if Parliament is already sovereign, then there already exists a rule to the effect and this rule is independent of the special statute. The rules that define sovereignty then are basic rules of any legal system (*y*), but are not themselves the creation of the sovereign. To refuse to call them law would run completely counter both to ordinary language and to legal terminology: no English lawyer or court would regard the rule that parliamentary statutes are the supreme law of England as anything other than a rule of English law.

Now this throws doubt on Austin's definition of sovereignty itself. We have seen that Austin defines the sovereign in terms of obedience. But the identification of the sovereign as a person who is obeyed by the bulk of the population but who himself obeys no other person claims at one and the same time too little and too much. It is not enough to say that sovereignty consists merely in being obeyed, yet it is too much to state that the sovereign cannot himself be in the habit of obedience to some outside body. In fact this identification confuses the two questions " where is sovereignty? " and " where is supreme power? " (*z*). The latter is a question of fact, the answer to which is to be found by observing who it is in reality whose orders are executed; the former is a question not merely of fact but also of law, to be answered by reference to the constitutional rules which lay down what body it is whose decrees are to count as law. In the last years of the Roman republic, while Caesar was in Gaul, it could be said that the real ruler of Rome was to all intents and purposes Pompey. Nevertheless he was not the sovereign, for though he

(*y*) Salmond terms such basic rules ultimate legal principles; in Kelsen's terminology they constitute *grundnorms*. See *infra*, §§ 6 and 17.

(*z*) Bryce in *Studies in History and Jurisprudence* distinguished between " legal sovereignty " and " practical sovereignty ", the former consisting of the ultimate authority to make law and the latter consisting of the ability to enforce obedience: Bryce, *op. cit.* 51-64; Lloyd, *op. cit.* 147-148.

could get enacted any law he wished, his own commands would not have qualified as laws. Sovereignty consists, not in having power, but in having authority.

This confusion landed Austin in particular difficulty when trying to identify the sovereign in England (*a*). At first sight the sovereign is a composite body comprising the Crown, the House of Lords and the House of Commons. But since the latter house is elected and must therefore ultimately obey the electorate, the House of Commons cannot on Austin's theory qualify as part of the sovereign. Accordingly, he concludes that the real sovereign is that body which consists of the Crown, the House of Lords and the Commons themselves. In fact, however, this larger body never issues any orders or decrees, nor, if it did, would they qualify as law under our present constitution. The real sovereign is, in fact, the Crown, the House of Lords and the House of Commons, whose enactments, whether made at the bidding of the electorate, the city, the trade unions or what you will, continue to count as law.

Since this is what sovereignty really means, it becomes unnecessary to add a rider to the effect that the sovereign must not himself be in the habit of obeying some other body. This is merely a confused attempt to distinguish supreme from subordinate law-makers. A subordinate legislator, whether enjoying delegated authority, as is the case with colonial legislatures, or original jurisdiction, as is the case with the courts, can be overruled by the supreme legislator. The real distinction is that when enactments of the two conflict, the enactments of the supreme law-maker prevail over those of the subordinate. The hall-mark of the sovereign is that his enactments qualify as law and that no other enactments overrule them. This shows that there is no logical or legal necessity for the sovereign's authority to be unlimited. No paradox arises if a written constitution places limitations on the legislature; if a constitution limits the legislative powers of the sovereign by providing that certain fundamental laws cannot be altered by legislation (*b*), we need not

(*a*) Austin, *op. cit.* 228 *et seq.*

(*b*) Some constitutions such as that of the German Federal Republic (1949) provide that certain fundamental rules are completely unalterable: Art. 79 (3) of the Basic Law of the Republic provides that Arts. 1–20 cannot be amended. Others such as the Constitution of the United States provide that such rules can only be amended by special procedures.

conclude that the real sovereign must be some other body, such as the people, which could, if necessary, alter the constitution. For ordinary laws not contravening these fundamental provisions can still be enacted by the existing legislature, which is accordingly the sovereign, albeit a limited one.

In trying to define positive law Austin was looking for a criterion to determine whether a given rule is a rule of a legal system (*c*). Now since every advanced legal system provides methods of enacting new law and since the most obvious method is to confer law making authority on a legislature, it follows that a great number of laws will result from legislation. One criterion for identifying a rule as one of a legal system, therefore, will be its having been enacted by such a legislative body. This, however, need not be the only criterion. In England, for example, there are additional criteria: a rule will qualify as a rule of English law if it has been laid down by the courts. Accordingly, to ask only whether the rule emanates from the sovereign is too crude and unsophisticated an approach to the problem.

There remains the question of sanctions. It was amongst other things the lack of sanctions that led Austin to describe international law as positive morality rather than law (*d*). International lawyers, however, contend that while sanctions render a legal system stronger, they are not logically necessary and that the idea of a legal system without sanctions is not self-contradictory. Of course one essential feature of law is that its subjects are bound by law whether they like it or not and cannot opt out of their legal obligations. Yet we know that on occasions the subject may refuse to obey the law and decide not to carry out his obligations. Were the majority of citizens of a society to follow this path, the legal system would break down, become ineffective and cease to be law; for it is only by being accepted and obeyed that law remains effective and continues to be law. The question then is whether the absence of sanctions would result in a legal system ceasing to be effective. The various reasons *why* people

(*c*) See *supra*, p. 12, n. (*l*).

(*d*) It might be argued that the sanction in international law is the use of force by the innocent state against the law-breaking state, but this is to reduce the notion of "sanction" from that of an institutionalised penalty to that of self-help. In any case, the present state of international law makes it far from clear whether such use of force would be legal under the United Nations Charter.

obey the law are outside our present scope, and form the subject rather of sociological research. It would seem reasonable, however, to estimate that the less civilised a society the greater the need for sanctions to ensure obedience to law; and the more advanced the society, the greater the likelihood that law will be obeyed from a conviction that a law-abiding society is preferable to lawlessness and anarchy. In most societies, however, there is at least a selfish minority prepared to enjoy all the benefits of an ordered society without accepting the burden of adherence to the rules; and here sanctions are needed, not to coerce the law-abiding majority, but rather to prevent the minority from gaining an unfair advantage. Given human nature as it exists, it seems fair to assume that law without sanctions would fail to be completely effective. In international law there exists nothing by way of institutionalised sanctions and yet the rules of international law, though often flouted, are far from totally ineffective. Suppose, however, that we found a community where the rules were always obeyed despite the absence of anything in the nature of sanctions: would such a system of rules differ so greatly from any system we know that we should hesitate to call it law? Completely effective law without sanctions may not exist, but the notion that there could exist such a system of law is not logically inconceivable. We conclude then that the idea of sanctions, though central to that of law, is not logically essential.

5. Law as the practice of the court: legal realism

Positivism regards law as the expression of the will of the state through the medium of the legislature. Theories of legal realism (*e*) too, like positivism, look on law as the expression of the will of the state, but see this as made through the medium of the courts. Like Austin, the realist looks on law as the command of the sovereign, but his sovereign is not Parliament but the judges; for the realist the sovereign is the court.

(*e*) The term "American Realists" serves to describe a number of American legal theorists, who, though in no way constituting a formal school of jurisprudence, share the view that the law consists of the pronouncement of the courts. On this theory of law see Holmes, "The Path of the Law" (1897) 10 H.L.R. 457–478, reprinted in *Collected Legal Papers*; Llewellyn, *The Bramble Bush* (2nd ed.); Frank, *Law and the Modern Mind* and *Courts on Trial*; Gray, *The Nature and Sources of Law* (2nd ed.). See also Friedmann, *Legal Theory*, (4th ed.), Chap. 23; Dias, *op. cit.* Chap. 19; Hart, *op. cit.*, Chap. 7.

One version of realism was held by Salmond (*f*). All law, he argued, is not made by the legislature. In England much of it is made by the law courts. But all law, however made, is recognised and administered by the courts and no rules are recognised and administered by the courts which are not rules of law. It is therefore to the courts and not to the legislature that we must go in order to ascertain the true nature of the law. Accordingly, he defined law as the body of principles recognised and applied by the state in the administration of justice, as the rules recognised and acted on by courts of justice.

This raises the question of the meaning of the word "courts" in the definition. Does it include administrative tribunals? By the National Insurance Act, 1946, and regulations made thereunder, the decision of questions arising under the Act is entrusted, in the last resort, to a commissioner whose decision is final. Suppose that the commissioner lays down a rule that he intends to follow in exercising his discretion. Is this "law"?

Again, there are other persons and bodies besides the law courts and administrators who enforce rules of conduct. If a member of the House of Commons affronts the House by interfering with the mace he is subject to disciplinary action; does this mean that there is a rule of law that no member must interfere with the mace? In the *Sheriff of Middlesex's Case* (*g*), where the sheriff was imprisoned by order of the House of Commons for attempting to enforce the judgment of a court of law, the act done by the sheriff was in accordance with the law enforced by the law courts; could it be said to be against a system of law enforced by the House of Commons?

To these objections Salmond would reply that they are marginal cases, that all words have a relatively fixed central core of meaning and a more hazy marginal sense, and that the word "law" is no exception.

Another criticism of Salmond's definition is that, though appropriate to case-law, it is not appropriate to statute-law. For a statute is law as soon as it is passed; it does not have to wait for recognition by the courts before becoming entitled to the name "law." Statutes are recognised by the courts because they are

(*f*) Salmond, *Jurisprudence* (7th ed., 1924 by Sir John Salmond), § 15.
(*g*) (1840) 11 A. & E. 273.

law; they are not law simply by virtue of judicial recognition. To this he would reply that so long as the courts and legislature are working in harmony, it does not matter whether we say that a statute is law because the courts recognise and apply it, or that the courts recognise and apply statutes because they are law. The statements are simply two aspects of a single truth. To make a practical issue, one would have to imagine that the legislature passes a statute which the courts subsequently declare to be void, and that a political conflict thereupon arises between the legislature and the courts. Is the statute then part of "the law"? No answer can be given to such a question in the abstract. An impartial observer could not give an answer until one side or the other had triumphed so that harmony between courts and legislature was once more restored. Here again we are faced with a marginal case where the application of the word "law" is unclear.

A much more polemical version of legal realism is that which originated with Holmes (*h*) and which has wielded enormous influence in the United States. This is the theory that all law is in reality judge-made. Holmes begins by considering the situation, not of the judge or lawyer, but of what he calls the "bad man," the man who is anxious to secure his own selfish interests. What such a person will want to know is not what the statute book or textbooks say but what courts are likely to do in fact. "I am much of his mind", said Holmes; "the prophecies of what the courts will do, in fact, and nothing more pretentious are what I mean by the law" (*i*). But what the courts will do in fact cannot necessarily be deduced from the rules of law in textbooks or even from the words of statutes themselves, since it is for the courts to say what those words mean. As another American writer observed, "the courts put life into the dead words of the statute" (*j*).

This is a useful counter to an attitude once prevalent in

(*h*) See n. (*e*). Several factors contributed to the prevalence of this approach to law in the United States. First, in many states judges are elected to office by popular vote, and accordingly decisions are likely to be influenced by political considerations. Secondly, the federal courts have the power of judicial review, whereby they can declare void any state or federal legislation contrary to the constitution. Thirdly, there is the factor of a multiplicity of jurisdictions. See *infra*, n. (*l*).
(*i*) Holmes, "The Path of the Law" (1896–97) 10 H.L.R. at 461; Lloyd, *Introduction to Jurisprudence* (2nd ed.), 272.
(*j*) Gray, *op. cit.* 125.

England to the effect that the judges never really create law but only declare what the law already is (*k*). In England a court, when overruling precedents of inferior courts, would commonly assert that the lower court had fallen into error, and that the law was and always had been what the present court now asserted it to be. American lawyers, however, confronted with a multiplicity of common law systems each of which had started from the same point but arrived at different results (*l*), realised that the development of common law could not consist of mere mechanical deductions of conclusions from premises, but must involve a process of creating new rules to deal with new situations, where a choice between competing alternatives had to be made. Questions of law, they saw, could not be answered by purely logical inference; they must be decided by reference to social, moral, political and other factors. As Holmes remarked, " the life of the law has not been logic, it has been experience "(*m*).

Today, it may be thought that the creative days of the judges are largely past. Now that common law is mostly completed and the greater part of modern law is statutory, the task of the judges is in fact the more automatic one of applying settled rules to the cases before them. In fact, however, for the courts the necessity of choice still remains. All legal rules are far less certain than was once imagined. For example, in England the unlawful and intentional killing of another is the common law crime of murder. But what if A intentionally inflicts on B a mortal wound and then, mistakenly thinking him dead, throws his body into a lake, with the result that B dies by drowning ? Is this murder ? Certainly A intended to murder B, who would have died from the wound had he not been thrown in the lake. On the other hand while the wounding was intentional, the actual killing was not. In 1954 the existing law had no answer to this problem, which arose in the case of *Thabo Meli* v. *R.* (*n*) where the court was forced to develop further the law of murder. Another example is provided by the

(*k*) See *infra*, pp. 144 and 189 and Cross, *Precedent in English Law*, 21–30.

(*l*) For example, many American states have accepted the doctrine of *Rylands* v. *Fletcher*, but many have rejected it. See *Prosser on Torts* (2nd ed.), § 59; Harper and James, *Torts*, 789–801.

(*m*) Holmes, *The Common Law* 1.

(*n*) [1954] 1 All E.R. 373; [1954] 1 W.L.R. 228. This was an appeal from Basutoland to the Privy Council. Though there was no English authority, this kind of point had arisen in the United States: see Glanville Willams, *The Criminal Law* (2nd ed.), 173–174.

Road Traffic Act, 1930, s. 11 (1), which made it an offence to drive a motor vehicle in a manner dangerous to the public. Is a person who steers a broken-down vehicle on tow a driver ? Since Parliament had not defined the term " driving " the word must presumably bear its ordinary meaning. But the ordinary usage of the word is not built to cope with this kind of marginal situation, for it draws no very clear line between what is, and what is not, driving. Faced with this question, then, the court had to draw an arbitrary line and further define the term " driving " (*o*).

Now this type of difficulty is one to which legislation is particularly susceptible. It arises from the fact that legislation is concerned with general classes of persons, objects and actions and must therefore employ words of general application. Such words, however, are usually far from precise. Though they draw boundary lines round the class of objects which they denote, their borders are often anything but clearly marked out; here they will be faint and hard to perceive, here vague and wavering, and elsewhere they may disappear altogether. Consequently the categories to which such words apply are never finally determined. Because of this feature, which has been described as the open-texture " of ordinary language, the use of such general terms always leaves open the possibility of a borderline case (*p*). In so far as rules of law are expressed in ordinary language, they too are prone to this inherent imprecision, and even where the law defines the word with new precision, this new definition must be given in terms of other words belonging to ordinary language, so that uncertainty is never completely ruled out. But this defect has its compensations. Suppose the legislator could draft rules that were absolutely clear in application: even so, he could not foresee every possible situation that might arise, and so, he could not anticipate how he, or society, would wish to react to it when it did arise. Too certain a rule would preclude the courts from dealing with an unforeseen situation in the way they themselves,

(*o*) In *Wallace* v. *Major* [1946] K.B. 473 this was held not to amount to driving.

(*p*) See Waismann, " Verifiability " in *Essays on Logic and Language*, 1 (ed. Flew), 117–130. This factor of open texture lends extra force to Hoadly's dictum to the effect that " whoever hath an absolute authority to interpret any written or spoken laws, it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spoke them ". Still, we must beware of mistaking the performer for the composer.

or society, might think best. As it is, legal uncertainty is counterbalanced by judicial flexibility (*q*).

Since law in practice must differ from the law stated in statutes or textbooks, American jurisprudence developed considerable scepticism about legal rules (*r*). Where courts must choose between alternatives, much will depend on the temperament, upbringing and so on of the members of the Bench. A conservative-minded judge, with religious leanings and aristocratic background, will obviously differ in outlook, and therefore in decisions, from one of radical agnostic middle-class make-up; and this will affect not only decisions on points of law, but also on questions of fact. On paper the law may provide that contributory negligence is a complete defence to an action for negligence. But courts, and juries may be so sympathetic to injured plaintiffs and so antipathetic to the defendants' insurance companies, as rarely to find any plaintiff guilty of contributory negligence. In this case contributory negligence would be a defence in theory only.

Accordingly, the realist concludes that a statement of law is nothing more than a prediction of what the courts will decide. This well describes what a lawyer does when advising a client whether or not to bring proceedings; on his knowledge of the law and his experience of court reaction the lawyer estimates the chances of success, assesses the amount of damages likely to be awarded and so advises his client. The description also fits to an extent the case of a textbook writer who expounds the rules of law which have been made, examines the practice of the courts in applying them, and to some extent indicates their possible future development.

There are other legal situations, however, which cannot be described in terms of prediction. Counsel's submission on a point of law is not a prediction; it is not a forecast of what this or any other judge will decide, but an argument about what the judge

(*q*) See Hart, *op. cit.* 125 *et seq.* Uncertainty of language has allowed the Supreme Court of the United States to adapt the United States Constitution to the needs of a changing society. See for example Sutherland, "The American Judiciary and Racial Desegregation" (1957) 20 M.L.R. 201.

(*r*) Most American realists have been rule-sceptics, who doubt whether there are in truth any rules of law and who seek to predict judicial decisions from the findings of non-legal sciences. Judge Frank claimed to be a fact-sceptic, i.e., he doubted whether any uniformity in law could be found, on the ground that the fact-finding which is a necessary preliminary to judicial decision is itself too fraught with uncertainty.

should decide. A judicial decision is not a prediction; it is not a forecast of what other, or higher, courts will hold, but a judgment as to what the law now *is*. Nor again is a piece of legislation a prediction of judicial behaviour: the legislature is not predicting what will be done but laying down what *shall* be done. For predictions, like other factual statements, can be wrong; indeed for this reason the term is not inappropriate to describe the activity of a legal adviser or writer, because later events can prove these wrong. When a judge's decision, however, is reversed by a higher court, his error (if there is one) is certainly not that of failing to predict that higher court's decision: for this indeed was no part of his objective.

The realist is misled by the fact that some statements of law, such as those of individual lawyers and writers, are unofficial and may have to be withdrawn later in the face of contrary official statements of law, *e.g.*, those of judges. This leads him wrongly to conclude that the law is simply what the judges happen to decide. Now there could be a state in which the constitution left the courts completely free to decide any point as they wished and to resolve each case on its merits, *ex aequo et bono*. Truly in such a state no one could ever say what the law was; one could only predict what the judges might do. But this is not the position in any ordinary legal system, and certainly not the position in the common law.

Moreover, the realist forgets that the decisions creating new law represent in fact only a fraction of the total of actual lawsuits. The majority of court cases involve no point of law and a greater number still never reach the courts at all; in such cases the law is clear and established and can be fairly automatically applied. Such is the case with the rules relating to commerce and property, which are in general clear enough to render even legal advice unnecessary in most situations. Excessive concentration on the law reports, which of course exist to record decisions developing the law, gives a lopsided picture of the operation of the law.

Furthermore, the realist overstresses the uncertainty of language. The fact that a country's boundaries are unclear means that uncertainty will arise concerning borderline territory, but not that all that land within the country, and all outside, is in dispute. So it is with words. The fact that a word like "driving" may be

unclear in its marginal applications must not be allowed to blind us to the truth that there exists a category of cases which clearly constitute driving. Because we cannot always draw a line, we must not imagine there are not some cases well to each side of any line that could be drawn. However blurred the edges of words may be, they have a hard central core of meaning without which language and communication would be at an end. As has been said, doubt about dusk is not doubt about noon.

But the distinction which the realist draws between law in the books and law in practice is a valid one. Indeed it is a distinction drawn by other legal theorists quite removed from the school of American realism (*s*). The importance of the distinction is self-evident, and the particular contribution of the realist is to highlight the creative nature of the judicial role, to demonstrate the inability of "slot-machine" deductions to provide solutions to legal problems, and to show that legal decisions must often involve value judgments on questions of policy. By focusing attention on the extra-legal considerations on which such decisions are based, the realist paved the way for a replacement of the inspired hunches of judicial intuition by the expert evidence of sociologists, economists and other scientists. Reliance on such findings rather than on past decisions surely will best enable the judiciary to adapt the law to changing social needs (*t*).

But concentration on court practice alone is legalistic rather than realistic. The majority of human situations governed by law produce no litigation, partly because the law in question is sufficiently clear, and consequently most of the layman's activities in private, commercial or industrial life are undertaken without legal advice. People act in accordance with the law as they understand it. But such understanding can be wrong: many people do not know, for instance, that the law requiring certain contracts to be in writing has changed; many are unaware that there is no judicial authority entitling policemen to "detain"

(*s*) On this distinction see Sumner, *Folkways*: Ehrlich, *Fundamental Principles of the Sociology of Law* (trans. Moll); see also Friedmann, *op. cit.*, Chap. 18. Sawer, *Law in Society*, Chap. 10.

(*t*) In constitutional cases in the United States the courts accept evidence derived from sociology, psychology and other sciences in order to decide questions of law and policy. This practice originated in the "Brandeis Brief" in *Muller* v. *Oregon*, 208 U.S. 412 (1907).

subjects just for questioning (*u*). While the law which applies to many such situations consists of official statements by Parliament and the courts, the law which is actually applied may turn out to be the unofficial view of the ordinary citizen, the policeman, the local government official, the civil servant, the accountant, the tax inspector and so on; in many cases even professional lawyers are forced by pressure of work to rely largely on recollection and general impression rather than on actual research and authority. To see what the law is, then, *i.e.*, to discover the rules which actually govern our lives, we must look not only at judicial practice but also at the humbler, more extensive non-judicial and even non-legal practice. We must not forget that the law which regulates people's lives may well be the plain man's misunderstanding of the official law.

6. Law as a system of rules

The three theories so far discussed are all at one in viewing law as consisting of rules. Such rules are regarded by natural law as dictates of reason, by positivism as decrees of the sovereign and by realism as the practice of the courts. None of the theories, however, provides any adequate analysis either of the term "rule" or of the notion of a system of rules. Austin's attempt to define rules in terms of commands is, as we saw, unsatisfactory. The realist on the other hand would deny the existence of rules, and would identify them with the uniformity of judicial practice. But we have seen that law cannot be completely analysed in terms of such practice. We shall now attempt to analyse law in terms of rules. (*uu*)

First, rules are concerned not with what happens but with what ought to be done; they are imperative or prescriptive, rather than indicative or descriptive. This characteristic they share with commands, and the fact that they share it tempts us to assimilate the two. But rules differ from commands in their generality. Whereas a command normally calls for one unique performance, a rule has general application and demands repeated activity. In this it resembles recipes, travel directions, maker's instructions and so forth It differs from these, however, in that all these are

(*u*) Sawer, *op. cit.* 184–186 gives some interesting examples of popular misconceptions.

(*uu*) This section is largely based on Professor Hart's theory of law, as set out in Hart, *The Concept of Law*.

of an instrumental nature: the recipe must be followed to cook the pie, the directions to reach the destination, etc., though in fact these objectives might equally well be attained by some different means, in which case there would be no need to adopt the recipe or directions in question. Rules by contrast have a certain independence or self-legitimating character. In some cases rules are constitutive and define the activity in question (*v*): the rules of a game such as contract bridge define the game, and when bridge-players comply with these rules they are not just using one particular method of achieving an objective (*i.e.*, playing bridge); on the contrary, compliance with the rules is partly what bridge-playing consists in. In other cases rules are not constitutive or definitive in this way, but regulate activities which would take place in any case whether the rules existed or not. Such are the rules of grammar and spelling, of etiquette, of morals and of law. In these instances the rules which exist could well be replaced by other rules. Nevertheless they are not merely instruments or means to and end, like recipes and directions. Rules of grammar are complied with, not as a means to, but rather as part of, the correct use of a language. Rules of etiquette and morals are observed, not as a means to, but as part of, being polite and virtuous. Rules of law are obeyed not as a means to producing an ordered, tolerable society: law-observance is itself part of what constitutes such a society.

Now the fact that we cannot point at rules, as we can at material objects, can lead to perplexities of a kind well known in philosophy. Some, like certain American realists, are tempted to identify rules with regularities in judicial behaviour. Others, such as the Scandinavian realists (*w*), contend that there are no such things as rules, but that conformity with a rule consists really in habitual behaviour accompanied by a feeling of being bound to act in this habitual way. On this view, the various psychological and other factors giving rise to such feelings are very important socially, highly worthy of study, and even perhaps essential for the

(*v*) See Marcus G. Singer, "Moral Rules and Principles" in *Essays in Moral Philosophy* (ed. Melden, 1958).

(*w*) Such theorists include Hägerström, *Inquiries into the Nature of Law and Morals* (trans. Broad; ed. Olivecrona); Olivecrona, *Law and Fact*: Lundstedt, *Legal Thinking Revised*. The Danish theorist Alf Ross, though sharing some of these views, would regard laws as directions to the judges rather than as mere statements of fact: see Ross, *On Law and Justice*.

function of what is believed to be the law. They are nonetheless impossible to justify on rational grounds because in reality nothing by way of rules exists to bind or compel obedience.

As Hart has demonstrated, however, compliance with a rule differs from mere acting out of habit (*x*). Contrast for example the case of a man who habitually cleans his car on Sunday morning with that of the driver who always conforms to the traffic law requiring him to stop at a halt sign. The former case is completely described by the statement that he always behaves like this, while it would be a far from adequate description of the latter case to say just that the driver always stops at halt signs. This would only suffice as a description provided the narrator and his audience already understood that his stopping was in compliance with a traffic regulation; in other words if they knew the relevant traffic regulation, or at least realised what it meant to observe such regulations. Otherwise such a description would only represent the observation of an external observer, who perceives the outward conduct of the driver but misses the point, known to the driver himself and others who fully understand the situation, that this conduct is the outcome of the driver's attitude of mind, of his acceptance of the traffic regulation as a rule with which he ought to comply. To the external observer the halt sign is a sign that the motorist will stop. To the motorist himself it is a signal to stop. Complying with a rule involves both aspects, external behaviour together with an internal attitude that such behaviour is obligatory.

Although Hart seems at first sight close to the Scandinavian realists here, there are important differences between them. Instead of behaviour accompanied by an unanalysable feeling of being bound, Hart talks in terms of conduct supplemented by an attitude of mind to the effect that the conduct in question is obligatory because it is required by rule. This attitude he analyses by specifying the criteria for its existence. Where a person is said to regard himself as required by a rule to act in a certain way, he will consider that his own conduct ought to conform to this pattern and will require the same of others; accordingly he will criticise deviations from the pattern because of their very non-conformity,

(*x*) Hart's analysis of the concept of rules is to be found in *The Concept of Law*, 9–11, 54–59, 86–88.

and will justify on the basis of conformity to the rule acts that might otherwise incur criticism on other grounds. In order then to ascertain whether a person accepts the existence of a rule, we must look, not into the inner workings of his mind, but rather at what he says and how he reacts; to discover whether a society accepts the existence of a rule, we must look at general social reaction. In international law, for example, to prove the existence of a customary rule of law one must show first that states follow a certain pattern of practice, and secondly that they do so by way of right or obligation. Evidence for the existence of this second factor (in international legal terminology the "opinio juris sive necessitatis") consists in the official statements of governments, of their reactions when the practice is challenged or disregarded, and of their own reliance on the practice as a justifying factor (*y*).

A further difference between Hart and the Scandinavian realists is that the latter look upon the feeling of being bound as mistaken or illusory; the citizen imagines that he is bound by a rule of law, while in fact this is not the case because there are no rules to bind. The internal attitude which Hart analyses involves no mistake or illusion: where people or states consider themselves obliged by rule to act in a certain manner, they are not *ipso facto* mistaken. Mistakes can of course exist: people may imagine themselves bound by rules which are no longer operative; indeed Parliament itself has through ignorance repealed statutes which had already been repealed and were therefore no longer in force (*z*). These, however, are highly unusual cases. Short of some such factual error, it makes no sense to contend that the members of a society are mistaken in believing themselves bound by the laws of that society; for being bound by law or other rules consists in fact largely of believing that one's behaviour ought to conform to the pattern specified in the rules.

Hart's analysis helps to distinguish between being obliged or compelled, and having an obligation (*a*). Acts done under compliance with the law are not, as Austin thought, done under coercion; they are done out of a sense of obligation. This is shown by the fact that even a person who cannot be compelled to obey

(*y*) Oppenheim's *International Law* (8th ed. by Lauterpacht), Vol. I, § 17. See also the *Asylum* case, I.C.J.Rep. 1950, pp. 276–277.
(*z*) Examples are given in C. K. Allen, *Law in the Making* (7th ed.), 442.
(*a*) Hart *op. cit.*, 80–81, 88, 236.

the law is still reckoned as having an obligation to obey; the law still remains as a standard demanding obedience. Laws and rules are concerned with obligation rather than coercion.

With this analysis of the term "rule" in mind, we must now go on to distinguish the characteristic features of legal rules. In some ways legal rules resemble the rules of games, clubs and societies. Rules such as these are typically of a formal nature and open to amendment by bodies authorised for this purpose. Moreover where difficulty arises as to the meaning or application of such rules, some sort of adjudication process is typically to be found. In the United States for example there has developed an extensive body of "case law" on the rules of golf. These characteristics which legal rules share with those of games and clubs differentiate them from the rules and principles of morality. For we saw earlier that rules of morality are not amenable to legislative alteration and that moral disputes are not resolvable by adjudication. And this, we saw, is not just due to the non-existence of legislators and judges of morality, but to the very nature of morality: legislation and adjudication in this sphere is logically inconceivable.

There is one characteristic, however, which legal and moral rules have in common and which distinguishes them both from the other types of rules just mentioned. Both legal and moral rules are *in invitum*; obedience to them is, as it were non-optional. In the first place the rules of a game apply only within a fairly limited context, *i.e.*, only to the players and only throughout the duration of the game. Likewise the rules of a club apply only to the members, whereas membership usually forms a relatively narrow segment of the members' lives. By contrast law and morals are concerned with much broader aspects of life. Morality may apply to every human act, while law, though narrower in scope, extends to a great number of such acts.

Secondly games and clubs are not compulsory; withdrawal and resignation are permanent possibilities. There is no such analogous choice in the case of moral rules, which apply to a man's conduct regardless of his own views on the matter. Morality is not something which one can participate in at will and resign from at one's pleasure. And the same is largely true of law. The law applies to the citizen whether he wants or no; it is not a club

which he is free to join or leave as he pleases. One can indeed withdraw from a legal system and adopt another one, but this involves the drastic step of emigration; and even so, one cannot avoid, so long as one resides in a country of some degree of civilisation, being subject to some system of law.

Law then consists of rules which are of broad application and non-optional character, but which are at the same time amenable to formalisation, legislation and adjudication. What is it, therefore, that serves to unite such rules and transform them into a legal system (*b*)? Austin, as we saw, considered that this uniting element was the characteristic of having been laid down by the same sovereign. A legal system may well, however, contain rules which cannot be attributed directly or indirectly to any act by the sovereign: the rules identifying the sovereign are a case in point.

A more sophisticated suggestion is that of Kelsen (*c*), who considers the systematic character of a legal system to consist in the fact that all its rules (or norms) are derived from the same basic rule or rules (grundnorms). Where there is written constitution, the grundnorm will be that the constitution ought to be obeyed.

(*b*) It should be noted that the term law is used in two senses, which may be conveniently distinguished as the abstract and the concrete. In its abstract application we speak of the law of England, the law of libel, criminal law and so forth. In its concrete application, on the other hand, we say that Parliament has enacted or repealed a law. In the abstract sense we speak of law, or of the law; in the concrete sense we speak of a law, or of laws. But the concrete term is not co-extensive and coincident with the abstract in its application. Law or the law does not consist of the total number of laws in force. The constituent elements of which the law is made up are not laws, but rules of law or legal principles. That a will requires two witnesses is not rightly spoken of as a law of England; it is a rule of English law. A law means a statute, enactment, ordinance, decree or other exercise of legislative authority. It is one of the sources of law in the abstract sense.

This ambiguity is a peculiarity of English speech. All the chief Continental languages possess distinct words for the two meanings thus inherent in the English term law. Law in the concrete is *lex*, *loi*, *Gesetz*, *legge*. Law in the abstract is *jus*, *droit*, *Recht*, *diritto*. The law of Rome was not *lex civilis*, but *jus civile*. *Lex*, a statute, was one of the sources of *jus*. So in French with *droit* and *loi* and in German with *Recht* and *Gesetz* though it is not the case that the distinction between these two sets of terms is always rigidly maintained, for we occasionally find the concrete word used in the abstract sense. Medieval Latin, for example, frequently uses *lex* as equivalent to *jus*; we read of *lex naturalis* no less than of *jus naturale*; and the same usage is not uncommon in the case of the French *loi*. The fact remains that the Continental languages possess, and in general make use of, a method of avoiding the ambiguity inherent in the single English term.

(*c*) Kelsen's Pure Theory of Law is to be found in his *General Theory of Law and State* (trans. Wedberg). See also Kelsen, *What is Justice?* and Kelsen "The Pure Theory of Law" (1934) 50 L.Q.R. 474; Kelsen, "Professor Stone and the Pure Theory of Law" (1965) 17 Stan.L.R. 1128.

Where there is no written constitution, we must look to social behaviour for the grundnorm. The English legal system would appear to be based on several different such basic rules, one of which concerns parliamentary legislation, others of which deal with the binding force of judicial precedents. Such basic rules are to a legal system what axioms are to geometry: they are the initial hypotheses from which all other propositions in the system are derived.

Similar to this is Hart's view that a legal system arises from the combination of primary and secondary rules (*d*). Primary rules are those which simply impose duties; secondary rules are power-conferring rules, of which the most important are those which confer power to make and unmake other rules in the system, and which Hart terms rules of recognition. These are rules of a higher order; being rules about the other rules of the legal system. They can be looked at from two different angles. We may regard them as prescribing the method and procedures for creating, annulling and altering rules of law. Or we may look on them as tests to discover whether a given rule is one of the legal systems in question. The English rule about parliamentary sovereignty at one and the same time lays down the procedure for legislation and serves as one means of identifying rules as rules of English law.

It is these rules of recognition which in Hart's view transform a static set of unrelated rules into a unified dynamic legal system capable of adaption to social change. He parts company from Kelsen, however, in refusing to regard them as hypotheses. The basic rule of a legal system is not something which we have to assume or postulate. On the contrary it is itself a rule accepted and observed in the society in question. Unlike the other rules of the system it cannot of course be derived from any more basic rule. It is, nonetheless a rule—a customary rule, acceptance and observance of which finds expression in social practice and the general attitude of society. Although the rule about parliamentary sovereignty in England cannot be derived from any other rule of English law, it is more than a hypothesis: it is a customary rule of English law, followed in practice and regarded as a standard requiring compliance.

(*d*) Hart, *op. cit.*, Chaps. 5, 6.

While Hart's analysis of the concept of law provides many valuable insights and represents a marked advance, it raises in its turn new questions to which there are no obvious and immediate answers (*e*). The technique which he employs throughout "The Concept of Law" is that of the linguistic philosopher, who seeks to explain and analyse concepts by reference to the way in which we use the words denoting them. But to regard this as a mere lexicographical exercise would be a mistake. Indeed Hart's own claim is to have written an essay in descriptive sociology; for in his view (a view shared by linguistic philosophers generally) sharpened awareness of words sharpens our awareness of the phenomena which they describe (*f*). Accordingly, Hart, like Austin and many other legal theorists, is concerned less to define the meaning of "law" than to describe a working model of a standard legal system (*g*). This being so, critics of his analysis have expressed disappointment at finding that this sociological description rests less on empirically discovered facts about social behaviour and social institutions than on Hart's own reflections on how words are used. For a better understanding of the working of law in society we must enlist the help of the sociologist, the psychologist and others. Meanwhile, Hart's contribution may be said to have cleared the ground and prepared the way for advances in this direction.

One of his most valuable insights is that provided by his analysis of the term "rule", in which he marks out the distinction between the external and internal aspects of rule-observance. Less satisfactory is his claim to have found the crucial factor which distinguishes a legal system from a set of rules to consist in the combination of primary and secondary rules. Certainly the basic secondary rules concerning the criteria for identification provide unifying force to a legal system, but are there not other factors of equal importance? Suppose for example that the legislative sovereign is forcibly replaced by a new body, but that the law remains in every other respect unaltered, and that the

(*e*) For criticisms of Hart's theory Graham Hughes, "Professor Hart's Concept of Law" (1962) 25 M.L.R. 319; B. E. King, "Professor Hart's Concept of Law" [1963] C.L.J. 270; Robert S. Summers, "Professor H. L. A. Hart's Concept of Law" [1963] *Duke Law Journal* 629; see also Robert S. Summers in (1963) 13 *Philosophical Quarterly* 157–161.

(*f*) Hart, *op. cit.*, p. vii.

(*g*) Hart, *op. cit.*, p. vii; see Sawer, *Law in Society*, 1–2.

various rules in the different branches of private and public law retain their validity. Hart's analysis would suggest that in such a case the legal system must be said to have changed. But it might equally well be argued that what has changed is not the legal system but only the basic constitution of the state. Must the adoption of a new French constitution in 1958 necessarily be regarded as entailing the adoption of a new legal system?

What this suggests is that there may be other factors that can weld into a legal system what would otherwise be discrete rules of law. One such factor is surely those fundamental principles which lie behind the rules of the system. These are not themselves rules of law, since they are too wide and general to be rigorously applied. Lord Atkin's contention that "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" (*h*) is not a strict rule of law that can be simply applied; there are too many well-established exceptions to allow for its wholesale application, and in any case it is too vague and imprecise to function as a legal rule. What Lord Atkin enunciated was a principle which serves to draw together into a coherent whole the various individual rules relating to the duty of care in the tort of negligence, and which forms a starting point from which to derive new rules (*i*). Such principles, being roughly the general reasons underlying the rules, help to rationalise and make more consistent the precise rules which crystallise out in actual cases.

Well-developed legal systems, such as English law, contain both basic rules in Hart's sense and basic principles such as those described above. International law is a less developed system, which lacks the basic rules relating to the criteria for identification; it therefore qualifies in Hart's eyes as a mere set of rules. Yet international law does rest on certain fundamental principles (*j*) of the same kind as are to be found in common law systems, and it is arguable that these go far to render this corpus of rules more than a mere disparate set. We may contrast the rules of a club's

(*h*) In *Donoghue* v. *Stevenson* [1932] A.C. 562 at 579.

(*i*) See Heuston, "*Donoghue* v. *Stevenson* in Retrospect" (1957) 20 M.L.R. 1.

(*j*) See Schwarzenberger, "The Fundamental Principles of International Law" (1955) 87 *Hague Recueil*, Vol. I, 195–383.

constitution, which usually incorporate regulations regarding its amendment, regulations analogous to the basic rules in a legal system; but the rules of the constitution are not further unified by anything in the nature of fundamental principles, and would for this reason perhaps be regarded in general as forming a set, rather than a system, of rules. With these examples we are in uncertain territory, but it is suggested that international law has more in common with ordinary legal systems than with rules of the kind just mentioned.

Another problem which arises about Hart's analysis concerns the extent to which the basic secondary rules of a legal system must enjoy that critical acceptance which constitutes the internal aspect of rule-observance. According to Hart's theory, in order for a rule to exist there must be more than a mere regular pattern of behaviour; there must also be a generally accepted view that this is a pattern to which conduct should conform and from which deviations are criticised. Driving on the left-hand side of the road would not amount to observance of a rule of the road if all that happened was that some, or even most, drivers, each for his own part and without regard to what others did, drove on the left. Now the difficulty with the basic rules of a legal system is that these may in truth be neither well known nor understood by the vast majority of society: the rules about the sovereignty of Parliament and judicial precedent may not be at all fully apprehended by the ordinary citizen. All that is necessary here, according to Hart, is that they should be accepted as rules by the officials concerned to apply and administer the law; the minimum requirement is that these officials should maintain a critical attitude towards them. It would not be enough, if for example each judge merely followed the practice for his own part, paying no attention to what was done by others. What is required is that the judges in general must regard the practice as required by a standard which is to be complied with, that they must disapprove of departures from the practice, and that they must follow it on the basis that it ought to be observed rather than out of fear of sanctions or desire for reward. To this it can be objected that the judge observing the rule of recognition, no less than the ordinary

citizen obeying the primary rules of law, may be motivated by fear or ambition—in which case his observance would seem devoid of the internal attitude required by the theory. But this objection appears to confuse the motives for compliance with the nature of the compliance itself: one may comply with a rule for fear of sanctions, while nevertheless regarding the rule as a rule. Furthermore, if the motive for observance is fear of punishment or desire for reward, this suggests that at some later stage such sanctions or rewards might be applied; but this is presumably done on the basis that the rule of recognition is something which ought to be obeyed.

Lastly, one problem not settled by the theory is the status of the "ought" in a basic secondary rule. Clearly this is not a mere instrumental "ought" as is the case with such statements as "you ought to go on a diet, if you mean to reduce your weight". Nor on the other hand is it a straight-forward legal "ought" such as is found in ordinary legal propositions. The rule that the citizen ought to pay taxes enshrines a legal "ought" since the rule has been laid down by a law derivable from the basic legal rules of recognition. But the basic rule of English law about parliamentary sovereignty is not itself derivable in this manner. We have seen that this is a customary rule. Yet such rules are not rules of morality and do not represent a moral "ought": that Parliament should be obeyed is a rule of law but not a rule which it would be morally wrong to alter. The truth would seem to be that behind all such basic rules of law lies a moral principle to the effect that social life is necessary and desirable, together with a factual truth to the effect that some type of legal system, and so some basic legal rule, is an essential means to this end. The proposition that Parliament's statutes ought to be the supreme law of the land, therefore, may be unpacked into a number of different propositions containing "oughts" of different nature. We ought (morally) to aim at a stable social system; for this we need, and so ought (instrumentally), to have some legal system incorporating some such basic secondary rule; and also perhaps we ought (morally) not lightly to disregard or abandon the rule which actually obtains.

MOHAN, C.J. & SHIVARAJ PATIL, J

B. Srinivasa Acharya vs District Judge*

KARNATAKA PUBLIC PREMISES (Eviction of Unauthorised Occupants) ACT, 1974 (Karnataka Act No.32 of 1974) - Section 2(g) - Definition includes continuance in occupation after authority under which allowed to occupy expired - No prior notice of termination to unauthorised occupant contemplated - Act governing field, unauthorised occupant does not become authorised because of earlier protection under Karnataka Rent Control Act, 1961.

HELD:

(i) The definition as contained in Section 2(g) of the PP Act includes the continuance in occupation by any person of the public premises after the authority under which he was allowed to occupy the premises has expired. In view of the law in force namely, the PP Act governing the field, the unauthorised occupant does not become authorised merely because protection was given against the arbitrary evictions under the provisions of the KRC Act earlier. (Para-7)

(ii) Under the provisions of the PP Act it is not at all contemplated that any prior notice of termination of tenancy be given toan unauthorisedoccupant. (Para-5)

ON FACTS:

The provisions of the PP Act are applicable to the facts of the case on hand. If that be so after the expiry of the lease period of 11 months initially fixed the appellant became unauthorised occupant. Even his tenancy was terminated by notice dated 3-10-1978, mere filing of HRC 406/78 or its continuance till it was withdrawn on 17-1-1981 did not make him authorised occupant when he became unauthorised occupant within the meaning as contained and defined under Section 2(g) of the PP Act...There was no necessity of issuing notice of termination of tenancy once again before initiating action under the PP Act and passing

*W.A.No. 427 of 1989 dated 31st January 1991

orders under the provisions of the said Act, for eviction of unauthorised occupant, like the appellant. (Paras-6 & 8)

CASE REFERRED

(1988) 3 SCC 416 - State of Haryana vs Ramkishan (Dist)

Mr. U.P. Mallya for Appellant; Mr. P. Vishwanatha Shetty for R-2

NOTE. ORDER IN W.P.NO.14150 OF 1988 DATED 28-9-1988 AFFIRMED

JUDGMENT

Shivaraj Patil, J

Briefly stated the facts, necessary to dispose of this appeal are:-

The appellant herein had taken the premises in question on lease for 11 months from the Corporation Bank Ltd., predecessor of the 2nd respondent. He had executed a lease deed for 11 months at the time of entering into the possession of the schedule premises. On expiry of the said period he continued in possession as a statutory tenant.

The Corporation Bank Ltd., issued a registered legal notice dated 3-10-1978 under which the tenancy of the appellant was terminated and he was called upon to surrender vacant possession of the schedule premises. The appellant gave reply to the said notice on 16-10-1978. Thereafter the Corporation Bank Ltd., filed HRC 406/1978 in the Court of the Munsiff at Mangalore for eviction of the appellant

The Corporation Bank Ltd., was nationalised on 15-4-1980. Thus the 2nd respondent herein is the successor of the Corporation Bank Ltd. The eviction petition filed in HRC 406/1978 filed earlier, was withdrawn by the 2nd respondent on 17-1-1981.

Thereafter the 3rd respondent issued a show cause notice to the appellant under Section 4(1) of the Karnataka Public Premises (Eviction of Unauthorised Occupants) Act, 1974 (for short hereinafter referred as 'PP Act') as to why he should not be evicted as he was an unauthorised occupant of the premises. In response to the said notice the appellant gave a reply on 23-3-1981 objecting to the eviction. The

3rd respondent after enquiry passed an order under Section 5 of the PP Act, on 7-9-1981 directing the eviction of the appellant.

The appellant feeling aggrieved by the said order dated 7-9-1981 passed by the 3rd respondent filed an appeal to the District Judge, Dakshina Kannada at Mangalore (1st respondent). The 1st respondent after hearing the appeal on merits, dismissed the same by his order dated 25-2-1982.

The appellant pursued his case further by filing Writ Petition No.14150/1982 in this Court assailing the said order dated 25-2-1982 passed by the first respondent affirming the order of the 3rd respondent. The learned single Judge heard the batch of Writ Petitions including this Writ Petition 14150/1982, and dismissed the same by a common and considered order dated 28-9-1988. Hence this Writ Appeal.

2. Before the learned single Judge, several contentions were urged including whether the PP Act providing for eviction of unauthorised occupants from the public premises belonging or taken on lease by a Corporation established by or under the Central Act and controlled by the Central Government is ultra vires and/or whether the Karnataka Rent Control Act, 1961 (for short KRC Act), would prevail over the PP Act. The learned single Judge having referred to and relied on various decisions of the Supreme Court did not accept the contentions of the Writ Petitioners. In the view he took, dismissed the Writ Petitions.

3. This Writ Appeal 427/1989 was posted along with W.A.Nos.597 and 598/1989 as all these Writ Appeals were connected and filed against the said common order of the learned single Judge. In Writ Appeals 597 and 598/1989 at the hearing, the parties filed a joint memo under which the appellants were satisfied if only time was granted to them upto 31-10-1991, to vacate the petition premises. We have passed a separate Order acting on the joint memo in those cases.

4. Sri U.P. Mallya, learned Counsel for the appellant in this appeal (W.A.427/1989), urged before us:-

That the determination of jural relationship of landlord and tenant by the 2nd respondent was a condition precedent for the issue of show cause notice under Section 4 of the PP Act and such a notice of termination of tenancy having not been issued, the proceedings taken up for eviction under Sections 4 and 5 of the PP Act are vitiated.

He would construct this argument stating that sub-section (5) of Section 5 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 provides that the suit, appeal or other proceedings may be continued, prosecuted and enforced by or against the corresponding new bank. HRC 406/1978 pending adjudication on 15-4-1980 on which date Corporation Bank Ltd., was nationalised should be taken as continued by the 2nd respondent by virtue of Section 5(5) read with Section 17 of the Banking Companies Act, 1980 up to 17-1-1981 on which date HRC 406/1978 was withdrawn. The jural relationship between the appellant and the 2nd respondent continued to be governed by the KRC Act. The notice of termination issued in 1978 by the erstwhile Corporation Bank Ltd., ceased to have any effect. The provisions of the Act became applicable to the premises of the 2nd respondent only from 17-1-1981. Since there was no termination of tenancy of the appellant after 15-4-1980 the appellant was in lawful and authorised possession of the schedule premises as a contractual tenant and he could never be treated as an unauthorised occupant of public premises. The 2nd respondent ought to have issued notice terminating the jural relationship of landlord and tenant keeping in view the provisions of Section 2(g) and Section 11(1) of the PP Act. Unless one more notice terrminati: ; tenancy was issued the proceedings under Section 4 and 5 of the PP Act could not have been taken. As such proceedings taken and order passed are vitiated for reason of non-issuing such a notice in the instant case.

In support of this argument he placed reliance on the case of STATE OF HARYANA vs RAMKISHAN & ORS.* He wants to take support from the said Decision to state that there is no provision in the PP Act declaring the authorised lawful occupation of the premises as an unauthorised occupation automatically.

*(1988) 3 SCC 416

5. We have carefully considered this argument of the learned Counsel for the appellant. But we find it difficult to accept the same for the following reasons:-

Section 2(g) of the PP Act reads thus:-

> "(g) "unauthorised occupation" in relation to any public premises, means the occupation by any person of the public premises, without authority for such occupation, and includes the continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever."
>
> (Emphasis supplied)

It is the case of the appellant himself, that the lease was for a period of 11 months and he executed a lease deed for 11 months at the time of entering into the possession of the schedule premises. It is also not disputed the Corporation Bank Ltd., issued the legal notice dated 3-10-1978 terminating his tenancy and thereafter HRC.406/1978 was filed in the Court of the Munsiff at Mangalore. The said HRC.406/1978 was withdrawn by the 2nd respondent on 17-1-1981. The definition as contained in Section 2(g) of the PP Act clearly takes the appellant within its ambit. The said definition includes the continuance in occupation by any person of the public premises after the authority under which he was allowed to occupy the premises has expired. Admittedly the appellant was allowed to occupy the premises under lease deed for a period of 11 months and the said period of 11 months has expired long back. Hence it is not possible to accept the contention to the contrary advanced by the learned Counsel for the appellant. His submission that the appellant continued as a tenant till 17-1-1981 the date on which HRC.406/1978 wa withdrawn. Under the provisions of the KRC Act, his possession was protected. No order of eviction could be passed against him. Hence he was not an unauthorised occupant when the show cause notice under Section 4 of the PP Act was issued, without issuing a notice of termination of tenancy prior to it. In this argument, the learned Counsel for the appellant has failed to see Section 21(1) of the KRC Act only provided a protective umbrella against order of eviction otherwise than on the grounds mentioned under Section 21(1) of the

KRC Act. In view of the law in force namely, the PP Act governing the field, the unauthorised occupant does not become authorised merely because protection was given against the arbitrary evictions under the provisions of the KRC Act earlier.

6. Learned Counsel for the appellant was not in a position to dispute as to the conclusion arrived at by the learned single Judge that the PP Act, prevails over the KRC Act. In other words, the provisions of the PP Act are applicable to the facts of the case on hand. If that be so after the expiry of the lease period of 11 months initially fixed the appellant became unauthorised occupant. Even his tenancy was terminated by the notice dated 3-10-1978, mere filing of HRC.406/1978 or its continuance till it was withdrawn on 17-1-1981 did not make him authorised occupant when he became unauthorised occupant within the meaning as contained and defined under Section 2(g) of the PP Act.

7. The Decision reported in 1988(3) SCC 416* in our opinion does not help the appellant. It is a Decision in which Section 4A of the Mines and Minerals (Regulation and Development) Act, 1957 came up for consideration by the Supreme Court in the matter of giving opportunity of hearing to the affected lessees before taking decision. In the said Decision it was held Section 4A by itself does not prematurely terminate any mining lease. The decision in this regard has to be taken by the Central Government after considering the circumstances of each case separately and for exercise of such power it is necessary to fulfil the condition mentioned therein, namely, that the proposed action would be in the interest of regulation of mines and mineral development. The Supreme Court in para-10 of the said Judgment has stated thus:-

> "10. On a consideration of the facts and circumstances of the present case, we are of the opinion that there was no effective consultation between the Union of India and the State Government, and the Central Government did not form any opinion as required under Section 4A of the Act. We are further of the view that the lessees, the respondents before us, were entitled to be heard before a decision to prematurely terminate their leases was taken but they were not given any opportunity to place their case."

Hence as stated above this Decision is not at all helpful to the appellant. Under the provisions of the PP Act it is not at all contemplated that any prior notice of termination of tenancy be given to an unauthorised occupant. Even under the K.R.C. Act, the notice of termination had already been issued in the instant case as early as on 3-10-1978.

8. In view of this clear legal position, we have no hesitation to hold that there was no necessity of issuing notice of termination of tenancy once again before initiating action under the PP Act and passing orders under the provisions of the said Act, for eviction of unauthorised occupant, like the appellant.

9. Thus, therefore, there is no merit in this Writ Appeal. Consequently what follows is its dismissal. Accordingly, we affirm the order of the learned single Judge and dismiss this appeal.

I.L.R. 1991 KAR 1371

MOHAN, C.J. & HAKEEM, J

State of Karnataka vs Messrs Cantreads Private Limited*

KARNATAKA FOREST ACT, 1963 (Karnataka Act No.5 of 1964) - Section 2(7): Forest Produce - Where latex undergone process of manufacture, will not be forest produce.

HELD:

The latex which is the natural produce is hardened by the application of sulphuric acid. The said latex is shaped in the form of sheets. Thereafter it is dried with the help of smoke and various grades I to V are produced. This is done for purposes of preservation of latex and making it fit for marketing...Where, therefore, it has undergone this process of manufacture, it is

*W.As. Nos. 525 & 526 of 1989 c/w W.P. No. 14734 of 1990 dated 4th March

on the ground that it does not disclose how the will was drafted or prepared. There is no reason for the Court to disbelieve the affidavit of an Advocate and Solicitor on a conjecture, particularly in the absence of any cogent challenge thereto. The proceedings had been non-contentious in view of the affidavit of the widow consenting to the grant of probate. The affidavit filed by the attesting witness met the requirement of Form 102 of the Rules and there is no justification to discredit the affidavit. It is true that the certification by the doctor is typed at the foot of the will. The certification, however, is signed by the doctor and bears the date. In fact, the will of 16th May 1996 on which reliance was placed by Counsel for the Petitioner contains a similar modality on the certification of the Doctor. There is no reasonable justification to discredit the certification, for to do so would be to substitute conjecture for a cogent line of reasoning. In the facts of this case when the grant of probate had proceeded on the basis that the matter was non-contentious, fault cannot be found with the executors in not filing the affidavit of the Sub-Registrar of Assurances before whom the will was registered. Under the Rules, an affidavit of one of the attesting witnesses was required and that requirement was duly complied with. The executors have set their oath in support of the will.

20. In these circumstances, the grounds which have been urged in support of the case for revoking the grant of the probate are lacking in substance. The Petition shall accordingly stand dismissed.

Petition dismissed.

2010 A I H C 1451

(BOMBAY HIGH COURT)

A. M. KHANWILKAR, J.

Pradeep Babubhai Chinai & Anr. v. Sindhu Resettlement Corporation Ltd., Bombay & Ors.

W. P. No. 5148 of 1993, D/- 12-1-2009.

Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971), S. 2(e), (i), (ii) — Public premises — Eviction — Plea of applicant to be lawful subtenant — Whether Bombay Rent Act applicable to public premises governed by P. P. Act (1971) — Suit premises were part of public premises belonging to Bank — Once premises are governed by definition of public premises in P. P. Act, it is not open to occupant of such premises or person claiming through authorized occupant to seek protection of provisions of Rent Act (1947) — Only enquiry permissible in relation to such premises is whether occupant of premises is authorized or unauthorized and not with reference to any matter referred to in Bombay Rent Act (1947).

Bombay Rents Hotel and Lodging House Rates Control Act (57 of 1947), Ss. 4, 5, 6.

After coming into force of the P. P. Act, the provisions of the Bombay Rent Act qua the properties of the Government and Government Companies would be inoperative. Indeed, the objective and purpose of the P. P. Act, is in relation to the "public premises". Whereas, the provisions of Bombay Rent Act inter alia deal with relationship between landlord and tenant or tenant and sub-tenant. However, the said relationship is ascribable to "a premises" which is necessarily governed by the Rent Control Legislation and not otherwise. Once the provisions of the P. P. Act are applicable to any premises, all rights and obligations of the occupants therein by whatever name called, would be and ought to be controlled by the mechanism provided for therein for eviction of occupants from such premises. The P. P. Act recognizes only "authorized occupants" and all others in occupation will have to be treated as unauthorized occupants or in unauthorized occupation of the public premises. These are the only two classes of occupants which are recognized by the provisions of the P. P. Act in relation to any public premises. Therefore, a person who claims to be a licensee or subtenant of the lawful occupant, cannot acquire the status of a lawful or authorized occupant — unless the statutory authority were to recognize his possession of the public premises in that capacity. Indeed, the moment the statutory authority were to recognize the posses-

sion of such occupant as legitimate one, then that person will have to be recognized as an authorized occupant of the public premises within the meaning of the P. P. Act and not otherwise. The concept of sub-tenant or lawful sub-tenant or protected licensee is the creature of the provisions of the Bombay Rent Act and is alien to the Scheme of P. P. Act. **(Para 13)**

Cases Referred: Chronological Paras

2007 (6) AIR Bom R 506 : 2008 AIHC 329	20
AIR 2002 SC 3404 : 2002 AIR SCW 3971	9, 11
AIR 2000 Del 439	20
(1996) 7 SCC 676	17
AIR 1992 Bom 375	6
1992 Mah LJ 944	20
AIR 1991 SC 855	7, 9, 10
AIR 1988 SC 1313	19
AIR 1969 SC 78	18

Dinyar Madon, Sr. Counsel i/b M/s. Malvi Ranchoddas & Co., for Petitioners; U. J. Makhija, Sr. Counsel i/b Amin Kherada, for Respondents.

ORDER :— This Writ Petition takes exception to the Judgment and order dated 21st June, 1993 passed by the Appellate Bench of the Small Cause Court at Bombay in Appeal No. 377/1992. The Appellate Bench of the Small Cause Court in turn confirmed the view taken by the trial Court vide Judgment and Order dated 24th November, 1992 below Interim Notice No. 369/1992 holding that the Court had no jurisdiction to try and entertain the subject suit in view of the fact that the suit premises are governed by the provisions of Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (hereinafter referred to as P. P. Act).

2. The relevant facts to examine the question regarding jurisdiction of the Court are as follows. The Punjab National Bank, a Public Corporation, is the owner of the building in which the suit premises are situated on the second floor of the building known as PNB House. The first Respondent is a tenant of the said Bank in respect of the premises on the second floor of PNB House. Out of the said premises in occupation of the first Respondent as tenant, portion thereof, admeasuring about 800 sq. feet, was allegedly let out to the predecessor of the Petitioners (one Babubhai M. Chinai) as sub-tenant thereof, sometime in 1966. It is the case of the Petitioners-Plaintiffs that the said arrangement was arrived at after taking approval of the Bank (the owners). The said Babubhai died on 4th July, 1975 leaving a Will wherein he appointed his widow Ashrumati B. Chinai and his sons — the Petitioners, as Executors thereof. It is stated that the said three persons were also the heirs/ legal representatives of Babubhai. It is the case of the Petitioners-Plalintiffs that after the death of Babubhai, first Respondent was pre-ssurising the said Ashrumati and the Petitioners to vacate the suit premises and also stopped accepting rent. In the circumstances, said Ashrumati and the Petitioners filed a Declaratory Suit being RAE Declatory Suit No. 5453/1975 for the following reliefs.

"(a) That it be declared that the Plaintiffs are the lawful sub-tenants or in any event protected Licensees in respect of the premises admeasuring 300 sq.ft.on the 2nd floor of PNB House, formerly known as Karimji House, situated at Sir Phirozeshah Mehta Road, Bombay Land more particularly shown in Pink wash and the sketch plan Ex.B hereto annexed and are fully protected under the provisions of the Bombay Act, 57 of 1947;

(b) that the Defendants, their servants and/ or agents be permanently restrained by an order and injunction of this Hon'ble Court from changing the common lock on the main gate leading to the respective premises of the Plaintiffs and the Defendants and/or from barring the entry of the Plaintiffs, their servants and agents into the said premises of the Plaintiffs and/or from trespassing, encroaching or entering upon the said premises described in prayer (a) above or any part or portion thereof or bringing any third person on the said premises or any part or portion thereof or from doing any act, deed or thing so as to disturb or interfere in any manner whatsoever with the quiet and peaceful possession and enjoyment of the said premises described in prayer (a) above by the Plain-

tiffs as lawful subtenants or protected licensees of the said premises described in prayer (a) above ;

(c) that pending the hearing and final disposal of the above suit, the Defendants, their servants and/or agents be restrained by an order and injunction of this Hon'ble Court from changing the common lock on the main gate leading to the respective premises of the Plaintiffs and the Defendants and/or from barring the entry of the Plaintiffs, their servants and agents into the said premises of the Plaintiffs and/or from trespassing, encroaching or entering upon the said premises described in prayer (a) above or any part or portion thereof or bringing any third person on the said premises or any part or portion thereof or from doing any act, deed or thing so as to disturb or interfere in any manner whatsoever with the quiet and peaceful possession and enjoyment of the said premises by the Plaintiffs as the lawful subtenants or protected licensees of the said premises described in prayer (a) above ;

(d) for interim and ad interim reliefs in terms of prayer (c) above ;

(e) for such other and further reliefs as the nature and circumstances of the case may require ;

(f) for costs of the suit."

3. During the pendency of the said Suit, the Defendants-Respondent No. 1 took out Interim Notice No. 3690 of 1992 asserting that the provisions of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (hereinafter referred to as Bombay Rent Act) have no application in relation to the suit premises. In that, the Defendants were the tenants of Punjab National Bank Ltd. in respect of larger premises of which the suit premises constitute a portion thereof. The said Bank is a "statutory authority" as defined by Section 2(fa)(ii) of the P.P.Act and that the suit premises qualify the definition of Public Premises as defined in Section 2(e) 2(i) or 2(ii) of the P.P. Act. According to the Defendants, therefore, the provisions of Public Premises Act were applicable to the suit premises for which reason the P.P.Act would override the provisions of Rent Control Legislation which has no application thereto. In substance, it was asserted that the Plaintiffs were not entitled to invoke the protection of the Bombay Rent Act. The defendants by the said Interim Notice prayed for the following reliefs.

"(a) That this Hon'ble Court may be pleased to frame Preliminary Issues regarding the Jurisdiction of this Hon'ble Court to try and entertain the aforesaid suit as to whether the provisions of the Bombay Rent Act apply to the suit premises and consequently whether this Hon'ble Court would have jurisdiction to try and entertain the aforesaid suit and/or whether the aforesaid suit is maintainable in view of the fact that the suit premises fall within the preview of the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971.

(b) That this Hon'ble Court may be pleased to decide the Issues as per prayer (a) above at the inception as Preliminary Issues.

(c) That after hearing the preliminary Issues this Hon'ble Court may be pleased to dismiss the aforesaid suit on the ground of lack of Jurisdiction and/or non-maintainability of the suit under the Bombay Rent Act.

(d) For such further and other reliefs as this Hon'ble Court may deem fit in the facts and circumstances of the case.

(e) Costs of this Application.

(f) That this Notice may be served upon the Advocate for the Plaintiff Shri. G. K. Chandan having his office at Chaturbhuj Jivandas House, 1st Floor, Near Flyover, 285, Princess Street, Bombay 400 002."

4. The said application was contested by the plaintiffs. While considering the rival stand, the trial Court Judge mainly framed three issues for consideration. Firstly, whether the suit premises were governed by the provisions of P.P. Act. Secondly, whether the premises were not governed by the provisions of Bombay Rent Act and the same has no application thereto and thirdly whether the application taken out by the Defendants at this stage was maintainable. The trial Court answered all the three issues against the Plaintiffs and in favour of Defendants. Consistent with that opinion, the application preferred by the Defendants came to be allowed

and the suit was dismissed on the ground of lack of jurisdiction of the Court for the reasons recorded in the Judgement and Order dated 24th November, 1992.

5. The Plaintiffs carried the matter in appeal before the Appellate Bench of the Small Cause Court by way of Appeal No. 377/1992. The Appellate Bench of the Small Cause Court was pleased to uphold the opinion of the trial Court Judge and dismissed the appeal preferred by the Plaintiffs.

6. Against the abovesaid decision, present Writ Petition has been filed. Besides questioning the correctness of the view taken by the two Courts below the petitioners-plaintiffs had challenged the constitutional validity of the provisions of the P. P. Act being ultra vires Article 14 and 19(1)(g) of the Constitution of India. Insofar as the question regarding constitutional validity of P.P. Act is concerned, the Division Bench has answered the same vide oral order dated 30-8-1994 against the Petitioners following its earlier decision reported in AIR 1992 Bombay 375 in the case of Minoo Framroze Balsara v. The Union of India & Ors. By the same order the Division Bench referred the matter back to the Single Judge to consider the same on merits regarding the correctness of the two decisions challenged in this writ petition as is required by the High Court Appellate Side Rules. Accordingly, the matter proceeded for arguments before me.

7. Insofar as the question whether the premises owned by Punjab National Bank are governed by the provisions of the P.P. Act is concerned, there is direct judgment of the Constitution Bench of the Apex Court where Punjab National Bank was respondent, in the case of Ashoka Marketing Ltd. & Ors. v. Punjab National Bank reported in AIR 1991 SC 855. On analysing the relevant aspects, the Constitution Bench of the Apex Court has held that the Nationalised Bank is a Corporation established under the Central Act and it is owned and controlled by the Central Government. It is further held that the premises belonging to nationalised banks are public premises within the ambit of Section 2(e)(2)(ii) of the P.P. Act. This decision is also an authority on the second issue that would arise for consideration to which reference will be made a little later. In view of this decision, it is not open to argue that the suit premises which is portion of the premises let out to the Defendants by the Punjab National Bank is not covered by the sweep of definition of "Public Premises" in the P.P. Act.

8. However, the moot question is; notwithstanding the suit premises are public premises within the meaning of the Public Premises Act, whether the plaintiffs are still entitled to claim protection under the provisions of the Bombay Rent Act?

9. The Petitioners/Plaintiffs are not in a position to dispute the fact that Punjab National Bank is a Corporation covered by the provisions of the P.P. Act and that the premises belonging to it would be public premises for the purpose of the said Act. It is indisputable that the provisions of the P.P.Act came into force with effect from 16th September, 1958, except Sections 11, 19 and 20, which were to come into force at once on 23rd August, 1971. The Scheme of provisions of the P.P. Act has been analysed in two different decisions of the Constitution Bench of the Apex Court. The first decision is in the case of Ashoka Marketing Ltd. (AIR 1991 SC 855) (supra) and recent decision of another Constitution Bench in the case of Kaisar-I-Hind Pvt. Ltd. & Anr. v. National Textile Corporation (Maharashtra North) Ltd. & Ors. reported in (2002) 8 SCC 182 : (AIR 2002 SC 3404). Both these decisions, apart from dealing with the question of constitutional validity of the P.P. Act have also answered the contention that once the provisions of the P.P. Act become applicable to any premises, the provisions of the Rent Control Legislation will be of no avail. It is held that the P.P. Act deals with Government property as well as property belonging to other legal entities mentioned in clauses (2) & (3) of Section 2(e) of the P.P. Act.

10. The Apex Court in paragraph 55 of its Judgement in Ashoka Marketing Ltd. 's case (supra) has noted that the Rent Control Law can be said to be a special statute regulating the relationship of landlord and tenant. But, the P.P. Act makes provision for speedy ma-

chinery to secure eviction of unauthorised occupants from public premises. It went on to hold that the Public Premises Act is also a special statute relating to eviction of unauthorised occupants from the public premises and being a special statute and not a general enactment the exception contained in the principle that a subsequent general law cannot derogate from an earlier special law cannot be invoked; and in accordance with the principle that the later law abrogates earlier contrary laws, the Public Premises Act must prevail over the Rent Control Act. In paragraph 61 of the same Judgment, the Court went on to restate the established legal principle that in the case of inconsistency between the provisions of two enactments, both of which can be regarded as Special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein. The Court then went on to consider the objects and reasons for the enactment of the Rent Act and found that the same is to make provisions for expeditious adjudication of the dispute between landlords and tenants, determination of standard rent payable by tenants and to give protection against eviction of tenants. The premises belonging to Government are excluded from the ambit of the Rent Control Act; which means that the Rent Act has been enacted primarily to regulate the private relationship between landlords and tenants with a view to confer certain benefits on the tenants and at the same time to balance the interest of landlords by providing for expeditious adjudication of the proceedings between landlords and tenants. While dealing with the objects and reasons for introducing the Public Premises Act, the Court noted that it has been enacted to deal with the mischief of rampant unauthorised occupation of public premises by providing a speedy machinery for the eviction of persons in unauthorised occupation. It further held that in order to secure this object, the said Act prescribes the time period for various steps which are required to be taken for securing eviction of persons in unauthorised occupation. The object underlying the P.P. Act is to safeguard public interest by making available for public use premises belonging to Central Government, Companies in which the Central Government has substantial interest, Corporations owned or controlled by the Central Government and certain autonomous bodies and to prevent misuse of such premises. After analysing the objectives of the two enactments, it went on to conclude that the effect of giving overriding effect to the provisions of the P.P. Act over the Rent Control Act, would be that buildings belonging to Companies, Corporations and autonomous bodies referred to in Section 2(e) of the Public Premises Act are excluded from the ambit of the Rent Control Act in the same manner as properties belonging to the Central Government. It went on to observe in paragraph 64 of the same Judgement that the reason underlying the exclusion of property belonging to the Government from the ambit of the Rent Control Act, is that, the Government while dealing with the citizens in respect of property belonging to it would not act for its own purpose as a private landlord but would act in public interest. It is further observed that what can be said with regard to Government in relation to property belonging to it can also be said with regard to companies, corporations and other statutory bodies mentioned in Section 2(e) of the P.P. Act. The Apex Court unambiguously held that keeping in view the object and purpose underlying both the enactments, namely, the Rent Control Act and the Public Premises Act, the provisions of the Public Premises Act have to be construed as overriding the provisions contained in the Rent Control Act.

11. If there was any doubt, the question is once again answered in the recent decision of the Constitution Bench in Kaisar-I-Hind case (AIR 2002 SC 3404) (supra). Even in this decision the question regarding the purport of provisions of the P.P. Act has been addressed. The specific question as to the effect of Article 254(1) of the Constitution of India on the Bomaby Rent Act after enactment of the P.P. Act has been adverted to in paragraph 38 of the Judgement. In para-40, the Court has observed that once the P.P. Act is enacted then the Bombay Rent Act

would not prevail qua the repugnancy between it and the P.P. Act. To the extent of repugnancy, the State law would be void under Article 254(1) of the Constitution and the law made by the Parliament would prevail. It went on to observe that the date of coming into force of the P.P. Act, the Bombay Rent Act qua the properties of the Government and Government Companies "would be inoperative". It has also noted the legal position that the language of Article 254(1) is unambiguous. On that reasoning, it is held that once the P.P. Act came into force, the existing Bombay Rent Act would be void so far as it is repugnant to law made by Parliament. Justice Shah speaking for the majority view summed up the position in paragraphs 65 & 66 as follows:

"65. The result of the foregoing discussion is :

1. It cannot be held that summary speedier procedure prescribed under the PP Eviction Act for evicting the tenants, sub-tenants or unauthorised occupants, it is reasonable and in conformity with the principles of natural justice, would abridge the rights conferred under the Constitution.

2.(a) Article 254(2) contemplates "reservation for consideration of the President" and also "Assent". Reservation for consideration is not an empty formality. Pointed attention of the President is required to be drawn to the repugnancy between the earlier law made by Parliament and the contemplated State legislation and the reasons for having such law despite the enactment by Parliament.

(b) The word "assent" used in clause (2) of Article 254 would in context mean express agreement of mind to what is proposed by the State.

(c) In case where it is not indicated that "assent" is qua a particular law made by Parliament, then it is open to the Court to call for the proposals made by the State for the consideration of the President before obtaining assent.

3. Extending the duration of a temporary enactment does not amount to enactment of a new law. However such extension may require assent of the President in case of repugnancy.

66. In this view of the matter, in the present case there is no question of giving supremacy to the Bombay Rent Act qua the law made by Parliament."

12. The Learned Counsel for the petitioners, however, contends that, the fact that the suit premises is part of the premises governed by the provisions of the P.P. Act per se does not make the provisions of the Bombay Rent Act inapplicable thereto. According to petitioners, the provisions of the Bombay Rent Act would be inapplicable only if expressly exempted under Section 4 of the Bombay Rent Act. Sans exemption, the provisions of the Bombay Rent Act would apply to premises defined in Section 5(8) read with Section 6 of the Rent Act. Indeed, Counsel for the Petitioners had also relied on the circumstance that recognising this position the recent Maha-rashtra Rent Control Act, 1999 has made an express provision to exempt the premises from the application of the Rent Legislation which are belonging to the Banks. It is argued that the present suit is governed by the provisions of the Old Rent Act which does not expressly exempt the application of the Bombay Rent Act to premises belonging to Banks — for which reason protection available under the provisions of the Bombay Rent Act would continue to apply in relation to the suit premises. It was argued that the Bombay Rent Act, on the other hand, exempts only premises belonging to "Government" or "Local Authority". The Punjab National Bank was neither Government nor Local authority as such. That means the State Legislation had never intended to exempt the application of provisions of the Bombay Rent Act in relation to premises belonging to the Banks. It was then argued that acceptance of argument of Respondent-Defendant that provisions of the P.P. Act will prevail — for which reason the Bombay Rent Act has no application — would result in rewriting of Section 4 of the Bombay Rent Act. For Section 4 of the Bombay Rent Act will have to be read as the Act shall not apply to "any public premises" covered by the provisions of the P.P. Act and not limited to premises belonging to Gov-

ernment or a Local Authority. It was then contended that the sweep of bar of provisions of Public Premises Act is limited to matters referred to in Section 15 of the P.P. Act. That would not cover a suit for declaration by a sub-tenant against the tenant of the Bank. Whereas, the dispute between the sub-tenant and the tenant was a matter regulated by the provisions of Rent Control Legislation and adjudication of that dispute is not expressly barred by Section 15 of the P.P. Act. It was contended that it is well established position that exclusion of jurisdiction of Court may not be readily accepted. In absence of express provision of exclusion of jurisdiction of Rent Court by the Central Enactment (P.P. Act), coupled with the fact that the dispute between the tenant and the sub-tenant was in respect of the "relationship of landlord and tenant" between them inter se, the same was completely outside the scope of provisions of the P.P. Act. Therefore, it ought to proceed as per the regime of the Rent Act before the Rent Court to effectuate the rights and liabilities arising from and under the provisions of the Bombay Rent Act.

13. The above arguments canvassed on behalf of the Petitioners will have to be stated to be rejected. For, by now it is authoritatively held by the Apex Court that after coming into force of the P.P. Act, the provisions of the Bombay Rent Act qua the properties of the Government and Government Companies would be inoperative. Indeed, the objective and purpose of the P.P. Act, is in relation to the "public premises". Whereas, the provisions of Bombay Rent Act inter alia deal with relationship between landlord and tenant or tenant and sub-tenant. However, the said relationship is ascribable to "a premises" which is necessarily governed by the Rent Control Legislation and not otherwise. Once the provisions of the P.P. Act are applicable to any premises, all rights and obligations of the occupants therein by whatever name called, would be and ought to be controlled by the mechanism provided for therein for eviction of occupants from such premises. The P.P. Act recognises only "authorised occupants" and all others in occupation will have to be treated as unauthorised occupants or in unauthorised occupation of the public premises. These are the only two classes of occupants which are recognised by the provisions of the P.P. Act in relation to any public premises. Therefore, a person who claims to be a licensee or sub-tenant of the lawful occupant, cannot acquire the status of a lawful or authorised occupant — unless the statutory authority were to recognise his possession of the public premises in that capacity. Indeed, the moment the statutory authority were to recognise the possession of such occupant as legitimate one, than that person will have to be recognised as an authorised occupant of the public premises within the meaning of the P.P. Act and not otherwise. The concept of sub-tenant or lawful sub-tenant or protected licensee is the creature of the provisions of the Bombay Rent Act and is alien to the Scheme of P.P. Act.

14. The argument that the Rent Legislation merely exempts only the premises belonging to "Government or a Local Authority" clearly overlooks the settled legal position that after coming into force of the P.P. Act, the premises belonging to the Government as also the Corporations or the Companies (covered by the definition of Public Premises Act) are controlled by the regime of the said Act alone. The provisions of P.P. Act overrides the application of the Bombay Rent Act qua the public premises. In other words, the provisions of the Rent Act will have no application to such premises. The fact that Section 4 of the Rent Act does not make specific reference to Corporations or companies referred to in Section 2(e), 2(ii) of the P.P. Act, does not take the matter any further. The field regarding the public premises belonging to the specified Corporation is fully occupied by the Central enactment. The State Legislation would be void to the extent it is repugnant with the Central enactment. In other words, irrespective of the State Legislation (Rent Act) being silent about the exemption of application qua the premises belonging to Banks or Corporations, that is of no avail. For, the law expounded by the Apex Court in the abovesaid two decisions is that the provisions of Bombay Rent Act will have no application to premises belonging to

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specified Companies or the Corporation such as the Punjab National Bank.

15. True it is that the Bombay Rent Act deals with the aspects of relationship of landlord and tenant or tenant and sub-tenant and/or protected licensees. However, that relationship cannot be examined in abstract but is ascribable to "a premises". Significantly, even the claim regarding rights and liabilities under the Rent Legislation is in relation to "premises" to which Rent Legislation is made applicable. If the premises are exempted from the operation of the Rent Legislation, the question of occupant of such premises claiming any rights in the context of provisions of the Rent Act does not arise. If any other view is taken, it would end up in a situation that even if Rent Legislation has no application to the premises, the person occupying the same may assert that he has the protection of the Rent Legislation. That cannot be countenanced. Applying the same logic, once the premises are governed by the definition of Public Premises in the P.P. Act, it is not open to the occupant of such premises or person claiming through the authorised occupant to seek protection of the provisions of the Rent Act therein. For, the provisions of Rent Act have no application to such premises and the only enquiry that is permissible in relation to such premises (public premises) is whether the occupant of the premises is authorised or unauthorised in the context of the provisions of P.P. Act and not with reference to any matter referred to in the Bombay Rent Act. I have no hesitation in taking the view that in such a case neither the provisions of Section 4 nor Section 5(8) read with Section 6 of the Bombay Rent Act would be of any avail. Taking any other view would lead to a preposterous situation. In that, if a person claiming to be in occupation in the capacity as licensee or sub-tenant, his claim was to be accepted with reference to the provisions of the Bombay Rent Act, obviously such person would acquire rights and protection in terms of provisions contained in the Bombay Rent Act. In that case he can be dispossessed only by following due process under the said enactment. In a given case, if the Estate Officer was to initiate action of eviction against the original allottee of the public premises on legitimate grounds and order of eviction was to be passed, in that case the so called sub-tenant or licensee in occupation of portion of the premises would assert that his possession is protected and has become the direct tenant of the statutory authority, having regard to the Scheme of Sections 14 and 15 of the Bombay Rent Act. In that case, he may further contend that he cannot be evicted merely on the basis of order passed against the main tenant. Obviously, when enacting the P.P. Act, the Parliament consciously evolved a mechanism for eviction of occupants or persons in unauthorised occupation by following summary procedure stipulated therein, so as to ensure remedy of speedy eviction in relation to public premises and also for its effective management and preservation in public interest.

16. To get over this position it was argued that only matters referred to in Section 15 of the P.P. Act have been barred by the Legislature. It was contended that matters which are not covered by Section 15 could be tried by the regular Courts or Special Courts. According to Petitioners, none of the matters referred to in Section 15 of the P.P. Act would cover the relief claimed by the Petitioners in the suit as presented. In the first place, this argument clearly overlooks that once it is held that after coming into force of the P.P. Act, the provisions of the Bombay Rent Act have no application to public premises, the question of resorting to proceedings by invoking the provisions of Rent Act or to assert right in the public premises in the context of provisions of the Rent Legislation does not arise. Viewed thus, there was no necessity to bar the jurisdiction of the Rent Court from entertaining any proceedings between the so called tenant and sub-tenant or licensee inter se. Non-mention thereof, either in Section 15 of the P.P. Act or in Section 4 of the Bomaby Rent Act, can be no basis to assume that the dispute between the original allottee of the public premises and his sub-tenant will still be governed by the provisions of the Bombay Rent Act.

17. Much emphasis was placed on the de-

cision of the Apex Court (Two Judges) in Life Insurance Corporation of India v. Shiv Prasad Tripathi & Ors., reported in 1996 (7) SCC 676. Relying on the dictum in paragraph 6 of the said decision, it was argued that the Apex Court has recognised the power of the Rent Court to adjudicate on question whether person was a tenant or not and for that reason has made observation that the Court's power to examine such a question has not been taken away by Section 10 of the P.P. Act. There is no substance in this argument. That was a passing observation made in the context of argument advanced in the fact situation of that case. In that case, the order of eviction passed by the Estate Officer was confirmed in appeal as well as before the High Court. The High Court, however, while upholding the eviction order granted liberty to the occupant to resort to suit before the Small Cause Court to establish his tenancy rights and protected the occupant by way of interim direction till the Court of Small Causes were to adjudicate on question of tenancy to be raised by the occupant in the proposed suit. That view of the High Court was set aside by the Apex Court on the reasoning that Section 10 bars granting of such relief. The Court was not called upon to specifically address the issue as to whether in fact the provisions of the Bombay Rent Act were available and could be invoked in respect of Public Premises governed by the Central Legislation i.e. the P.P. Act. That aspect has been specifically dealt with at least by two Constitution Bench decisions of the Apex Court already adverted to earlier.

18. Counsel for the Petitioners had relied on the decision of the Apex Court in the case of Dhulabhai v. State of M.P. & Anr., reported in AIR 1969 Supreme Court 78, to buttress the argument that exclusion of jurisdiction of Court should not be readily accepted. This argument clearly overlooks that it is not a question of exclusion of jurisdiction of the Rent Court but one of application of provisions of the Bombay Rent Act in relation to premises which are covered by the definition of public premises. Once it is held that provisions of the Bombay Rent Act have no application to such premises, the question of Rent Court having any jurisdiction to decide matters between the occupants inter se on the basis of provisions of the Rent Act does not arise.

19. My attention was invited to the decision in the case of Nagji Vallabhji & Co. v. Meghji Vijpar & Co., reported in AIR 1988 SC 1313. That was a case in which premises belonged to Bombay Port Trust (Local Authority). The same was let out to Respondent No. 1 therein under a written agreement who in turn had inducted the Appellant herein as sub-tenant. The question that was posed for consideration before the Apex Court was that the premises were governed by the provisions of the Bombay Rent Act and respondent No. 1 firm was not entitled to a decree for eviction as none of the grounds for eviction under the Rent Act had been made out. The Court considered the argument in the context of scope of section 4(1) and Section 4(4)(a) of the Bombay Rent Act. Significantly, in that case the Apex Court found as of fact that the entire building in which the suit premises is situated belonged to the Bombay Port Trust. The Court then considered the argument of the Appellant therein that if the sub-lessee in a building put up by a lessee on land leased from the Government or a local authority under a building lease is entitled to the protection of the Bombay Rent Act under Section 4(4)(a) thereof, there is no reason why such protection should be denied to a sub-lessee in any building belonging to the Government or a local authority and taken on lease by a private party regarding the question as to who has put up the building. The Court while considering the above submission clearly observed that "that may or may not be so". It then held that the plain reading of sub-section (1) of Section 4 of the Rent Act makes it clear that the provisions of the Bombay Rent Act are not applicable to premises belonging to the Government or a local authority. Upon analysing the provisions of Section 4(4)(a) of the Rent Act the Court observed that if this provision were to be construed as including any building put up or erected on land held by any person from the Government or a local authority, the result would be that such protection would be

available even against the Government or a local authority and the provisions of sub-section (1) of Section 4 may be rendered largely nugatory. It has further held that the provisions of Section 4(4)(a) in the context clearly shows that there is no intention therein to take out a building put up by the Government or a local authority from the scope of the exemption conferred by Section 4(1) of the Rent Act. Whereas, Section 4(4)(a) read with Section 4(1) of the Rent Act together suggests that it was only in respect of a building put up by the lessee on the Government land or land belonging to a local authority under a building agreement that the sub-lessee were taken out of the exemption in Section 4(1) and allowed the benefit of the provisions of the Rent Act. Notably, the Apex Court has held that the exemption granted under the earlier part of Section 4(1) is in respect of the premises and not in respect of the relationship. To my mind, this decision is of no avail to the petitioners especially when it is common ground that the suit premises are part of the "Public Premises" belonging to the Bank. Rather, the statement of Law that Section 4(1) of the Bombay Rent Act makes it clear that the provisions of the Bombay Rent Act are not applicable to premises such as the present one belonging to the Bank squarely answers the issue against the petitioners herein.

20. The Petitioners then relied on two other decisions in the case of United India Insurance Company Ltd. v. The Hongkong & Shanghai Banking Corporation Ltd., reported in 2007 (6) All MR 843 : (2007 (6) AIR Bom R 506) and Mrs. Nisha v. Punjab National Bank, reported in AIR 2000 Delhi 439. In both these decisions the argument dealt with is that if the company or corporation was tenant in relation to any premises and had overstayed the express lease period whether should be proceeded under the provisions of the P.P. Act or the Landlord was obliged to take recourse to remedy before the regular Court. These authorities would be of no avail to the Petitioners. Reliance was then placed on another decision of our High Court in the case of Dattaram T. Bordekar v. Prakash D. Tiwatane, reported in 1992 MLJ 944. Once again this decision will be of no avail to the Petitioners. In that case it was held that provisions of Section 4(1) of the Bombay Rent Act were applicable even to a case where property has been subsequently acquired by the local authority. The Court noted that the provisions of Rent Act were not applicable.

21. It was also argued that there is no remedy provided to the lawful sub-tenant or protected licensee which can be suitably addressed. In the first place, the concept of lawful sub-tenant or protected licensee is relevant only to the provisions of the Bombay Rent Act and has no application to the Scheme of Public Premises Act. Secondly, for the nature of stand taken by the Petitioners in the present suit implicit in that is the claim that the original allottee was disowning the lawful possession of the Petitioners in relation to the suit premises which is part of the public premises. In the context of Public Premises Act, the issue would be whether the Petitioners-Plalintiffs are in unauthorised occupation of the portion of public premises. Having regard to the Scheme of Section 4 of the P.P. Act, it is the boundened duty of the Estate Officer to preserve the public premises from being encroached upon by unauthorised occupants. Primarily, the Estate Officer has to examine the question as to whether a person who claims to be in occupation of the public premises or any portion thereof is an authorised or unauthorised occupant. The controversy as raised by the Petitioners, if taken before the Estate Officer, he will have to address that issue. However, if the issue was to be answered against the Petitioners, it would be the duty of the Estate Officer to ensure that such unauthorised occupant is immediately removed and evicted from the public premises. That can be done even at the instance of the original allottee, whom the statutory authority recognises as the only lawful occupant of the public premises. If such is the enquiry to be made in the said proceedings, it is possible to take the view that the claim of the Petitioners of being in lawful occupation would be covered by the enquiry to be conducted by the Estate Officer for the purpose of Section 4 of the P.P.

Act. By no standards, however, the reliefs claimed by the Petitioners in the subject suit are available or can be granted by the Civil Court or for that matter by the Rent Court.

22. Taking over all view of the matter, I have no hesitation in concluding that the premises referred to in the suit being part of public premises, the provisions of Bombay Rent Act will have no application thereto. On this conclusion, it necessarily follows that the reliefs claimed in the suit for declaration that the Petitioners-Plaintiffs are the lawful subtenants or protected licensee in respect of portion of the premises and protected by provisions of the Bombay Rent Act is unavailable. Accordingly, the suit should fail.

23. Counsel for the Petitioners lastly submitted that in that case the Court may direct return of plaint in terms of Order VII, Rule 10 of the Civil Procedure Code. Ordinarily, having held that the Rent Court has no jurisdiction, the appropriate course would be to return the plaint to be presented before the Court of competent jurisdiction. However, for the nature of reliefs claimed on the basis of provisions of the Rent Act which has no application to the public premises, as observed earlier, the question of returning the plaint does not arise. Inasmuch as, that relief cannot be granted by any other Court for the simple reason that the provisions of the Bombay Rent Act have no application to the suit premises. Indeed, Section 8 of the P.P. Act bestows same powers in the Estate Officer as are vested in Civil Court under the Code of Civil Procedure when trying the suit in respect of matters of summoning and enforcing the attendance of any person and examining him on oath, requiring discovery of production and other matters which may be prescribed. However, the Estate Officer is not treated as a Civil Court or deemed to be a Civil Court as such, but the said provisions only invests certain powers of the Civil Court in the Estate Officer. Thus understood, it is not possible to accept the request of return of plaint in the fact situation of the present case.

24. Accordingly, this Writ Petition fails and the same is dismissed with costs.

25. At this stage Counsel for the Petitioner prays for continuing the operation of stay granted during the pendency of this petition for a period of 10 weeks. Request being reasonable, is granted. Ordered accordingly.

Order accordingly.

2010 A I H C 1461

(BOMBAY HIGH COURT)

B. H. MARLAPALLE AND S. J. VAZIFDAR, JJ.

Smt. Manju Kamal Mehra v. Kamal Pushkar Mehra.

F. C. A. No. 20 with 44 of 2005, D/- 18-7-2009.

(A) Hindu Marriage Act (25 of 1955), S. 9 — Restitution of conjugal rights — Wife had withdrawn from society of husband without any reasonable excuse — Material on record showing that she had no good reason to stay away from her husband — Husband entitled to decree of restitution of conjugal rights. (Para 8)

(B) Hindu Marriage Act (25 of 1955), Ss. 9, 24 — Maintenance — Grant of in favour of wife — Validity — Wife withdrawing from society of husband without any reasonable excuse — Consequential passing of decree of restitution of conjugal rights in favour of husband — It would be implied that wife was required to join company of husband at her matrimonial home — Grant of maintenance to wife despite to decree of restitution of conjugal rights in favour of husband not proper — It would penalize husband to pay maintenance to wife who did not subject to the decree and would encourage wife to stay away from husband despite the decree.

When the husband has succeeded in obtaining a decree of restitution of conjugal rights against the wife, it is implied that the wife was required to join the company of the husband at her matrimonial home and therefore, there is no question of maintenance at least from the date of the said order. If the wife is directed to be paid maintenance despite the said decree, reluctance of the wife to join the husband would be further strengthened and she would be encouraged to stay

afresh the objections dated 14.08.2006 and by a reasoned order communicate such reasons to the petitioner. It is open to the petitioner to supplement the said objections by further supplementary objections, if any, in view of the fact that the said objections were filed as early as on 14.08.2006 and several subsequent events may have become relevant. If the petitioner chooses to file the said supplementary objections, if any, he shall do so within a period of two (2) weeks from today. The first respondent is directed to consider the objections filed earlier together with supplementary objections, if any, within a period of six (6) (sic) from today and communicate its reasoned decision to the petitioner. The petitioner shall be at liberty to take such appropriate steps as permissible under law thereafter. As no measures under Section 13(4) of the SARFAESI Act are taken by the first respondent bank, no directions in that regard are necessary to be issued till the bank passes appropriate orders on the objections of the petitioner under Section 13(2) of the SARFAESI Act.

The writ petition is accordingly disposed of. There shall be no order as to costs.

Order accordingly.

AIR 2010 ANDHRA PRADESH 46

R. SUBHASH REDDY, J.

Podduturi Vasantha Reddy & etc. v. Estate Officer, Airports Authority of India, N. A. D., Hyderabad

W. P. Nos. 9083, 9584, 10391, 14417 & 20345 of 2001, D/- 22-9-2009.

Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971), S. 5 — Eviction of unauthorised occupant — Jurisdiction of authority — In case of bona fide dispute of title to property, authority constituted under Act would have no jurisdiction to adjudicates dispute — Remedy is to approach Civil Court.

The Public Premises (Eviction of Unauthorised Occupants), Act has been designed and intended for ordering evictions and removal of encroachments in cases where there is no dispute with regard to title and possession of property in question. The powers conferred on authorities under said Legislation are only to order eviction and removal of constructions with regard to premises which belong to them. But in cases, where there is a bona fide dispute with regard to title/boundaries of land belonging to the Government or its Corporations or companies, such disputes are outside scope of said Legislation, and authority constituted under said enactment cannot be said to have jurisdiction to embark upon the domain of the Civil Court for purpose of adjudicating civil disputes, the power of which, is exclusively vested in such Courts, and it would be unreasonable to allow such authority to decide such disputes by invoking the provisions of Public Premises Act, 1971, which provides for a summary procedure to conduct inquiry and order for eviction and removal of constructions. In that view of the matter, when the said provisions are read with reference to the object of the Legislation, it is clear that the said piece of Legislation never intended to give its authorities the power to decide such complicated questions of title disputes, so as to decide the same by passing orders under Section 5 of the said Act.

AIR 1991 SC 855 (1) and AIR 1972 SC 2205 Disting.

AIR 1977 Bom 220, AIR 1982 SC 1081, AIR 2003 Jhar 17 and 1995 Supp (2) SCC 290, Rel. on. **(Paras 12, 21)**

Cases Referred : Chronological Paras

2004 (3) Andh LT 276	9
AIR 2003 Jharkhand 17 : 2003 AIR Jhar HCR 25 (Rel. on)	8, 15
AIR 2003 MP 256	8
1995 Supp (2) SCC 290 (Rel. on)	8, 16
AIR 1991 SC 855 (1) (Disting)	9, 18
AIR 1982 SC 1081 (Rel. on)	8, 14
AIR 1977 Bom 220 (Rel. on)	8, 13
AIR 1972 SC 2205 (Disting)	9, 19

Prabhakar Sripada, M. V. Durga Prasad, for Petitioner; E. Madan Mohan Rao, for Respondent.

ORDER : — As much as common questions of law are raised for consideration on same set of facts, all these writ petitions are heard together and are being disposed of by this common order.

2. In all the above writ petitions, the petitioners herein have questioned the orders issued under Section 5-A (2) of the Public Premises (Eviction of Unauthorised Occupations) Act, 1971, by the respondents. Through the aforesaid orders, the respondent has ordered for removal of flats in a residential complex, namely 'Archana Apartments'. As in all the writ petitions, identical orders are questioned, I refer to the facts as narrated in W.P.No.14417 of 2001.

3. One Smt. C.Kamsamma, claiming to be the owner and possessor of land to an extent of 600 square yards in the premises bearing No.1-11-252/1/E in Survey No.19 of Begumpet, has sold her undivided share to the petitioner by registered sale deed dated 26.10.1994, bearing document No.3071/94. After purchase of the said plot, the petitioner has entered into an agreement for construction of flat bearing No.204 and the same was constructed, and ever since, the petitioner is in its possession and enjoyment. As averred in the affidavit filed in support of the writ petition, it is the case of the petitioner that one Sri Mamilla Krishna Reddy, who was the father of Smt.C.Kamsamma, was the original owner and possessor of the land as he has purchased the same from its earlier owner one Sri Hazaratulla by a registered sale deed bearing document No.6041, dated 5th Aban, 1358 Fasli, and the said property is given to Smt.C.Kamsamma by way of pasupu kumkuma at the time of her marriage. Afterwards, when there was a claim by her sisters also for the property, the said Kamsamma had filed suit for declaration of title, in O.S.No.252 of 1990 on the file of Subordinate Judge, Ranga Reddy District, and the said suit was decreed by a judgment and decree dated 15.03.1991. Thereafter, she entered into development agreement with M/s. Naveen Constructions on 4th of January 1993, to develop the said property and obtained permission from the Municipal Corporation of Hyderabad to construct an apartment complex, vide permission bearing No.415/12, dated 12th February 1993. The petitioner has availed housing loan from Canara Bank and having paid the said amount to the vendor of the land, she got constructed the flat in question and is in possession of the same by letting out to a tenant. At this stage, respondents have issued the notice dated 11th January 2001, in exercise of powers under Section 5-A (1) of the Public Premises (Eviction of Unauthorised Occupations) Act, 1971, alleging that the Airports Authority has got surveyed the land in survey No.15 and it was found that the building in question is constructed by encroaching upon its land to an extent of 570 Square yards, as such, directed the petitioner to remove these flats. Initially, the petitioner sent a telegram dated 13.02.2001, thereafter, through an Advocate, got filed a detailed representation dated 24.02.2001, questioning the authority of the respondents in invoking the provisions of the Public Premises (Eviction of Unauthorised Occupations) Act, 1971. After filing of explanation by the petitioner, the respondents have issued the impugned notice dated 26.04.2001 in exercise of powers under Section 5-A (2) of the said Act, directing the petitioner for removal of her flat. In the aforesaid impugned notice, it is stated that the land in Survey No.15 of Begumpet village has been acquired for establishment of Hyderabad Airport by the then Civil Aviation Department by paying compensation, and as such, the said land is now in possession of the Airports Authority, as such, the land in Survey No.15 is the public premises and as the land in the said survey number is encroached by Archana Apartments, which are constructed in Survey No.15 but not in Survey No.19, the representation of the petitioner is not considered. Consequently, orders are issued for removal of said flats.

4. In the writ petition, it is the case of the petitioner that the said apartments are constructed in the land covered by Survey No.19, but not 15. It is submitted that after purchase of the land by one Mamilla Krishna Reddy by the registered sale deed bearing document No.6041, dated 5th Aban, 1358 Fasli, the name of said Krishna Reddy is recorded in all the revenue records right from the Khasra Pahani of 1954-55, and after the said land was given in pasupu kumkuma to Smt.C.Kamsamma, her name was also recorded in all the subsequent pahanis prepared

for Begumpet village. It is also the case of the petitioner that when there was an interference by the National Airports Authority, the vendor of the petitioner i.e. Smt. Kamsamma has filed the suit in O.S.No.137 of 1991 on the file of the I Additional Sub-Judge, Ranga Reddy District, and the said suit was decreed by a judgment and decree dated 16th July 1997. It is submitted that when the respondents have lost their claim in Civil Proceedings, it is not open for them to invoke the provisions under the Public Premises (Eviction of Unauthorised Occupations) Act, 1971, and deprive the petitioner of her property, by resorting to summary inquiry contemplated under the said Act. It is the case of the petitioner that as much as the apartment complex is constructed in Survey No.19 of Begumpet village, but not in Survey No.15 as claimed by the respondents, it is beyond the scope of the provisions contained under the Public Premises (Eviction of Unauthorised Occupations) Act, 1971 to resolve such disputes and to order for removal of structures. It is submitted that in view of the long-standing possession of the vendor of the petitioner and the petitioner after construction of the flat in question, if there is any claim by the respondent-Authority, it is for them to approach the competent Civil Court to establish their claim, but at the same time, they cannot pass any order unilaterally, presuming that the property in question is 'public premises' within the meaning of Section 2 (e) of the Public Premises (Eviction of Unauthorised Occupations) Act, 1971.

5. On behalf of respondents, counter affidavit is filed by the Senior Manager (Law). In the counter, while generally denying the allegations of the petitioner, it is stated that during the course of inquiry under the provisions of the Public Premises (Eviction of Unauthorised Occupations) Act, 1971, the claim of the petitioner was that she has purchased the ownership rights in Survey No.19 and Archana Apartments are constructed in Survey No.19, which is outside the Airports Authority owned land. It is stated that in support of her claim, the petitioner has submitted several documents, but all the documents pertain to Survey No.19 and they are nothing to do with Survey No.15. While referring to the telegram dated 13th February 2001 issued by the petitioner and the reply dated 24th February 2001 issued on behalf of the petitioner, it is stated that as much as all the documents produced by the petitioner relate to Survey No.19, but not 15, as such, respondents have issued orders for removal of the structures which are constructed in Survey No.15. It is stated that since the petitioner's claim of title is over Survey No.19 and the Airports Authority's claim of title is over Survey No.15, there is no dispute regarding title of their respective land and it is only identification of property in question, as such, the respondents are within their powers for invocation of provisions under the Public Premises (Eviction of Unauthorised Occupations) Act, 1971. In the counter affidavit, it is also stated that the survey report submitted by the revenue authorities, dated 10th August 2000, also shows that the land covered by Survey No.15 belongs to the Airports Authority, and therefore, there is no conflicted question of law of fact arise for consideration, but it is only the question of identification of the land. Further, with regard to suit in O.S.No.137 of 1991, it is stated that the said suit pertains to the land belonging to Survey No.19, but not 15.

6. A reply affidavit is also filed on behalf of the petitioner, reiterating that the land in question has been in possession and enjoyment of the petitioner and her predecessors in title, for more than 50 years. It is also stated that no notice was given to the petitioner before conducting survey by the revenue authorities, as referred in the counter affidavit. It is further stated that the suit schedule property in O.S.No.137 of 1991 relates to the same property in which the petitioner's flat was constructed.

7. Heard learned counsel Sri M.V.Durga Prasad and Sri Prabhakar Sripada, for the petitioners in all the writ petitions and Sri E.Madanmohan Rao, for the respondent-Airports Authority.

8. It is contended by the learned counsel appearing for petitioners in this batch of cases, that the petitioners have purchased the

undivided share of land and got constructed the residential complex in the land covered by Survey No.19, but not Survey No.15. It is submitted that the title and possession of petitioners and their vendor is traceable to last more than 50 years, which is evident from various public documents issued by the revenue and Municipal authorities. Referring to such documentary evidence, it is submitted by the learned counsel that when there is a serious dispute with regard to title and possession of property in question, the respondents have no authority or jurisdiction to invoke the provisions under the Public Premises (Eviction of Unauthorised Occupations) Act, 1971, and deprive the petitioners of their land, and such action on the part of respondents is illegal and arbitrary, and also runs contrary to the object of the very Legislation. It is submitted that the predecessor of the petitioners in title Smt.Kamsamma was in actual physical possession of the land and the building constructed thereon, and when there was interference by the respondents, she filed suit during her lifetime in O.S.No.137 of 1991, and there was no dispute that on the very same property, the flats in question were constructed. It is submitted that when the suit filed by the predecessor in title of the petitioners is decreed and when such judgment and decree has become final, it is not open for the respondents to invoke the provisions under the Act, so as to deprive them of their property in illegal and high-handed manner. It is submitted that having regard to the object of the Legislation, it is not intended to decide the complicated questions of title and possession, and if the respondents are having any right over the land in question, it is for them to approach the competent Civil Court to establish title. In support of their contentions, the learned counsel for petitioners have placed reliance on the judgments in the case of S.K.B.Gaikwad v. The Union of India, AIR 1977 Bombay 220, in Govt. of A.P. v. Thummala Krishna Rao & another, AIR 1982 SC 1081, in M/s.Shree Bajrang Hard Coke Manufacturing Corporation v. Ramesh Prasad & others, AIR 2003 Jharkhand 17, in Madhya Pradesh Electricity Board v. Badri Prasad & others, AIR 2003 MP 256 and in the case of State of Rajasthan v. Padmavati Devi & others, 1995 Supp (2) SCC 290.

9. Per contra, it is contended by Sri E.Madanmohan Rao, learned counsel appearing for the respondent-Airports Authority that as much as it is not in dispute that the land covered by Survey No.15 is the land belonging to the respondent-Authority and the same was acquired for Hyderabad Airport, in that view of the matter, as the petitioners got constructed their flats by encroaching into the land belonging to the respondents, they have rightly invoked the provisions under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and ordered for removal of said structures. It is submitted that as all the documentary evidence filed by the petitioners relate only to Survey No.15, but not 19, in that view of the matter, they are not helpful to the petitioners in support of their claim for title and possession with regard to the land covered by Survey No.19. It is submitted by the learned counsel that in view of the provision contained under Section 15 of the Public Premises (Eviction of Unauthorised Occupations) Act, 1971, there is a bar on the respondent-Airports Authority on approaching the Civil Court, and in that view of the matter, the only remedy available to the respondents is to invoke the provisions of the Act, so as to remove the unauthorized structures. In support of his argument, the learned counsel has relied upon the judgments in the case of S.Lingamaiah v. State of A.P., 2004 (3) ALT 276, in Ashoka Marketing Ltd. v. Punjab National Bank and others, AIR 1991 SC 855 (1), and in Hari Singh & others v. The Military Estate Officer, AIR 1972 SC 2205.

10. Before I consider the respective contentions of the learned counsel for the parties, I deem it appropriate to refer to the Statement of Objects and Reasons of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. This Act was enacted to provide for a speedy machinery for eviction of unauthorised occupants of public premises. In the said objects, it is stated that it has become impossible for Government to take expeditious action even in flagrant cases

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of unauthorized occupation of public premises – and recovery of rent or damages for such unauthorized occupation. It is therefore, considered imperative to restore a speedy machinery for the eviction of persons who are in unauthorized occupation of public premises, keeping in view, at the same time, the necessity of complying with the provisions of the Constitution and the judicial pronouncement. "Premises" is defined under Section 2 (c) and "Public Premises" is defined under Section 2 (e) of the said Act. As evident from the definition under Section 2 (e) of the Act, any premises belonging to, or taken on lease or requisitioned by or on behalf of the Central Government, and includes any such premises which have been placed by the Government, whether before or after the commencement of the Public Premises (Eviction of Unauthorised Occupants) Amendment Act, 1980, under the control of the Secretariat of either House of Parliament for providing residential accommodation to any member of the staff of that Secretariat. Further, it also includes any premises belonging to, or taken on lease by or on behalf of any Company in which not less than 51% of the paid-up share capital is held by the Central Government or any Company which is a subsidiary of the Government Company, and also includes any premises belonging to any Corporation or a local authority established by or under a Central Act and owned or controlled by the Central Government.

11. In that view of the matter, the definition pre-supposes that the premises shall belong to the Government or the Government-owned Company, so as to construe the same as a 'public premises', and the said Legislation is enacted for the purpose of taking steps for eviction and removal of constructions on such public premises. Section 5 of the said Act empowers the authorities to order eviction of the unauthorized occupants, whereas Section 5-A empowers the authorities to remove the unauthorized constructions, etc.

12. Coming to the case on hand, it is the specific case of the petitioners that the flats in question are forming part of apartment complex constructed in Survey No.19 of Begumpet village. It is also their case that earlier, the said piece of land is held by Sri Mamilla Krishna Reddy, which was given to his daughter by name Smt.C.Kamsamma in pasupu kumkuma, and it is their specific case that for the last more than 50 years, it was in possession of either the petitioner or her predecessors in title. In support of her claim, the petitioner has also filed public documents, namely, Khasra pahani for the year 1954-55 and subsequent pahanis, wherein, Smt.Kamsamma's father is shown to have been in possession of the land in question, covered by Survey No.19 and also Smt.Kamsamma, after the said land was given to her by way of pasupu kumkuma at the time of her marriage. Further, when there is an interference by the respondents with regard to possession of Smt.Kamsamma, she has filed a suit in O.S.No.137 of 1991, wherein, a written statement was filed on behalf of defendant No.3, and in para 3 of the said written statement, it is categorically alleged that the suit land does not fall in Survey No.19, but is part of Survey No.15 of Begumpet village. Though the written statement is filed, subsequently, the defendants have not contested the proceedings before the Civil Court, and ultimately, the suit in O.S.No.137 of 1991 was decreed by a judgment and decree dated 16th July 1997. Though it is stated in the counter-affidavit that the proceedings have been initiated pursuant to the survey conducted by the Assistant Director of Survey and Land Records, Ranga Reddy District, who has addressed a letter dated 10th August 2000, but it appears that the said survey was conducted without issuing any notice to the affected persons. When the piece of land was purchased by the petitioner and when constructions have already come up, the survey conducted by the respondents, without any notice to the petitioners, could not have been the basis for initiation of proceedings against the petitioners. In the reply affidavit filed on behalf of the petitioner, it is categorically stated that the petitioner and other interested persons were not put on notice and there was no survey to their knowledge. I have also perused the various documents filed on behalf of petitioners. With regard to same premises, there were notices of demand for assessment, is-

sued right from the year 1982, and there is also an inquiry notice with regard to non-assessment of property tax, issued to the vendor of the petitioner on 13.11.1982. The very same premises was assessed to property tax in the name of the petitioner's vendor under the provisions of the Hyderabad Municipal Corporation Act, 1955. The petitioner has also placed on record, a notice, dated 02.11.1986, issued to her for assessment of property tax with respect to the premises bearing No. 1-11-252/1/E, at which place, the present apartment complex has come up. In addition to the same, a copy of Khasra Pahani for the year 1954-55 is filed. In the said pahani patrika, the name of Sri Mamilla Krishna Reddy i.e. the father of Smt. C.Kamsamma is recorded as possessor and the name of one Allauddin was recorded as pattedar. Even in the subsequent pahani patrikas also, the name of Smt.C.Kamsamma was recorded as the person in actual possession of the property in question, covered by Survey No.19. When the suit was filed by Smt.Kamsamma in O.S.No.137 of 1991, the respondents have filed the written statement, and with regard to very same premises, it is their case that the said property is covered by Survey No.15, but not by 19. In spite of the same, they have not contested the proceedings, and ultimately, the suit was decreed. In that view of the matter, having regard to the decree obtained by Smt. C. Kamsamma, vendor of the petitioner, and the abundant documentary evidence filed by the petitioners, it is a clear case, where, serious dispute arises for consideration with regard to title and possession of the land in question. It is also to be noticed that at several times, respondents themselves were addressing the survey authorities to decide the boundary dispute by demarcating the land covered by Survey No.15 as well as 19, which itself indicates that there was a boundary dispute with regard to land covered by Survey Nos.19 and 15, and in that view of the matter, based on the ex parte survey conducted, the respondents cannot invoke the provisions under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. Having regard to the objective of the said Legislation and the provisions contained therein, it is designed and intended for ordering evictions and removal of encroachments in cases where there is no dispute with regard to title and possession of property in question. The powers conferred on the authorities under the said Legislation are only to order eviction and removal of constructions with regard to premises which belong to them. But in cases, where there is a bona fide dispute with regard to title/boundaries of the land belonged to the Government or its Corporations or Companies, such disputes are outside the scope of said Legislation, and the authority constituted under the said enactment cannot be said to have jurisdiction to embark upon the domain of the Civil Court for the purpose of adjudicating civil disputes, the power of which, is exclusively vested in such Courts, and it would be unreasonable to allow such authority to decide such disputes by invoking the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, which provides for a summary procedure to conduct inquiry and order for eviction and removal of constructions. In that view of the matter, when the said provisions are read with reference to the object of the Legislation, it is clear that the said piece of Legislation never intended to give its authorities the power to decide such complicated questions of title disputes, so as to decide the same by passing orders under Section 5 of the said Act.

13. In the judgment relied upon by the learned counsel for the petitioners in the case of S.R.B.Gaikwad (AIR 1977 Bom 220) (supra), a Division Bench of Bombay High Court, while considering the scope of the definition of 'public premises' under Section 2 (e) of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, has held to the effect that 'public premises' means any premises belonging to or taken on lease or requisitioned by or on behalf of the Central Government. In the said judgment, it is further held that the enactment, as indicated in the preamble, is intended to provide for eviction of unauthorized occupants from public premises and for certain incidental matters. The enactment is not so much concerned with

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the title as with the possessory rights vested in the Central Government, and Section 2 (e) only indicates the sources by which such right to possession can be acquired, one such being, the taking of the premises on lease, from its owner. The definition, thus, is descriptive of the source or origin of the possessory rights acquired by the Central Government. It is the continuance of the vesting of this possessory right in Government and not so much more the origin thereof, that makes any premises, a public premises under the Act. In the same judgment, it is held that the enactment is thus aimed at ensuring the continuance of possessory rights acquired through the modes indicated in the definition clause.

14. In another judgment relied upon by the learned counsel in the case of Govt. of A.P. v. Thummala Krishna Rao (AIR 1982 SC 1081) (supra), while elaborately considering the scope of similar such provision under Sections 6 and 7 of the A.P. Land Encroachment Act, 1905, the Hon'ble Supreme Court has held as under :

"The summary remedy for eviction which is provided for by S.6 of the Act can be resorted to by the Government only against persons who are in unauthorized occupation of any land which is "the property of Government". If there is a bona fide dispute regarding the title of the government to any property, the Government cannot take a unilateral decision in its own favour that the property belongs to it, and on the basis of such decision take recourse to the summary remedy provided by S.6 for evicting the person who is in possession of the property under a bona fide claim or title. The summary remedy prescribed by S.6 is not the kind of legal process which is suited to an adjudication of complicated questions of title.

Held, that the questions as to the title to the three plots could not appropriately be decided in a summary inquiry contemplated by Ss.6 and 7 of the Act. The long possession of the respondents and their predecessors-in-title of those plots raised a genuine dispute between them and the Government on the question of title, remembering specially that the property, admittedly, belonged originally to the family of Nawab Habibudin from whom the respondents claimed to have purchased it. The question as to whether the title to the property came to be vested in the Government as a result of acquisition and the further question whether the Nawab encroached upon that property thereafter and perfected his title by adverse possession had to be decided in a properly constituted suit and until the Government succeeded in establishing its title to the property, the respondents could not be evicted summarily."

15. Reference is also made to the judgment in the case of M/s. Shree Bajrang Hard Coke Manufacturing Corporation (AIR 2003 Jhar 17) (supra), wherein, a Division Bench of Jharkhand High Court, while considering the scope of provision under Section 5 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, has held in paras 14 and 19 as under :

"14. From what has been discussed and quoted above, it is abundantly clear that an authority under the aforementioned Act has a very limited jurisdiction and it has to determine only a dispute that may arise, vis-a-vis a public premises. Upon an application made before it, it has to proceed in a summary disposal thereto. The question, as to whether the area formed part of the Royal Tisra Colliery or not, consequently making it a public premise is a question that becomes the focal point of the instant case and it, therefore, obviously involve determination/finding of fact. Undoubtedly, while attempting to come to such finding, the authority may be faced with complicated question of title as is involved in the instant case. The authority in the aforementioned case cannot be said to have the jurisdiction to embark upon the domain of the Civil Court for the purposes of adjudicating on a question of a complicated title, which can only be done by a Civil Court. It would be extremely unreasonable to allow a Court vested with summary procedure to give a finding, which can only be arrived at by a Civil Court having the necessary judicial competence.

19. ..... Now, under Section 5 of the aforementioned Public Premises (Eviction of Unauthorised Occupants) Act, 1971, it is

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clear that a Estate Officer after following the procedure required to be followed therein and after reaching to a conclusion that a person is in unauthorized occupation of a public premises, he may make an order of eviction. The catch words that cannot be lost track of in this provision are that, all that the Estate Officer is required to do is that he must come to a conclusion that a person is in occupation of an area which is already confirmed or which has already been declared to be a public premises. He cannot nor does he have the jurisdiction to identify a particular piece of property and then give a finding that, that piece of property is a public property. This power is vested only with a Court of competent civil jurisdiction and not in a statutory authority, such as Estate Officer, who has been conferred only with summary powers. If such Estate Officers are allowed to give such finding, it would amount to conferring them with the powers of adjudication and delivery of judgments within the meaning of Section 2(a) read with provisions of Order XIV of the Code of Civil Procedure and/or principles/provisions analogous thereto."

16. Reference is also made to the case of State of Rajasthan (supra), wherein, the Hon'ble Supreme Court, while considering the provisions under Section 91 of Rajasthan Land Revenue Act, 1956, which provides for summary proceedings for eviction of unauthorized occupants, has observed that where there is a bona fide dispute, the matter cannot be decided under the said Section, and it is held that in such cases, proper course would be to have the matter adjudicated by the competent Court of Law.

17. All the above referred judgments support the case of the petitioners as much as there is abundant material in support of their plea that the constructed portions fall within the land covered by Survey No.19, but not 15. When such a plea is raised, in view of the judgments referred above, it is not open for the respondents to record a finding to the effect that such piece of land is covered by Survey No.15 and to order removal of constructions by the authority under the Act. In view of the material placed on record on behalf of the petitioner, it is a clear case where there is a bona fide claim of the petitioners with regard to their plea that the constructions are in Survey No.19, but not in 15. Having regard to such a plea, it is not open to the respondents to initiate proceedings under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, and order eviction.

18. The learned counsel for respondent has relied on the judgment in the case of Ashoka Marketing Ltd. (AIR 1991 SC 855 (1)) (supra), wherein, the Hon'ble Supreme Court has held that the Nationalised Bank is a Corporation established by a Central Act and it is owned and controlled by the Central Government. As such, the premises belonging to such banks are the 'public premises' within the meaning of Section 2(e)2(ii) of the Public Premises Act.

19. Reliance is also placed in the case of Hari Singh & others (AIR 1972 SC 2205) (supra). In the said judgment, by upholding the Legislative competency to enact such a law, the Hon'ble Supreme Court has held that the word 'premises' as used in Section 2 (c) of the Act would apply to agricultural land also.

20. The questions, which fall for consideration in the aforesaid two judgments relied upon by the learned counsel for the respondent-Authority, would not render any assistance in support of his plea, having regard to the facts and circumstances of the cases on hand.

21. Though a further argument is advanced by the learned counsel for respondent that in view of the provision under Section 15 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, there is a bar on them to approach the Civil Court, but it is very difficult to accept such contention advanced by the learned counsel. As per the provisions under Section 15 of the Act, there is a bar of jurisdiction created on the Courts only in respect of orders passed under the said Act. Upon a reading of the said provision, it is very clear that it creates a bar on the Courts to entertain any suit or proceeding in respect of eviction of any person who is in unauthorized occupation of any public premises or in respect of removal of

any building, structure or fixture or goods, cattle or other animal from any public premises etc. But, when there is a dispute with regard to title and possession of the very public premises, this bar created under Section 15 of the Act would not come in the way of respondents to seek declaration with regard to title and possession, in the event of any disputes with regard to boundaries of the public properties. As such, the contention advanced on behalf of the learned counsel cannot be accepted.

22. For the aforesaid reasons, as this Court is of the view that the respondents are not empowered to decide such complicated questions of title and possession which are involved having regard to the pleas of the petitioners herein, the impugned orders are liable to be quashed.

23. Accordingly, all the writ petitions are allowed, declaring the initiation of proceedings against the petitioners under the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, as illegal, and consequently, the impugned orders issued under Section 5-A (2) of the said Act against the petitioners in all these writ petitions, are hereby quashed. No order as to costs.

Petitions allowed.

AIR 2010 ANDHRA PRADESH 54

B. PRAKASH RAO AND
G. BHAVANI PRASAD, JJ.

Maganti Raja Babu v. Vijaya Bank & Ors.

Appeal No. 1388 of 1999, D/- 2-9-2009.

Partnership Act (9 of 1932), Ss. 19, 22 — Implied authority of partner — Suit for recovery of loan — Acknowledgment of debt — Loan was obtained for purpose of Business of firm — Partners were running cinematograph firm — It cannot be said to be non-trading business as undisputedly profit making subsists— Consequently principle of extension of acknowledgment by partner on behalf of firm under implied authority can extend even to business of such firm. (Para 26)

Cases Referred : Chronological Paras

AIR 2001 SC 1363 : 2001 AIR SCW 1087	20
AIR 1980 SC 1167	18, 24
AIR 1968 SC 554	22
AIR 1968 SC 739	23
AIR 1957 SC 699	21
AIR 1955 SC 176	19
(1941) KBD 1192	7-11, 25

T. Ravi Kumar, Counsel for Appellant; K. Mallikarjuna Rao, Counsel for Respondents.

B. PRAKASH RAO, J. :— In this appeal filed under Section 96 of the Civil Procedure Code, the appellant who is defendant No. 2 in the Court below, seeks to assail the correctness of the judgment and decree dated 5-4-1999 in O.S. No. 10 of 1991 on the file of the III Additional Senior Civil Judge Vijayawada, Krishna district decreeing the suit filed by the first respondent-Vijaya Bank for recovery of a sum of Rs. 5,27,227.24 Ps against the defendants 1 to 5/partners and so far defendants 6 and 7 are concerned from the estate of late Koganti Kesava Rao, along with interest at 18% per annum from the date of suit till the date of realization and costs.

2. The brief version as can be made out from the pleadings in the Court below, is that in the suit, the case of the plaintiff was that it is a corporate body/a bank and the husband of the first defendant by name Mr. Koganti Kesava Rao and defendants 1 to 3 constituted a firm viz., M/s. Sai Krishna Films, Gandhinagar, Vijayawada-3 and applied for three types of loans for the purpose of business. Accordingly, the plaintiff bank has sanctioned a sum of Rs. 1,50,000/- under Clean Bills Purchased Account, Rs. 1,00,000/- towards Open Loan Cash Credit and another sum of Rs. 3,00,000/- towards Key Loan Cash Credit in favour of the said firm. Thereupon, on behalf of the firm, promissory notes were executed on 28-3-1985 for repayment of the said loans together with interest at 18% per annum with quarterly rests. Accordingly, accounts were opened with the bank in the name of the firm. The two loans viz., clean bills purchased account and open loan cash credit loan were closed, since the amounts due under them were adjusted and received by the plaintiff bank. The defendants 3 to 5

der 7, Rule 13 of the Code of Civil Procedure does not preclude the plaintiff from presentation of fresh plaint after rejection in respect of the same cause of action and hence, the said contention of the petitioner also does not bear any substance.

23. Reliance can very well be placed on the observations made by the Honourable Supreme Court in the case reported at (2001) 2 AP LJ 489, A.P. State Wakf Board v. Tati Venkata Sheshagiri Rao [E.Dharma Rao, J.], which are as follows :—

"No suit shall be instituted against the Wakf Board in respect of any act purporting to be done by it in pursuance of the Act or any Rules made thereunder unless two months notice is issued prior to the filing of the suit. The section further contains that notice in writing containing the cause of action, the name of plaintiff and description and place of residence and the relief sought for should be left at the office of the Board. Thus sub-sec. (2) of S.80 of the Code requires issuance of notice before institution of the suit against the Government of Public servant, but it can dispense with the same for passing any urgent or immediate order against the Government. This exception is not present in S.89 of the Act. The Legislature in its wisdom has not given any option to the plaintiff intending to file a suit against Wakf Board to file a petition to dispense with the issuance of 60 days notice. Therefore, as seen from the language imported in the Section, it is mandatory on the part of any person who claims to institute any suit against the Wakf Board in respect of any act purported to be done in pursuance of the Act or Rules made thereunder, have to issue 60 days notice with the particulars contained in the section."

24. Reliance also can be placed on the observations made by the Madras High Court in the case reported at AIR 1982 Mad 202, Rahmath Bi v. State Wakf Board [Ratnam, J.], in respect of erstwhile Section 56 of the Wakf Act, which are as follows :—

"The court cannot make exceptions or qualifications to the explicit terms of S.56 on account of consideration of hardship and absence of prejudice or detriment. A defect, as in the present case, cannot be equated to a formal defect contemplated by O.23, R.1 (3) Civil P.C. It is a radical defect going to the root of the claim of the plaintiff (petitioner). S.56 is express, explicit, mandatory and admits of no exceptions. Therefore, the issue of a notice under S. 56 is a condition precedent to the institution of the suit itself. Cases where suits have been instituted without the issue of a notice in accordance with S. 56 as in the instant case, are cases which clearly fall under O. 7, R. 11(d), C.P.C."

25. In the circumstances, it is amply clear that there is no illegality and/or perversity in the impugned order passed by the learned Presiding Officer, Maharashtra Wakf Tribunal, Aurangabad in Suit No. 109 of 2007 below Exh. 46 on 1.12.2007 and, therefore, no interference therein is warranted under the revisional jurisdiction.

26. In the result, present Civil Revision Application bears no substance and same is devoid of any merits and, therefore, same fails and accordingly same stands dismissed. In the facts and circumstances, there shall be no order as to costs.

Application dismissed.

2010 A I H C 1408

(BOMBAY HIGH COURT)

A. S. OKA, J.

Life Insurance Corporation of India & Anr. v. Banatwala & Co.

W. P. No. 5023 of 2009, D/- 8-9-2009.

Maharashtra Rent Control Act (18 of 2000), S. 8 — Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971), S. 15 — Fixation of standard rent — Application for by occupant of public premises — Question as to whether application for fixation of standard rent under provisions of Act (18 of 2000) is maintainable regarding premises to which provisions of Act (40 of 1971) are applicable — No provision for fixing standard rent under Act of 1971, but there are provisions to pass an order for recovery of rent and/or compensation from tenant — Provisions of Act of 1971 override provisions of Act of 2000 — And in view of overriding effect an occupant of public premises can-

not claim protection under Act of 2000 — As S. 15 of Act of 1971 ousts jurisdiction of Courts under Act of 2000 to deal with matter of recovery of rent in respect of public premises — Application for fixation of standard rent not maintainable. (Paras 17, 18)

Cases Referred : Chronological Paras

2009 (3) Mah LJ 671 3, 13
2006 (5) AIR Bom R 231 : AIR 2006 SC 2544 : 2006 AIR SCW 3449 3, 10, 14
AIR 2004 SC 1815 : 2004 AIR SCW 537 3
2003 (9) LJ SOFT 27 10
AIR 2002 SC 3404 : 2002 AIR SCW 3971 3, 10, 12
AIR 1991 SC 855 3, 4, 5, 9, 16
AIR 1989 SC 1642 7
1989 (2) RCJ 154 (Karnataka) 4, 16
AIR 1988 SC 1708 10
AIR 1981 SC 670 3, 11

V. Y. Sanglikar, for Petitioner; Hiralal Thakkar, Sr. Counsel with Joseph Fernandes, Rehana Kesuri, Jeetendra Ranawat i/by Manoj Dalvi, for Respondent.

ORDER :— The writ petition is taken up for final disposal. Following questions are involved in this writ petition:

(i) Whether the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (hereinafter referred to as the said Act of 1971) have overriding effect over the provisions of the Maharashtra Rent Control Act, 1999 (hereinafter referred to as the said Act of 1999)?

(ii) Whether an application for fixation of standard rent under the provisions of the said Act of 1999 is maintainable to the premises to which provisions of the said Act of 1971 are applicable?

2. The 1st petitioner Life Insurance Corporation of India is constituted under the Life Insurance Corporation Act, 1956 (hereinafter referred to as the said Act of 1956). The 2nd petitioner is an officer of the 1st petitioner. It is not in dispute that the premises belonging to the 1st petitioner are "public premises" under section 2(e) of the said Act of 1971. The dispute relates to a commercial premises admeasuring 1289.16 sq.ft situated in Reliance Building at D.N.Road, Fort, Mumbai 400 001 owned by the 1st petitioner. The said commercial premises (hereinafter referred to as the suit premises) were let out by the 1st petitioner to the respondent with effect from 1st August 1998. The respondent filed an application before the Court of Small Causes at Bombay praying for fixation of standard rent in respect of the suit premises. The said application was opposed by the 1st petitioner by contending that the said Act of 1971 has overriding effect on provisions of the said Act of 1999 and therefore, the application for fixation of standard rent was not maintainable. A preliminary objection was raised by the petitioner to the maintainability of the application for fixation of standard rent. An application was moved by the 1st petitioner purporting to be an application under Section 9A of the Code of Civil Procedure, 1908 praying for framing a preliminary issue of jurisdiction. By the impugned order dated 30th March, 2001, the said application has been rejected. The learned trial Judge held that "public premises" are not exempted from the applicability of the said Act of 1999. The learned trial Judge held that an application for fixation of standard rent is not a proceeding for eviction of a tenant. The learned Judge observed that section 3 of the said Act of 1999 does not exempt the 1st petitioner from the applicability of the said Act of 1999.

3. Mr. Sanglikar, learned counsel appearing for the petitioners relied upon the following decisions of the Apex Court:

1. Ashoka Marketing Ltd. & Anr. v. Punjab National Bank & Ors. [(1990) 4 SCC 406 : AIR 1991 SC 855]

2. Crawford Bayley & Co & Ors. v. Union of India & Ors. [(2006) 6 SCC 25 : 2006 (5) AIR Bom R 231];

3. M/s.Jain Ink Manufacturing Company v. Life Insurance Corporation of India & Anr. [(1980) 4 SCC 435 : AIR 1981 SC 670];

4. Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai & Anr. [AIR 2004 SC 1815]

He also placed reliance on a decision of the learned single Judge of this Court in the

case of Pradeep Babubhai Chinal & Anr. v. Sindhu Resettlement Corporation Ltd., Bombay & Ors. [2009 (3) Maharashtra Law Journal 671]. He submitted that the Apex Court has held that the provisions of the said Act of 1971 will prevail over the Rent Control Legislations enacted by the State. He submitted that once provisions of the said Act of 1971 are applicable to a premises, the rights and liabilities of the parties will be governed by the said Act of 1971 which will override the provisions of the Rent Control Legislation. He submitted that, therefore, to such premises provisions of the Transfer of Property Act, 1882 will be applicable. He, therefore, submitted that application for fixation of standard rent in respect of such premises will not be maintainable as provisions of the said Act of 1999 cannot be applied to such premises.

4. Mr. Thakkar, learned senior counsel appearing for the respondent invited the attention of the Court to the decision of the Apex Court in the case of Ashoka Marketing Ltd. (supra) and submitted that as there is no provision under the said Act of 1971 for fixation of reasonable rent, the provision relating to fixation of standard rent in the said Act of 1999 is not affected by the provisions of the said Act of 1999. He submitted that the said Act of 1971 will operate only insofar as mechanism provided for eviction of tenants is concerned, but, the tenant will continue to have protection of all other provisions of the said Act of 1999. He invited my attention to certain observations made by the Apex Court in the case of Kaiser-I-Hind Pvt. Ltd. & Anr. v. National Textile Corporation (Maharashtra North) Ltd. & Ors. [(2002) 8 SCC 182 : AIR 2002 SC 3404]. Lastly, he placed reliance on decision of the Division Bench of Karnataka High Court in the case of Bharath Gold Mines Ltd. v. Kannappa [1989 (2) All India Rent Control Journal-II 154].

5. I have carefully considered the submissions. There is no dispute that the suit premises are "public premises" under the provisions of the said Act of 1971. It will be necessary to refer to the decision of the Apex Court in the case of Ashoka Marketing Ltd (supra). The question before the Apex Court was whether a person who was inducted as a tenant in public premises for the purposes of the said Act of 1971 can be evicted from the said premises as a person being in unauthorised occupation under the provisions of the said Act of 1971 and whether such a person can invoke the protection of the Delhi Rent Control Act, 1958. The question which was considered specifically by the Apex Court was whether the provisions of the said Act of 1971 would override the provisions of the Rent Control Act in relation to the premises which fall within the ambit of both the enactments. The Apex Court observed that the Rent Control Legislations fall within the ambit of Entries 6, 7 and 13 of List III of Seventh schedule to the Constitution of India. The Delhi Rent Control Act was enacted by the Parliament in relation to Union Territory of Delhi in exercise of power conferred under Article 246(4) of the Constitution of India. The Apex Court observed that the said Act of 1971 in relation to the properties belonging to various legal entities mentioned in clauses (2) and (3) of section 2(e) is covered by Entries 6, 7 and 46 of List III of the Seventh schedule to the Constitution of India. The Apex Court observed that the said Act of 1971 and the Delhi Rent Control Act have been enacted by the same legislature in exercise of powers in respect of matters enumerated in the concurrent list. The Apex Court also observed that in relation to the properties belonging to the Central Government the said Act of 1971 would fall within the Entry 32 of List I being a law with respect to property of the Union. In paragraph 54 of the decision, the Apex Court observed that the said Act of 1971 was later enactment. The argument before the Apex Court was that the said Act of 1971 was a general enactment and whereas the Rent Control Act is a special enactment and therefore Rent Control Act should prevail over the said Act of 1971. The other argument was that the said Act of 1971 is also a special enactment making a provision for speedy recovery of possession of public premises in unauthorised occupation of a person. Thus, the argument was both the enactments are special legislations. It will be necessary to refer to what is

held by the Apex Court in paragraph 55 of the said decision. The relevant portion of the said paragraph reads thus:

"..... Therefore, the Public Premises Act is also a special statute relating to eviction of unauthorised occupants from public premises. In other words, both the enactments, namely, the Rent Control Act and the Public Premises Act, are special statutes in relation to the matters dealt with therein. Since, the Public Premises Act is a special statute and not a general enactment the exception contained in the principle that a subsequent general law cannot derogate from an earlier special law cannot be invoked and in accordance with the principle that the later laws abrogate earlier contrary laws, the Public Premises Act must prevail over the Rent Control Act."

6. In paragraph 56 the Apex Court observed thus:

"We arrive at the same conclusion by applying the principle which is following for resolving a conflict between the provisions of two special enactments made by the same legislature. We may in this context refer to some of the cases which have come before this Court where the provisions of two enactments made by the same legislature were found to be inconsistent and each enactment was claimed to be a special enactment and had a non obstante clause giving overriding effect to its provisions."

7. In paragraph No. 69 of the judgment, the Apex Court referred to its earlier decision in the case of Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay (1989) 3 SCC 293 : (AIR 1989 SC 1642). The Apex Court observed that the observations in the said case were made in the context of the provisions of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947 (hereinafter referred to as the said Act of 1947) under which an exemption from applicability of the provisions of the said Act of 1947 was granted to the premises belonging to the Bombay Port Trust. Thereafter, the Apex Court proceeded to observe thus:

"..... The consequence of giving overriding effect to the provisions of the Public Premises Act is that premises belonging to companies and statutory bodies referred to in clauses (2) and (3) of Section 2(e) of the Public Premises Act would be exempted from the provisions of the Rent Control Act. The actions of the companies and statutory bodies mentioned in clauses (2) and (3) of Section 2(e) of the Public Premises Act while dealing with their properties under the Public Premises Act will, therefore, have to be judged by the same standard."

8. In paragraph 70 the Apex Court held thus:

".....In our opinion, the provisions of the Public Premises Act, to the extent they cover premises falling within the ambit of the Rent Control Act, override the provisions of the Rent Control Act and a person in unauthorised occupation of public premises under Section 2(e) of the Act cannot invoke the protection of the Rent Control Act."

9. It must be remembered here that Apex Court in the case of Ashoka Marketing Ltd. (supra) was dealing with two special statutes enacted by the same legislature. In the said case, the Rent Control Legislation was prior in time to the said Act of 1971. The Apex Court has noted that under the provisions of the said Act of 1947, the premises belonging to Bombay Port Trust are specifically exempted from the applicability of the said Act of 1947.

10. The factual position in this petition is slightly different. Here the question is whether the said Act of 1999 will prevail over the provisions of the said Act of 1971 in view of the Article 254 (2) of the Constitution of India. The said Act of 1999 is a law made by the legislature of the State in respect of matters enumerated in Entries 6 and 46 of the Concurrent List and the said law has been enacted long after the said Act of 1971 was enacted. Moreover, the said Act of 1971 is also a law made under the concurrent list. The question will be what is the effect of the said Act of 1999 having being reserved for consideration of the President and having received the assent of the President of India. In this behalf, it will be necessary to refer to the decision of the Apex Court in the case of Crawford Bayley & Co. (supra). This was a

case where procee-dings were sought to be initiated against the appellant before the Apex Court under the provisions of the said Act of 1971. One of the grounds urged by the appellants was that the provisions of the said Act of 1999 shall prevail over the provisions of the said Act of 1971. In a writ petition filed by the said appellant before a Division Bench of this Court a contention was raised based on the fact that the said Act of 1999 was a subsequent legislation and the same had received assent of the President of India. In fact the said contention is specifically noted by the Division Bench in paragraph 3 of its decision [2003(9) LJSOFT 27]. The said contention was elaborately dealt with in paragraph 10 of the decision of the Division Bench and was rejected relying upon the decision of the Apex Court in the case of Kaiser-I-Hind Ltd. (supra). The Division Bench held that the provisions of the said Act of 1971 will prevail. The said decision of this Court was challenged before the Apex Court. It will be necessary to refer to the contention raised by the appellant before the Apex Court which is incorporated in paragraph 6 of the said decision in the case of Crawford Bayley & Co. (supra) which reads thus:

"6. The appellant raised five grounds before the High Court; first the provisions of the Maharashtra Rent Control Act, 1999 (hereinafter referred to as the Maharashtra Rent Act) shall prevail over the provisions of the said Act of 1941 in view of Article 254(2) of the Constitution of India as the Maharashtra Rent Act applies to all premises belonging to the respondent and therefore, appellant 1 is a protected tenant under the provisions of the Maharashtra Rent Act and the order of eviction for appellant 1 cannot be made. It was submitted that the Maharashtra Rent Act is law made by the legislature of the State in respect of matters enumerated under the Concurrent List i.e Entries 6, and 46. The Public Premises Act, 1971 is an earlier law made by Parliament under the Concurrent List i.e Entry 6. It was submitted since it was reserved for the assent of the President of India as it contained the repungnant provisions to the earlier law made by Parliament. Therefore, the later Act i.e. the Maharashtra Rent Act having been reserved and having received the assent of the President of India, would prevail over the Act, 1971."

In paragraphs 15 and 16, the Apex Court referred to its earlier decision in the case of Accountant and Secretarial Services (P) Ltd. v. Union of India ((1988) 4 SCC 324 : AIR 1988 SC 1708) which dealt with the issue whether the said Act of 1971 will prevail over the West Bengal Premises Act, 1956. In paragraph 17 of the decision the Apex Court observed thus:

"17. Therefore, His Lordship has held that the premises of the Bank shall also be governed by the provisions of the Act, 1971. In view of the decision of this Court, the argument made by the appellant has no legs to stand."

Therefore, the argument that the said Act of 1999 would prevail over the said Act of 1971 in view of Article 254(2) of the Constitution of India has been considered and rejected by a Division Bench of this Court which has been affirmed by the Apex Court.

11. It will be also necessary to consider the decision of the Apex Court in the case of M/s. Jain Ink Manufacturing Company (supra). This was a case where the 1st petitioner herein was owner of a premises. The 1st petitioner initiated proceeding under the said Act of 1971 against the appellant before the Apex Court. The matter was carried to the High Court on account of preliminary objections raised to the maintainability of proceedings. Before the Apex Court, a submission was made on the basis of the provisions of the Delhi Rent Control Act, 1958. A submission was made that the said Delhi Rent Control Act will override the provisions of the said Act of 1971. One of the contentions raised before the Apex Court was that though the said Act of 1971 was passed in 1971, it was given retrospective effect from September 15, 1958 and therefore the Delhi Rent Control Act passed subsequently will have overriding effect. However, the said argument was not accepted by the Apex Court and it was held that the said Act of 1971 is a subsequent legislation.

12. In this context, it will be necessary to refer to the decision of the Apex Court in the case of Kaiser-I-Hind Pvt. Ltd. (supra). An argument was advanced before the Apex Court that having regard to Article 254 (2) the provisions of the said Act of 1947 would prevail over the Act of 1971. Reliance was placed on the fact that the said Act of 1947 was a temporary enactment. The duration and applicability of the said Act was extended from time to time by State Legislature including Maharashtra Act No. 16 of 1986. The majority view taken by the Apex Court is that the assent given by the President of India to the extension Acts of 1981 and 1986 of the said Act of 1947 was only for the limited purpose of repugnency to the Transfer of Property Act, 1882 and the said assent was not applicable to the said Act of 1971. The majority view of the Apex Court is that Maharashtra Act No. 16 of 1986 did not amount to new enactment and when the said Act of 1971 came into force, the existing Act, namely, said Act of 1947 would be void so far as it is repugnant to the law made by the Parliament in view of Article 254(1) of the Constitution of India. The Apex Court has not considered the subsequent Rent Control Legislation in the form of the said Act of 1999.

13. As far as the decision of the learned single Judge of this Court in the case of Pradeep Babubhai Chinal (supra) is concerned, the same deals with overriding effect of the said Act of 1971 over the provisions of the said Act of 1947. The said decision does not consider the effect of the said Act of 1999.

14. Thus, in view of the decision of this Court and the Apex Court in the case of Crawford Bayley & Company (supra), the argument that the provisions of the said Act of 1999 shall prevail over the provisions of the said Act of 1971 cannot be accepted as the said argument has not found favour with the Apex Court. The fact remains that the argument based on the said Act of 1999 having received assent of the President of India and the argument based on Article 254(2) of the Constitution of India was rejected by a Division Bench of this Court and the said argument was not accepted by the Apex Court.

15. Therefore, the submission of the learned counsel appearing for the petitioners that the provisions of the said Act of 1971 have overriding effect on the said Act of 1999 will have to be accepted in view of the aforesaid decisions of the Apex Court.

16. Now the question which remains to be decided is whether the said Act of 1971 will prevail over all the provisions of the said Act of 1999 including the provisions under the said Act of 1999 regarding fixation of standard rent. Reliance is placed in this behalf on the decision of the Karnataka High Court in the case of Bharat Gold Mines Ltd. (supra). The learned counsel appearing for the respondent relied upon what is observed by the Apex Court in paragraph 70 in the decision in the case of Ashoka Marketing Ltd. (supra). What is held by the Apex Court is the provisions of said Act of 1971 to the extent they cover premises falling within the ambit of Rent Control Act, override the provisions of the Rent Control Act. Therefore, the person in possession of the premises which is a public premises within the meaning of said Act of 1971 cannot claim the protection of the provisions of the Rent Control Act.

17. There may not be a provision to the said Act of 1971 for fixing standard rent but there are provisions in the said Act of 1971 which empower the authorities to pass an order for recovery of rent and/or compensation from the tenant. Apart from that, in view of the overriding effect of the said Act of 1971, an occupant of the public premises cannot claim protection under the Rent Control Legislation in as much as section 15 of the said Act of 1971 ousts the jurisdiction of the Courts under the Rent Control Legislation to deal with the matter of recovery of rent in respect of public premises. Therefore, the said submission made by Mr. Thakkar, the learned senior counsel appearing for the petitioner cannot be accepted.

18. Thus, it will have to be held that the provisions of the said Act of 1971 override the provisions of the said Act of 1999. Consequently, application for fixation of standard rent will not be maintainable.

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19. It must be stated here that by the impugned order, an application made by the petitioners for framing preliminary issue of jurisdiction has been rejected. The trial Court had not framed issue of jurisdiction. However, submissions have been made before this Court on the applicability of provisions of the said Act of 1999. In view of the answers to the said submissions, it is obvious that the application for fixation of standard rent was not maintainable and the said application will have to be dismissed.

20. Hence, I pass the following order:

ORDER

Rule is made absolute in terms of prayer clause (a).

Order accordingly.

2010 A I H C 1414

(BOMBAY HIGH COURT)

(AURANGABAD BENCH)

SHRIHARI P. DAVARE, J.

Shobha Ashokrao Deshmukh v. Jagannath Parshuram Shinde & Ors.

Civil Revn. Appln. No. 150 of 2004, D/-3-7-2009.

Civil P. C. (5 of 1908), Ss. 151, 152 — Rectification of decree — Inherent Powers — Scope — Decree for specific performance — Order of District Court becoming final — Typographical error — Inadvertent omission of name of one of the parties found at the time of filing execution proceedings — Application for rectification of decree by aggrieved party — Can be made before the Court that passed the decree at any time — Such application cannot be dismissed as not maintainable as no cross-objections filed in appeal against said decree — Nor a review application held necessary. (Paras 16, 17, 18)

Cases Referred: Chronological Paras

AIR 2009 SC 2136 : 2009 AIR SCW 2725 12

AIR 2001 SC 2316 : 2001 AIR SCW 2146 12

AIR 1980 Kerala 76 9, 10

1969 Ker LT 710 9

B. N. Patil, for Petitioner; S. S. Patil, for Respondent.

ORDER :— This Civil Revision Application arises out of the order passed below Exh. 1 in M.A. No. 82/2003, by learned District Judge, Latur on 31.3.2004 and the petitioner herein prayed that the said impugned order be quashed and set aside.

2. The factual matrix in brief are that, the respondent Nos. 1 and 2 i.e. original plaintiffs had filed Special Civil Suit No. 6/1982 before Civil Judge, Senior Division, Latur for specific performance against the present respondents as defendants. However, the said suit was decided on 1.9.1989 and the specific performance and the another relief of refund of consideration were refused therein. Aggrieved by the said judgment and decree, the respondent Nos. 1 and 2 i.e. original plaintiffs preferred Regular Civil Appeal No. 22/1990 in District Court, Latur. During the pendency of the suit, defendant No. 1 expired and his heirs i.e. defendants No. 1b to 1f were brought on record. Subsequently, the said appeal was allowed by judgment and order dated 16.2.1999 and the relief of specific performance was granted to the plaintiffs. The operative part of the order reads as follows:—

"The suit is decreed. The defendant Nos. 1b to 1e are directed to receive the amount of Rs. 25,000/- from the plaintiffs and thereafter defendant Nos. 1b to 1e and defendant Nos. 2 to 6 shall execute a registered sale deed in respect of the suit land, in favour of the plaintiffs, within a period of two months. Otherwise, plaintiffs shall be entitled to get specific performance through the court of law. The plaintiffs to recover cost of the suit from the defendant Nos. 1b to 1e and defendant Nos. 2 to 6."

3. Being aggrieved by the said judgment and order, Second Appeal No. 185/1999 was preferred by the original defendants before this Court, but the said Second Appeal was also dismissed on 11.3.2003.

4. Execution proceeding was filed in pursuance of the judgment, order and decree passed by the District Court, Latur by the plaintiffs and it is submitted that an error was detected in the operative part of the judgment

DA/DA/AP965/2008/ABD/SNB/7081/2009

2010 AIHC (NOC) 158 (A.P.)

P. S. NARAYANA, J.

Sunkara Surya Prakash Rao v. Madireddi Narasimha Rao

C. Rev. P. No. 6416 of 2006, D/- 19-12-2008.

Stamp Act (2 of 1899), Ss. 35, 2 (14) — Evidence Act (1 of 1872), S. 65 — Xerox copy of document — Would not fall within meaning of instrument — Said document cannot be received as evidence even on condition of payment of stamp duty and penalty.

BA/CA/AP812/2008/ABD/APD/1799/2009

2010 AIHC (NOC) 159 (A.P.)

VILAS V. AFZULPURKAR, J.

Kona Kanthamma v. Guntamukkala Srinivasa Rao.

S. A. No. 992 of 2007, D/- 8-12-2008.

Specific Relief Act (47 of 1963), S. 31 — Suit for declaration of sale deed as void — Ground of fraud and misrepresentation — Plaintiff owner alleging that her brother taking advantage of her indebtedness and illiteracy had executed sale deed — But scribe of document deposed that contents of document were read over to her and she affixed her thumb impression — Her son was also co-executant of document — Charge of fraud is a serious one which requires elaborate pleadings and evidence, which Courts found to be lacking in case — No relief can be granted to plaintiff.

CA/DA/PJ1847/2008/ABD/APD/6324/2009

2010 AIHC (NOC) 160 (P. & H.)

PERMOD KOHLI, J.

Amar Nath Bahri (since expired) through L.Rs. v. Municipal Committee, Kapurthala & Anr.

C.W.P. No. 3620 of 1987, D/- 9-12-2008.

Punjab Public Premises and Land (Eviction and Rent Recovery) Act (31 of 1973), S. 9 — Appeal — Limitation — Section 9 provides 30 days' period for preferring an appeal against the order passed under Sections 5 and 7 — Appeal was preferred after period of four years and there was nothing on record to show that limitation was ever condoned or even an application for condonation of delay was made — Appeal before Commissioner held barred by time.

DA/DA/AP47/2009/ABD/APD/7060/2009

2010 AIHC (NOC) 161 (A.P.)

P. S. NARAYANA, J.

Pullella Lakshminarayana & Anr. v. Maddimsetti Mukteswara Rao & Anr.

Civil Revn. Petn. No. 2138 of 2008, D/- 20-2-2009.

Registration Act (16 of 1908), S. 17 — Document not compulsorily registrable — Suit for eviction — Based on document wherein a recital had been incorporated to effect that lessor and lessee agreed to get lease deed with terms and conditions therein executed and registered when demanded by either of parties — Document would fall in category of agreement in furtherance of which further lease deed was to be executed and would not be compulsorily registrable — Consequently said document can be received in evidence and marked on behalf of plaintiff.

DA/DA/PJ185/2009/ABD/APD/7218/2009

2010 AIHC (NOC) 162 (P. & H.)

RAKESH KUMAR GARG, J.

Ram Lal & Anr. v. Duli Chand and Ors.

RSA No. 2515 of 2003, D/- 19-2-2009.

Registration Act (16 of 1908), S. 17 — Transfer of Property Act (4 of 1882), S. 5 — Transfer of property — Effected through consent decree on basis of family settlement recognising pre existing right in property — Such consent decree would not be compulsorily registrable.

CA/CA/C104/2009/SAS-BSC/AN/4377/2009

2010 AIHC (NOC) 163 (CAL.)

JAYANTA KUMAR BISWAS, J.

Manik Lal Majhi & Ors. v. State of West Bengal & Ors.

W.P. No. 18865 (W) of 2008, D/- 10-2-2009.

Motor Vehicles Act (59 of 1988), S. 83 — West Bengal Motor Vehicles Rules (1989), Rr. 153, 156 — Replacement of vehicle — Vehicle sought to be replaced dif-

JANATA COLONY

Resettling a Squatter Resettlement

S G Deshpande

THE Trombay hill lies like a beached whale on the eastern shore of the Bombay peninsula, facing north, with a red light at its highest point marking the whale's spout and warning off aircraft which fly in to land past its nose. West of the hill are a number of major industries, mainly fertilisers and chemicals and the oil refineries. On the east, in the narrow strip of land between the hill and the sea, the prominent white dome one sees is Apsara, the Canada-India research reactor, flanked by the other buildings of the Bhabha Atomic Research Centre. This is a high-security area accessible by road only from the north and south. To the north the Department of Atomic Energy land continues beyond the security gate into the DAE residential complex, a group of long low three and four storeyed buildings with 16 and 20 storeyed point blocks between, extending around the hill. At the foot of the hill on the north, touching the spout of the whale, dwarfed by the scale and ample layout of the DAE residential buildings now all around its remaining open sides, is the 54-acre Janata Colony, a squatter resettlement dating from the early 1950s.

To the DAE the Janata Colony is a nuisance and an eyesore, and, supposedly, a security hazard. It must be removed. Persuasion and offers of assistance having failed, the only recourse now is eviction by force. This the 72,000 residents of the colony seem determined to resist.

Forcible eviction attempted in May 1975 was stayed by a High Court order confirming that eviction would be only in accordance with due process of law. This required the Bombay Municipal Corporation, who are the owners of the Janata Colony land, to issue proper notices to the occupants asking them to show cause why they should not be removed. This was followed by an Enquiry, conducted by the Enquiry Officer appointed by the Municipal Commissioner. The Enquiry Officer's order on December 29, 1975 was that eviction was in the public interest, and all residents must vacate Janata Colony within a month. In appeal to the Bombay City Civil Court the Principal Judge upheld the Order on February 25, 1976. Appeals to the High Court made thereafter have failed. Within a few days the Supreme Court will decide whether or not to admit an appeal for hearing.

The first residents to move to Janata Colony were a group of 31 persons who were cleared out of the Sion-Raoli area in September 1949. Their leader, who is now a Congress party official, staged a hunger strike and went to jail. The hutment dwellers were able to wring some concessions from the authorities, among them allotment letters assigning them sites in what they were led to believe was perpetuity. At that time the Janata Colony area was beyond the end of the city, with no transport and no civic amenities, in a rural setting of mango trees and agriculture, farms and a few country houses of the wealthy who wanted to escape from the city. More residents started moving into the resettlement from 1951 onwards, in batches of several hundred at a time as they were cleared out of other areas in the city.

Morarji Desai was then the Chief Minister. Some residents claim he signed an agreement assuring them of permanence of tenure; others recall S K Patil, Mayor of Bombay at about that time, assuring them the same thing in speeches. The state government notified the land for acquisition in February 1951, completing the proceedings some years later, and in September 1953 the Bombay Municipal Corporation (BMC) allotted sites to individual occupants and started charging them rent. Sites were about 15 ft x 20 ft, some smaller, some larger, and rents ranged from Rs 3 to Rs 6 per month per site. The BMC also constructed common lavatories, installed some water taps, paved some roads and put in street lighting.

Meanwhile work on the DAE complex had started. The Canada-Indo reactor was commissioned in the mid-1950s. Work on the residential buildings of DAE in that area started much later, and the first residents did not move in until late 1969, more than 18 years after the Janata Colony was properly started. Efforts to move the Janata Colony residents elsewhere had however begun before that.

On April 19, 1963 the Municipal Commissioner (the Chief Executive of the BMC) wrote to the BMC corporators advising that they accept an offer of Rs 62 lakhs from the DAE towards the cost of purchasing and developing 54 acres of land at Ghatkopar to which the Janata Colony residents would be shifted by the BMC within 18 months. There were then 2,300 hutments in the Janata Colony and the Rs 62 lakhs compensation to be paid to the BMC by DAE included Rs 4,60,000 on account of Rs 200 to be paid to each hutment dweller as the cost of rehabilitation.

The BMC passed a resolution accepting the recommendation, but six years later, in May 1969, a minute of the Improvements Committee reads:

> However, land at Ghatkopar was used for some other purpose by the Corporation. The land suggested was also low-lying and the residents of the Janata Colony were not willing to shift to the low-lying areas. Thus though the sanction of the Improvements Committee and the Corporation was obtained the Janata Colony could not be shifted to the sites mentioned earlier.

Meanwhile the Department of Atomic Energy had bought 47 acres of land a mile-and-a-half down the road, and had put in some internal roads and common sanitary blocks, the total cost of land and this construction being Rs 40 lakhs. Since the BMC's total investment until that time in the Janata Colony amounted to no more than Rs 8.5 lakhs (of which Rs 3 lakhs was for land acquisition and only Rs 5.5 lakhs for development) the Improvements Committee proposed that the two plots be exchanged. Janata Colony would be cleared by the BMC and the land handed over to DAE. In exchange the BMC would get the land bought and developed by DAE (called Cheetah Camp) and the DAE would also pay BMC shifting charges of Rs 200 per resident to move them from Janata Colony to Cheetah Camp. The minute reads:

> However, the occupants who will refuse to shift will not be paid their share of shifting charges and the eviction cost incurred for them will be recovered from the share payable

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to them.

The residents by now numbered 3,700 against the 2,700 admitted by the BMC to be tenants according to the original inventory. At Cheetah Camp each resident would be allotted a space of 10 ft x 12 ft, or less than half the space many of them had been allotted in Janata Colony.

This proposal was accepted by the BMC on July 7, 1969, and the BMC served the Janata Colony residents with notices to quit. The residents protested, and no further action was taken until the forcible eviction attempted in May 1975, followed by the legal events described earlier.

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The huts in Janata Colony have a solidity and an air of permanence about them which can only have come from the occupants feeling that they are now secure on their plots, and that it is worth spending money on improving the hut. The place has shops, small-scale industries of all kinds, workshops, fish and mutton stalls on plinths in a market earlier constructed by the Municipality, and places of religious worship. The roads and lanes are narrow, but the main roads are paved and there is good street lighting which remains on all night. The following is an inventory of some of the buildings and activities which the development at present contains :

Hutments :	7,450
Electricity, private connections for lighting :	1,500
Electricity, connections for commercial purposes :	150
Mosques :	5
Temples :	6
Churches : (One of which is a proper church, built for the purpose, and the other a Protestant church conducted in someone's house)	2
Schools : (of which two, conducted in Tamil and Urdu respectively, are run by the Municipality, two, conducted in Urdu and Hindi, are private)	4
Police station :	1
Municipal Office :	1
Dispensaries : (of which 4 are attended to by qualified MBBS doctors)	17
Eating places :	Over 20
Municipal markets	2
Ration shops :	4
Private municipal water connections :	21
Public municipal water taps :	44
Drinking water wells :	5
Public latrines :	220 seats

The place is a township of about 72,000 population, with all its attendant economic activities. Many of the residents go out to work in the city, but there is a considerable volume of activity within the development itself :

Men working in the DAE complex :	1,200
Dock workers :	over 2,000
BMC workers :	over 600
State government workers :	80
Central government workers :	45
Mill workers :	over 170
Major shops, including barber shops, tailors, eating places, grocers, etc	102
Minor shops, usually in the same hut in which the occupant resides :	400
Power-looms :	2
Moulding industries :	7
Furniture shops :	15
Flour mills :	10
Jari works (embroidery) :	260
Readymade garment works :	10
Small-scale industries :	over 65
Women working in the DAE buildings as domestic servants :	360

•

The South India Nur-ul-Islam Mosque carries the date 1953 over its entrance. It is a solid looking building, height of ground and one upper, complete with minarets, set a little apart from the rest of the development. The main prayer hall is about 1,000 sq ft, covered with a beam and slab construction. The prayer hall extends on two sides to include 10 ft wide verandahs, also useful for prayer, and on a third side is a rectangular water tank of about 150 sq ft with a paved passage all round for the ritual washing before prayer. Presumably this also will be demolished with the rest of the development.

We waited in the grocer's shop while he finished his evening meal. The settee, comfortable, upholstered in rexine, was dusted of its film of flour before we were allowed to sit down. The room is about 20 ft x 20 ft, divided by a partition parallel to the back into two parts, the front for the shop, and the rear, whose only entry is through the shop, for living. The shop floor is crowded with sacks and shelves at the far end. Above is a loft covering half the shop for more storage. The floor is concrete, the roof Mangalore tiles on timber battens, the walls partly timber, partly plastered brickwork.

The grocer came here 15 years ago, at which time there were between 3,000 and 3,500 huts in the area. The surrounding area was still semi-rural, with trees and farming all round. There was no housing of the Atomic Energy Commission around the colony at that time. He bought the shop at that time from another owner, and continues to pay the monthly rent of Rs 3 to the BMC. In those days he did a business of Rs 1,500 worth of sales a day. This has now fallen, because rice is now a rationed item which he cannot sell, and most of the residents of the colony are rice-eating South Indians. But he says that his shop is now patronised also by the residents of the nearby DAE complex, since they find that in many instances shopping in the Janata Colony is substantially cheaper than shopping in the DAE market shops where prices are much higher. The compensation that hut owners are being offered for shifting has now been raised to Rs 400. He says this is what it will cost him to demolish his present hut, let alone construct a new one. In fact knowing current building materials prices, and the fact that Mangalore tiles alone cost Re 1 each retail, his roof alone represents an investment of Rs 400, not counting the battens on which the tiles are supported or the labour for construction. He says his hut represents an investment of approximately Rs 6,000, and knowing how expensive the cheapest official low-cost construction is, there is no reason to disbelieve him. He is prepared to sign an affidavit, and file a petition if that will help, as are the others one speaks to.

Visiting the area, one felt no shortage of electric power. All the huts which had power connections were brightly lit inside with no notion of saving power by using a lower wattage bulb.

The grievances of these men are simply expressed: They are respectable citizens, earning their living in trades sanctioned by society as being legitimate. They came to this out of the way place under assurances that their tenancies here would be permanent. With this understanding they have spent substantial amounts in constructing their houses and shops. The new site to which they are to be shifted at Cheetah Camp is a mile and a half away without a satisfactory transport connection. The plinths they will be allotted at the new site will be considerably smaller than the areas they presently occupy. The compensation

of Rs 400 per hut which they are to receive cannot possibly provide them with a replacement of what they presently have. Their lives will be disrupted and their earning interrupted until they are able to re-establish themselves.

•

Why are they being shifted at all? It is because the Colony happens to be now entirely surrounded by DAE land. The fact that the first residents in the DAE complex did not move in until 20 years after the Janata Colony was established is apparently of no consequence.

The land on which the Janata Colony is built was acquired by the Government for a public purpose, that of resettling squatters. They are now to be evicted from the same land, because it is again required for a public purpose, this time the housing of DAE residents. Although they were allegedly once given assurances of permanency of tenure, the 72,000 residents of Janata Colony are now to be evicted to make way for about 700 flats for DAE Officers which at an occupancy rate of 5 persons per family will mean about 3,500 persons to be newly housed. Although they could perfectly well be housed in other lands which DAE has, the public purpose of housing 3,500 DAE employees apparently overrides the public purpose of housing 72,000 squatters.

The Enquiry Officer appointed by the BMC conducted an enquiry and decided the residents of Janata Colony should be evicted. The following are extracts from the Enquiry Officer's Order of December 29, 1975. The Applicants are the Bombay Municipal Corporation and the Opponents are the residents of Janata Colony. Shri Lawrence is the attorney for the Opponents:

> The issues involved in the present enquiry are (1) whether the Applicants require the land under Janata Colony in public interest and (2) whether the opponents are in unauthorised occupation of the respective Enquiry premises. By no stretch of imagination can the development plan of Cheetah Camp be said to be relevant to these two issue ...
>
> The purpose is that the land is required to be handed over to the Bhabha Atomic Research Centre for their own project of housing for their staff. The question that remains to be determined is whether this purpose constitutes public interest ...
>
> Admittedly the land in question was acquired for the purpose of establishing squatters' colony and the squatters' colony was accordingly established there. It must however be remembered that the land was acquired about 25 years before when the urgent need was to rehabilitate the squatters. But 25 years is certainly a long time for newly independent countries like India and rapid changes and developments are bound to take place in such a country in all walks of public life. New concepts of progress develop disturbing the priorities between different spheres of development. New spheres of development come up relegating to the background the older spheres of development. It is entirely left to the public authorities to arrange the priorities of spheres of development and a private citizen does not have any legal right to complain against such priorities. The land in question was acquired for developing squatters' colony and that objective was certainly achieved when the colony was finally established. But this by itself cannot prevent the Government or other public authorities to decide to utilise the said land for some other user which now claims a higher priority. If the argument of Shri Lawrence to the effect that the land cannot now be used for any other purpose is to be accepted in principle, it will stifle all the progress of the country. The country or for that matter, the whole world is not static but is dynamic throwing away the old order and establishing new order. The older priorities are discarded in favour of new priorities. This is rightly to be so as otherwise it would be impossible to make any progress keeping in tune with the changing circumstances. In any case there is no law which prohibits the Government or the Corporation from utilising the land for the purpose other than the purpose for which it was acquired 25 years ago, especially when the intended user is in public interest ... .
>
> Shri Lawrence has further argued that Bhabha Atomic Research Centre has vast land in Mankhurd where their staff quarters can be constructed instead of at Janata Colony by ousting 72,000 people therefrom, and that ousting of these people from Janata Colony would not be in public interest. Assuming that BARC does have a vast land at Mankhurd, it is entirely upto it to decide how these lands should be utilised. What is more the Enquiry Officer cannot dictate to Bhabha Atomic Research Centre as to how it should use its particular lands. Settlement of hutment dwellers is no doubt in public interest. But housing of Bhabha Atomic Research Centre Staff is equally in public interest as the functioning of the Bhabha Atomic Research Centre is itself in public interest. As already stated above, there are always priorities in public interest and the order of these priorities is bound to change with the new developments. It is entirely upto the Government to decide what user should have a higher priority and what user should have lower priority. The Government is the only authority to decide this issue as it always has a wider interest of the nation in view. The opponents cannot arrogate to themselves the right to decide this issue, simply because they are affected by it. Department of Atomic Energy is a department of Government of India. If the Government decides to use the land in question for the housing of staff of Bhabha Atomic Research Centre in preference to the settlement of squatters' colony, the point cannot be challenged as the satisfaction of the Government in this matter is not justiciable. Similarly, the fact that there are other alternative suitable sites for the same user is also not justiciable. The Enquiry Officer cannot, therefore, concern himself with the reasonableness of the demand of Bhabha Atomic Research Centre for this land.
>
> Shri Lawrence has also argued that the land at Cheetah Camp is not suitable for the settlement of the colony. I am afraid I cannot go into this question being beyond my jurisdiction. The opponents, as a matter of fact, do not have any legal right to claim alternative accommodation.
>
> It will be observed from the forediscussion that Shri Lawrence has not brought out any point of law which can be sustained against the Applicants. He appears to have been carried away by the inconvenience that would be caused to the occupants of Janata Colony in order to provide housing to the staff of the Bhabha Atomic Research Centre. It is, however, not the question of providing housing to the Bhabha Atomic Research Centre staff at a particular site. This must be viewed as a part of an overall project of the Department of Atomic Energy, which is very vital to the interest of the nation. Though the overall project of the Bhabha Atomic Research Centre is not before me on record, it must be left to the Bhabha Atomic Research Centre to implement its entire project in a manner it thinks proper and no outside agency should be allowed to interfere with it. ...
>
> Coming to the question of unauthorised occupation, the Enquiry Officer finds in favour of the Opponents and says:
>
> Their tenancies not having been properly terminated, they cannot be deemed to be unauthorised occupants of the respective enquiry premises. I, therefore, hold that the ground of being unauthorised occupants is not established against the opponents as detailed in List I (Exhibit 'C'). ...

However, this need not deter the BMC from evicting them. Citing an earlier

judgment in respect of acquisition for the road leading to the Deonar Slaughter House, the Enquiry Officer in this case then concludes :

> In view of this, the order of eviction against all the opponents on the ground of public interest would be prefectly valid even if all the opponents are not proved to be in unauthorised occupation of the respective enquiry premises.

■

The urban poor who cannot afford even the cheapest housing that government will be able to provide from a group whose numbers are steadily increasing in the city.

Jai Sen, speaking of Calcutta, calls them "the unintended city". He says:

> The city is something which is run by urban people for a rather abstract and nebulous 'urban' populace; the fact that the ruling urban elite is increasingly a small minority is disregarded, as is the fact that the rural and poor form an increasingly large part of the population, to the point where urban 'development' only serves often to put the poor at greater disadvantage and to make them the 'parasites' that the urban elite insists on calling them.
>
> There is little or no genuine attempt to accept the poor and disadvantaged as part of the city development process — to accept them as equal and integral citizens, to develop the city also according to their needs as a society different from the urban, to develop ways through which their disadvantage might be reduced. Quite the opposite: not only are they exploited but their lifestyles and livelihoods are often made illegal, and then even the 'illegality' is exploited.
>
> And yet, and this is not understood sufficiently, the poor as a group are an absolutely indispensable part of the city and of society as it is presently structured. The middle-class and the wealthy, and the economy more generally, could not survive without them and their services. The urban city is totally dependent on them — as dependent and perhaps more so than they are on it. But the city is is not made for the poor; it has evolved not to reduce dependency but to take advantage of it; it is not made so as to enable the poor to improve their condition but rather to serve the wealthy and to allow them to enjoy and increase their advantage.
>
> That a city should be urban may sound quite self-evident, but it is becoming increasingly a questionable fact as to how 'urban' cities of the developing countries in fact are. A great deal of evidence suggests that a new type of city is emerging, in many ways a rural city. And from another point of view, the majority of its people are involved in service and small-industry, making this very different to the heavy-industry based cities of the West which evolved under very different conditions. . .

What should be done about squatter settlements in our urban areas? The present trend in Bombay seems to be to put them somewhere where they cannot be seen. Out of sight, out of mind. A much more nimble-footed and elegant solution to this problem was achieved in Hyderabad, where an unsightly settlement was simply enclosed behind a high wall and everyone was happy. We want our cities to look clean and modern and efficient, and the poor must somehow be made to disappear. Beggars must be removed to some forgotten institution, or made to flee to some other town some miles away where action against beggars is not yet being taken. If they are unauthorised or illegal squatters the settlement can be cleared and the residents housed at some distant location. If they are an authorised squatter resettlement as in the Janata Colony, the present instance seems to prove that the settlement can once again be cleared and the population pushed still further out, until that piece of land is needed, and then they can be flung out again.

IN THE HIGH COURT OF DELHI AT NEW DELHI

Writ Petition (Civil) Nos. 16005-16006/2006

21.01.2008
Date of decision: 21st January, 2008

Commissioner of Industries ... Petitioner
through: Mr. Arun K. Sharma and Mr. Amiet Andlay, Advs.

VERSUS

Shri O.P. Batra and Anr. ....Respondents
through: Mr. Arvind Kumar Gupta and Mr. Vikrant Bhardwaj, Advs.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL

1.Whether reporters of local papers may be allowed to see the Judgment?
2.To be referred to the Reporter or not?
3.Whether the judgment should be reported in the Digest?

GITA MITTAL, J(Oral)

1. By this writ petition, the petitioner has assailed the order dated 4th July, 2006 passed in PPA No. 155/2003. The facts giving rise to the present writ petition are narrow compass.

It appears that the petitioner allotted a factory bearing no. D-183, Flatted factories complex, Okhla, New Delhi on rental basis to the respondent. Possession thereof was handed over in December, 1981 and the respondent was liable to pay rent @ Rs. 611/- per

-2-

month.

2. It was also a term and condition of the letter of allotment that the respondent was required to start production in the allotted premises within six months from the date of taking over of possession of the factory. The petitioner also provided other facilities including one window service for SSI Registration; recommendation for import and hire purchase of machinery; a telephone connection; issue of municipal licence for running a factory and installation of an individual power, grant of loans, marketing and products etc.

3. It is stated that despite several notices, the respondent neither started production in the allotted premises in terms of the allotment letter nor paid any rent since the date of taking possession of the same to the petitioner.

4. By a letter dated 7th April, 1984, the respondent was required to give reasons for non-functioning of the unit. The reply given by the respondent was found unsatisfactory.

5. In these circumstances, by an order dated 9th October, 1984, the allotment made to the petitioner was cancelled by the Lt. Governor being the lessor. It was also directed that the respondent

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shall hand over peaceful possession of the said premises to the petitioner. As the respondent failed to hand over vacant physical possession of the premises to the Estate Manager within 30 days and failed to pay the rent due with regard to the subject premises, by a letter dated 30th July, 1999, eviction proceedings under the provisions of Public Premises (Eviction of Unauthorized Occupants) Act, 1971 were initiated against the respondent.

6. A demand dated 19th November, 1999 for a sum of Rs. 2,60,692/- as payable on the date of issuance of the letter towards recovery of rent and interest was also issued.

The respondent is stated to have made a request for return of the subject premises which was examined and it was conveyed to the respondent by a letter dated 9th May, 2001 that the department would await the outcome of the court case.

7. The notice under provisions of Section 4(1) and 4(2) (b) (ii) of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 was issued to the respondent on 10th May, 2002. In response, the respondent merely addressed a letter dated 15th May, 2002 to the Estate Officer requesting that the proceedings be dropped but failed

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to appear and contest the proceedings.

8. According to the writ petitioner, in this background, the Estate Officer was left with no option but to proceed ex parte against the respondent by an order passed on 28th October, 2002. Subsequently, by a detailed order dated 25th April, 2003, the Estate Officer also directed the respondent to vacate the subject premises within 15 days from the date of publication of the order.

9. Aggrieved thereby, the respondent appears to have filed an appeal under Section 9 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 praying for setting aside of the order dated 25th April, 2003 passed by the Estate Officer under Section 5(1) of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971.

The petitioner has contested the appeal. However, by a judgment dated 4th July, 2006, the learned Additional District Judge has set aside the eviction order dated 25th April, 2003.

10. I have heard learned counsel for the parties. Learned counsel for the respondent has supported the order dated 4th July, 2006 and has pointed out that the same does not suffer from any legal infirmity.

-5-

11. Upon a consideration of the submissions made by learned counsel for the parties, I find that the provisions of Section 4 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 mandate that upon issuance of the notice to the person occupying the public premises, it is for the occupant to show that he is not an unauthorized occupant. In the instant case, the respondent appears to have only addressed a communication requesting that the proceedings be dropped and has not contested the eviction proceedings which were commenced by the petitioner against him. However, the statutory provisions mandate so and it is certainly incumbent upon the Estate Officer to arrive at a conclusion that the person who was being proceeded against was an unauthorized occupant. The finding in this behalf has to be specifically recorded.

12. I find that in the order for eviction passed under Section 5(1) of the statute dated 25th April, 2003, the Estate Officer has not discussed any material which was placed by the petitioner before him. No conclusion or

finding that the respondent was an unauthorized occupant has been recorded.

-6-

In view of the above, it has to be held that the order dated 25th April, 2003 is not in accordance with law and is not sustainable.

For this reason, the Additional District Judge has arrived at a conclusion that the order assailed before it was contrary to law. Such conclusion is as per the provisions and mandate of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971.

The challenge to the order dated 4th July, 2006 is consequently not sustainable on any tenable grounds.

Accordingly, this writ petition is dismissed.

It is however made clear that it shall be open to the Estate Officer to consider the material placed before him and to proceed in the matter in accordance with law.

(GITA MITTAL)
JUDGE
January 21, 2008
SD
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IN THE HIGH COURT OF DELHI AT NEW DELHI
W.P. (C) NO. 8926/2005 and W.P. (C) No. 8337/2005

Reserved on 05.12. 2007
14.01.2008
Date of decision : January 14th, 2008
1. W.P. (C) NO. 8926/2005

DALIP KUMAR CHADHA
.... Petitioner
Through:
Ms. Anubha Rastogi, Advocate
:: VERSUS ::
A.I.I.M.S Through its Director
Dr. P. Venugopal and Anr. .....
Respondents
Through : Mr.V.K. Rao, Advocate, for R-2
Mr. Mukul Gupta with Mr. Mr. Mithilesh Singh, Advocates

2. W.P. (C) No. 8337/2005

ALL INDIA INSTITUTE OF MEDICAL SCIENCE? Petitioner
Through : Mr. Mukula Gupta with
Mr. Mithilesh Singh, Advocates
:: VERSUS ::

THE CHIEF COMMISSIONER FOR PERSONS
WITH DISABILITIES and ANR. ? Respondents
Through : Ranjan Sabharwal with
Ms. Seema Bhadavriya, Advocate for
R-1
Ms. Anubha Rastogi, Advocate for R-2
CORAM:
MR. JUSTICE S. RAVINDRA BHAT :
1. Whether reporters of local papers may be
allowed to see the judgment.?

2. To be referred to the Reporter or not?

3. Whether the judgment should be reported
in the Digest?

MR. JUSTICE S. RAVINDRA BHAT:

1. In Writ Petition (C) No.8925/2005 the Petitioner seeks direction to the Respondent to restore possession of the Public Call Office (PCO) Telephone booth located on the premises on AIIMS and sealed on January 5th 2005 by AIIMS.

2. The Petitioner is physically handicapped with 50% impairment, and is duly certified as a disabled person under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full participation) Act, 1995 (hereinafter called the ?Disabilities Act?). The Respondent, the All India Institute of Medical Sciences (hereafter referred to as ?AIIMS?) is an autonomous statutory body created under the All India Institute of Medical Sciences Act 1956. In the year 1981 the petitioner was allotted a PCO Booth to be operated in the Out Patient Department (OPD) of the Respondent Institute. The allotment was made under a Special Scheme introduced in 1980 by the Department of Post and Telegraph, Government of India for the benefit of physically handicapped persons. The scheme was intended to provide disabled persons with a regular source of income and the Department of PandT undertook to provide a booth and a cash chest for such persons. On 1st June 1981 an agreement was made between the President of India and the Petitioner to operate the PCO at the OPD of AIIMS. The Petitioner operated the booth from June 1981 to January 2005 for a period of 24 years. The petitioner avers that the PCO booth was inaugurated by the Director, AIIMS; he also alleges that the maintenance and upkeep of the booth was done by the AIIMS, whose patients benefited from the service.

3. The Petitioner avers that in January 2005, the security personnel of AIIMS threatened to dispossess him of the booth and on 5th January 2005, the Administrative Officer of AIIMS dispossessed him and sealed the PCO, without giving notice or granting opportunity of being heard. Failed attempts to persuade the concerned authorities of the Respondent prompted the Petitioner to approach the Chief Commissioner for Disabilities, New Delhi (hereafter the ?Chief Commisioner?) claiming that he be allowed to operate his booth, the only source of his livelihood. The Chief Commissioner issued notice to AIIMS on 27th January 2005, asked them to provide relevant documents relating to the allotment of the booth, the scheme and the agreement. The Petitioner meanwhile approached many authorities, including the Director of AIIMS, the concerned Member of Parliament, but AIIMS refused to hand over possession. Meanwhile, repeated notices were issued by the Chief Commissioner to the Respondent.

4. On 21st February 2005, AIIMS sent a reply to the Chief Commissioner admitting that the Petitioner had indeed produced before it details of the scheme, a copy of the agreement and other relevant documents. However, AIIMS submitted that the Petitioner did not have any valid allotment from it and

proceedings under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereafter ?the PP Act?) for unauthorized occupation were initiated. On 14th March 2005, the Estate Officer issued a notice to the Petitioner to show cause within two days why the booth must not be demolished. On the next day the Petitioner submitted all relevant documents, including details of the scheme, disability certificate, copy of the agreement and further also pleaded that since the booth was the only source of income, he be permitted to continue to operate it. The AIIMS submitted that the authorization was illegal since there was no agreement between them and the Petitioner.

5. On the 8th and 15th of April 2005 notices were issued by the Chief Commissioner scheduling a hearing of the Petitioner and AIIMS on the 24th of April. The Petitioner avers that both parties were adequately heard after which the Chief Commissioner passed an order directing AIIMS to allow the Petitioner to operate the booth with immediate effect. In the order the Chief Commissioner after recording details of the various documents filed by the Petitioner concluded that he had indeed been allotted the booth and also recorded that it was unreasonable on the part of AIIMSs to claim that the Petitioner was an unauthorized occupant after 24 years. This order of the Chief Commissioner was not complied with, and on 5th May 2005 the Petitioner once again approached the Chief Commissioner, who issued a notice to AIIMS asking it to furnish reasons for the non observance of the earlier order. Since the Petitioner was not handed back possession of the booth, he preferred the present petition claiming that restoration of possession be restored and the proceedings before the Estate Officer under the PP Act be quashed, besides damages for loss of income.

6. In WP (C) No. 8337/2005, the Petitioner, AIIMS, challenges the order dated 25th April 2005 of the first Respondent (the Chief Commissioner), asking them to hand over possession of the booth to the second Respondent as being void, without jurisdiction and passed in violation of principles of natural justice.

7. The AIIMS, avers that the second Respondent (the Petitioner in WP (C) No. 8926/05, hereafter called ?the claimant Petitioner?) ran the booth without their permission and that till date no money had been paid to them by him as license fee. They also claim to have recently installed a state of the art diagnostic machine adjoining the OPD block called the PET with a heavy cost of about 5 crores, which has narrowed the passage to the OPD block. They submit that the booth operated by the claimant Petitioner creates congestion in the OPD block given that there has been a steady increase in the inflow of patients in the OPD. They submit that, as there was no allotment in favour of the second

Respondent by the AIIMS, the Estate Manager of the AIIMS, took steps to initiate proceedings under the PP Act, since the properties of the AIIMS are ?public premises?. Further, that during the proceedings before the Estate Officer the second respondent was unable to prove that he was given permission by the Petitioner to run the PCO.

8. The AIIMS further submits that the Chief Commissioner on the date of hearing only gave a semblance of hearing and handed over a prepared order to it, asking it to hand over possession to the claimant Petitioner. They allege that the Chief Commissioner did not consider the fact that proceedings were pending under the PP Act nor did he appreciate that no agreement existed between the parties. Further, the order of the Chief Commissioner is without jurisdiction and over reaches quasi judicial proceedings under the PP Act. They also submit that there is absolutely no power or authority with the first Respondent, to pass any such directions under Sections 58, 59 and 63 of the Disabilities Act. It is also submitted that under Section 23 the directions of the Central Government are binding on the authorities under the Disabilities Act.

9. Mr. Mukul Gupta, learned counsel for the AIIMS submits that there is nothing on record to show that the claimant Petitioner was in lawful occupation of the premises since 1981. Further, he contends that in the absence of a notified policy by the appropriate government with regard to allotment of the booths to persons with disabilities, the claimant Petitioner had no right to continue in possession of the premises. He was a trespasser and was liable to be dealt with as such under provisions of the PP Act. Counsel also submitted that the Chief Commissioner?s orders amount to curtailing independent quasi-judicial powers of the Estate Officer under the PP Act, which is uncalled for and unfounded in law.

10. Mr. Rajan Sabharwal, learned counsel for the Chief Commissioner contended that under section 58(c) read with section 59 (a) of the Disabilities Act, the Chief Commissioner had the jurisdiction to hear the matter and was also duly empowered to pass an order directing restoration of possession of the PCO to the claimant Petitioner. He submitted that since the matter at hand involved the question of deprivation of the rights of the disabled, the Chief Commissioner had the power to ensure that their rights were not violated. Furthermore, he submitted that notices were sent on various occasions to the AIIMS asking them to show cause and also adequate hearing was given to them before passing the order, therefore, the order was valid in law. Ms. Anubha

Rastogi, learned counsel for the claimant respondent, adopted these submission. She also stated that the Disabilities Act, being a special enactment and later

in point of time, prevailed over the Public Premises Act. Counsel lastly submitted that the petitioner-claimant is not seeking a lease or interest in AIIMS property, he merely wants the continuation of a beneficial scheme to earn his livelihood.

11. The Disabilities Act, as is evident from the preambular paragraph, was enacted a welfare measure to ensure that disabled persons are extended an adequate standard of living and also to ensure that they are not discriminated against in terms of educational, employment and other opportunities. The Act not only guarantees rights for the disabled but also devises a system through which their problems can be redressed. The Chief Commissioner is one such authority created. His functions and powers are delineated by the Act; the relevant provisions are extracted below:

?58. Functions of the Chief Commissioner - The Chief Commissioner shall -

1.coordinate the work of the Commissioners;

2.monitor the utilisation of funds disbursed by the Central Government;

3.take steps to safeguard the rights and facilities made available to persons with disabilities;

4.submit reports to the Central Government on the implementation of the Act at such intervals as that Government may prescribe.

59.Chief Commissioner to look into complaints with respect to deprivation of rights of persons with disabilities - Without prejudice to the provisions of section 58 of the Chief Commissioner may of his own motion or on the application of any aggrieved person or otherwise look into complaints with respect to matters relating to -

1.deprivation of rights of persons with disabilities;

2.non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate Governments and the local authorities for the welfare and protection of rights or persons with disabilities;

and take up the matter with the appropriate authorities.

Xxxxx xxxxxxx

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61.Powers of the Commissioner - The Commissioner within the State shall-

1.coordinate with the departments of the State Government for the programmes and schemes for the benefit of persons with disabilities;

2.monitor the utilisation of funds disbursed by the State Government;

3.take steps to safeguard the rights and facilities made available to persons with disabilities;

4.submit reports to the State Government on the implementation of the Act at such intervals as that Government may prescribe and forward a copy thereof to the Chief Commissioner.

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62.Commissioner to look into complaints with respect to matters relating to deprivation of rights of persons with disabilities - Without prejudice to the provisions of section 61 the Commissioner may of his own motion or on the

application of any aggrieved persons or otherwise look into complaints with respect to matters relating to -
a. deprivation of rights of persons with disabilities;
b. non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate Governments and the local authorities for the welfare and protection of rights or persons with disabilities;
and take up the matter with the appropriate authorities.
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63.Authorities and officers to have certain powers of civil court - The Chief Commissioner and the Commissioners shall, for the purpose of discharging their functions under this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit, in respect of the following matters, namely:-
a. summoning and enforcing the attendance of witnesses;
b. requiring the discovery and production of any document;
c. requisitioning any public record or copy thereof from any court or office;
d. receiving evidence on affidavits; and
e.issuing commissions for the examination of witnesses or documents.
(2) Every proceeding before the Chief Commissioner and Commissioners shall be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code and the Chief Commissioner, the Commissioner, the competent authority, shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.?

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12. It is a well settled rule of interpretation that while construing welfare legislations, a beneficial rule of construction should be adopted. (State of Tamil Nadu v. Sabanayagam, (1973) 1 SCC 813; Workmen v. Firestone Tyre and Rubber Co. Ltd, (1973) 1 SCC 813) The construction so placed must effectuate their objectives and also effectuate the rights conferred by the legislation to the disadvantaged. If that is so, rights of the disabled can be safeguarded only if the powers of the authorities created under the Disabilities Act are to be given their widest possible construction. Sections 58(c) and 59 (a) give ample power to the Chief Commissioner to take necessary action, in order to safeguard the rights and facilities made available to the disabled and to look into complaints regarding deprivation of their rights. The position of law in this regard has been summarized in Dilbagh Singh v. Delhi Transport Corporation 2006 (1) LLJ 480 thus:
?22..By virtue of Sections 59, that authority has fairly wide powers to make, inter alia, suo motu enquiry into instances of violations of provisions of the Act; including deprivation of rights of persons with disabilities. He also has the power to look into complaints, under Section 62. Rule 42 of the Rules framed in 1996 under the Act prescribes the procedure to be followed while

investigating into complaints; the Chief Commissioner can ?decide? the matter ex-parte, and decide, on merits, after hearing the parties (sub-rule 8). Powers of a civil court, in regard to matters specifically listed, inhere with the Chief Commissioner (Section 63(1)); proceedings before him are deemed to be judicial proceedings under Sections 193 and 228 of the Indian Penal Code (Section 63(2)). It can therefore, safely be concluded that the powers and duties of the authority are akin to a quasi judicial tribunal, charged with deciding issues entrusted to it.

23. The Act does not, expressly provide that the orders/ decisions of the authority bind the establishment/ government body concerned. However, the statutory provisions noted above give sufficient indication that its functions are not purely recommendatory; it decides the issue of entitlements of individuals. In such a situation, it must necessarily be inferred, in the absence of any provision to the contrary, that full and effectual adjudicatory powers were granted by the statute. To this end, the maxim ?ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest? (Where anything is conceded, there is conceded also anything without which the thing itself cannot exist) can be invoked.

13. This court will exercise its power of judicial review only if it finds that the impugned order is illegal, irregular or irrational. It will have to be shown that order suffered some infirmity either in terms of jurisdiction, procedural irregularity, the consideration of irrelevant factors or the omission to consider relevant ones. From the foregoing discussion it is amply clear that the Chief Commissioner was cloaked with appropriate powers to take cognizance of the matter and pass suitable orders. A look at the impugned order would indicate that the Chief Commissioner had provided both parties adequate notice, appreciated the relevant documents relating to the allotment of the booth including the scheme under which it was allotted, heard both parties and concluded that it was unreasonable on the part of the AIIMS after a period of 24 years, to contend that the claimant Petitioner was an unauthorized occupant, especially so when the PCO was his only source of livelihood.

14. Pursuant to the notice of this Court, the Mahanagar Telephone Nigam Limited (MTNL) was impleaded as a party respondent in WP(C) No. 8926/2005. In its return by way of affidavit, the MTNL admitted that the claimant Petitioner was indeed allotted the PCO under a scheme for the orthopaedically disabled persons, evolved by it. It also states that the allotment, made in 1981 subsisted.

15. The Disabilities Act is a lex specialis; and therefore, in cases where the rights of the persons with disabilities are involved, it will take

precedence over the provisions of the PP Act. Section 43 of the Disabilities Act, enjoins upon all public authorities the obligation to create opportunities for the full participation of the persons with disabilities, by evolving policies though which they can be ensured a decent standard of livelihood, including, though not limited to granting allotment of public spaces and office or commercial premises. Viewed from this perspective, the action of AIIMS, notwithstanding the order of the Chief Commissioner, is indefensible. Having not disputed possession of the claimant petitioner for the past 25 years, and having being involved in the inauguration of the PCO booth, it would be highly iniquitous for the AIIMS to now contend that the claimant does not have documentary evidence to support his possession. Significantly, the claimant Petitioner does not claim any right, title or interest in the property but only demands that the status quo be maintained. To deny him of this opportunity to earn a decent livelihood would not only be iniquitous, but would run contrary to the spirit of the Disabilities Act and to many of the provisions enshrined in Part III and IV of the Constitution of India. Undoubtedly the authorities of AIIMS are clothed with power to evict unauthorized occupants under the PP Act. Yet, like all forms of power, these powers too are to be used taking into account relevant considerations, and towards securing public interest. Evicting a person with disability who had been in undisputed occupation of premises to earn his livelihood, can hardly benefit the public weal. It may even run counter to the enactment by which AIIMS itself was brought into existence and owes its character as an institution of national importance.

16. Therefore, this Court is of opinion that even if for some reason the order of the Chief Commissioner is unsound, the facts of this case do not disclose grounds on which that order should be set aside. During the pendency of these proceedings, the premises were directed to be de-sealed. In view of the conclusions recorded in this judgment, AIIMS is directed to hand over possession of the PCO, in operable condition, within one week, to the claimant petitioner (i.e Shri Dalip Kumar). The AIIMS shall, in case it becomes necessary to use the space occupied by him, for any reason, arrange for an alternative space to house his kiosk within the Hospital premises, in a manner which does not adversely

affect the business interests of the said claimant petitioner, after giving him reasonable notice.

17. The writ petitions are disposed off in the above terms. No costs.

(S. RAVINDRA BHAT)
Dated : 14th January, 2008 JUDGE

The City of London looks after more than 2,700 properties across six London boroughs - Hackney, Islington, Lambeth, Lewisham, Southwark and Tower Hamlets. It also has two housing estates - Golden Lane and Middlesex Street - within the City itself.

The detection and eviction of unauthorised occupants or squatters is important to us because it means that otherwise:

a. the City of London loses valuable rental revenue and possible increased repair costs
b. bed and breakfast costs are increased
c. Applicants on our Housing Register wait longer for affordable accommodation and be rehoused and tenants for transfers
   Often unauthorised occupants or squatters will wish to remain in the property. Only in extremely rare instances will this be permitted.

Definition of squatting

We regard a squatter as someone who occupies the property without obtaining permission of the owner, or his / her agent or the person legally entitled to be occupying it. In General terms we classify a squatter as any one who is not known to the tenant that manages to gain access into an empty property for occupation following the termination of the tenancy. During the course of a year many tenancies are terminated and often properties stand empty for a short period of time while we carry out repairs before the next tenant moves in. Although we aim to turn around all void properties within two weeks depending on the extent of the repairs this sometimes may take a little longer. If so we will then consider whether additional security measures should be taken to prevent unauthorised entry.

Legal action against squatters

The laws on squatting are quite complex and no landlord cannot simply evict a person who is squatting. There are three ways of repossessing a property which has been squatted. These are by using:

- The Protected Intending Occupier (PIO) procedure under the 1977 criminal Law Act
- The County Court by way of Order 24
- (and the tenant may also use) the Displaced Residential Occupier procedure under the 1977 Criminal Law Act

A Court Order issued by the County Court is required to repossess a property from squatters. Once a 'possession order' is obtained a bailiff's appointment will be requested and the squatters will be notified of the date of eviction.

If the squatter or occupant of the premises at any time makes representation or an application for re-housing, then they will be referred to Southwark's Homeless Persons Team.

Unauthorised occupants

Unauthorised occupants are in the main 'left behind' in a tenancy following the departure of the tenant. The tenancy is still in existence although the tenant is no longer resident.

Unauthorised occupation covers a multitude of situations including unauthorised assignment / exchange, people staying on following death of tenant, residents who have no right to succeed, children remaining after the parents have moved.
At the City of London we encourage all residents if they become aware of squatters in a property that they know should be vacant or if one of their neighbours has moved out and another has not yet moved in to contact their local estate office. This also applies generally to unknown and suspicious occupants.

The City of London cannot be expected to know what is happening in all of the properties that it owns and we greatly appreciate the information we receive from our residents. Once notified an Area Housing Manager will then visit the property and assess whether the occupant has a right to be there or be granted the tenancy and if necessary commence legal action through the courts to repossess the property.

In exceptional cases the City may agree to grant the unlawful occupant a tenancy of the property concerned or that of a smaller or more suitable dwelling. In making this decision the City will consider:

a. The length of residence.
b. The relationship to the tenant.
c. The City's obligations under Housing and Homeless Persons Legislation.
d. If the occupant qualifies to go on out Housing Register.
e. The size of the dwelling and its suitability for occupation by the unlawful occupant.

Contact

For more information or advice please call 020 7332 1575/1656 or email.

COMING TO the rescue of the non-government organisation- Gandhi Peace Foundation, having its office at Deen Dayal Upadhyaya Marg, New Delhi, the bench of Justices B N Agrawal and GS Singhvi of Supreme Court were critical of the notification of the Ministry of Urban Development asking the NGO, founded with the purpose to espouse the virtues professed by Gandhi, to vacate the building.

The Centre had accused the foundation of carrying out 'anti-government activities' by constructing staff quarters and servant quarters and further sub-letting the premises to other NGOs and organisations. As per the lease deed, this was not permitted, said AK Srivastava, the counsel appearing for the Centre.

The apex court bench was curious to know why the Centre should have proceeded with the eviction proceeding by levelling the charge of 'anti-government activities'. The bench noted, "There is no dearth of people in this country, who will call Gandhi anti-national."

Anguished by the hurry at which the Centre proceeded in the case against the foundation, it said, "These are sacred institutions...You cannot permit these institutions to be shut."

Srivastava, who pitched in for the absence of additional solicitor general (ASG) Indira Jaising, tried hard to save the day for the Centre by referring to the July 14, 2009 letter issued by the ministry to the office-bearers of the institution. In the reply given by the foundation, Srivastava said the body had admitted to having sub-let the premises to other institutions and organisations. Even construction of staff quarters and servant quarters was not denied, he added.

Rather piqued by the Centre's haste to proceed against the foundation without giving them further opportunity, the bench found a striking parallel in the government's inability to rein in unauthorised occupants in government bungalows. "Eminent government servants are qualified to be under unauthorised occupation for staying beyond the permissible period." In a lighter vein, the bench added, "If such a notification (to evict all unauthorised occupants) is issued, 50 per cent government quarters will fall foul."

On further enquiry, the court learnt that the constructions were undertaken at the premises in the 1960s. "Before passing an order, you (Centre) is required to consider their cause...unless you are able to establish that the cause shown by them is of no use," the bench said, before dismissing the petition.

Kanhaya Lal vs House Allotment Committee, ... on 30 July, 1997

Equivalent citations: (1997) 117 PLR 381

Bench: N Kapoor, K Srivastava

Kanhaya Lal vs House Allotment Committee, Chandigarh Administration And Ors. on 30/7/1997

JUDGMENT

K.K. Srivastava, J.
1. This is a writ petition filed under Article 226 and 227 of the Constitution of India filed by Kanhaya Lal-petitioner, who seeks the quashing of orders dated 11.3.1991 (Annexure P2) and dated 22.3.1991 (An-nexure P5) passed by the Secretary and Chairman, House Allotment Committee, Chandigarh Administration, Chandigarh, respectively. Petitioner-Kanhaya Lal was working as a peon in the Animal Husbandry Department, Chandigarh, when he was allotted house No. 13-JE/2247, Sector 28-C, Chandigarh. The said allotment was made about 23 years prior to the filing of the writ petition, i.e. sometimes in the year 1968. The petitioner was later on transferred to the office of the Milk Commissioner, Punjab, Chandigarh, which had its milk plant in the state of Punjab. Respondent No.2/Secretary, House Allotment Committee, Chandigarh, sent letter memo No. A-4/90 dated 11.3.1991, communicating the petitioner about the cancellation of the allotment of the house aforesaid with effect from 29.11.1983 by virtue of Section SR-317-AM-12(3) of the House Allotment Rules, as amended from time to time. The petitioner was advised to handover the possession of the premises aforesaid immediately to the maintenance authorities of the concerned sector, i.e. Sector 28-C, failing which he was to be dispossessed from the premises under the law. He was also asked to pay licence fee equal to market-rent determined by the Government from time to time for the period of unauthorised possession from the date of cancellation till the actual handing over of the vacant possession of the said premises. The copies of this letter were forwarded for information and necessary action to the Senior Accounts Officer (Rents) the S.D.E. Mtco. Sub-Divn. No. III and the L.A.O./S.D.M. (Estate Officer under the PP Act). Chandigarh with the request to start eviction proceedings against the petitioner to get the house aforesaid vacated. The Chairman, House Allotment Committee/respondent No.1 passed order (Annexure P5) dated 22.3.1991, prescribing the rates of penal rent as also of the licence fee w.e.f. 13.1991 from all unauthorised occupants of the Government residences beyond the period permissible under the rules. This order was passed in suppression of the earlier office memo. No. A6/91/59-60 dated 12.3.1991. This order further mentioned that the said decision shall be applicable to those occupants of Government houses whose allotment is cancelled or deemed to have been cancelled under any of the provisions of Government Residences (Chandigarh Administration Pool Allotment) Rules, 1972. The Estate Officer passed order of eviction on 13.5.1991 under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and the same was delivered to the petitioner on 16.5.1991 . The petitioner filed an appeal against the order of eviction before the District Judge, Chandigarh. During the pendency of the said

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appeal, record of the Estate Officer was requisitioned and it was pointed out to the petitioner that the allotment of the aforesaid house had been cancelled by the Secretary, House Allotment Committee, Chandigarh, on the ground that the petitioner had permanently been absorbed in the service of Milk Project, Mohali. The petitioner denied the said fact and filed his affidavit dated 29.5.1992 in appeal before the District Judge. The petitioner deposed, inter alia, that he was never absorbed permanently or temporarily in the service of Milk Project, Mohali, which comes under Milk Union, Ropar, in the year 1983 or prior or after that, The copy of the affidavit aforesaid was annexed as PI with the writ petition. It has further been alleged that respondent No.3/Managing Director, Punjab State Co-operative Milk Producer Federation Limited, who is employer of the petitioner started deducting house rent from the salary of the petitioner at the rate of Rs.652/- per month with effect from May, 1991, whereas prior to the said date, the house rent was being deducted @ Rs.185/- per month. In support of his allegation, the petitioner annexed copies of salary slips for the month of April and May, 1991, as Annexures P3 and P4 respectively. On enquiry from the office of respondent No.3, petitioner learnt that the penal rent/licence fee equivalent to the market rent was being deducted from his salary as per the impugned order dated 27.3.1991 issued by respondent No.1, treating the petitioner as unauthoried occupant

of the said house. The penal rent/licence fee is detailed in the order Annexure P5. A legal notice dated 4.6.1991 was served by the petitioner through his counsel, praying that the order charging penal rent @ Rs.652/- per month be withdrawn. The petitioner alleged that despite service of the legal notice, respondent No.3 was continuing to deduct the same from his* salary since May, 1991. The amount deducted from his salary towards the house rent at the penal rate, it is averred, is still lying with respondent No. 2 and has not been deposited with the Chandigarh Administration. The main contention of the petitioner while attacking the impugned orders is that these (Annexures P2 and P5) have been passed without affording an opportunity of hearing to him. It is alleged that respondent No.2 had no jurisdiction to cancel the allotment of the said house as the same was allotted to the petitioner by the House Allotment Committee, U.T. Chandigarh. It is further alleged that respondent No.2 could not cancel the allotment of the house with retrospective effect, i.e. with effect from 29.11.1983, which is illegal and arbitrary.

2. Respondents No.1 and 2 filed a joint written statement, wherein it was alleged that the petitioner was absorbed in the Punjab Diary Development Corporation (in short to be referred as "the PDDC") under the Milk Project, Chandigarh, w.e.f. 29.11.1983 permanently and the same is an in-eligible office. Therefore, the petitioner is an unauthorised occupant of the Government house aforesaid from the date had been absorbed permanently in the said Corporation. It was mentioned that a notice of personal hearing was issued by the Estate Officer under the Public Premises Act to the petitioner prior to the passing of the order of eviction dated 13.5.1991. The respondents have further contended that the petitioner

being an unauthorised occupant
of the said house is liable to pay the rent at the rate of Rs.185/-pcr month, as per instructions dated 22.3.1991
issued by the Chandigarh Administration. It was further contended that the penal rent at the aforesaid rates of
Rs.185/-and Rs.652/- has been charged rightly. The respondents have defended the impugned orders
(Annexures P2 and P5) being legal, just, constitutional and in accordance with law on the grounds that no
opportunity of hearing required to be given to the petitioner prior to the passing of the said orders. It was
further alleged that as per Allotment Rules, 1972, the allotment of the house is deemed to have been cancelled
w.e.f. the date the petitioner became unauthorised occupant of the house, w.e.f. 28.11.1983 when he was
absorbed permanent in the PDDC and the allotment of the house was rightly cancelled by respondent No.2. It
is further alleged that the order Annexure P5 has been issued by the competent authority in accordance with
law.

3. We have heard learned counsel for the petitioner and respondents and have gone through the record.

4. Undisputedly, house No. 13-JE/2247, Sector 28-C, Chandigarh, was allotted by the House Allotment
Committee, Chandigarh, to the petitioner who at that time was working as peon in the Animal Husbandry
Department, Chandigarh, which is an eligible office. As per the averments made in the petition, the petitioner
was transferred in the office of the Milk Commissioner, Punjab, Chandigarh. The Punjab Government
incorporated the PDDC limited in the year 1966 and the Milk Plants of the Punjab Government were
transferred to the PDDC. The concerned employees, including the petitioner, were sent to the PDDC where
they were permanently absorbed. In the year 1979, the Punjab Government incorporated the Punjab State
Cooperative Milk Producers Federation Limited (respondent No.3) and in the year 1982-83 the milk plants of
the PDDC were handed over to respondent No.3. The employees of the PDDC including the petitioner were
permanently absorbed by respondent No. 3 and since then, the petitioner is working at Chandigarh with
respondent No.3. It has been further averred in para 5 of the petition that the petitioner is continuously posted
at Chandigarh for the last about 23 years. It will, thus, appear from the averments made in the petition that the
petitioner was permanently absorbed by respondent No.3 sometimes in the year 1982-83. The impugned order
(Annexure P2) mentions the dale of permanent absorption of the petitioner in the Milk Project, Mohali, as
29.11.1983. The petitioner has controverted this date of his permanent absorption. In the affidavit, copy of
which is Annexed P-1, filed in the Court of the District Judge, Chandigarh, in the appeal filed against the
eviction order, petitioner denied about his being absorbed permanently in the Milk Project, which runs counter
to the averments made in the petition and further deposed that he remained posted throughout at Chandigarh.

5. The Government Residences (Chandigarh Administration Pool) Allotment ..Rules, 1972, which came into
force w.e.f. 1/2.2.1973, (hereinafter to referred to as "the Rules"), define the words "eligible office", vide Rule
2(e) as under :"

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Eligible office" means an office of the Government of Punjab, the Government of Haryana at Chandigarh
Administration located in Chandigarh, the staff of which has been declared by the Chandigarh Administration
to be eligible for accommodation under these rules."

Once the petitioner left the Department of Animal Husbandry and got permanently absorbed in the PDDC and
the Punjab State Co-operative Milk Producers Federation Ltd. (respondent No.3), he ceased to be entitled for
retaining the house allotted to him by the Chandigarh Administration. Rule 2, Sub-rule (O) of the rule reads as
under:

"Transfer" means transfer from Chandigarh to any other place is from an eligible office to an ineligible office
in Chandigarh.

Provided that Government servants who are in occupation of Chandigarh Administration Pool
accommodation at the time of proceeding on foreign service with State owned autonomous bodies or public
undertakings in Chandigarh, shall be allowed to continue in occupation of the accommodation on payment of
licence fee at market, as may be determined by the Government from time to time, as long as they retain lien
on a post in an eligible office."

A perusal of the proviso to Rule 2(o) will categorically show that the State owned autonomous bodies or
public undertakings in Chandigarh are not treated as eligible offices. An employees retaining his lien on a post
in an eligible office, during his posting in the State owned autonomous bodies or public undertakings in
Chandigarh is entitled to occupy the Government residence in Chandigarh. As soon as the petitioner lost his
lien on the post in the eligible office in Chandigarh, by virtue of his being permanently absorbed in the
aforesaid State owned autonomous bodies or public under takings in Chandigarh, his occupation of the
Government residence in Chandigarh belonging to Chandigarh Administration was rendered unauthorised.
Consequently, the possession and occupation of the aforesaid accommodation by the petitioner after his being
permanently absorbed in PDDC or the Punjab State Cooperative Milk Producers Federation Ltd. (respondent
No.3) w.e.f. 29.11.1983 would become unauthorised and his allotment of the said accommodation was liable
to be cancelled.

6. Learned counsel for the appellant submitted that no opportunity of hearing was afforded to the petitioner
prior to the cancellation of the allotment order by respondent No.2 Shri Ashok Aggarwal, learned standing
counsel for respondents No.1 and 2 pointed out that under the rules. It was the duty of the petitioner himself to
vacate the said accommodation soon after being absorbed permanently in the ineligible office. He made
reference to Rule 12 of the rules, which, inter alia, provides that an allotment shall be effective from the date
on which it is accepted by the Government servant and shall remain in force until:(
a) the expiry of the concessional period mentioned in column 2 of the Table given in Sub-rule (2).
(b) it is cancelled or is deemed to have been cancelled under these rules, or it is surrendered by the
Government servant. (Rule 12(i))

Rule 12(2) lays down:

"A residence allotted to a Government servant may, subject to Sub-rule (3), he retained on the happening of
any of the events specified in column 1 of the Table below for the period specified in the corresponding entry
in column 2 thereof, provided that the residence is required for the bonafide use of the Government servant or
members of his family :

Kanhaya Lal vs House Allotment Committee, ... on 30 July, 1997

Events Permissible period for retention of the residence.

(1) (2)
----- (1 to 3 not relevant)

4. Transfer to an ineligible
office in Chandigarh. Two months

----- (5 to 13 not relevant)

Rule 12(3) of the rules provides :

"Where a residence is retained under Sub-rule (2) the allotment shall be deemed to have been cancelled on the
expiry of the admissible concessional period unless immediately on the expiry thereof the Government servar'
resumes duty in an eligible office in the Chandigarh."

The other Sub-rules (4) and (5) of Rule 12 are not relevant for the purposes of this case.

7. It is, thus, evident that after the expiry of a period of two months of transfer to an ineligible office in
Chandigarh, i.e. the date on which the petitioner was permanently absorbed on a post in an ineligible office in
Chandigarh and lost his lien on a post in the eligible office in office in Chandigarh, he was duly bound to
vacate the accommodation and his allotment was deemed to have been cancelled under Rule 12(3) of the
rules. These rules do not provide for affording any opportunity of hearing before the competent authority
before proceeding to cancel the allotment order. We do not find any merit in the submissions of learned
counsel for the appellant and are of the considered view that the impugned order (Annexure P2) is quite valid
and legal.
8. As regards the impugned order (Annexure P5) the same was issued by the Chairman, House Allotment
Committees, Chandigarh Administration, Chandigarh., in exercise of the powers conferred under Rule
SR-317-Am-23 of the Government Residence (Chandigarh Administration Pool) Allotment Rules, 1972 and
the rates of Penal rent/licence fee were revised w.e.f. 1.3.1991. The penal rent/licence fee is chargeable from
the unauthorised occupants of the Government accommodation in Chandigarh. There are no grounds
mentioned in the writ petition to challenge the validity of the said order (Annexure P5). The learned counsel
for the appellant has not been able to show as to how the impugned order (Annexure P5) was invalid, illegal

and liable to be quashed.
Accordingly, the writ petition lacks merit and is dismissed.

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Moti Lal vs State Of M.P on 15 July, 2008

Bench: P Sathasivam, D A Pasayat

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. OF 2008 (Arising out of SLP (Crl) No. 4751 OF 2006) Moti Lal ...Appellant
Versus

State of M.P. ...Respondent JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. Leave granted.
2. Challenge in this appeal is to the judgment of a learned Single Judge of the Madhya Pradesh High Court at Jabalpur upholding the conviction of the appellant for offence punishable under Sections 450 and 376(1) of the Indian Penal Code, 1860 (in short the 'IPC') and sentence of five years and seven years rigorous imprisonment respectively and fine of Rs.2,000/- and 1,000/- respectively with default stipulation as recorded and imposed by the Learned Special Judge Chhattarpur in Special Case No.33 of 2002. Appellant (hereinafter also referred to as an 'accused') was charged for commission of offences punishable under Sections 450 and 376(1) IPC and 3(1)(xii) of the Scheduled Castes and Scheduled Tribes Prevention of Atrocities Act, 1989, (in short the 'Act').
3. Prosecution version as unfolded during trial was as follows: On 17.1.2002 at 1735 hours prosecutrix lodged report at police station Khajuraho to that effect that on the said date at 11 O'clock she was in the field of Hannu Gadariya at Bhusaur. The said field was taken on share basis by her husband, in which gram and wheat were sown. As usual, she had gone to the field for guarding. One hut was situated there, in which she lives and cooks and eats food at that place. At the said 2

time she was alone in the hut. Her husband had gone to village Rajnagar. Accused Motilal Gadariya who was resident of same village, came there and enquired from her about her husband Barelal. She told him that he had gone to Rajnagar, and he went away. She started sweeping with broom, inside the hut. After some time, Motilal forcibly entered her hut and knocked her down on the floor. He pulled up her saree and committed sexual intercourse. She kept shouting to break free, but there was no body. Then he ran away. Being knocked down by Motilal, her bangle on the right hand had broken and ankle had bruised. When her husband returned from Rajnagar, she narrated the incident to him. Then she and her husband went to Hannu Pal and informed him about the incident. Report was lodged and on the basis of aforesaid facts offences were registered under Sections 452, 376 IPC and Section 3 of the Act. The said First Information Report (in short the 'FIR') was recorded by Sub-Inspector-S.R. Rai (PW 7).

The prosecutrix was sent for medical examination. Dr. Smt. Rama Parihar performed the medical examination of which the medical examination report is Ex.P.10. The then Sub-Divisional Officer, Police-S.S. Chahal (PW 11) prepared spot map Exb.P7 of the place of incident during the investigation and from the place of incident,

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pieces of broken bangles found were seized vide seizure Panchnama - Exb. P.5. On 18.01.2002 the statements
of prosecutrix her husband Parelal, Habbu and Manua were recorded. On 19.1.2002, accused was arrested
vide arrest Panchnama -Exb.P.8 and one of his used underwear which was bearing some stains was seized
vide Seizure Panchnama -Exb.P.6. Accused was sent for medical examination regarding his capability of
performing intercourse. The examination report is Exb.P.11. After completion of investigation, chargesheet

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was produced before Chief judicial Magistrate, Chhatarpur. On 18.2.2002 the case has been committed from
the said court to the Court of Sessions.

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Considering the evidence more particularly of the prosecutrix conviction was recorded. Accused preferred an
appeal before the High Court.

The High Court on considering the evidence given by the prosecution came to hold that the accused was
guilty of the offences punishable under Sections 376 and 450 IPC. The appeal was accordingly dismissed.

4. In support of the appeal, learned counsel for the appellant submitted that the prosecution version has not
been established. The uncorroborated version of the prosecutrix should not have been relied upon by the trial
court and the High Court. It was also submitted that the punishment is harsh.
5. Learned counsel for the State on the other hand supported the judgments of the trial court and the High
Court. 5
6. In the Indian Setting refusal to act on the testimony of the victim of sexual assault in the absence of
corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive
society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her
chastity had ever occurred. She would be conscious of the danger of being ostracized by the society and when
in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine
rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be
self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence
of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. A woman or a
girl who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in a rape case. The
observations of Vivian Bose, J. in Rameshwar v. The State of Rajasthan (AIR 1952 SC 54) were:
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"The rule, which according to the cases

has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the
necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to

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dispense with it, must be present to the mind of the judge..." .

7. It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian women has tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the 7 accused does not appeal to reasoning. There was no apparent reason for a married woman to falsely implicate the accused after scatting her own prestige and honour.

8. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection

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on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault -- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Court, therefore, shoulders a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor 8

contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. This position was highlighted in State of Punjab v. Gurmeet Singh (1996 (2) SCC 384).

9. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She 9 is undoubtedly a competent witness under Section 118 and her evidence must

receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix. There is no rule of law or practice incorporated in the Indian Evidence Act, 1872 (in short 'Evidence Act') similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full 10

understanding the Court is entitled to base a conviction on her evidence unless the same is own to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. This position was highlighted in State of Maharashtra v. Chandraprakash Kewalchand Jain (1990 (1) SCC 550).

10. It needs no emphasis that the physical scar on a rape victim may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery.
11. The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations

in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, married women and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. There are no extenuating or mitigating

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circumstances available on the
record which may justify 12

imposition of any sentence less than the prescribed minimum. To show mercy in the case of such a heinous
crime would be a travesty of justice and the plea for leniency is wholly misplaced.

12. The evidence on record is analysed on the basis of the principles set out above. The inevitable conclusion
is that the accused has been rightly convicted and sentenced. Impugned judgment does not warrant any
interference.
13. The appeal stands dismissed.
.....J.
(Dr. ARIJIT PASAYAT)
.....J.
(P. SATHASIVAM)
New Delhi,
July 15, 2008
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