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(Founder : Late Sri G.S. GUPTA)

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PART - 12 (30ST JUNE 2018)

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PRINCIPLES RELATING TO MORTGAGE SUITS

By
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Senior Civil Judge, Avanigadda, Krishna Dist.

Introduction:-

This article is an outcome of my considerable hard work if not to say the product of the reflective thinking to make it handy to the legal field not confined but being more useful to the legal profession as a sharpening tool on law of mortgages. This article gives a comprehensive picture right from basics to principles and precedents relating to law on mortgages. I hope that it is useful to advocates, law students and judicial officers while dealing with mortgage suits.

The suits relating to mortgages stand for the principle "***once a mortgage, always a mortgage***", meaning a borrower cannot contract to give up his automatic right to redeem title to his property once the debt is paid.The Transfer of Property Act, 1882 deals with the mortgage of immovable property in our country. Mortgage is the transfer of an interest in an immovable property for the purpose of securing a loan or the performance of an engagement. A mortgage to be valid must be in relation to payment of any definite amount either already advanced or to be advanced, by way of loan. This was observed in *Sita Bai Vs. South Indian Bank Ltd., Trichur, Kerala State and others,* ***2013 (5) ALT 430 (D.B.).*** A personal decree passed under Order 34 Rule 6 is a decree within the meaning of the definition in Sec. 2 (2). Under Sec. 48, the terminus quo is the date of the decree. An execution application filed within 12 years of the passing of a personal decree under 0. 34 R. 6 is within time. - *Adabala Satyanarayana Vs. Damisetty Nagaraju and others,* ***1955 (1) ALT 389 (D.B.).***

Who are necessary and properties in a mortgage suit?:- (1) The provisions or Or. 1 R. 10 (2) C. P. C. as held by the Supreme Court in Kaziu Begum's case (A. I. R. 1958 S. C. 886), should be construed very liberally and all persons who are found to have direct interest in the mortgaged properties must be held to be proper, though not necessary, parties for a complete and effective adjudication of the rights of the parties. (2) The object of the Legislature in making rule 1 to Order 34 C.P.C. is to define the scope of a mortgage suit, pure and simple. (3) The provisions of 0. 34, R. 1 C.P.C. are subject to the provision; of Or. 1 R, 10(2), but the provisions of Or. 1 R. 10(2), are not controlled by Or. 1 R. 3 C.P.C. (4) The question as to who are all the necessary parties to be impleaded as party defendants in a suit on mortgage is not one of jurisdiction but at most one of misjoinder or non-joinder

of parties. (5) Where a suit for redemption, fore-closure or sale of mortgaged property is brought by the respective parties to the mortgage, all persons interested in the equity of redemption and all those who claim right and interest through the mortgagee should ordinarily be necessary parties, and the persons who claim adverse title paramount in some or all of the mortgaged properties but no through the mortgagor or mortgage, need not be implead as parties normally to such a suit. (6) But, the aforesaid rule is not inflexible or absolute and the court, in each case, has to see whether such a course will lead to inconvenience or confusion and exercise its discretion judiciously and properly. (7) In certain cases, where the court thinks it just, proper and necessary in the interests of all parties to adjudicate on the questions relating to paramount title, it is not only proper but even desirable to implead such parties and avoid multiplicity of litigation. (8) Where it is alleged that the person claiming adversely or by title paramount is a benamidar of the mortgagee, or is claiming to be in possession and enjoyment of all or some or the mortgaged properties, those who are likely to resist the decree-holder in case the decree is passed in terms of the plaint, must be held to be proper, though not necessary, parties to such a suit on mortgage. (9) Where the court, on a consideration of the facts and circumstances of each case, is of the opinion that it would be just and convenient and desirable to decide the title of the persons who set up a paramount title, then those persons must be impleaded as party defendants, and in the interests of all parties the question of title also should be adjudicated upon after framing appropriate and proper issues and giving opportunity to all the parties concerned. - *R. Veeraswamy Vs. R. Jangamayya* - ***1969 (2) ALT(NRC) 12***. *KONDAIAH,j*

An application under Sec. 19 A (1) of Madras Agriculturists Relief Act (IV of 1938) has power to decide all questions arising between the mortgagee and the mortgagor:- A court deciding an application under Sec. 19 A (1) has power to decide all questions arising between the mortgagee and the mortgagor as well as other' owners of the equity of redemption, as in a regular mortgage suit. If the mortgagee does not relinquish his security, the court would have to pass a mortgage', decree under Sub-section (5) of Sec. 19-A. Appeal dismissed. - *Kotipalli Thammayya and others Vs. Mattapalli Raju and others* - ***1955 (1) ALT(NRC) 111.1 (D.B.)***. *N.D. KRISHNA RAO and VISWANATHA SASTRY,jj.*

Second suit for mortgage not barred either on principle of res judicata or under Order 2 Rule 2 CPC.:- Till mortgage debt is discharged and rights are determined by parties or by Court decree, any number of suits can be filed, subject to period of limitation. - *Gummuluru Sansyasinaidu and others v. State Bank of India, rep. by the Manager, Narsipatnam* - ***2011 (3) ALT 731***. *N.R.L. NAGESWARA RAO,j.*

Even if E.P. is not filed in execution of earlier decree or if it is time barred- second suit maintainable:- Even if E.P. is not filed in execution of earlier decree or if it is time

barred, still second suit maintainable - Second suit not barred either on principle of res judicata or under Order 2 Rule 2 CPC. - *Gummuluru Sansyasinaidu and others v. State Bank of India, rep. by the Manager, Narsipatnam -* ***2011 (3) ALT 731.*** *N.R.L. NAGESWARA RAO,j.*

Execution of preliminary decree:- Preliminary decree in a mortgage suit is not executable in the absence of a *final* decree obtained in the suit. (Para 85). - Lanka Babu Surendra Mohana Benarji Vs. Canara Bank, Unguturu and another - **2015 (6) ALT 473.** M.S. RAMACHANDRA RAO,j.

Preliminary decree- Not Executable:- Execution petition for execution of preliminary decree in mortgage suit is not maintainable - What is executable is only final decree.(Para 5). - *K. Anuradha Vs. Ramadevi and another -* ***2012 (4) ALT 410.*** *C.V. NAGARJUNA REDDY,j.*

Specific performance of an agreement to mortgage:- Specific performance of an agreement to mortgage is different from relief for redemption of mortgage as such. - *Booz Allen and Hamilton Inc Vs. SBI Home Finance Ltd. and others - 2011 (4) SCJ 604 (D.B.). J.M. PANCHAL and R.V. RAVEENDRAN,jj.*

Preliminary decree/final decree:- In cases where there is a prior charge or mortgage before suit is filed, the case falls under Order 34 Rule 15 (1), CPC and the properties charged or mortgaged cannot be brought to sale without a final decree Order 34 Rule 15 (2), CPC covers a situation where a charge is created for the first time under the decree and it permits the property charged to be brought to sale in execution of a preliminary decree without a final decree. (Paras 60 and 64). - *Lanka Babu Surendra Mohana Benarji Vs. Canara Bank, Unguturu and another,* ***2015 (6) ALT 473 .*** *M.S. RAMACHANDRA RAO,j.*

Right of redemption:- Till the passing of final decree and even till the confirmation of the sale made in pursuance of the final decree or the disposal of any appeal against orders passed under Order 21 Rule 89 or 90, CPC, a right to redeem continues to subsist in the mortgagor. (Para 50). - *Lanka Babu Surendra Mohana Benarji Vs. Canara Bank, Unguturu and another,* ***2015 (6) ALT 473 .*** *M.S. RAMACHANDRA RAO,j.*

No Claim petition:- No claim petition under Section 47 or under Order 21 Rule 58, CPC would be maintainable in an execution taken out in a suit based on a mortgage. (Para 39). - *Indian Bank, Nidadavole, rep. by its Zonal Manager Vs. Nallam Veera Swamy and others -* ***2014 (5) ALT 631.*** *NOOTY RAMAMOHANA RAO,j.*

Appeal against preliminary decree:- In a mortgage suit, appeal filed against suit claim to the extent disallowed in the preliminary decree passed cannot be said to be not maintainable on the ground that a final decree application was made in respect of suit claim allowed in the preliminary decree and that it was allowed pending appeal. (Para 8). - State Bank of India, Settipalle Branch, Tirupati rep. by its Chief Manager Vs. P. Veeranarayana - **2014 (1) ALT 714.** VILAS V. AFZULPURKAR,j.

Interest:- Civil court has discretion under Order 34 Rule 11, CPC to reduce the contractual rate of interest depending upon the facts and circumstances of each case in spite of the provision of Section 21-A of Banking Regulation Act providing for charging compound interest at contractual rate. (Paras 23 and 24). - State Bank of India, Settipalle Branch, Tirupati rep. by its Chief Manager Vs. P. Veeranarayana - **2014 (1) ALT 714.** VILAS V. AFZULPURKAR,j.

Interest in mortgage suit:- In mortgage suits, court has discretion in the matter of grant of interest pendent lite and subsequent interest - It is not absolutely obligatory on court to decree interest at contractual rate upto date of redemption. - Dara Namassivaya and other V. Smt. Veturi Ratnalamma - **2005 (6) ALT 118.** P.S. NARAYANA,j.

Doctrine of lis pendens in mortgage suit:- Doctrine of lis pendens applies to mortgage suits as well. - *Sunita Jugalkishore Gilda Vs. Ramanlal Udhoji Tanna (Dead) thr. Lrs. and others - **2014 (1) ALT(SC) 15 (D.B.).** K.S. Radhakrishnan and Arjan Kumar Sikri,jj*

Rate of interest:- The very purpose of the enactment of Usurious Loans Act is to ensure that the persons in need of money are not exploited by the lenders - The reasonableness of the rate of interest mentioned in the contract falls within the realm of adjudication by Court on the touchstone of settled principles.(Paras 10 and 11). - *Investment Trust of India Limited, Chennai Vs. P.Varahalamma and another - **2013 (6) ALT 212 (D.B.).** L. NARASIMHA REDDY and S.V. BHATT,jj.*

Sale in mortgage suit:- J.Dr. in mortgage suit can seek annulment of sale by depositing the amounts as stipulated in Order 34 Rule 5, CPC at any stage before confirmation of sale.(Para 10). - Patnam Subbalakshmamma v. Sunkugari Sreenivasa Reddy and another - **2011 (3) ALT 591.** L. NARASIMHA REDDY,j.

Period of limitation:- When an appeal is filed against preliminary decree in mortgage suit, period of limitation to file application for passing final decree begins to run from the date of appellate decree and not from the date of preliminary decree even though no stay application was filed in appeal.(Paras 8 and 9). - *Bank of India rep. by its Branch Manger, Dommeru v. Pothula Veera Krishna Rao and others - **2010 (5) ALT 534.** P.S. NARAYANA,j.*

Execution of mortgage final decree:- A decreeholder in a mortgage suit has to proceed against mortgaged property and then to resort to other steps, in case the sale does not result in satisfaction of decree.(Para 6). - *P. Ravinder v. Manohar Reddy* - ***2010 (1) ALT 365****. L. NARASIMHA REDDY,j.*

Mortgage decree against company:- Where the J.Dr. in a mortgage decree is a company, E.P. be filed against company itself. Filing of EP against Managing Director of Company straightaway is not just.(Para 5). - *P. Ravinder v. Manohar Reddy* - ***2010 (1) ALT 365****. L. NARASIMHA REDDY,j.*

Final decree in partition suit is different from the final decree in mortgage suit:- 1. A preliminary decree in a mortgage suit decides all the issues and what is left out is only the action to be taken in the event of non payment of the amount. When the amount is not paid the plaintiff gets a right to seek a final decree for foreclosure or for sale. 2. In a partition suit the preliminary decrees only decide a part of the suit and therefore an application for passing a final decree is only an application in a pending suit, seeking further progress. In partition suits, there can be a preliminary decree followed by a final decree, or there can be a decree which is a combination of preliminary decree and final decree or there can be merely a single decree with certain further steps to be taken by the court. In fact several applications for final decree are permissible in a partition suit. A decree in a partition suit enures to the benefit of all the co-owners and therefore, it is sometimes said that there is really no judgment-debtor in a partition decree. A preliminary decree for partition only identifies the properties to be subjected to partition, defines and declares the shares/ rights of the parties. That part of the prayer relating to actual division by metes and bounds and allotment is left for being completed under the final decree proceedings. Thus the application for final decree as and when made is considered to be an application in a pending suit for granting the relief of division by metes and bounds. - *Shub Karan Bubna @ Shub Karan Prasad Bubna Vs. Sita Saran Bubna and others* - ***2009 (8) SCJ 281 (D.B.)*** *R.V. RAVEENDRAN and B. SUDERSHAN REDDY,jj.*

Revision petition filed challenging the order passed on application made for passing final decree :- Application to pass final decree for sale of mortgaged property in terms of preliminary decree filed. Final decree passed. Execution proceedings initiated - Revision petition filed challenging the order passed on application made for passing final decree. Not maintainable. - *Kommuru Bhaskararao and another Petitioners (R-4 and R-5). vs.Aremanda Sivanagendramma Respondent (Plaintiff-Petitioner).* - ***1996 (4) ALT 915****. D.H. NASIR,j.*

Limitation to file final decree in mortgage suit:- Preliminary decree passed granting instalments to pay decretal amount - Right to apply for final decree accrues from the date of default in payment of any instalment - Limitation period of three years starts from the

date of default. - *Manotosh Kumar Mitra (dead) by LRs. Vs. Amarendranath Shaw (dead) and others -2000 (2) ALT(SC) 29 (D.B.) Y.K. SABHARWAL and S. SAGHIR AHMAD,jj.*

Usufructuary mortgage:- Suit for possession of land by redemption - Claim by heirs of mortgagor not traceable. Whether acceptable. Mortgagor not traceable or heard of for the last more than seven years before institution of suit - Mortgagee not able to establish his plea that mortgagor was alive. Evidence of plaintiffs' witnesses accepted by trial Court. Rejection of their evidence by appellate Court held to be wholly unfounded and unjustifiable. Decree passed by trial Court upheld. - *Rati Ram and another Vs. Salig Ram - 1996 (1) ALT(D.N.) 3.3 (D.B.). FAIZAN UDDIN and S.C. SEN,jj*

Mortgage by deposit of title deeds:- Deeds may be delivered as security for a debt. Contract between debtor and creditor need not be by a written document. Intention to created security is a question of fact to be decided on presumptions and on oral, documentary and circumstantial evidence. Defendant delivered title deeds as security for repayment of amounts due under promissory notes. Order of lower Court directing office to register the suit as simple money suit instead of registering it as mortgage suit by deposit of title deeds. Not legal and unjustified. Whether there was intention to create security while delivering title deeds is a matter to be decided on evidence after registering the suit and not at the stage of registering it. - *Shaik Mastanamma Vs. Kadiyala Gopalaiah - 1993 (3) ALT 617. BHASKARA RAO,j.*

A suit cannot be dismissed except on appeal or by review after a preliminary decree is passed.:- It follows that there cannot be abatement of the suit even if the L.Rs of the deceased party are not brought on record during the final decree proceedings. But, even a final decree cannot be passed for or against a dead person. So, it is necessary to bring on record the L.Rs. of the deceased before a final decree is passed. It has to be seen as to what provision is applicable when Or. 22 Rules 1, 3 and 4 are not applicable in case of death of parties during the final decree proceedings. - *Siddavatam Mohan Reddy Vs. P. Chinnaswamy And Ors - **1991 (3) ALT 513**. NEELADRI RAO,j*

Applicability of Order 22 Rule 10 C.P.C:- Order 22 Rule 10 C.P.C lays down that in cases of an assignment, creation or devolution of any interest other than the cases referred to in remaining Rules of Or. 22, the suit may by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. When Or. 22 Rules 3 or 4 is not applicable in cases of death during the final decree proceedings, one has to invoke Or. 22 Rule 10 C.P.C. to bring the L.Rs. on record. (Para 7). - *Siddavatam Mohan Reddy Vs. P. Chinnaswamy And Ors - **1991 (3) ALT 513**. NEELADRI RAO,j*

Or. 34, Rules 3 and 4:- Preliminary decree in a mortgage suit for sale of land belonging to mortgagor. Final decree passed for delivery of possession of land to mortgagee. Not

legal. - Nagamma Vs. S.P. Manipal Reddy - **1990 (2) ALT(NRC) 21.2.** J. ESWARA PRASAD,j.

No bar To record payments under a preliminary decree in a mortgage suit:- Application by judgment-debtor to record payments under a preliminary decree in a mortgage suit. No execution petition pending. Not a bar to maintainability of application under Or.21, Rule 2. Right to apply under Or. 34, Rule 3 (I) for passing a final decree. Also not a bar to entertain application, under Order 21 Rule 2. - *Messrs Sri Laksbminartiyana Sago Manufacturing Co. rep. by its Partner Chintapalli Ramakrishna and another Vs. State Bank of India, Samalkota - **1988 (1) ALT 837.** SYED SHAH MOHAMMED QUADRI,j.*

Death of plaintiff in mortgage suit:- Held - Under Order 1, Rule 10 C.P.C., in order to effectually dispose of the suit, it is necessary to bring the legal representatives on record. (para 2). - *Kuragayala Savithri and others Vs. Konduri Chinnayyamma and others -**1988 (1) ALT 528.** A. SEETHARAM REDDI,j.*

Limitation Act not applicable to Or 34, Rule 5:- Sale of mortgaged property not confirmed till judgment debtor filed application an under Or. 34, Rule 5 for setting aside sale and for depositing amounts due to auction purchaser-Court can allow petition of judgment debtor-Limitation Act not applicable to Or 34, Rule 5. - *S. Subba Rao Vs. B. Suryaprakasa Rao - 1988 (1) ALT(NRC) 33.1. P.A. CHOUDARY,j.*

Prior mortgage- Burden of proof :- Decree passed in a mortgage suit and sale of hypothec of the mortgagor-Subsequent suit filed by the son-in-law of mortgagor setting up prior mortgage. Burden of proof lies on the prior mortgagee. - *D. Pera Reddy Vs. D. Kondareddy and others -1985 (1) ALT(NRC) 75.2. P.A. CHOUDARY,j.*

Hindu son- Not a mortgage suit :- A Hindu son is bound by the court sale of properties mortgaged by his father though he is not a party to the mortgage suit**.** - *V. Narasimhulu Vs. V. Ramaiah & another - **1978 (2) ALT 435.** A. GANGADHARA RAO,j.*

Conclusion:- A mortgagor is a borrower in the mortgage. Mortgagor owes the obligation secured by the mortgage. The borrower must meet the conditions of the underlying loan or other obligation in order to redeem the mortgage. If the mortgagor fails to meet these conditions, the mortgagee may foreclose to recover the outstanding loan. As to ' Once a mortgage, always mortgage', as was observed by Lord Henley in *Vernon Vs. Bethel* that_ "This court as a conscience is very jealous of persons taking securities for a loan and converting such securities into purchases and therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance made absolute and there is great reason and justice in this rule for necessitous men or not will submit to any terms that the crafty may impose upon them." The equity of redemption

has been well recognized in common law as well as in the Transfer of Property Act, 1882 which explicitly substantiate this principle. There may be various conditions whereby the stipulations in the mortgage-deed have turned to be the clog on the equity of redemption. The equity of redemption can be brought to an end either by the act of parties or by a decree of the court. The sale, exchange, mortgage are the alienations as defined within the meaning of the provisions of the Transfer of Property Act, 1882. The sale and exchange are absolute alienations, but the mortgage is condition alienation. As long as the mortgage amount is not discharged, the mortgagee has got a right over the mortgaged property and insofar as mortgage amount the right of mortgager is only to redeem the mortgaged amount.

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It is clear that the Rule provides suspension pending an investigation and a proviso enjoins the authorities to give opportunities. The question is would this rule lend support to the petitioner? To our mind it is not. If the proviso to sec.31(1) is sufficient and the authorities are bound to issue the notice even for suspension pending enquiry the sub-rule(2) with its proviso is unnecessary as the law presumes such power pending enquiry. The rule specially provided an opportunity even for suspension pending enquiry. It shall be noticed that under rule 18 there is no suspension as a substantive punishment but provides only for cancellation and a suspension pending enquiry. Further it is not permissible rule of construction to construe the power under the statute with reference to the rule made by the executive even though the rules have statutory powers. **Hence we are clearly of the opinion that the licensing authority can suspend, a licence or permit pending final orders**.

(45) However we must make it clear that this incidental or ancillary powers cannot be exercised in a routine way or as a matter of course. The licensing authority is bound to exercise the discretion reasonably, bona fide and without negligence considering the circumstances of the case when such interim suspension is necessary. If it is possible to give an opportunity to the petitioner and the circumstances do not warrant such a drastic step, the licensing authority is bound to afford an opportunity as the power of suspension pending enquiry should not be exercised as an invariable rule or mode of making an enquiry. Further, the suspension pending the enquiry should not be allowed to continue for an unduly long period. The authorities are bound to complete the enquiry as early as possible and any undue delay when it constitutes abuse of power makes the order liable to be set aside. Whether the suspension of licence must be preceded by notice or opportunity must depend upon various factors such as, degree of urgency involved, the duration of suspension, the nature of the breach, public danger to be avoided, and other similar circumstances which warrant an immediate action where it is not feasible or possible or even advisable to give an opportunity to the holders of the licences before passing interim orders of suspension."

11-g). **In Khoday Distilleries vs. State of Karnataka** (1995 (1) SCC 574)-A Constitution Bench of the Supreme Court, after referring to various authorities, summarized the law on the subject relating to right to carry on trade or business in potable liquor. "In paragraph 60 (b), (f), (g) and (m), it was laid down as under.

(b) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilized societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., res extra

commercium, (outside commerce). There cannot be business in crime.

(f) For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are res extra commercium. The restrictions and limitations on the trade or business in potable liquor can again be both under Article 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/ or to preserving to itself the right to sell licences to do trade or business in the same, to others.

(g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business.

(m) The restrictions placed on the trade or business in industrial alcohol or in medicinal and toilet preparations containing liquor or alcohol mayalso be for the purposes of preventing their abuse or diversion for use as or in beverage".

11-h). In **Sri Narsimha Wines v. Prohibition and Excise (**2001 (6) ALT 240 FB=2002 Suppl (1) ALD 375), (FB), a Full Bench of this Court observed that, the matter relating to grant of liquor licence is a matter of contract.

11-i). In **Superintendent, Prohibition & Excise Vs. Krishna Wines (1998 (6) ALD 204, 1998 (5) ALT 498)**, a Division Bench of this Court while referring to above decision of the Full Bench and other relevant decided cases held as under:

"It is now well settled that doctrine of natural justice if embodied in the statute ought to be given its true and proper meaning, and one need not give it restrictive meaning, but the entire text of the statute shall have to be looked into for the purpose of attributing a proper meaning. Section 31, therefore, encompasses to severable elements, the first being the power inherent and the second being the power as prescribed. In the event of there being an order of suspension simpliciter, question of invocation of the second element, does not and cannot arise, but in the event, however, the order of suspension partakes the character of a penalty, then and in that event, question of reading into the statute the first element does arise."

11-j). In Assistant Commissioner of Prohibition and Excise & Prohibition and Excise Superintendent, R.R. District and others Vs. M/s.Jayadeep Wines, Gaddiannaram (W.A. No. 877 and 878 of 1998, dt.01-06-1998(DB), another Division Bench expressed similar opinion that:

"**It is now well settled that the power**

to suspend a licence pending enquiry is inherent and therefore if the order is in the nature of an interim order, the principles of natural justice need not be complied with unless the order is in the nature of a penalty or a final order on a perusal of the order, we are of the view that the impugned order is in the nature of an interim order and therefore in exercise of the inherent power, the authorities are competent to suspend the licences."

11-k). In **M/s.Madhavi Wines, Mancherial Vs. Excise Superintendent (**1994 (3) ALT 17 (NRC)=LAWS(APH) 1994 (9) 26) it has been held by the Division Bench that only where suspension is resorted to as a substantive punishment an opportunity of 8 †9 †10 11 †hearing has to be given to the person whose licence is proposed to be suspended. There can thus be no difficulty in cases where suspension is resorted to as an interim measure pending enquiry into the charges leveled against the licensee, but where suspension is resorted to as a substantive punishment an opportunity of hearing has to be given to the person whose licence is proposed to be suspended.

11-l). In **Satyanna Goud Vs. Excise Superintendent, Mahboobnagar (**1994 (2) APLJ 42 (HC)=(2) ALT 270), this Court by referring to the full bench expression of **Tappers Cooperative Society** supra held that if it is possible to give an opportunity to the petitioner and the circumstances do not warrant such a drastic step, the licensing authority is bound to afford an opportunity as the power of suspension pending enquiry should not be exercised as an invariable rule or mode of making an enquiry.

11-m). In **M/s. Sree Devi Wines Vs. The Deputy Commissioner of Excise, Kakinada and Others (**1995 (1) ALD 164=1995 (1) ALT 1 (NRQ), this Court held that the authority passing the order already concluded on the violation of the conditions, no opportunity given to the dealer to make his representation, held the order is bad being violative of Section 31 of the Act. Thus this decision is not an authority on scope of suspension pending enquiry since available.

11-n). In **Sunil Vs. Assistant Commissioner of Prohibition and Excise/Excise Superintendent, Twin Cities of Hyderabad, Narayanguda and Another (**1997 (4) ALD 625), this Court held that for suspension pending enquiry into the allegation that the licensee is getting the liquor sold outside the licenced premises through others in violation of Rule 19 of the conditions of Licences Rules, no prior notice need be given to the licensee and it cannot be complained of violation of principles of natural justice. Suspension of licence basing on confession made by the person selling the liquor coupled with the fact that the liquor sold by him is one supplied to the petitioner-licensee by the A.P. Beverage Corporation Limited, is not liable to be interfered as it is only an interim order pending enquiry. It further held at Paras 4 to 9 as follows:

"4. This Court as early as in the year 1984 took the view that "the power of suspension which is concomitant or adjunct is no doubt restricted by the statutory provision under the proviso in question to pass final orders of suspension but that power cannot be said to have been taken away to pass an interim order of suspension not intended to be a penalty but only interim measure to pass effective orders. This conclusion of ours applies with greater force when we notice that we are concerned with the liquor licences in which the citizen has no right guaranteed under Article 19 (1) (g) of the Constitution of India but only a privilege. No doubt once a licence is granted, valuable right would accrue to him and that can be taken away as per the provisions of the Act. But as a rule of construction the proviso cannot have a larger affect than it intended to govern the final disciplinary proceedings of suspending or cancelling a licence or permit "(see 1984 (2) APLJ page 1 (FB)). The impugned order in this case itself says that the licence of the petitioner is kept under suspension pending enquiry. It is not a final order. Enquiry is yet to be commenced and a final decision has to be taken. It is true that the petitioner is required to be given an opportunity of making his representation before taking a final decision in the matter. The statute does not require issuance of any notice or opportunity for keeping the licence under suspension pending enquiry. The requirement of notice and opportunity is only in cases of final decision of suspension or cancellation of the licence as the case may be. Therefore, the impugned order cannot be declared as ultravires the provisions of the Act or the Rules. **The principles of natural justice have no application as the rights of the petitioner to hold the licence till the end of the period for which it is granted is yet to be decided.** The order of suspension pending enquiry is an interim measure taken by the authority in public-interest.

5. The learned Counsel for the petitioner, however, relied upon a decision rendered by this Court in **Satyanna Goud v. Excise Superintendent-**1994 (2) ALT 270, in support of his submission that the petitioner's licence could not have been kept under suspension by merely depending upon the confessional statement of one D. Ramesh, who has no concern whatsoever with the petitioner's business. It is true there is a reference to the confessional statement of the said D. Ramesh that he is selling the liquor with the consent of the petitioner on a dry day i.e., on 1-7-1997. But, it is required to notice that on verification it was found that the liquor seized on 1-7-1997 from the possession of the said D. Ramesh was supplied to the petitioner's shop on 4-6-1997 and 25-6-1997 by the Andhra Pradesh State Beverage Corporation Limited for the purpose of selling the same in retail by the licensee. In Satyanna Goud, the Court observed that there is no material whatsoever except the alleged oral statement of the person from whom the toddy was seized. In such view of the matter, the Court came to the conclusion that there was no basis whatsoever for keeping the licence under

suspension. Such is not the case on hand. The suspension order passed by the respondent is not only based upon the confessional statement of the said D. Ramesh but also based upon the further material available on record that what was being sold by D. Ramesh was the same liquor supplied by the Beverage Corporation to the petitioner for the purpose of retail sale through the licenced shop. It cannot be said that there is no prima facie case for keeping the licence under suspension pending enquiry. The observations of the Court are made only for the purpose of considering the submission made by the learned Counsel for the petitioner. No opinion as such is expressed on the merits of the case and the observations shall have no bearing whatsoever on the enquiry to be made by the respondents for taking further appropriate action in accordance with law. The decision in M/s. Madhavi Wines, Mancherial v. Excise Superintendent, Adilabad, 1994 (3) ALT 17 (NRC) has no application, whatsoever, to the instant case. It was a case where the licence was suspended as a substantive punishment and not an interim measure pending enquiry of the charges leveled against the licensee. It was a case where final order of suspension was passed without giving any opportunity to the licensee to represent his case. The Division Bench came to the conclusion that such a final orders suspending the licence without giving a reasonable opportunity to the licensee is ultravires Section 31 (1) (b) of the A.P. Excise Act, 1968. Here is a case of suspension pending enquiry and not a final order. The decision relied upon by the learned Counsel for the petitioner in **Sree Devi Wines v. Dy. Commissioner of Excise, Kakinada and Ors.** 1995 (1) ALD 164 = 1995 (1) ALT 1 (NRQ) also has no application. It was a case where the impugned order of suspension was construed and viewed as final order of suspension as the authority passing the order has already concluded about the violations of the condition by expressing final opinion that the licensee has wilfully violated the licence conditions and rules and indulged in malpractices Under Section 36 (b) of the A.P. Excise Act, 1968. No such final opinion is expressed by the authority in this case. Therefore, the present impugned order is an order which is pure and simple order of suspension of the licence of the petitioner pending enquiry.

6. It is settled law that this Court in a judicial review proceeding under **Article 226** of the Constitution does not act as a Court of appeal against the orders passed by the statutory authorities. The Court is more concerned with the decision making process. Court is not required to express any opinion on the merits of the case while considering the validity of an order of suspension pending enquiry. Rights of the licensee are yet to be adjudicated. In such cases, a very limited judicial review is available. The Court would interfere only in a case where the impugned order is passed without jurisdiction or which could be said to be so perverse that no reasonable person could have taken such a decision in the facts and circumstances of the case. Such is not the case on hand.

7. In the similar circumstances, this Court declined to interfere and disposed of a Writ Petition at the admission stage with a direction to the authority to dispose of the enquiry pending before him within a period of four weeks from the date of receipt of a copy of the order after affording an opportunity of being heard to the licensee (**See the order dated 8-7- 1997 in W.P. No. 14393 of 1997**). I feel that similar directions in this case would meet the ends of justice.

8. I do not see any reason whatsoever to interfere in the matter and set aside the impugned order.

9. The Writ Petition is accordingly disposed Of with a direction to the 1st respondent i.e., the Assistant Commissioner of Prohibition & Excise/Excise Superintendent, Twin Cities of Hyderabad at Narayanaguda, Hyderabad District, to dispose of the enquiry pending before him within a period of four weeks from the date of receipt of a copy of this order after affording an opportunity of being heard to the petitioner. No costs.

11-o). In **V.P.Thimmaiah supra**, this Court held that licence cannot be cancelled on confessional statement of an accused until he had violated conditions of licence. However, when that is not the only basis as held by **Sunil** supra, it no way requires interference by writ court.

11-p). In **Goka Bujjamma Vs. Prohibition and Excise Superintendent, Srikakulam (**2003 (2) ALT 549 (DB), the Division Bench of this Court held that the appellant permitted to run the shop pending enquiry into show cause notice and for that observed: A Division Bench of this Court comprising of Chief Justice and V.V.S. Rao, J., in the judgment reported in **K.Srinivasa Reddy V. Superintendent, Prohibition And Excise (**2002 (1) ALT 108 (DB) in an identical matter held as follows:

"The proviso appended to Section 31(1) of the Act clearly states that no licence or permit shall be cancelled or suspended unless the holder thereof is given an opportunity of making his representation against the action proposed. In the instant case, the 1st respondent neither gave any notice to the appellants nor gave them any opportunity to make their representation against the action proposed. The 1st respondent, instead of proposing the action of suspending the licence, has passed a final order suspending the licence of the appellants, which is illegal and against the provisions of Section 31 (1) of the Act."

11-q). In **K.Srinivasa Reddy's** case (supra), the Division Bench found that the order impugned reads as if it is a final order under Section 31(1) and therefore held it was illegal and against the provisions of Section 31(1) of the Act since the licensee was not issued a prior notice. Similar view has been expressed in Goka Bujjamma's case (supra). **In both the said cases supra, the decision of the Full Bench in Tappers Co-operative Society's case supra was not brought to the notice of the Division**

Benches. Hence, said decisions relied on by the learned Counsel for the petitioners are distinguishable and not applicable to the case on hand.

11-r). In **Venkateswara Wines Vs. Superintendent of Prohibition and Excise and Others (**2004 (4) ALD 681), this Court held: in view of the fact that the power to suspend a licence pending enquiry has already been upheld by a Full Bench of this Court reported in Tappers Co-op. Society, Maddur, v. Superintendent of Excise, **this writ petition being premature could not be, therefore, allowed. However, in the facts and circumstances of the case, the authority concerned is directed to complete the enquiry within a period of one month from the date of receipt of a copy of this order**. The writ petitions are accordingly disposed of.

12). **From the above legal position**, the only thing to be considered with reference to the individual facts is whether the suspensions are pending enquiry as an interim measure for which principles of natural justice have no application including of any prior show cause notice or opportunity of hearing for final orders to be passed after notice and opportunity of hearing from any submissions by giving reasons and or final orders or deemed final orders as penalty to comply with.

12-a). So far as W.P.No.1359 of 2018 of M/s.D.J.Wines concerned, the proceedings of the Excise Superintendent-cum-licensing authority issued in RC.No.PESKKD-IMLOO the/3/2018-JA-A3(P&E)-KKD-EG-1 dated 12.01.2018 speaks on the facts give rise to suspension pending enquiry that on 11.01.2008 the Sub Inspector supra, STF team with staff conducted raids in Tallarevu, booked case in Cr.No.23/2018 u/sec.34(a) of the Act, for unauthorized possession of 18 IML bottles of 120ml size with Ch.Manikyam who also confessed of purchased stocks from A-4 shop of DJ wines supra and **also ascertained and found the bottles belongs to the A.4 shop of DJ wines supra** which is evident of deliberate violation of the Rules and licence conditions and pending enquiry thereby suspended as functioning of the shop is detrimental to the public interest.

Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite as per the full bench expression in **Tappers Co-op. Society** supra, besides **Sunil & Venkateswara Wines** supra, to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders

and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

Further for the show cause notice issued in RC.No.PESKKD-IMLOO the/3/2018-JA-A3(P&E)-KKD-EG-1 dt.12.01.2018, which is on even date of suspension and for no bar to the suspension pending enquiry therefrom as per **Tappers Co-op. Society** supra, it is left open to the petitioner to submit explanation to pass final orders u/sec.31 of the Act and the Rules made thereunder.

12-b). So far as W.P.No.1377 of 2018 of M/s.Guru Wines concerned, the proceedings of the Excise Superintendent cum licensing authority issued in Rc.No.A4/340/2017 dated 08.01.2018 speaks on the facts give rise to suspension pending enquiry that on 05.01.2018 the Inspector supra, STF team with staff reached the shop of M/s.Guru Wines and found the shop was closed, but the permit room of A-4(B) licence was opened and found a person sitting with one carton box in front of him by name Gijari Hanumans, who disclosed of said carton box contain liquor 30 nip bottles (each 180ml) belong to M/s.Guru Wines and he is working in the shop and as per the instructions of the shop owner by supply he is now selling. When found out of which, 7 nip bottles are without heals and 23 having heals and among which 23 nips of heavens door whisky 180ml, 4 nips of Haywards select whisky 180ml, 2 nip bottles of Honeybee genuine Brandy 180ml and one nip bottle of Masion House XO brandy 180ml and also found Rs.480/- at the carton box and on scanning the liquor bottles with mobile scanner it is revealed those are supplied to M/s.Guru Wines and samples drawn for chemical analysis and therefrom booked case in Cr.No.31/2017 u/sec.34(a) of the Act, and **also ascertained from depot Manager APSPDCL IML unit, Proddutur confirming the bottles belongs to the A.4 shop of Sri Guru wines supra but for 02 Heals Nos. of HD Whisky of M/s Dwaraka wines and GVR wines respectively each,** which is evident of deliberate violation of the Rules and licence conditions and pending enquiry thereby suspended as functioning of the shop is detrimental to the public interest.

Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite as per the full bench expression in **Tappers Co-op. Society** supra, besides **Sunil & Venkateswara Wines** supra, to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the

final orders u/sec.31 of the Act and the Rules made thereunder.

12(c). So far as W.P.No.1405 of 2018 of M/s.Raghu Wines concerned, the proceedings of the Excise Superintendent cum licensing authority issued in RC.No.228/2017/B4 dated 17.01.2018 speaks on the facts give rise to suspension pending enquiry that on 21.12.2017 the Sub- Inspector supra, STF team with staff reached Kanchedam village and found a person with Mica bag and on suspicion when questioned, he disclosed of said bag with him contain liquor 25 nip bottles (each 180ml). When found out of which, 10 nip bottles are Bagpiper Elite whisky and 15 anytime fine whisky with batch Numbers and on scanning the liquor bottles with mobile scanner it is revealed those are supplied to M/s.Raghu Wines and samples drawn for chemical analysis and therefrom booked case in Cr.No.82/2017 u/sec.34(a) of the Act, which is evident of deliberate violation of the Rules and licence conditions and pending enquiry thereby suspended as functioning of the shop is detrimental to the public interest, by saying Show cause notice has been issued to the licensee for the said violation and in his explanation stated he and his noukarnama holder have not sold more than 3 or 4 IMFL bottles to anyone and do not know the accused and did not even clarify the batch numbers belongs to his shop or not. In fact there is no bar even after show cause notice and reply as per **Tappers Co-op. Society** supra, pending enquiry to suspend. Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite as per the full bench expression in **Tappers Co-op. Society** supra, besides **Sunil & Venkateswara Wines** supra, to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

2(d). So far as W.P.No.1427 of 2018 of M/s.Swagath Wines concerned, the proceedings of the Excise Superintendent cum licensing authority issued in Rc.No.305/2017/A4 dated 06.01.2018 on the facts give rise to suspension pending enquiry speaks that on 30.12.2017 the Sub-Inspector supra, STF team with staff reached at Turkapalem village and found two persons proceeding on Hero Glamour vehicle by carrying something and on suspicion when questioned, they disclosed of their carrying liquor and when found it is 24 nip bottles of Evershine Premium Classic whisky and samples drawn for chemical analysis and

therefrom booked case in Cr.No.132/2017 u/sec.34(a) of the Act. The 24 nips supra do not having any heals codes on it and noticed small stickers attached to each bottle namely Ch.V.L.Reddy. the two persons reveals of the said stickers affixed by the shop owner of Swagath wines, Machavaram supra, to identify their stock supplying to unauthorized outlets there from. As it is evident of deliberate violation of the Rules and licence conditions, and pending enquiry thereby suspended as functioning of the shop is detrimental to the public interest, by saying Show cause notice has been issued to the licensee for the said violation and submitted explanation. However, the CC TV recorded data of 13.12.2017 establishes the 24 bottles are of the Swagath Wines, Machavaram and the stickers affixed as referred supra. In fact there is no bar even after show cause notice and reply as per **Tappers Co-op. Society** supra, pending enquiry to suspend.

Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite as per the full bench expression in **Tappers Co-op. Society** supra, besides **Sunil & Venkateswara Wines** supra, to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

12(e). So far as W.P.No.1456 of 2018 of M/s.Sri Rama Wines concerned the proceedings of the Excise Superintendent cum licensing authority issued in Rc.No.09/2018/A4 dated 14.01.2018 on the facts give rise to suspension pending enquiry speaks that on 13.01.2018 the Sub- Inspector supra, STF team with staff while checking MRP violations at Veldurti Mandal, at Sirigipadu, sent mediator to purchase 750ml bottle from M/s.Sri Rama Wines supra and the mediator purchased Mc Dowell No.1 Gold Brandy 780ml for Rs.480/- against MRP of Rs.440/- which is a violation and therefrom visited the A-4 shop supra where one G.P.Ranga Reddy present and conducting business and when shown and questioned, he disclosed of the sale by him for the said Rs.40/- excess price from which booked case in Cr.No.02/2018 u/sec.31(1)(b) of the Act r/w R.42 of the Conditions of Licence Rules 2012. As it is evident of deliberate violation of the Rules and licence conditions, pending enquiry thereby suspended. Though it is mentioned of Sec.31 of the Act in the order of suspension pending enquiry, it will not make as a final or deemed final order.

Having regard to the above, there is no any

illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite as per the full bench expression in **Tappers Co-op. Society** supra, besides **Sunil & Venkateswara Wines** supra, to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

12(f). So far as W.P.No.1708 of 2018 of M/s.RVT Wines concerned, the proceedings of the Excise Superintendent cum licensing authority issued in Rc.No.14/2018/A1 dated 17-1-2018 on the facts give rise to suspension pending enquiry speaks that on 11.01.2018 the Inspector supra with his team while conducting raids at Obireddipalli cross on Punganur-Eudru bus road found a person traveling two wheeler with white polythene bag and on suspicion questioned disclose about that polythene bag contained liquor bottles and found and seized of the 20 nips of 999 Power Star fine Whisky, 3 nips Heywards fine Whisky and 2 nips Old Tavern Whisky total 25 duty paid liquor stock without having any heals and the said person disclosed his identity as P.Ramakrishna Reddy and the liquor bottles purchased from M/s.RVT Wines supra to sell for high price at Punganur and collected samples and Cr.No.4 of 2018 u/sec.34(a) of the Act registered by the SHO. The above facts are clear of the M/s.RVT Wines supplied the duty paid liquor to the unauthorized person supra for illegal sales at unauthorized places by willful violation of the condition No.1 of the A-4 shop licence in Form-A.4 of the conditions of licence Rules in suspending the licence pending enquiry.

Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite and once there are grave allegations even based on confession interim suspension can be ordered as per the expressions in **Sunil & Venkateswara Wines** referring to the full bench expression in **Tappers Co-op. Society** supra and to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving

reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

12(g). So far as W.P.No.1740 of 2018 of M/s. Bhanu Wines concerned, the proceedings of the Excise Superintendent cum licensing authority issued in Rc.No-A2/293/2017 dated 17.01.2018 on the facts give rise to suspension pending enquiry speaks that on 04.01.2018 the DSP, STFT with his team while conducting surprise visit at the A-4 shop of M/s. Bhanu Wines, found four loose liquor bottles in the almyrah adjacent to sales counter and one of which is HD Heavens Door whisky 180ml with about half of the quantity without Heal, one of which is Honeybee Genuine Brandy 180ml with about half of the quantity with Heal, one of which is Officers choice reserve whisky 180ml with about half of the quantity with Heal and one Mc Dowell, No.1 Celebration luxury xxx rum 180ml, about half of the quantity with Heal and on enquiry the person in the shop conducting the sales produced noukarnama with name and address by disclosing of conducting loose sales as per the instructions of the shop owner of M/s. Bhanu Wines and drawn samples and Cr.No.4 of 2018 u/sec.34(a) of the Act, is regsitered. From the above facts suspended the licence pending enquiry.

Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite and once there are grave allegations even based on confession interim suspension can be ordered as per the expressions in **Sunil & Venkateswara Wines** referring to the full bench expression in **Tappers Co-op. Society** supra and to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

12(h). So far as W.P.No.1745 of 2018 of M/s. Kick Wines, concerned, the proceedings of the Excise Superintendent cum licensing authority issued in PE-STAOOTH/48/2018-JA(A4)-ESGWK, dated 19.1.2018 on the facts give rise to suspension pending enquiry speaks that on 08.01.2018 the Sub Inspector, STFT with his team while conducting vehicle check at Moghalipuram, found a person traveling on two wheeler with contraband and on suspicion questioned disclosed about liquor bottles and found and seized of the 15 nips of Officers Choice Reserve Whisky 180ml, 15 nips of Directors Special fine whisky 180ml, 10 nips of Aristocrat Premium Reserve Whisky 180ml, 5 nips of Mc Dowell No.1 Whisky 180ml, 5 nips of Imperial Blue Classic Grain Whisky 180ml, total 50 liquor

stock and the said person disclosed his identity as G.Santhosh and of at instructions of B.V.D.P.Rao of kick wines supra he purchased bottles from kick wines and handed over 30 bottles to one B.Bangaramma to sell unauthorizedly. It is also on verification found the 50 liquor bottles are the stock belongs to M/s.kick Wines supra and collected samples and Cr.No.5 of 2018 u/sec.34(a) of the Act registered by the SHO. The above facts are clear of the licensee M/s.Kick Wines is deliberately violated the conditions of the A-4 shop licence in Form-A.4 of the conditions of licence Rules and a show cause notice issued for which there is an improper reply issued and hence in the public interest suspended the licence pending enquiry.

Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite and once there are grave allegations even based on confession interim suspension can be ordered as per the expressions in **Sunil & Venkateswara Wines** referring to the full bench expression in **Tappers Co-op. Society** supra and to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice issued and from submission of explanation and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder, for no bar to the suspension pending enquiry even after show cause notice and reply as per **Tappers Co-op. Society** supra.

12(i). So far as W.P.No.1783 of 2018 of M/s.SS Wines concerned, the proceedings of the Excise Superintendent cum licensing authority issued in RC.No.126/2017/A1 dated 17.01.2018 on the facts give rise to suspension pending enquiry speaks that on 16.12.2017 the Sub Inspector, STFT with his team while proceeding to Vemavaram, found a person with one mika bag in his right hand and on suspicion questioned disclosed about liquor bottles and found and seized of the 49 IML bottles with Heal Numbers viz; 14 Old Tavern Fine Whisky 180ml and 35 Old Label Superior whisky 180ml with batch numbers and said person disclosed his identity as P.Sivaiah and purchased from the SS wines supra to sell for high price unauthorizedly. It is also on verification through scanner found the 49 liquor bottles are the stock belongs to M/s.SS Wines supra and collected samples and Cr.No.173 of 2017 u/sec.34(a) of the Act registered by the SHO. The above facts are clear of the licensee M/s.SS Wines has deliberately violated the conditions of the A-4 shop licence in Form-A.4 including the sale above permissible quantity of the conditions of licence Rules 2012 and a show cause notice issued for which there is no any reply issued even after expiry of 15 days time including after extension

of time till 17.01.2018 on the ground of his brother expired and hence in the public interest suspended the licence pending enquiry.

Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite and once there are grave allegations even based on confession interim suspension can be ordered as per the expressions in **Sunil & Venkateswara Wines** referring to the full bench expression in **Tappers Co-op. Society** supra and to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice issued and from submission of explanation and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder, for no bar to the suspension pending enquiry even after show cause notice and reply as per **Tappers Co-op. Society** supra.

12(j). So far as W.P.No.1901 of 2018 concerned of M/s. Sai Krishna Wines, Mopur, impugning the proceedings of the 4th respondent-Excise Superintendent cum licensing authority issued in Rc.No-367/ 2017/A6 dated 19.01.2018 on the facts give rise to suspension of the licence of M/s. Sai Krishna Wines, the proceedings speak that on 09.12.2017 the Sub Inspector with his team while conducting raids, found at the house of one T.Chinavemaiah in a plastic gunny bag 14 liquor bottles 4 having Heal Numbers and 8 having no Heal Numbers and on questioned disclosed about purchased the liquor bottles from A-4 shop of M/s. Sai Krishna Wines, Mopur, and on verified Heal Numbers of the 6 bottles and found of M/s. Sai Krishna Wines, Mopur, and seized of the bottles, collected samples and Cr.No.192 of 2017 u/sec.34(a) of the Act registered by the SHO. Further on 12.01.2018 the Sub Inspector with STF team booked another crime 2 of 2018 for 19 Old Tavern bottles seized from K.Sulochanamma who also disclosed of supplied by the A-4 shop of M/s Sai Krishna Wines supra. The above facts are clear of the licensee M/s. Sai Krishna Wines, Mopur, has deliberately violated the conditions of the A-4 shop licence in Form-A.4 and hence in the public interest suspended the licence with immediate effect.

Having regard to the above, the very order is not an order of suspension pending enquiry but as if a final order by also mentioning there is a right of appeal to the Deputy Commissioner and the same without show cause notice and violation of principles of natural justice being per se illegal, arbitrary and contrary to A.P.Excise Act, 1968 and the rules made and the pronouncements thereunder referred supra and is thereby liable to be set aside by giving liberty to the respondents to issue show cause notice and from submission of explanation and on

hearing by giving reasons pass final orders u/sec.31 of the Act and the Rules made thereunder.

12(k). So far as W.P.No.1953 of 2018 of M/s.Navyasri Wines concerned the proceedings of the Excise Superintendent cum licensing authority issued in Rc.No-05/2018/B dated 05.01.2018 on the facts give rise to suspension pending enquiry speaks that on 04.01.2018 the Sub Inspector with his team reached M/s.Navyasri Wines supra, found a person who is nowkarnama holder by name C.Nagaraju and on inspection found 3 loose liquor bottles one of Haywards Select Whisky 180ml with about half quantity, one Honeybee Brandy 180ml with about half quantity and HD Heavans Door Whisky 180ml with about half quantity, on questioned disclosed about loose sales unauthorizedly. It is also on verification found the liquor bottles are the stock belongs to M/s.Navyasree Wines supra and collected samples and Cr.No.7 of 2018 u/sec.34(a) of the Act registered by the SHO. The above facts are clear of the licensee M/s.Navyasree Wines has deliberately violated the conditions of the A-4 shop licence in Form-A.4 including by loose sales through noukarnama and of the conditions of licence Rules 2012 and hence in the public interest suspended the licence pending enquiry.

Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite and once there are grave allegations even based on confession interim suspension can be ordered as per the expressions in **Sunil & Venkateswara Wines** referring to the full bench expression in **Tappers Co-op. Society** supra and to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice issued and from submission of explanation and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder, for no bar to the suspension pending enquiry even after show cause notice and reply as per **Tappers Co-op. Society** supra.

12(l). So far as W.P.No.1985 of 2018 concerned of M/s. Sai Krishna Wines, Mopur, impugning the proceedings of the 4th respondent-Excise Superintendent cum licensing authority issued in Rc.No-366/2017/A6 dated 19.01.2018 on the facts give rise to suspension of the licence of M/s. Sai Krishna Wines, the proceedings speak that on 09.12.2017 the Sub Inspector with his team while conducting raids, found at the house of one K.Udaykumar of Vellikallu 16 liquor bottles in a plastic gunny bag, 7 having Heal Numbers and 9 having no Heal Numbers and on questioned disclosed about purchased the liquor bottles from A-4 shop of M/s. Sai Krishna Wines, Mopur, and on verified Heal Numbers of the 6 bottles

and found of M/s. Sai Krishna Wines, Mopur, and seized of the bottles, collected samples and Cr.No.193 of 2017 u/sec.34(a) of the Act registered by the SHO. The above facts are clear of the licensee M/s. Sai Krishna Wines, Mopur, has deliberately violated the conditions of the A-4 shop licence in Form-A.4 and hence in the public interest suspended the licence with immediate effect.

Having regard to the above, the very order is not an order of suspension pending enquiry but as if a final order by also mentioning there is a right of appeal to the Deputy Commissioner and the same without show cause notice and violation of principles of natural justice being per se illegal, arbitrary and contrary to A.P.Excise Act, 1968 and the rules made and the pronouncements thereunder referred supra and is thereby liable to be set aside by giving liberty to the respondents to issue show cause notice and from submission of explanation and on hearing by giving reasons pass final orders u/sec.31 of the Act and the Rules made thereunder.

12(m). So far as W.P.No.2152 of 2018 of M/s.Chirudeep Wines concerned, the proceedings of the Excise Superintendent cum licensing authority issued in Rc.No-A3/184/2017/2 dated 17.01.2018 on the facts give rise to suspension pending enquiry speaks that on 17.01.2018 the Inspector, STF with his team reached M/s Chirudeep Wines supra, found a person who is unauthorized transacting business by name B.Madangopaiah and found 4 liquor bottles of one litre each of Honeybee brandy and one half filled one litre of Honeybee brandy seals are open. Further strength is checked by hydrometer and thermometer with the help of SS table and found lower than specified and said person disclosed about doing the sales unauthorizedly at the direction of the owner of M/s Chirudeep Wines supra. Samples are drawn from the seized stock supra. The above facts are clear of the licensee M/s. Chirudeep Wines has deliberately violated the conditions of the A-4 shop licence in Form- A.4 including by loose sales by dilution of liquor through unauthorized person and of the conditions of licence Rules 2012 and hence in the public interest suspended the licence pending enquiry.

Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite and once there are grave allegations even based on confession interim suspension can be ordered as per the expressions in **Sunil & Venkateswara Wines** referring to the full bench expression in **Tappers Co-op. Society** supra and to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice issued and from submission of explanation and on hearing by giving reasons

to the final orders u/sec.31 of the Act and the Rules made thereunder, for no bar to the suspension pending enquiry even after show cause notice and reply as per **Tappers Co-op. Society** supra.

12(n). So far as W.P.No.2797 of 2018 of M/s.Sri Red Lip Wines concerned, the proceedings of the Excise Superintendent cum licensing authority issued in Rc.No-257/2017/A2 dated 16.01.2018, on the facts give rise to suspension pending enquiry speaks that on 11.12.2017 the Sub Inspector, STFT with his team while proceeding to Rayavaram in raids, found a person with liquor bottles and on verified and found 33 nips duty paid liquor and seized of the 33 bottles without Heal Numbers viz; 11 Imperial Blue Classic Whisky 180ml, 13 Directors Special Fine whisky 180ml and 9 Everyday Whisky 180ml and said person disclosed his identity as N.Venkateshwaramma and that she purchased from Sri Redlip wines supra to sell for high price unauthorizedly. It is the stock belongs to M/s.Sri Redlip Wines supra and collected samples and Cr.No.178 of 2017 u/sec.34(a) of the Act registered by the SHO. The above facts are clear of the licensee M/s.Sri Redlip Wines has deliberately violated the conditions of the A-4 shop licence in Form-A.4 including the sale above permissible quantity of the conditions of licence Rules 2012 and a show cause notice issued for which there is no any reply issued even after expiry of 15 days time including after extension of time till 16.01.2018 and hence in the public interest suspended the licence pending enquiry.

Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite and once there are grave allegations even based on confession interim suspension can be ordered as per the expressions in **Sunil & Venkateswara Wines** referring to the full bench expression in **Tappers Co-op. Society** supra and to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice issued and from submission of explanation and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder, for no bar to the suspension pending enquiry even after show cause notice and reply as per **Tappers Co-op. Society** supra.

12(o). So far as W.P.No.2835 of 2018 of M/s. Maridimamba Wines concerned, the proceedings of the Excise Superintendent cum licensing authority issued in Rc.No-164/2017/A4 dated 23.01.2018, on the facts give rise to suspension pending enquiry speaks that on 22.01.2018 the Inspector with his team while conducting vehicular check at Gajuwaka Y Junction, found liquor bottles in Bajaj auto and on verified and

found 960 nips IML HD Heaven Door 180ml and seized and said persons in the auto disclosed their identity as G.S.Reddy, K.Satish and L.Appaladora and collected samples and Cr.No.178 of 2017 u/sec.34(a) of the Act registered by the SHO. They disclosed about their planning to run mobile sales on the occasion of dry day of January, 2016, by making loose sachets and contacted D.J.Rao working in M/s Maridamamba Wines, Parwada and when proceeded to Parwada and enquired said D.J.Rao he disclosed about he has given from the shop of Maridamamba wines the bottles supra which is the stock thus belongs to M/s. Maridamamba Wines supra. The above facts are clear of the licensee M/s. Maridamamba Wines has deliberately violated the conditions of the A-4 shop licence in Form-A.4 including the sale above permissible quantity of the conditions of licence Rules 2012 and hence in the public interest suspended the licence pending enquiry.

Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite and once there are grave allegations even based on confession interim suspension can be ordered as per the expressions in **Sunil & Venkateswara Wines** referring to the full bench expression in **Tappers Co-op. Society** supra and to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice issued and from submission of explanation and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder, for no bar to the suspension pending enquiry even after show cause notice and reply as per **Tappers Co-op. Society** supra.

12(p). So far as W.P.No.2995 of 2018 of M/s.L.N.Wines concerned, the proceedings of the Excise Superintendent cum licensing authority issued in Rc.No-05/2018/B dated 25.01.2018, on the facts give rise to suspension pending enquiry speaks that on 22.01.2018 the Inspector with his team proceeded to M/s.L.N.Wines and found nowkarnama holder N.Srinivasulu transacting business and on inspection found in the counter one black cover beneath cash counter containing one nip of original Choice Whisky containing 90ml, one nip of Buckarthy Black Rum containing 90ml, one nip of Heywards Select Whisky containing 90 ml, one nip of Bagpiper Whisky contaiing 90ml, one nip of Romonova Vodka of 90ml, one nip of black and gold brandy 90ml, one nip of Old Tavern Whisky 90ml all the seven nips are duty paid and said person disclosed identity and stated conducting loose sales and collected samples and Cr.No.29 of 2018 u/sec.34(a) of the Act registered by the SHO. The above facts are clear of the licensee M/s. L.N.Wines has deliberately violated the

conditions of the A-4 shop licence in Form-A.4 including the sale above permissible quantity of the conditions of licence Rules 2012 and hence in the public interest suspended the licence pending enquiry.

Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite and once there are grave allegations even based on confession interim suspension can be ordered as per the expressions in **Sunil & Venkateswara Wines** referring to the full bench expression in **Tappers Co-op. Society** supra and to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice issued and from submission of explanation and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder, for no bar to the suspension pending enquiry even after show cause notice and reply as per **Tappers Co-op. Society** supra.

12(q). So far as W.P.No.3055 of 2018 of M/s.Sri Sri Wines concerned, the proceedings of the Excise Superintendent cum licensing authority issued in File.No.PE-FIN/11/2018/JA(A4)-ESGWK, dated 29.01.2018, on the facts give rise to suspension pending enquiry speaks that on 20.01.2018 the Sub Inspector, STF with his team detected at Gulepalli village, of a person disclosed his name as A.Rama Rao selling liquor to public and seized 70 nips of various liquor bottles described in the proceedings of same seized with an amount of Rs.150/-, collected samples and Cr.No.13 of 2018 u/sec.34(a) of the Act registered by the SHO. The said person disclosed of purchased daily two boxes of said liquor bottles from M/s.Sri Sri Wines and sold at pan shop opposite to petrol bunk, Gullepalli and it was on instructions of owner of M/s.Sri Sri Wines and the salesman Gangadhar from A-4 shop daily issued two boxes of IML to sell unauthorizedly and established of said 90 nip bottles of IML stock belongs to the A-4 shop of M/s.Sri Sri Wines. Show cause notice issued and not submitted explanation within the stipulated time. The above facts are clear of the licensee M/s.Sri Sri Wines has deliberately violated the conditions of the A-4 shop licence and Rules and hence in the public interest suspended the licence pending enquiry.

Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite and once there are grave allegations even based on confession interim suspension can be ordered as per

the expressions in **Sunil & Venkateswara Wines** referring to the full bench expression in **Tappers Co-op. Society** supra and to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice issued and from submission of explanation and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder, for no bar to the suspension pending enquiry even after show cause notice and reply as per **Tappers Co-op. Society** supra.

12(r). So far as W.P.No.3491 of 2018 of M/s.Babu Wines concerned, the proceedings of the Excise Superintendent cum licensing authority issued in Rc.No-369/2017/A4 dated 30.01.2018, on the facts give rise to suspension pending enquiry speaks that on 29.01.2018 the Sub Inspector with his team proceeded to Thimmarajupeta village, as surprise check at M/s.Babu Wines and found a person disclosed his name as K.Arunkumar, nowkarnama selling liquor at sales counter and found 9 loose liquor bottles described in the proceedings with insufficient quantity and seized said liquor bottles described in the proceedings, collected samples and Cr.No.19 of 2018 u/sec.34(a) of the Act registered by the SHO. The said person disclosed of selling liquor loosely and on verification found the same as diluted with cheap liquor Heaven Door Whisky mixed to the above seized liquor bottles of Directors Special Fine Whisky, Officers choice reserve and blue whisky and Royal Street whisky and Mc Dowell Brandy belongs to the A-4 shop of M/s.Babu Wines. Show cause notice issued and not submitted explanation within the stipulated time. The above facts are clear of the licensee M/s.Babu Wines has deliberately violated the conditions of the A-4 shop licence and Rules and hence in the public interest suspended the licence pending enquiry.

Having regard to the above, there is no any illegality or arbitrariness or unconstitutionality or anything contrary to A.P.Excise Act, 1968 and the rules made thereunder referred supra and also no any violation of principles of natural justice to set aside the proceedings, but for the said proceedings of suspension pending enquiry cannot be indefinite and once there are grave allegations even based on confession interim suspension can be ordered as per the expressions in **Sunil & Venkateswara Wines** referring to the full bench expression in **Tappers Co-op. Society** supra and to confine the same for a period of six(6) weeks from the date of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice issued and from submission of explanation and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder, for no bar to the suspension pending enquiry even after show cause notice and reply as per **Tappers Co-op. Society** supra.

12(s). So far as W.P.No.3595 of 2018 concerned of M/s.Sindu Wines, Chendodu,

impugning the proceedings of the 4th respondent- Excise Superintendent cum licensing authority issued in Rc.No- 07/ 2018/A3, dated 23.01.2018, on the facts give rise to suspension of the licence of M/s.Sindu Wines, Chendodu, the proceedings speak that on 21.12.2017 the Sub Inspector with his team while conducting raids, found a person with a plastic bag and on suspicion when questioned disclosed his name as T.Saikumar of Prakasham colony and about liquor bottles therein and when verified found 75 liquor bottles of 180ml viz; 65 Bagpiper Elite Whisky and 10 Heavens Door, dutypaid and on the 75 bottles Heal Numbers torn on questioned disclosed about purchased the liquor bottles from A-4 shop of M/s.Sindu Wines and selling unauthorizedly without licence and seized of the bottles, collected samples and Cr.No.212 of 2017 u/sec.34(a) of the Act registered by the SHO. The above facts are clear of the licensee M/s.Sindu Wines, has deliberately violated the conditions of the A-4 shop licence in Form-A.4 and hence in the public interest suspended the licence with immediate effect.

Having regard to the above, the very order is not an order of suspension pending enquiry but as if a final order by also mentioning there is a right of appeal to the Deputy Commissioner and the same without show cause notice and violation of principles of natural justice being per se illegal, arbitrary and contrary to A.P.Excise Act, 1968 and the rules made and the pronouncements thereunder referred supra and is thereby liable to be set aside by giving liberty to the respondents to issue show cause notice and from submission of explanation and on hearing by giving reasons pass final orders u/sec.31 of the Act and the Rules made thereunder.

13). Accordingly and in the result,

13-a). the W.P.No.1359 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-b). the W.P.No.1377 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-c). the W.P.No.1405 of 2018 is disposed

of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-d). the W.P.No.1427 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-e). the W.P.No.1456 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-f). the W.P.No.1708 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-g). the W.P.No.1740 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-h). the W.P.No.1745 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or

later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice issued and from submission of explanation and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-i). the W.P.No.1783 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice issued and from submission of any explanation to said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-j). the W.P.No.1901 of 2018 is allowed by setting aside the impugned proceedings of suspension by giving liberty to the respondents to issue show cause notice and from submission of explanation if any and on hearing by giving reasons pass final orders u/sec.31 of the Act and the Rules made thereunder.

13-k). the W.P.No.1953 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-l). the W.P.No.1985 of 2018 is allowed by setting aside the impugned proceedings of suspension by giving liberty to the respondents to issue show cause notice and from submission of explanation if any and on hearing by giving reasons pass final orders u/sec.31 of the Act and the Rules made thereunder.

13-m). the W.P.No.2152 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-n). the W.P.No.2797 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice issued and from

submission of any explanation and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-o). the W.P.No.2835 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-p). the W.P.No.2995 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-q). the W.P.No.3055 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder.

13-r). the W.P.No.3491 of 2018 is disposed of by confining the impugned proceedings of suspension for a period of six(6) weeks from the date of receipt of the impugned proceedings so that either meantime or later to it as the case may be, the respondents shall pass final orders pursuant to the show cause notice to be issued if not issued and from submission of any explanation within the time stipulated in said show cause notice for final orders and on hearing by giving reasons to the final orders u/sec.31 of the Act and the Rules made thereunder &

13-S). the W.P.No.3595 of 2018 is allowed by setting aside the impugned proceedings of suspension by giving liberty to the respondents to issue show cause notice and from submission of explanation if any and on hearing by giving reasons pass final orders u/sec.31 of the Act and the Rules made thereunder.

Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

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2018(2) L.S. 191 (Hyd.)

HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Present:
The Hon'ble Mr.Justice
U. Durga Prasad Rao

Pitta Chandramma
& Ors., ..Petitioners

Vs.

The State of A.P.,
rep.by P.P ..Respondent

CRIMINAL PROCEDURE CODE, Sec.202 - Whether a Magistrate shall invariably examine all list mentioned witnesses in a complaint case exclusively triable by Court of Session and If not so, whether Sessions Court during trial can examine only those witnesses whose statements were recorded by the Magistrate before committal or it can examine the omitted witnesses also.

Held – In a compliant case triable exclusively by Court of Session, Magistrate need not direct complainant to examine all list mentioned witnesses - Sessions Judge, no doubt can examine the omitted witnesses or any other person as a witness in terms of Sec.311 Cr.P.C. as a court witness if in his view evidence of such witness is essential to just decision of case by giving reasons – Criminal Revision disposed of accordingly.

Crl.R.C.No.171/2018 Date::14-06-2018

Mr.Ramakrishna Pativada, Advocate for the Petitioners.

Public Prosecutor (Andhra Pradesh), Advocate. For the Respondent.

J U D G M E N T

1. This Criminal Revision Case is filed by the petitioners/A.1 to A.5 under Section 397 Cr.P.C, aggrieved by the order dt.05.01.2018 in Crl.M.P.No.274/2017 in S.C.No.140/2009 passed by the Assistant Sessions Judge, Vizianagaram, whereby the learned Judge dismissed the petition filed by the petitioners under Sections 202 and 309 Cr.P.C seeking to drop the evidence of LWs.6 to 12.

2. The petitioners/accused filed Crl.M.P.No.274/2017 on the submission that the witnesses, who were examined by the Judicial First Class Magistrate, Cheepurupalli under Section 202 Cr.P.C, are only to be examined before the Trial Court and since LWs.6 to 12, who were not examined by the learned Magistrate during the enquiry under Section 202 Cr.P.C, the Trial Court may drop the evidence of LWs.6 to 12. The said petition was dismissed by the learned Assistant Sessions Judge, Vizianagaram, in his order dated 05.01.2018 on the observation that the Court during trial stage cannot go beyond investigation and question the enquiry under Section 202 Cr.P.C or cognizance order. Hence, the instant Crl.R.C.

3. Heard Sri Ramakrishna Pativada, learned counsel for petitioners and learned Additional Public Prosecutor for the State (Andhra

Pradesh).

4. Learned counsel for petitioner would argue, Section 202 Cr.P.C. ordains that in a compliant case if it appears to the Magistrate that the same is exclusively triable by Court of Session, he shall direct the complainant to examine all his witnesses and commit the case to Sessions Court in terms of Sections 208 and 209 Cr.P.C. Non-examination of all list mentioned witnesses by a Magistrate is a grave procedural error. Further, even if the Magistrate without insisting examination of all the list mentioned witnesses and permit the complainant to examine only some of them and commits the case to Sessions Court, the said Court shall examine only those witnesses who were earlier examined before the Magistrate but not other witnesses who were not examined by the complainant. The reason is that under Sections 208 and 209 Cr.P.C., the Magistrate while committing the case to Sessions Court shall, furnish all the copies to the accused including the statements of witnesses recorded under Section 202 Cr.P.C. Naturally, the Magistrate can give copies of the statements of only those witnesses who were examined by the Magistrate but not others who were omitted. If during trial, the Sessions Court proposes to examine all the witnesses including those who were omitted to be examined before the Magistrate, then the accused can not have the advantage of their earlier statements so as to confront them during trial to point out any contradictions or improvements. Therefore, examination of the omitted witnesses for the first time in the Sessions trial would amount to gross- infraction of procedure contemplated under Sections 202, 208 and 209 Cr.P.C. He relied upon the decision reported in Leela Dhar vs. State of UP .

5. Per contra, learned Additional Public Prosecutor would argue that under Section 202 Cr.P.C. it is not mandatory that a complainant or the Magistrate shall examine all the witnesses mentioned in the list of witnesses in respect of a case exclusively triable by Sessions Court. The complainant has liberty to examine such of the list mentioned witnesses on whom he may repose confidence. Similarly, there is no embargo for Sessions Court during trial to examine only those witnesses who were examined earlier before the Magistrate. It can examine even omitted witnesses as well. There is no hard and fast rule that the Sessions Court shall examine only those witnesses whose 161 Cr.P.C. statements were recorded or those whose statements were recorded by the Magistrate before committal. He thus prayed to dismiss the revision case.

6. The following points would arise for determination.

1. Whether a Magistrate shall invariably examine all the list mentioned witnesses in a complaint case exclusively triable by Court of Session? 2. If point No.1 is held in negative, whether Sessions Court during trial can examine only those witnesses whose statements were recorded by the Magistrate before committal or it can examine the omitted witnesses also?

7. POINT No.1: As per proviso to Section 202 Cr.P.C., if it appears to the Magistrate

the offence complained of is triable exclusively by a Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

8. The case on hand, admittedly, is triable by a Court of Session. Coming to fulfilment the aforesaid requirement, we have the decisions of Apex Court and this High Court to the effect that there is no requirement to examine all the witnesses mentioned in the complaint. The Courts in this regard, have explained the term all his witnesses appearing in proviso to Section 202(2) Cr.P.C.

9. In Shivjee Singh vs. Nagendra Tiwary and others vs. Nagendra Tiwary and others it was held that even though in terms of proviso to Section 202(2) Cr.P.C. the Magistrate is required to direct the complainant to produce all his witnesses and examine them on oath, however, failure or inability of the complainant or omission on his part to examine one or some of the witnesses cited in the complaint, will not preclude a Magistrate from taking cognizance and issuing process or passing committal order, if he is satisfied that there exists sufficient ground for doing so. Such an order passed by the Magistrate cannot be nullified only on the ground of non-compliance with the proviso to Section 202 (2) Cr.P.C.

10. In Jumrnan and others vs. State of UP and another similar question fell for consideration before Allahabad High Court. A learned single Judge observed thus:

Para-13. Further elementary rule of interpretation is that the Statute must be read as a whole, in the instant case reading the entire Section 202 as a whole and particularly the Second Proviso to Section 200 makes it manifest that the intention of the legislature was not that the complainant may be compelled to examine all the prosecution witnesses rather only those witnesses were to be examined who can be said to be 'his' witnesses. The emphasis by the Legislature appears to be on the word 'his' which cannot be ignored in making a proper interpretation. In order to ascertain as to whether the witnesses of the complainant on whom he places his reliance are his witnesses or not, a question may be put to the complainant as to who are the witnesses whom he wants to examine or when certain number of witnesses have been examined a question can be put to the complainant as to whether they are the only witnesses or some more witnesses are required. To ascertain number of witnesses or to put a question to the complainant, no special form has been prescribed under the Code nor any strict procedure has to be followed rather it has to be ascertained judicially. I am accordingly of the view that Section 202(2) (Proviso) does not connote that all the prosecution witnesses must be examined rather only those witnesses may be examined who are of the choice of the complainant or in whom the - complainant reposes the confidence.

Para-14. The only limitation on the number of witnesses would be that no more witness would be permitted to be examined at the trial by the complainant in a case triable exclusively by the Sessions, when the case is committed to the Court of Session, under Section 207 or Section 208 of the Code a copy of the statement of witnesses to

be examined by the complainant or other material on the record has to be given to the accused before the case is committed to the Court of Session. It is another matter that if the ends of justice require that some more witnesses are to be examined in that even after following the procedure under Section 311 of the Code, the Court can examine any other witness, but not as witness of the complainant or prosecution, rather as a court witness.

11. Subsequently, a Full Bench of this Court in G.Subba Naidu and others vs Talluri Mahalakshmamma and another also reiterated the same principle as follows:

Para-4We are the view that the Legislature has qualified 'all' with the words 'his' and in case on the basis of the statement of the witnesses produced by the complainant the Magistrate finally takes the cognizance and commits the case in terms of Sections 208 and 209 he will be giving the copies of the statements of only those witnesses whose statements were recorded by him and Allahabad High Court in the judgment referred to above (supra) has correctly stated that, only those witnesses can be examined in the trial which were examined before the Magistrate. (Emphasis No.1). This view appears to be correct in view of sub-clause (c) to Section 209 of Cr.P.C. as well which lays down that the Magistrate shall send to the Court of Session the record of the case and the documents and articles, if any, which are to be produced in evidence. So, whatever the documents are sent under Section 209(c) by the Magistrate to the Court of Sessions including the statements of the witnesses can be relied at the time of trial. Therefore, it is not necessary in our view for the complainant to produce all the witnesses in an enquiry under Section 202 Cr.P.C.(Emphasis No.2).

12. Therefore, the Apex Court and High Courts including ours were of the view that in a compliant case triable exclusively by Court of Session, the Magistrate need not direct the complainant to examine all the list mentioned witnesses but suffice for the complainant to produce all his witnesses which means those witnesses on whom the complainant repose confidence. Thus, Point No.1 is answered in negative.

13. POINT No.2: Since Point No.1 is held in negative, the question would arise whether Sessions Court during trial can examine only those witnesses whose statements were recorded by the Magistrate before committal or it can examine the omitted witnesses also? The answer is not far to seek as it is no more res integra for, in Jumrnans case (3 supra) High Court of Allahabad clarified this legal point also in para-14 of its judgment which is extracted supra. From the aforesaid judgment, it is clear that in a case triable exclusively by a Court of Session, the Magistrate need not direct the complainant to examine all the list mentioned witnesses but, suffice if the complainant examines all his witnesses on whom he reposes confidence. If their statements project sufficient material, the Magistrate can commit the case. The only limitation in such an instance as per Allahabad High Court is, during trial no more witnesses would be permitted to be examined by the complainant. However, if the ends of justice require that some more

witnesses have to be examined, by following the procedure under Section 311 Cr.P.C., the Court can examine any other witness, but not as witness of the complainant or prosecution rather as a court witness. This view was approved by a Full Bench of our High Court also in G.Subba Naidus case also. (Vide Emphasis No.1).

14. The net result in view of above precedential jurisprudence is that learned Assistant Sessions Judge, Vizianagaram no doubt can examine the omitted witnesses i.e. LWs.6 to 12 or any other person as a witness in terms of Section 311 Cr.P.C. as a court witness if in his view the evidence of such witness is essential to the just decision of the case by giving reasons. If any such person is examined as court witness, needless to emphasize, the Court shall afford opportunity to prosecution and defence to cross-examine such witness.
This point is answered accordingly.

15. In the result, it is held that the Assistant Sessions Judge, Vizianagaram can examine either the omitted witnesses i.e. LWs.6 to 12 or any other person as a witness in terms of Section 311 Cr.P.C. only as a court witness, if in his view the evidence of such witness is essential to the just decision of the case by giving reasons. If any such person is examined as court witness, the Court shall afford opportunity to prosecution and defence to cross-examine such witness.

16. This Criminal Revision Case is disposed of accordingly. As a sequel, miscellaneous applications pending, if any, shall stand closed.

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2018(2) L.S. 195 (Hyd.)

HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Present:
The Hon'ble Mr.Justice
P. Naveen Rao

Masana Srinivas ..Petitioner

Vs.

The State of Telangana, ..Respondent

CONSTITUTION OF INDIA, Arts.226 & 323A - Legality of transfer – Petitioner challenged order of his transfer – Government identified petitioner as an employee, who is liable for transfer compulsorily by treating services rendered by him on deputation.

Held – Petitioner has no indefeasible right to claim that he should not be disturbed from present station – Petitioner cannot seek to take shelter on ground that Institute is independent organization and his tenure in said institute, cannot be computed for assessing tenure – Court cannot go into intricacies of cadre management and posting of employees and it cannot go into administrative issues in exercise of power of judicial review – Writ Petition dismissed.

Mr.V. Ravichandran, Advocate for the Petitioners.
Government Pleader for Services-I (TG) for Govt.Pleader for Medical Health & Family

Welfare (TG), Advocate for the Respondent.

J U D G M E N T

1. Heard learned counsel for petitioner and learned Government Pleader for respondents.

2. Petitioner is presently working as Health Educator in State Health Education Bureau. While he was working in Ramayampet, Medak district, he was selected as Training Programme Coordinator by at Hyderabad. Accordingly, he was deputed to Dr. MCH HRD Institute, initially, for a period of one year, vide proceedings dated 26.03.2012. In terms thereof, he joined on 01.04.2012. This deputation was extended from time to time till he was transferred as Health Educator. Petitioner joined as Health Educator on 18.11.2016. While so, in the recent transfers exercise undertaken by the Government, petitioner was identified as an employee, who is liable for transfer compulsorily by treating the services rendered by him on deputation to Dr. MCH HRD Institute along with the service rendered as Health Educator as service rendered in Hyderabad. Aggrieved thereby, this writ petition is filed.

3. According to learned counsel for petitioner, posting of petitioner in Dr. MCH HRD Institute was on deputation. This institute is an independent institute and is no way concerned with the Public Health & Family Welfare Department of the State. Thus, said assignment cannot be computed towards service rendered in department to identify him as a person who has completed five years of service and to be transferred. According to learned counsel, after notifying the transfer guidelines in G.O.Ms.No.61 Finance (HRM.I) Department, dated 24.05.2018, the Finance Department issued clarifications vide Circular Memo dated 02.06.2018. Clarification-5 is on deputation service. Learned counsel would submit that according to clarification-5, it is clear that only service rendered on deputation, where posts are under the control of Head of Department alone be counted for the purpose of qualifying service at the station and, therefore, service rendered by petitioner in Dr. MCH HRD Institute cannot be computed as qualifying service. According to learned counsel, this institute is an independent institute and is not under the control of Head of Department.

4. There is plethora of precedents on transfer matters. Some leading decisions are :

i) Shilpi Bose vs. State of Bihar [1991 Supp (2) SCC 659];

ii) Bank of India v. Jagjit Singh Mehta [(1992) 1 SCC 306];

iii) Union of India and other vs. S.L.Abbas [(1993) 4 SCC 357];

iv) N.K.Singh vs. Union of India [(1994) 6 SCC 98];

v) State of Madhya Pradesh vs. S.S.Kourav [(1995) 3 SCC 270];

vi) State Bank of India vs. Anjan Sanyal and others [2001 (5) SCC 508];

vii) State of Utter Pradesh vs. Gobardhan Lal [(2004) 11 SCC 402];
iv) Airports Authority of India vs. Rajeev Ratan Pandey (2009) 8 SCC 337];

viii) Tushar D.Bhatt vs. State of Gujarath and another [(2009) 11 SCC 678];

ix) Rajendra Singh and others Vs. State of Utter Pradesh and others [(2009) 15 SCC 178];

x) Registrar of High Court of Judicature of Madras vs. R.Perachi [(2011) 12 SCC 137];

5. It is necessary to notice the view expressed by Supreme Court in few of the above decisions to appreciate the contentions in the writ petition.

6. In S.L.Abbas, Supreme Court held as under:

6. An order of transfer is an incident of Government service. Fundamental Rule 11 says that the whole time of a Government servant is at the disposal of the Government which pays him and he may be employed in any manner required by proper authority. Fundamental Rule 15 says that the President may transfer a Government servant from one post to another. That the respondent is liable to transfer anywhere in India is not in dispute. It is not the case of the respondent that the order of his transfer is vitiated by mala fides on the part of the authority making the order, though the Tribunal does say so merely because certain guidelines issued by the Central Government are not followed, with which finding we shall deal later. The respondent attributed mischief to his immediate superior who had nothing to do with his transfer. All he says is that he should not be transferred because his wife is working at Shillong, his children are studying there and also because his health had suffered a setback some time ago. He relies upon certain executive instructions issued by the Government in that behalf. Those instructions are in the nature of guidelines. They do not have statutory force.

7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee a legally enforceable right.

8. The jurisdiction of the Central Administrative Tribunal is akin to the jurisdiction of the High Court under Article 226 of the Constitution of India in service matters. This is evident from a perusal of Article 323-A of the Constitution. The

constraints and norms which the High Court observes while exercising the said jurisdiction apply equally to the Tribunal created under Article 323-A. (We find it all the more surprising that the learned Single Member who passed the impugned order is a former Judge of the High Court and is thus aware of the norms and constraints of the writ jurisdiction.) The Administrative Tribunal is not an appellate authority sitting in judgment over the orders of transfer. It cannot substitute its own judgment for that of the authority competent to transfer. In this case the Tribunal has clearly exceeded its jurisdiction in interfering with the order of transfer. The order of the Tribunal reads as if it were sitting in appeal over the order of transfer made by the Senior Administrative Officer (competent authority).

7. In Shilpi Bose, Supreme Court held as under:

> 3. .. If the competent authority issued transfer orders with a view to accommodate a public servant to avoid hardship, the same cannot and should not be interfered by the court merely because the transfer orders were passed on the request of the employees concerned. The respondents have continued to be posted at their respective places for the last several years, they have no vested right to remain posted at one place. Since they hold transferable posts they are liable to be transferred from one place to the other. The transfer orders had been issued by the competent authority which did not violate any mandatory rule, therefore the High Court had no jurisdiction to interfere with the transfer orders.

4. In our opinion, the courts should not interfere with a transfer order which is made in public interest and for administrative reasons unless the transfer orders are made in violation of any mandatory statutory rule or on the ground of mala fide. A government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the department. If the courts continue to interfere with day-to-day transfer orders issued by the government and its subordinate authorities, there will be complete chaos in the administration which would not be conducive to public interest. The High Court overlooked these aspects in interfering with the transfer orders.

8. In Rajendra Singh, Supreme Court held as under:

> 14. We are pained to observe that the High Court seriously erred in deciding as to whether Respondent 5 was a competent person to be posted at Ghaziabad IV as Sub-Registrar. The exercise undertaken

by the High Court did not fall within its domain and was rather uncalled for. We are unable to approve the direction issued to the State Government and the Inspector General of Registration to transfer a competent officer at Ghaziabad IV as Sub-Registrar after holding that Respondent 5 cannot be said to be an officer having a better conduct and integrity in comparison to the petitioner justifying his posting at Ghaziabad IV. The High Court entered into an arena which did not belong to it and thereby committed serious error of law.

9. In Airport Authority of India, employee challenged his transfer as in violation of transfer policy. According to him, inter-regional transfer should not be made before the incumbent completes at least five years tenure in that region. Supreme Court observed:

10. In the writ petition, the transfer order has been assailed by the present Respondent 1 on the sole ground that it was violative of transfer policy framed by the appellant. The High Court, did not even find any contravention of transfer policy in transferring Respondent 1 from Lucknow to Calicut. In a matter of transfer of a government employee, scope of judicial review is limited and the High Court would not interfere with an order of transfer lightly, be it at interim stage or final hearing. This is so because the courts do not substitute their own decision in the matter of transfer.

10. In Jagjit Singh Mehta, Supreme Court observed as under:

5. There can be no doubt that ordinarily and as far as practicable the husband and wife who are both employed should be posted at the same station even if their employers be different. The desirability of such a course is obvious. However, this does not mean that their place of posting should invariably be one of their choice, even though their preference may be taken into account while making the decision in accordance with the administrative needs. In the case of all-India services, the hardship resulting from the two being posted at different stations may be unavoidable at times particularly when they belong to different services and one of them cannot be transferred to the place of the other's posting. While choosing the career and a particular service, the couple have to bear in mind this factor and be prepared to face such a hardship if the administrative needs and transfer policy do not permit the posting of both at one place without sacrifice of the requirements of the administration and needs of other employees. In such a case the couple have to make their choice at the threshold between career prospects and family life. After giving preference to the career prospects by accepting such a promotion or any appointment in an all-India service with the incident of transfer to any place in India,

subordinating the need of the couple living together at one station, they cannot as of right claim to be relieved of the ordinary incidents of all-India service and avoid transfer to a different place on the ground that the spouses thereby would be posted at different places. In addition, in the present case, the respondent voluntarily gave an undertaking that he was prepared to be posted at any place in India and on that basis got promotion from the clerical cadre to the officers' grade and thereafter he seeks to be relieved of that necessary incident of all-India service on the ground that his wife has to remain at Chandigarh. No doubt the guidelines require the two spouses to be posted at one place as far as practicable, but that does not enable any spouse to claim such a posting as of right if the departmental authorities do not consider it feasible. The only thing required is that the departmental authorities should consider this aspect along with the exigencies of administration and enable the two spouses to live together at one station if it is possible without any detriment to the administrative needs and the claim of other employees.

11. It is clearly discernible from the precedent decisions that in matters of transfer, scope of judicial review is limited, and High Court should not interfere with an order of transfer lightly, unless the transfer is vitiated either by mala fidies or on the ground of infraction of any professed norm or principle; only limited judicial scrutiny can be undertaken either at the interim stage or final stage; transfer is an incidence of service, implicit as an essential condition of service; no employee has vested right to remain posted at a place of his/her choice; at times, several imponderables requiring formation of subjective opinion may be involved; realistic approach is to leave to the wisdom of hierarchical superiors; the wheels of administration should be allowed to run smoothly; Courts do not substitute their own decision in the matters of transfer; there are no judicially manageable standards for scrutinizing the transfers; Courts lack necessary expertise for personnel management; in public interest, transfers involving public services have to be best left to the concerned authorities; writ Court cannot sit as appellate forum to consider transfer matters; guidelines do not have statutory force; guidelines do not confer legally enforceable right; even if an order of transfer is passed in violation of executive instructions or orders, Court should not interfere; affected party should approach higher authorities; Court should not interfere if transfer is made to equivalent post without any adverse consequence on the service prospects.

12. Employees working in the government seek transfer from the place of work on completion of certain period of service. Such request for transfer can be for variety reasons, such as childrens education, health, parental care, working spouse, attraction towards a post, etc. For reasons best known to Government, transfers were

not made in the last 4 years. Thus, demand for transfers is more vocal. Yielding to the pressure of employees, government agreed to undertake the exercise of transfers. The process was set in motion by issuing GO Ms. No. 61 finance department dated 25. 4. 2018. Government notified guidelines for transfers.

13. Transfer exercise involves posting in existing vacancies or replacing existing incumbent. It requires identification of vacancies and /or identification of employees who can be disturbed to accommodate request transfers. It is not uncommon that request for transfers to few places can be more than the vacancies available /vacancies that can be made available. Request for transfers cannot be effectively processed unless incumbents are disturbed. It therefore requires prioritisation of requests. There must be some criteria to identify employers who can be disturbed. Further, in mammoth government organisation leaving it to individual competent authorities to process transfer claims may have its own drawbacks. Thus, transfer exercise per force requires formulation of guidelines /framing of rules dealing with all categories and all claims to the extent possible. As noted above, vide GO Ms. No. 61 government notified guidelines. To accommodate the respective claims of employees seeking transfer for various reasons, certain yardsticks are fixed by the Government.

14. Salient features of these guidelines are:

(i) Transfer should be effected between 25.5.2018 to 15.06.2018.

(ii) A person can be transferred only if he has completed 2 years of service in a station as on 31.5.2018. Two exceptions are made to this condition: 1. seeking transfer on spouse ground ;

2. earlier employee was transferred and provisionally ordered to serve in new districts in October 2016.

(iii) Employee who has completed 5 years of service in a station as on 31.5.2018 shall be compulsorily transferred. However, employee retiring from service on/before 31.5.2019 is exempted from transfer even if he has completed 5 years of service in a station.

(iv) While effecting transfers CAP is imposed i.e., not more than 40% in a cadre can be transferred. Thus, even if there are many employees who have completed more than 5 years as on 31.5.2018 or/and requests for transfers are made, while considering such transfers the cadre controlling authority should ensure not more than 40% in the cadre are disturbed.

(v) Guidelines prescribe priority in consideration of request for transfer, such as spouse working in a station, date of retirement, health of self or dependent, etc. However, such priority is applicable only when more than one employee opts for same

post.

(vi) Station means place of actual working i.e., city/ town/ village. Service in all cadres at a station will be counted.

(vii) It is pertinent to note that if adequate personnel do not opt for hardship area system of lottery should be followed.

(viii) Transfers should be made by adopting counselling procedure.

(ix) These general guidelines are not mutatis/mutandis applicable to certain departments and they are authorized to frame additional guidelines/ amend/ formulate rules.

(x) The G.O clarifies that the presidential Order should be followed and existing instructions on posting of second level and higher level gazetted officers to their native districts.

15. To accommodate request of individual employees, it is necessary to identify the availability of vacancies and to assess the tenure of employee working in a particular place and if it is found that employee is working for long time in a particular place, it is desirable to shift him/ her from the present place in order to accommodate claims of other employees. There is more demand for postings to Urban areas, more particularly to the city of Hyderabad. If persons continuation is allowed in a station for long time, aspirations of other employees would be adversely affected. There is a need to balance the request of employees. Thus, fixing five years tenure has clear objective underlying the very transfer policy. While identifying an employee for transfer to accommodate request of another employee what is required to be seen is whether that employee has worked for considerable period in a station. It is immaterial, for a limited purpose of transfer, to see in what capacity he worked in a station.

16. While assessing the guidelines formulated for transfers, keeping in mind the scope of judicial review on transfer guidelines, the object it seeks to achieve must be seen. Twin objectives discernible from transfer guidelines are, to accommodate the request for transfer of employees to the extent possible and not to retain an employee in a station for longer period. It also takes care of smooth transition by fixing cap on maximum number of employees who can be disturbed. It is also significant to note from para-VII (e) of guidelines, the objective of transfer policy is to act as a catalyst in capacity building by ensuring departmental employees in getting variety of experience and becoming more fit to hold higher responsibilities. Therefore, the tenure of an employee in a place must be viewed not only with reference to the claim of employee for retention, but also with reference to the claim of other employees for posting at prime location, like Hyderabad and over all objective of Government. Thus, while identifying the tenure in a station liberal construction to

relevant clauses of guidelines is necessary. More so, when transfer is made to equal post and if service conditions are not affected. So long as a person was working in a station for more than five years, in what capacity and in what manner he was working is immaterial and the total amount of service rendered in that station can be computed. What is important is tenure in a Station.

17. According to paragraph-II(b), if an employee completed five years of service as on 31.05.2018 in a station, such employee is liable for compulsory transfer. As per paragraph-IV (b), Station means place of actual working at city/ town/ village. Petitioner was working in Dr. MCR HRD institute from 01.04.2012. After his tenure in Dr. MCR HRD, petitioner was retained in Hyderabad. Thus, as per paragraph-IV(b), he has been in the same station since April 2012. By counting this service, petitioner cannot be retained in the present place of posting. The petitioner is identified as an employee liable for compulsory transfer as he has been in Hyderabad city for more than six years. The decision of the competent authority cannot be faulted.

18. It appears from the reading of Circular Memo, dated 02.06.2018, competent authority has sought certain clarifications. One of the clarifications sought was, whether the period of deputation of an employee (if it is in the same station) is to be counted for qualifying service at the station. In response to this doubt expressed by the competent authorities, reply given was yes. It was further stated that the service rendered on deputation where the posts are under the control of Head of Department shall be counted as qualifying service at the station. Though the doubt expressed appears to be in broad terms while saying yes to such clarification, further clarification was referring to a person working on deputation under the control of Head of Department. Furthermore, on a plain reading of guidelines in G.O.Ms.No.61, guidelines do not make any distinction as to in what capacity an employee was working in a station. Petitioner cannot seek to fall back on the further clarification to say that he is not liable for compulsory transfer and that he has rendered less than 2 years of service by treating his posting in State Health Education Bureau as independent posting. Even otherwise, petitioner cannot seek enforcement of clarification to claim retention.

19. In the case on hand, petitioner is working in Hyderabad station since April, 2012. He has no indefeasible right to claim that he should not be disturbed from the present station. He cannot seek to take shelter on the ground that Dr.MCH HRD Institute is an independent organization and his tenure in the said institute, though in Hyderabad, cannot be computed for assessing the tenure in Hyderabad.

20. From the proposition of law as laid down in several precedent decisions, it is manifest that the Court cannot go into intricacies of the cadre management and posting of the employees; there can be several imponderables requiring formation

of a subjective opinion and Court cannot go into those administrative issues in exercise of power of judicial review. In any service, there can be competing claims/ aspirations and the cadre controlling authority is the best judge to accommodate competing claims and organize his cadres. It is appropriate to note that no mala fides are attributed against any officer. By identifying petitioner as long standing employee, his service conditions are not affected.

21. Having regard to the parameters laid down by the Supreme Court in the precedents referred to above, and in the facts of this case, I do not see any illegality in identifying petitioner as person who cannot be retained in the present place of posting warranting interference by this Court. Writ Petition is accordingly dismissed. Pending miscellaneous petitions shall stand closed.

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2018(2) L.S. 204 (Hyd.)

HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Present:
The Hon'ble Dr.Justice
B. Siva Sankara Rao

Satyaboina Chandrasekhar
& Anr., ..Petitioners

Vs.

The State of Telangana ..Respondent

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, Secs.2(xxii), 8, 22, 25, 41, 42 and 57 – Possession of contraband – Entitlement for bail – Petitioners were illegally in conscious possession of psychotropic substance defined in Section 2(xxii) of Act.

Held – Contraband 100 grams and 6 kgs were respectively seized from first and second Accused – Disclosure by Accused persons within meaning of Section 67 of Act– Nothing to show that any of Petitioners/Accused is entitled to acquittal ultimately for entitlement of concession of bail– Criminal Petitions dismissed.

Mr.Milind G. Gokhale, H. Prahlad Reddy, Advocate for the Petitioners.
Public Prosecutor, Advocates for the Respondent.

Crl.P. Nos. 3930 & 5050/2018 Dt:8-6-2018

C O M M O N O R D E R

1. The petitioner in Crl.P.No.3930 of 2018 is A.1 by name S.Chandra Sekhar, and the petitioner in Crl.P.No.5050 of 2018 is A.2 by name K.Nikhil Reddy of Cr.No.158 of 2017 of Police Station (Proh.& Excise), Quthbullapur of Ranga Reddy district, State of Telangana, registered for the offences punishable u/sec.8_ r/w 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the NDPS Act'), for they are illegally in conscious possession of Alprazolum-a psychotropic substance defined in Sec.2(xxii) of the NDPS Act.

2. As per the prosecution case on some reliable information on 26.12.2017 evening, the Excise officials proceeded to Shapur Nagar for conducting raids and when they were present in front of the Muthoot Finance at Shapur Nagar towards Balanagar to Narsapur Road, along with panch witnesses-the respective VRAs of Jeedimetla, they found one person moving suspiciously and trying to skulk away on seeing them and they apprehended the person and on enquiry, the person disclosed his name as S.Chandra Sekhar and other details (described as A.1) found putting his hands in his pant pocket and on suspicion of any contraband, he was issued notice u/sec.50(1) of NDPS Act as to his willingness to search in the presence of either Gazetted Officer or learned Magistrate for which the A.1 chose to be searched in the presence of one of the Gazetted Officers who is in the raid team by name G.Venkatesham, Inspector of Proh. & Excise, SHO, Qutubullapur, and gave it in writing and when searched his pant pocket, found paper pocket containing contraband, which he disclosed of Alprazolum of 100 grams in weight to give as a sample to one person and there is further stock of about 6kgs. of Alprazolum with him that is kept with his friend and he called that friend over his mobile bearing No.9949128458 and that person came having light green colour carry bag hanging on his back and he was apprehended and when questioned, disclosed his name as K.Nikhil Reddy and other particulars (described as A.2) and A.2 was also given notice of the option u/sec.50(1) of the NDPS Act for search, for which the A.2 also chose said G.Venkatsham, the Excise Inspector, in the raid party and given it in writing for search before him and then opened the light green carry bag and found therein one black polythene cover tied with thread and found therein white crystal powder which he also disclosed as Alprazolum saying one person wanted to purchase at Rs.1,35,000/- per kg. and asked them to come there with, they got the contraband 5 months back through one Srinivas who is no more and when questioned as to whether they got licence or permit to possess or sell, they stated nothing. On that the A.1 and A.2 were explained by the SHO, that it is an offence and cause weighed the Alprazolum from nearby kirana stores and found what was seized under the panchanama from A.1 of 100grams and from A.2 of 6kgs. and collected samples from each of 50gms duly packed and sealed the samples as well as the remaining contraband and affixed chits. It further discloses that there are two Nokia cell phones available with those two persons that were also seized and further

formalities were complied with.

3. The contentions in the bail applications are that there is noncompliance with the mandatory requirements of Sections 50 & 42 of the NDPS Act and the so called disclosure is hit by law and it is a false case foisted and it is their further submission in the course of hearing in the bail applications through their learned counsel that from perusal of the occurrence report contents pursuant to the panchanama supra, it is mentioned date and hour of detection on 26.12.2017 at about 5.30p.m. in front of Muthoot Finance of Shapur Nagar, road leads to Balanagar to Narsapur and at column No.10 mentioned about seizure of the light green colour carry bag with 6kgs. of Alprazolum and two cell phones of Nokia and Vivo and the names mentioned of the mediators and of the two persons the petitioners herein as A.1 and A.2 and there is no mention of the 100grams seized from A.1 at column No.10.

4. In fact as answer to the above, in the occurrence report at the column of brief particulars also mentioned about apprehension of the two persons with contraband and presence of mediators and notices given to exercise any option for search and found 100gms and 6kgs., of Alprazolum seized and drawn two samples each of 50grams from the respective seizures as per the procedure prescribed under cover of panchanama with details including arrest and seizure of the contraband and original case papers the contraband and remaining property including two cell phones and the accused persons were produced before the Court for judicial remand and further report would be submitted after investigation. Said occurrence report was also of even date prepared from panchanama and once panchanama contains the details, nothing to make a mountain out of mole-hill for mistake in mention in its scribing, that too once it discloses from the occurrence report prepared is based on two seizures from the disclosures in the presence of the mediators covered by the panchanama supra, when it is clearly mentioned of samples drawn of 50grams each from the respective seizures from A.1 and A.2 while mentioning 6 kgs. seized from one of them and 100grams seized from other of them. Thereby said contention of the petitioners has no basis including from anything to point out with reference to the remand report of the accused persons of even date pursuant to the apprehension, seizure covered by panchanamas and arrest and seizure of 100 grams of Alprazolum from A.1 and 6 kgs. from A.2 pursuant to the information given by A.1 by calling A.2 over cell phone of their conscious possession of the entire contraband. There is thus nothing to the advantage of the accused much less to say the contraband is not of commercial quantity and or to say the twin requirements of the Section 37 of the NDPS Act have no application.

5. Among several contentions raised in the bail applications, besides the one referred supra, one more is regarding the sample collection based on two Single Judge expressions of the Karnataka High Court placed reliance by the respective counsel, viz., (1). in **Noble Vs. State of Karnataka (**2018 SCC online Kar 448)where the bail application filed u/sec.439 CrPC by the

accused against whom the FIR registered from the occurrence report of the offences punishable u/sec.22(b) of NDPS Act as Cr.No.2 of 2018 and there is an observation of no specific mention about the credible information reduced into Case Diary and there is non-compliance of the mandatory requirements of 42(1) and 42(2) of the NDPS Act on furnishing copies to immediate superior officer and material goes to show 18grams of MDMA seized from the accused person and with regard to personal search, there is a duty of the police officer to explain to the petitioner that he is having legal rights about the exercise of option for conducting search before the Gazetted Officer or Magistrate and there is no averment that police explained that legal right for said seizure and prosecution not produced the qualitative as well as quantitative test where the instruction No.1.18 of Annexure-1 in the standing instructions purports expeditious analysis of a narcotic drug and psychotropic substance is of essence to all proceedings under the NDPS Act and in many cases the Court may refuse to extend police/judicial remand beyond 15 days, however, where quantitative analysis requires longer time, the result of the qualitative test should be dispatched within 15days and there is thereby non-compliance with the mandatory requirements of Sections 42 and 50 of NDPA Act and thereby the accused is entitled to bail and (2). in **Ejem Peter Vs. State of Karnataka (**2017(2) KCCR 1765)where it is observed that out of quantity seized, the samples drawn and sent to the FSL and at this stage bail sought and as per the counsel for the bail applicant even assumed that psychotropic substance seized from the petitioner, it would be necessary for the prosecution to demonstrate that it was a quantity which could be considered as a commercial quantity to attract stringent punishment and substance seized into is indeed narcotic drug or psychotropic substance falling under the notifications appended to the NDPS Act and out of the 5 items, the article 1 revealed positive of charas and not indicated as to what percentage of charas was found and Articles 2 and 5 are concerned found positive for the presence of cocaine and paracetamol and Articles 3 and 4 shows the negative report for presence of cocaine; thereby as the qualitative analysis coupled with quantitative test required to be conducted and once it is adulterated with other substance and contains a percentage of cocaine it might be shown what percentage and whether it is commercial and in the absence of which benefit must go to the accused of no commercial quantity and referred the standing instruction No.1.18 as also referred the other expression of another single judge supra besides instructions 1.19 and 1.22 by saying accused made out case for enlargement on bail from the lacunae.

6. These two decisions have in fact no application to the present facts more particularly for the reasons the quantity seized is clearly cause weighed and mentioned apart from their disclosure of the contraband is Alprazolum of 100 grams and 6 kgs. respectively seized from A.1 A.2 and A2 was called with contraband by A1 to say same A1 also in conscious and constructive possession within the meaning of section 54 of the Act. It is in fact there is disclosure by accused persons within

the meaning of section 67 of the Act of the contraband is Alprazolum and its weight referred supra and not even any mention of same is an adulterated substance mixed with Alprazolum. It cannot be disputed that the person conducted the raid is the empowered officer statutorily by the State Govt., and not an authorised officer by the empowered officer and as such compliance of Section 42 does not arise and he is also covered by Section 67 of the Act.

7. Apart from it, as referred in the panchanama supra, they clearly mentioned about their conscious possession of the contraband and both got culpable mental state regarding their possession attracting sections 35 and 54 of the Act of 6 Kgs. that was kept with A.2 who is kept away while A1 came forward with the sample of 100 grams kept in his pant pocket and waiting for the person to whom they negotiated to sell that contraband after supply of the sample with the rate already fixed and as per the prearranged plan, which contraband they already secured from their late friend earlier. Once such is the case, there is nothing to show that any of the petitioners is entitled to acquittal ultimately for the entitlement of the concession of bail, leave about the fact of any of them may not involve in another crime in future.

8. Further, so far as seizure from A.2 from disclosure by A.1 and also by A.2 as referred supra from no search involved even for such seizure is not from person of A.2 but for from his bag and as such Section 50 compliance also not required leave about notice given intimating his right of search with option either before a Gazette Officer or Magistrate and one of the raid parties is also a gazetted officer, when wanted to be searched before the Gazetted Officer of the raid party and has given it in writing the willingness to be searched by the raid party itself, it tantamounts to waiving of right of search before independent gazetted officer or Magistrate and the same also applies to A.1 so far as 100 grams of Alprazolum seized from his pant pocket that seizure is also even from his disclosure and leave it even there is taken for arguments sake, search and seizure from the pant pocket as involves personal search, once notice served informing his right and options for search and did not exercise option before independent gazetted officer or Magistrate and willingness once given in writing to be searched before the gazetted officer among the raid party it shows prima facie compliance with the requirements of Section 50 of the Act.

9. For more elaboration on the legal aspects it is for more clarity to the conclusions the legal position is detailed hereunder:

> 9(a). As per Section 37 (1)(b), if it is the commercial quantity of the Narcotic drug or psychotropic substance, whatever be the penal provision, leave about irrespective of commercial quantity similar rider is there for those offences punishable under Sections 19, 24 and 27(a). The Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail, then question of considering to grant bail if any

arises.

9(b). In **Babua Vs State of Orissa (**2001 (2) SCC 566), the Apex Court held that the Court should examine whether prosecution statements, if believed would result in conviction, if it could not give an answer in negative, bail could not be granted; another expression in **Intelligence Officer, Narcotics Controal Bureau Vs Shambhu Shankar (**2002 (2) SCC 562) that bail cannot be granted unless the public prosecutor has been heard and Court is satisfied that the accused is not guilty and not likely to commit any offence while on bail; **State of M.P.., Vs Kajad (**2001 (7) SCC 672) held that Court's satisfaction under Section 37 (1) (b) (ii) about accused being not guilty must be arrived based on the record; also held the same in **D. Sarojini Vs State of A.P**., (2001 (7) SCC 677) and further in Customs, New Delhi Vs Ahmadalieva Nodira (2004) 3 SCC 549: 2004 Cr LJ 1810).

9(c). **In** Union of India Vs. Sanjeev V.Deshpande (2014 (13) SCC 1 : AIR 2014 SC 3625) the Apex Court three judge bench held referring to Sections 2(xiv), 8(c), 19, 24, 37 of the Act and Rules 64, 65, 65A of the Narcotic Drugs and Psychotropic Substances Rules, 1985 as to whether exclusion of a particular substance in Schedule 1 to Rules of 1985 would exclude application of Section 8 of the Act, though it is mentioned in Schedule to the Act, it was held that both Rules 53 and 64 are really in the nature of exception to the general scheme of Chapters VI and VII respectively containing a list of narcotic drugs and psychotropic substances which cannot be dealt in any manner notwithstanding the other provisions of these two chapters. Neither Rule 53 nor Rule 64 is a source of authority for prohibiting the dealing in narcotic drugs and psychotropic substances. The source is Section 8. Rajesh Kumar Gupta's case in Court's view is wrongly decided. Provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of the Drugs and Cosmetics Act, 1940 or the rules made thereunder as per Section 80 of the Act. Same is not really called for in the instant case. It is only required to be stated that essentially the Drugs & Cosmetics Act deals with various operations of manufacture, sale, purchase etc. of drugs generally, whereas Narcotic Drugs and Psychotropic Substances Act deals with a more specific class of drugs and, therefore, a special law on the subject. Further the provisions of the Act operate in addition to the provisions of 1940 Act. Considering scope of Section 37 of Act of 1985, finding by High Court that prohibition in Section 8 of 1985 Act is not attracted to the drugs not mentioned in Schedule 1 to Rules of 1985, though mentioned in Schedule I to Act of 1985 is not sustainable.

9(d). The Apex Court in

Superintendent, NCB, Chennai Vs. R.Poulsawmy (2001) Crl. L.J. 117 SC) held that once Section 37(1)(b) NDPS Act applies, it is mandatory on the part of the Court of its satisfaction to grant or decline to grant bail to consider the scope of Section 37 of the Act. The rigour of Section 37(2) of the NDPS Act is in addition to the restrictions for grant of bail under Chapter XXXIII CrPC. The subjective satisfaction of the Court must reflect in the order granting bail of the twin conditions of reasonable grounds to believe that the accused is not likely to be convicted and he is not likely to commit any offence while on bail and the conditions are cumulative and not alternative.

9(e). In **Union Of India v. Rattan Mallik @ Habul (**2009 Crl Law Journal 3043 (SC), wherein it was observed in paras 13 to 16 that ……Offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from opportunity to the Public Prosecutor to oppose, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be made out. The conditions are cumulative and not alternative. The satisfaction contemplated has to be based on "reasonable grounds", means something more than prima facie grounds. Existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

9(f). In Union of India Vs. Shiv Shanker Kesari (2007 (7) SCC 798) also it was held that recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act. The Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail.

9(g). As per Section 2 sub section (vii-d) of the Act, 'controlled substance' means any substance which the Central Government may, having regard to the available information as to its possible use in the production or manufacture of narcotic drugs or psychotropic substances or to the provisions of

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any International Convention, by notification in the Official Gazette, declare to be a controlled substance. From this, it is important to note the fact that the contraband, involved in this case is a commercial quantity, which is undisputedly a psychotropic substance either in one category or the other very nearer to it.

9(h). Among the other provisions that to be kept in mind, Section 35 speaks on mensrea a reverse onus clause putting burden on accused to rebut the presumption and thus the Court shall draw till rebutted of the culpable mental state. Similarly under Section 54 regarding possession, which needless to say includes a conscious possession – whether physical or constructive is suffice of awareness about a particular fact from State of mind is criteria – as held in **Madanlal v. State of Himachal Pradesh (**2003 SCC crl. 1664) and **Avtar Singh and Ors. vs State of Uttar Pradesh (**2002 SCC (Crl) 1769 (A&E)**.**

9(i). Coming to other relevant sections - Section 25 speaks same punishment of substantive against those allowed the premises in use; Section 28 speaks of an attempt is also a punishable offence providing same punishment of accomplished act, if some act done under the attempt; Section 30 speaks of even preparation is an offence punishable, (like in Sections 399 I.P.C.); Sections 29 speaks of vicarious liability (like in Sections 107 to 120-B & Sections 34 to 37 I.P.C.). For the NDPS Act not defined conspiracy separately, it can thus be taken note of the punishment provided under Section 120-B IPC from its definition under Section 120-A IPC and its application to be r/w. Section 10 Evidence Act.

9(j). Coming to Sections 41 & 42 (like sections 100 & 165 CrPC.) where the officer is empowered officer and where the officer is authorised officer (to say because of empowerment by delegation) otherwise by statutory empowerment to intimate to the superior within the prescribed time of search proceedings, compliance of Section 42 is not required if not a delegated exercise and from Section 43 (like Section 102 CrPC.) where only seizure involved with no search, there also compliance of Section 42 not required and coming to compliance of Section 57 if any which is even directory as held by the Apex Court in **Narayana Swamy v. Assistant Director of D.R.I. (**2002 SCC Crl 1865 (A)**. In Karnail Singh Vs. State of Haryana** (2009) 3 SCC (Crl) 887) the Apex Court Constitution Bench held categorically that even where Sections 41 and 42 of the Act compliance required, mere non-compliance will not vitiate the proceedings, unless it is shown from said mandatory provisions applicable not complied, prejudice is caused to the accused.

9(k). Coming to compliance of the mandatory provision u/sec.50 of the

Act, in **State of Rajasthan Vs.Paramanand (**2014(5) SCC 345) **also it was held by the Apex Court** that if merely a bag carried by a person is searched without there being any search of his person, Section 50 has no application.

9(l). In **State of H.P. Vs. Pawan Kumar (**2005 (4) SCC 350) also the Apex Court held that, search of a person would mean person covering with clothing and pockets and baggage carrying any article or container etc., can under no circumstances be treated as search and seizure from person.

9(m). In **Narcotics Central Bureau Vs. Sukh Dev Raj Sodhi (**AIR 2011 SC 1939) it was held by the Apex Court that for the search of a person, Section 50 compliance is mandatory and the accused is provided with an option either to be searched in the presence of any Gazetted Officer or Magistrate. The accused must be physically produced before such Gazetted officer or Magistrate once he opted to be so searched before any of them and the non-compliance by taking him before a Gazetted officer or Magistrate at his option for search of his person entitles said search and seizure illegal.

9(n). In fact regarding such requirement as to what is a compliance of section 50, **the five judge bench expression of the Apex Court in Vijayasinh Chandubha Jadeja Vs. State of Gujarat (**2011(1) SCC 609) **-** observed categorically also with reference to the amendment to section 50 by Act 9 of 2001 and by clarifying the earlier constitutional bench expressions in **Baldev Singh(supra) and another expression in Karnail Singh Vs. State of Haryana (**2009 (8) SCC 539) on the section 50 compliance that, informing to the suspect under section 50 of the NDPS Act of right to be searched of his person in the presence of any Gazetted Officer or Magistrate can be either oral or in writing and it is any of such non-compliance that too it must be shown that failure to apply such mandatory provision of Section 50 of the NDPS Act cause prejudice to the accused and then only it has to render such recovery of illicit article from the suspect inadmissible to vitiate the conviction, if the conviction is recorded solely on the basis of such illicit article recovered by violating of the section 50 of the NDPS Act by searching a person. **It is also observed that whether complied with or not and any prejudice caused or not must be matters in trial to appreciate from evidence to be let in.**

9(o). Thus any contentions regarding Section 50 compliance required or not, being a matter for decision in trial and not a consideration for grant or refusal of bail, that too from the material on record of the prosecution

it shows the compliance prima facie.

9(p). As laid down by the three judge bench expression in **Narendra K.Amin Vs. State of Gujarat (**2008(13) SCC 584) at para-22 in its saying mere fact that accused has undergone certain period of incarceration that by itself would not entitle him to be enlarged on bail, nor the fact that the file is not likely to be concluded in near future, when the gravity of offence is severe and there are allegations against the accused of possibility of interfering with witnesses and the like.

9(q). The Apex Court in **Kanhaiyalal v. Union of India (**AIR 2008 SC 1044), held that confession of offence, other than to a police officer, before an officer governed by the provision of Narcotics Act is not hit by Section 25 of the Indian Evidence Act. As referred supra from very wording of Section 67 discloses the same and the officer in raid party is an officer governed by the provisions of the Act and not mere police officer, leave about any contention including as to the issue pending on reference before a larger bench of the Apex Court is a matter for appreciation during trial to so raise and consider if at all same hit by Section 25 of the Evidence Act and to consider of the fact discovered from the disclosure to that extent admissible under Section 27 of the Evidence Act. Further the earlier expression of the Apex Court in **Francis Stanly @ Stalin Vs. I.O. Narcotic Control Bureau, Tiruvanantapuram (**2006(13) SCC 210), it was held that Section 67 of the Act response is admissible. Further even in a later expression **Union of India Vs. Bal Mukund (**2009(12) SCC 161)**,** it was held that to act on Section 67 of the Act disclosure some other corroboration is required to base a conviction therefrom during trial.

9(r). Here from this perspective, once there is a disclosure statements made by the accused, which are prima facie for purpose of the bail application scope to hold as part of prosecution material for consideration for the bar to the entitlement to the concession of bail under Section 37 of the Act. 9(s). Even coming to the contention of the search before one of raid party even Gazetted officer, it is answered that same is after serving notice of options available and waived and asked the search can be before them, there is nothing more on it to discuss. For the other contention in this regard of same tantamounts to search/seizure, report, registration and crime investigation by same officer a bar, it is the well settled position of law right from **Balbir Singh's case (**AIR 1994 SC 1872=1994-SCC-Crl-634) that there cannot be any argument in defence to doubt the prosecution case that complainant and investigating officer cannot be one person. The officer who conducted search and seizure cannot be technically called as complainant.

Even there can be no bar for the person who conducted search/ seizure to investigate the case and file charge sheet. Same is also the law well laid down in **State Vs. Jayapal (**2004(5)SCC 223), **S.Jeevanatham Vs. State (**2004(5)SCC 230) apart from the law settled way back in **State Vs. Bhagwant Kishore Joshal (**AIR 1964 SC 221).

9(t). Coming to the compliance of provisions U/s. 52 and 52-A are concerned, the law is well settled holding that compliance of Sections 57,55, 52-A & 52 are only directory and not at all mandatory. It is at best for the accused to show any prejudice from any non-compliance of such directory provisions during trial and when not so shown, from any noncompliance of such directory provisions by itself is no way fatal to the prosecution-case as held by the Apex Court in **Babubhai Vs. State (**2005(8) SCC-725) at para8, **State Vs. Makkan Chand (**2004(3) SCC-453); **Khat Singh Vs. Union of India (**2002 (4) SCC-380) and **Khandoori Sahoo's case (**2004(1) SCC-337).

9(u). Coming to delay in sending samples or any other irregularities concerned, in **State Vs. Kandari Sahoo (2004 (1) SCC. 337)** it was held that delay in sending samples to laboratory is not at all fatal, where the articles are in safe custody. It is for the accused to show any prejudice to consider. In **Karnal Singh Vs. State (2000-SCC(Crl)1437)** also it was held that the alleged violation of Secs.52 52-A, 55& 57 does not effect merits of case.

9(v). **Regarding any non following of any administrative instructions interdepartmental in sending samples to Annalist and sending remaining contraband to court are concerned, for more clarity it is required to reproduce s**ections 52 and 52-A which read as follows:

Section 52:

(1) Any officer arresting a person under section 41, Section 42, Section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section(2) of Section 41, Section 42, Section 43 or section 44 shall be forwarded without unnecessary delay to (1) the officer in charge of the nearest police station or (b) the officer empowered under section 53.

(4) The authority or officer to whom any person or article is forwarded under sub-section (2) or Sub-section (3) shall, with all convenient dispatch, take such measures

as may be necessary for the disposal according to law of such person or article.

Section 52-A: (1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette specify such narcotic drugs or psychotropic substances or class of narcotic bags or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub section(1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub section(1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any magistrate for the purpose of -

(a) Certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) **allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn**.

(3) Where an application is made under sub-section(2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872(1 of 1872) or the code of Criminal Procedure, 1973(2 of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or substances and any list of samples drawn under sub-section(2) and certified by the Magistrate, as primary evidence in respect of such offence).

From these provisions there is no set procedure specifically including to provide for any administrative instructions for that. In this regard in **State of Punjab Vs.MakhanChand (2004(3)SCC-453)** Paras 4-12, by relying on the ratio laid down in **Khat Singh Vs. Union of India (2002(4)SCC-380)** and after referring to **Valsala Vs. State (1993 SCC (CRl) 1082)** it was held that when there is no case from the accused about any tampering with seals of the samples that could be made out,

the conviction can be upheld. **It was also held that the contention that standing orders and instructions issued U/s.52 A are not followed regarding procedure for drawing sample is held untenable, since Section 52-A, no where empowered the Central Govt. to lay down any procedure for search/seized contraband sample collection and at best, the standing instructions and orders are a mere guidance and have no any legal force since not the inexorable rules. Further, it was held that Sec.52-A only deals with disposal of seized narcotic Drugs and psychotropic substances.** It was further held in **Valsala supra** that as it was not laid down that whenever there is a delay in the sending of samples, the prosecution version would not become vulnerable, it is to be shown from any inordinate delay that it caused prejudice.

10. In **Union** of **India** vs **Ashok Kumar Jaiswal** (2010) 3 SCC (Crl) 604=(2007) 15 SCC 569)the Apex Court cancelled the bail granted by the High Court having find fault for non-application of mind to the parameters required to be considered in granting or refusal from non-consideration of the limitations laid down in Section 37 of the Act. It was held at para 3. "It is evident that the High Court did not at all take into consideration the requirements of Section 37 of the Act as it stood when the application of the respondent for grant of bail was allowed and bail was granted to him merely observing that "considering the recovery and detention it is a fit case for bail". The legislature with a view to check the menace of drugs incorporated in the Act the stringent provisions of Section 37 for considering prayer for grant of bail of those who are accused of offence punishable for a term of imprisonment of five years or more under the Act. Under the mandatory conditions provided in Section 37 before granting bail the court is to be satisfied that there are reasonable grounds for believing that the accused is not guilty of offence and that he is not likely to commit offences under the Act while on bail". See also **Union of India Vs. Rattan Mallik @Habul (**2009(2) SCC 624)**, Customs, New Delhi Vs. Ahmadalieva Nodira (**2004 (1) SCC 662) and the recent one in **Satpal Singh Vs. State of Punjab (**Crl.A.Nos.462 and 463 of 2018,dt.27.03.2018)by a constitution bench**.**

11. The purpose of penal law as rightly stated by Wechsler – an American jurist is to express a formal social condemnation of a forbidden conduct, buttressed by sanctions calculated to prevent it. Even according to Robert Jackson – liberty to be achieved is only within and through the rule of law.

12. From the very preamble of the Act, the policy, purpose, reasons and the objects to be achieved are clearly explained as to for which the Act (NDPS Act) 61 of 1985, later amended by Act 2/1989, 9/2001 and 16/2014 is brought. It is an exhaustive law enacted with stringent punishments to control the malady of drug abuse of trafficking etc., by consolidating and amending the then existing laws in this field viz., opium Act & Dangerous Drug Act. There is one more related Act called Prevention of Illicit traffic in NDPS Act, 1988.

Though solutions do not lie with law alone, however, provision for stringent punishments made, at least to control the offences to a considerable extent. Article 21 is not an absolute fundamental right but qualified and in consideration of bail it is not the personnel liberty alone, but impact of the crime on society. Thus what ever the contentions of the personnel liberty is a constitutional guarantee cannot be claimed for release on bail unless it is shown the limitations laid down in Section 37 of the Act have no way apply and the other general parameters for bail laid down in CrPC are no way a bar for the entitlement. Here once there is as discussed supra prima-facie case against the petitioners and the twin requirements of reasonable grounds exist in their favour of not being held guilty from taken on face value the prosecution material and there is also no likely hood of committing any offence further once released on bail, the question of entitlement does not arise on the facts of the case on hand with reference to the law supra.

13. Having regard to the above, the two Criminal Petitions are dismissed. Consequently, miscellaneous petitions, if any, in these Criminal Petitions shall stand closed.

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2018(2) L.S. 217 (Hyd.)

HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Present:
The Hon'ble Mr.Justice
U. Durga Prasad Rao

D. Sitharamaiah ..Petitioner

Vs.

State of A.P., & Anr., ..Respondents

INDIAN CONTRACT ACT, Sec.56 – Frustration of contract – Payment of compensation – Whether contract between parties was frustrated due to Vis Major – Whether Defendants were liable to pay compensation to Plaintiff for cancelling contract because of Vis Major.

Held – Work could not be executed by plaintiff because of untimely devastating cyclone due to which subject road was badly damaged – Defendants in written statement admitted that cyclone damaged road – Contract can be said to be frustrated within meaning of Section 56 of Act – Since contract was frustrated because of cyclone i.e. Vis Major and neither party can be attributed with pre-knowledge of said event, Defendants cannot be mulcted with compensation on ground that Plaintiff incurred some expenditure and suffered damage – No illegality or perversity in judgment of Trial Court– Appeal stands dismissed.

65 A.S.No.1217/1998 Dt:8-6-2018

Mr.N. Subba Rao, Advocate for the Appellant.
Government Pleader for Appeals (AP), Advocate for the Respondents.

J U D G M E N T

1. The challenge in this appeal, at the instance of plaintiff, is the judgment dated 08.09.1997 in O.S.No.66 of 1993 on the file of Subordinate Judge, Bapatla partly decreeing the suit for Rs.10,000/- with interest at 12% p.a. against the claim of Rs.3,50,000/-.

2. The parties in the appeal are referred as they were arrayed before the trial Court.

3. The factual matrix of the case is thus:

a) The plaintiff is the contractor of Government works. During 1989-90 the 2nd defendant called tenders for strengthening and black topping of Bapatla—Parchoor road from K.M.10.40 to 15.00 at an estimate of Rs.10,00,000/- vide CR.No.21/89-90. The plaintiff being the highest bidder the work was entrusted to him and plaintiff executed an agreement in favour of 2nd defendant vide CR.No.11/90-91 on 20.04.1990 and site was entrusted to plaintiff on the same date. Plaintiff with a view to commence the work paid advance to a tune of Rs.76,500/- for supply of metal from quarries and for transportation.

b) While so, there was devastating cyclone on 07.05.1990 thereby, the proposed site of suit contract was badly damaged forming breaches and pits at several points. There were rains continuously for sum more days after cyclone. Hence, the plaintiff and officials of the 2nd defendant jointly visited the site and found the condition of the site not conducive to carry out black topping work proposed in the contract. The officials of 2nd defendant orally instructed the plaintiff not to proceed with the work and submit report about the condition of the site so that they may submit additional estimate and get it sanctioned for doing the work perfectly. Hence plaintiff sent a representation dated 21.06.1990 about the condition of the road and sought instructions for commencing the work. However, the plaintiff never expressed his inability or unwillingness to proceed with the work as per the agreement dated 20.04.1990. On the other hand, he was always ready and willing to carry out his part of the work. Basing on his representation, the 2nd defendant addressed a letter dated 30.08.1990 to the Engineer-in-Chief (R&B) A.P., Hyderabad appraising the bad condition of the road due to cyclone and the need for carrying additional work before commending the actual work as per the agreement dated 20.04.1990. The 2nd defendant requested the Engineerin- Chief to include the additional work in the special repair programme for the year 1990-91 and pending instructions he asked the plaintiff not to commence the work till the necessary orders for additional work were received from the Engineer-in-Chief. As there were no instructions from the 2nd defendant for a long time, the plaintiff addressed a letter dated 04.10.1990 to Executive Engineer (R&B) requesting to inform him about the decision taken by the 2nd defendant. However, to the surprise of plaintiff, he received a letter LR.No.WF/CR/11/90-91 AG dated 11.12.1990 from the Executive

Engineer terminating the contract and ordering refund of the deposited amount. The said order is contrary to the terms of contract dated 20.04.1990. The allegation in the said letter that the contract was terminated because of the difficulty expressed by the plaintiff to maintain uniform thickness of the road in question is false. On the other hand, the work could not be commenced because of the instructions of the 2nd defendant and his subordinate officials. Thus, the termination of the contract for no fault of the plaintiff was illegal. The plaintiff addressed several letters to 2nd defendant but no reply was given. The defendants thus committed breach of the contract due to which plaintiff suffered mental agony besides monetary loss. He deposited Rs.10,000/- by way of demand draft on 16.01.1990; he paid advances to a tune of Rs.76,500/- for transportation of metal which he could not recover; further, he suffered a loss of estimated profit of Rs.1,80,800/-. He claimed interest at 24% on the aforesaid three items and claimed total sum of Rs.3,50,000/- and filed the suit after issuing notice under Section 80 CPC.

c) Second defendant filed written statement denying plaint averments contending that the plaintiff executed agreement on 20.04.1990 and site was entrusted immediately to him. Due to cyclone in May, 1990 the way was completely sunken and sand has come out. The plaintiff failed to commence the work for about 8 months even after completing agreement and taking the site. But he has not started the work even to the date of determination of the contract in December, 1990 even though he has taken over the site on 20.04.1990. He stated in his letter dated 21.06.1990 that the road was completely damaged unravelling black top earth and hence metal layer cannot lay uniform thickness. He should have started work of packing the road surface, spreading metal after bringing the levels of camber. Instead of that he started unnecessary correspondence only to avoid execution by lapsing 8 months time out of agreed period of 9 months for completion of the work. The plaintiff in his letter dated 19.12.1990 requested the Department to reconsider and issue orders for execution of the work within reasonable rates etc. The plaintiff's work was determined in the divisional proceedings dated 17.12.1990 considering the difficulties expressed by him in starting the work by duly refunding the deposits made by him. As such, the plaintiff's loss said to have been sustained by him is not acceptable to the Department.

d) It is further contended that the work originally entrusted to the plaintiff was to black top the road with two layers metalling. However, as per the present condition of the road, it is felt necessary to provide 200 mm thickness of gravel and one layer metalling with 65 mm HBG metal before the work is started. The cost of extra work was estimated at Rs.7,00,000/- which is to be taken separately under special repairs programme. In those circumstances, the position of the road was submitted to 2nd defendant by Executive Engineer (R&B) in his letter dated 18.08.1990 for taking up SR programme as a special case. The 2nd defendant in turn reported to Chief Engineer (R&B) through his report SE Lr.No.4263/J2/76 dated 30.08.1990. The Chief Engineer

(R&B) in his Memo No.99163/TA2/W1(1)/76 dated 12.10.1990 had directed the 2nd defendant to close the contract and submit the estimate for scrutiny of CBR files. Accordingly, the 2nd defendant instructed vide Memo No.4263/J2/76 dated 25.10.1990 to close the contract of the above work and submit the detailed estimate with CBR values. In view of said instructions, the contract was closed duly intimating the plaintiff. The 2nd defendant contended that as per Clause 59 of P.S. to APDSS, no claims for compensation can be entertained due to hindrance of work for whatsoever reasons. The defendant thus prayed to dismiss the suit.

e) The following issues were framed by trial Court.

1. Whether the plaintiff is entitled to the suit amount?

2. To what relief?

f) During trial, PWs.1 to 8 were examined and Exs.A1 to A10 were marked on behalf of plaintiff. DW1 was examined and Ex.B1 and B2 were marked on behalf of defendants.

g) As can be seen from the impugned judgment, the trial Court having considered the evidence on record opined that after the work was entrusted to plaintiff on 20.04.1990 there was heavy cyclone on 07.05.1990 which damaged the road and therefore, the work could not be executed by the plaintiff as per the agreement dated 20.04.1990 and the damage to the road was caused due to act of God and therefore, defendants were not liable to pay any damages and hence the question of ascertaining the quantum of damages as deposed by PWs.2 to 8 does not arise. Ultimately the trial Court held the deposit amount of Rs.10,000/- made by the plaintiff alone can be ordered to be refunded and accordingly decreed the suit for the said amount of Rs.10,000/- with interest @ 12% p.a. while dismissing the other claims.

Hence, the appeal.

4. Heard arguments of Sri N.Subba Rao, learned counsel for appellant and learned Government Pleader for Appeals (AP).

5. Severely castigating the judgment of the trial Court, learned counsel for appellant would argue that the work was entrusted to plaintiff on 20.04.1990 and the cyclone that lashed out Andhra Pradesh has damaged the contract road on 07.05.1990 and therefore, the plaintiff, though made arrangements to transport bitumen could not commence the work but, however, the plaintiff was always ready and willing to perform his part of contract and there were no laches on his part. He did not commence the work after cyclone only on the oral instructions of 2nd defendant and his subordinate officials and, therefore, no fault can be attributed to him. Learned counsel further argued, in the absence of pleadings and proof on the part of defendants that plaintiff committed breach of contract or that contract was impossible for performance by act of God, termination of the contract by unilateral decision of the 2nd defendant is quite illegal and therefore, trial Court ought to have considered efforts already put in by plaintiff and mental agony and

monetary loss sustained by him, decreed the suit as prayed for. Learned counsel further argued that if, as per defendants, the damaged road required full-fledged repairs and relaying at an additional cost of Rs.7,00,000/-, they should have entrusted that work also to the plaintiff or defendants ought to have completed the additional work by themselves and ought to have entrusted the contract work to the plaintiff to enable him to perform the contract. Therefore, the defendants are liable to pay compensation to the plaintiff. He thus prayed to allow the appeal.

6. Per contra, learned Government Pleader argued that though the work of black topping of Bapatla—Parachoor was entrusted to plaintiff on 20.04.1990 and site was also entrusted to him on the same day with an understanding that the work should be completed within 9 months, plaintiff did not commence the work till 07.05.1990 and thereafter the cyclone intervened and damaged the road and made it impossible to execute the original contract but plaintiff thereafter also did not make any efforts except whiling away time by making some correspondence. The 2nd defendant sent a letter to Engineer-in-Chief (R&B) informing that the road needs special repairs at an estimated cost of Rs.7,00,000/- before proceeding with original work. However, the Engineer-in-Chief instructed the 2nd defendant to terminate the contract and submit revised estimates for full-fledged repairs and in those circumstances the contract was terminated in December, 1990 ordering return of deposit made by plaintiff. Learned Government Pleader vehemently argued that in the entire process there was no fault of defendants in cancellation of contract and it was only due to Vis Major. Therefore, the plaintiff cannot claim compensation. The trial Court rightly dismissed the suit. He thus prayed to dismiss the appeal.

7. In the light of above rival arguments, the points for determination in this appeal are:

1) Whether the contract dated 20.04.1990 between the parties was frustrated due to Vis Major?

2) If point No.1 is held in affirmative, whether defendants are liable to pay compensation to plaintiff for cancelling the contract though because of Vis Major?

8a) **POINT No.1**: In the pleadings, the plaintiff narrated that he executed an agreement on 20.04.1990 and site was also entrusted to him on the same day. Thereafter, on 07.05.1990 there was a devastating cyclone due to which the proposed site was badly damaged by forming breaches and pits at several points. There were rains continuously for some more days and therefore, the plaintiff and officials of 2nd defendant jointly visited the proposed site and found the condition of the road was not conducive to carry out the contract work as per the terms of the contract by the plaintiff. On their instructions he also submitted Ex.A6—letter to that effect. In his evidence also PW1 stated that just before transporting the material there was cyclone on 07.05.1990 and due to it the subject road was damaged to a large extent and base for laying road was damaged heavily. He took Deputy Executive Engineer,

Bapatla to the work spot and shown the damage caused by the cyclone. The DEE asked him to stop the road work as no road can be laid as the base was damaged. The 2nd defendant addressed a letter to Engineer-in-Chief to include the said work in the repair programme for the year 1990-91. The 2nd defendant and his subordinates asked him not to commence the work till the instructions are received from the Engineer-in-Chief. Ultimately the Chief Engineer wrote a letter to 2nd defendant on 16.10.1990 to close the contract vide Ex.B2. Thus, according to plaintiff, the contract work could not be commenced due to devastating cyclone occurred on 07.05.1990.

b) Coming to defendants, in para-4 of the written statement it is pleaded that Deputy Executive Engineer (R&B) has submitted a detailed report that 150 mm thick sand cushion and 150 mm thick compacted gravel base was provided in that reach during 1980-81; first layer of metal was laid during 1982-83; since 1983-87 no renewals were provided and during usage road was sunken and base was completely damaged and due to recent cyclone in May, 1990 the carriage way was completely sunken and sand has come out. In Ex.B1, the 2nd defendant informed the Engineer-in-Chief that due to recent cyclone and subsequent continuous rains, the carriage way was completely sunken and sand has come out and traffic was experiencing much difficulty to pass on the way due to bad condition. He further stated that black topping with two layers of metalling entrusted to the plaintiff was yet to be commenced and as can be seen from the present condition of the road, it is better to provide 200 mm thick compacted gravel base and one layer of metalling with 65 mm HBG metal before the work is started as otherwise black toping may not stand. The approximate cost of gravel base and one layer of metalling comes to Rs.1,50,000/- per one KM and total cost comes to Rs.7,00,000/-.

c) In his deposition DW1 stated that there was a cyclone on 07.05.1990, due to which the surface of the road was damaged to some extent. The departmental people have opined that further layer of crust at an estimate of Rs.7,00,000/- was required as per the technical standards. He of course stated that the plaintiff could procure metal and proceed with the work and at the time of spreading material the department could consider whether the road condition was suitable or not for executing the work.

9. Thus, as can be seen, as per the plaintiff, the work could not be executed because of the untimely devastating cyclone due to which subject road was badly damaged. On the other hand, the defendants in the written statement though not mentioned in same fashion with strong words, still they admitted that the cyclone dated 07.05.1990 damaged the road. Of course, defendants pleaded as if plaintiff could have made efforts to proceed with the work after cyclone. However, such a plea cannot be accepted in view of Ex.B1—letter in which the 2nd defendant himself stated that due to cyclone and subsequent rains carriage way was completely sunken and sand has come out and traffic was experiencing much difficulty to pass on the road due to its bad condition. In view of such bad condition, probably the

playing possum. As has been stated earlier, facts are self-evident and the grieved protagonist, a person belonging to the lower strata. He should not harbour the feeling that he is an "orphan under law".

12. Suffice it to observe that we do not intend to deviate from the conclusion reached by the High Court that in the peculiar facts and circumstances of the case, it is but appropriate that investigation of the crime in question must be entrusted to CBI.

13. Reverting to the last contention that the High Court should have been loath to entertain a public interest litigation at the instance of respondent No.14, who happens to be a member of the Legislative Assembly in the State of Tamil Nadu or that he had pro-actively participated in raising the issue in the Assembly, has also been answered in the impugned judgment. The Court, while entertaining public interest litigation at the instance of respondent No.14, has relied upon the dictum in **K. Anbazhagan Vs. Superintendent of Police and Ors.**, (2004) 3 SCC 767) †wherein it is observed that the political opponents play an important role both inside and outside the House and are the watchdogs of the Government in power. They are the mouthpiece to ventilate the grievances of the public at large, if genuinely and unbiasedly projected. Referring to this decision, the Court noted in paragraph 70 of the impugned judgment that a petition filed by such persons (such as respondent No.14) cannot be brushed aside on the allegation of political vendetta, if otherwise, it is genuine and raises a reasonable apprehension of likelihood of bias in the dispensation of criminal justice system. Accordingly, the ground of challenge under consideration, in our opinion, is devoid of merits.

14. While parting, we may restate the observations made by the High Court in paragraph 144 of the impugned judgment to clarify that the transfer of investigation of the crime in question to CBI is no reflection on the efficiency or efficacy of the investigation done by the State Vigilance Commission. We reiterate that position.

15. As a result, this special leave petition is dismissed.

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2018 (2) L.S. 52 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr. Justice
Uday Umesh Lalit &
The Hon'ble Mr.Justice
Deepak Gupta

U.P.P.S.C., Through its
Chairman & Anr., ..Appellants
Vs.
Rahul Singh & Anr., ..Respondents

Extent and power of the Court to interfere in matters of academic nature - Appellant/U.P. Public Service Commission issued the key after the preliminary examination was conducted - Petitioners before the High Court below contended that some of the key answers were incorrect or that some of the questions had more than one correct answer.

Held - When there are conflicting views, then Court must bow down to the opinion of experts - Judges are not and cannot be experts in all fields and, therefore, they must exercise great restraint and should not overstep their jurisdiction to upset the opinion of the experts – Civil Appeal stands dismissed.

Mr.Ankit Yadav, Shrish Kumar Misra, Badri Prasad Singh, Ankur Sood, Sanjay Rastogi, Advocate for the Appellants.

Mr.Badri Prasad Singh, Gopal Jha, Bankey Bihari Sharma, Shrish Kumar Misra, Advocates for the Respondents.

J U D G M E N T
(per the Hon'ble Mr.Justice Deepak Gupta)

1. Applications for impleadment are allowed.

2. Leave granted.

3. These appeals are being disposed of by a common judgment since they arise out of one judgment delivered by the High Court of Allahabad on 30.03.2018.

4. Briefly stated, the facts necessary for the decision of this case are that the appellant U.P. Public Service Commission (for short 'the Commission') issued an advertisement on 22.02.2017 inviting applications for filling up vacancies in the Upper Subordinate Services of the State. The selection is conducted through a three stage test consisting of preliminary written examination, main examination and interview. Those candidates who clear the preliminary examination are entitled to appear in the main examination.

5. The preliminary examination consisted of two papers namely General Studies-I and General Studies-II. We are in this case concerned only with the General Studies-I paper which carried 200 marks and consists of 150 objective type questions with multiple choice answers. After the preliminary examination was conducted, key answers were published by the Commission. Many persons including the

petitioners before the Allahabad High Court contended that some of the key answers were incorrect or that some of the questions had more than one correct answer.

6. It is not disputed before us that the Commission initially constituted two separate expert committees; one comprising of 15 experts and the other comprising of 18 experts. This was done even before the key answers were displayed on the official website of the Commission. After these two committees gave their expert opinion the key answers were uploaded on the official website of the Commission during the period 18.11.2017 to 23.11.2017. Objections to the key answers were to be submitted by 24.11.2017.

7. The Commission received 962 objections. The Commission constituted a committee consisting of 26 members to consider the objections raised by the candidates. This 26 member expert committee examined all the objections over a period of two days and, thereafter, on the basis of the recommendations of this committee 5 questions were deleted and the key answers of 2 questions were changed. As a consequence the result was declared on the basis of 145 questions. Thereafter, various candidates filed writ petitions in the Allahabad High Court wherein challenge was raised to the correctness of the key answers in respect of 14 questions. The High Court examined these questions and after elaborate discussion and reasoning negatived the prayer of the petitioners in respect of 11 questions but in respect of one question the High Court held that the question should be deleted; in respect of another question it held that there were two correct answers and in respect of one more question it disagreed with the view of the Commission and accepted the submission of the petitioners that the answer given in the key was incorrect. This judgment is under challenge in these appeals.

8. In the appeal filed by the Commission it has been urged that the High Court transgressed its jurisdiction and went beyond the scope of judicial review available in such cases and it should not have overruled the view of the Commission which was based on the report of two committees of experts. On the other hand one of the original writ petitioners in his appeal claims that as far as the question where the High Court has held more than one answer is correct, the same should be deleted and in respect of another question it is urged that the High Court wrongly accepted the answer of the Commission.

9. What is the extent and power of the Court to interfere in matters of academic nature has been the subject matter of a number of cases. We shall deal with the two main cases cited before us.

10. In Kanpur University, through Vice Chancellor and Others v. Samir Gupta and Others, (1983) 4 SCC 309, this Court was dealing with a case relating to the Combined Pre Medical Test. Admittedly, the examination setter himself had provided the key answers and there were no committees to moderate or verify the correctness of the key answers provided by the examiner. This Court upheld the view of the Allahabad High Court that the students had proved that 3

of the key answers were wrong. Following observations of the Court are pertinent:-

"16.....We agree that the key answer should be assumed to be correct unless it is proved to be wrong and that it should not be held to be wrong by an inferential process of reasoning or by a process of rationalization. It must be clearly demonstrated to be wrong, that is to say, it must be such as no reasonable body of men well-versed in the particular subject would regard as correct....."

The Court gave further directions but we are concerned mainly with one that the State Government should devise a system for moderating the key answers furnished by the paper setters.

11. In Ran Vijay Singh and Others v. State of Uttar Pradesh and Others, 2018(1) S.C.T. 334 : (2018) 2 SCC 357, this Court after referring to a catena of judicial pronouncements summarized the legal position in the following terms:-

"30. The law on the subject is therefore, quite clear and we only propose to highlight a few significant conclusions. They are:

30.1. If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it;

30.2. If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;

30.3. The court should not at all re-evaluate or scrutinise the answer sheets of a candidate-it has no expertise in the matter and academic matters are best left to academics;

30.4. The court should presume the correctness of the key answers and proceed on that assumption; and

30.5. In the event of a doubt, the benefit should go to the examination authority rather than to the candidate."

We may also refer to the following observations in Paras 31 and 32 which show why the Constitutional Courts must exercise restraint in such matters:-

"31. On our part we may add that sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheet. If an error is committed by the examination authority, the complete body of candidates suffers. The entire examination process does not deserve to be derailed only because some candidates are disappointed or dissatisfied or perceive some injustice having been caused to them by an erroneous question or an erroneous answer. All candidates suffer equally, though some might suffer more but that cannot be helped since mathematical

precision is not always possible. This Court has shown one way out of an impasse - exclude the suspect or offending question.

32. It is rather unfortunate that despite several decisions of this Court, some of which have been discussed above, there is interference by the courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities. The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination - whether they have passed or not; whether their result will be approved or disapproved by the court; whether they will get admission in a college or university or not; and whether they will get recruited or not. This unsatisfactory situation does not work to anybody's advantage and such a state of uncertainty results in confusion being worse confounded. The overall and larger impact of all this is that public interest suffers."

12. The law is well settled that the onus is on the candidate to not only demonstrate that the key answer is incorrect but also that it is a glaring mistake which is totally apparent and no inferential process or reasoning is required to show that the key answer is wrong. The Constitutional Courts must exercise great restraint in such matters and should be reluctant to entertain a plea challenging the correctness of the key answers. In Kanpur University case (supra), the Court recommended a system of - (1) moderation; (2) avoiding ambiguity in the questions; (3) prompt decisions be taken to exclude suspected questions and no marks be assigned to such questions.

13. As far as the present case is concerned even before publishing the first list of key answers the Commission had got the key answers moderated by two expert committees. Thereafter, objections were invited and a 26 member committee was constituted to verify the objections and after this exercise the Committee recommended that 5 questions be deleted and in 2 questions, key answers be changed. It can be presumed that these committees consisted of experts in various subjects for which the examinees were tested. Judges cannot take on the role of experts in academic matters. Unless, the candidate demonstrates that the key answers are patently wrong on the face of it, the courts cannot enter into the academic field, weigh

the pros and cons of the arguments given by both sides and then come to the conclusion as to which of the answer is better or more correct.

14. In the present case we find that all the 3 questions needed a long process of reasoning and the High Court itself has noticed that the stand of the Commission is also supported by certain text books. When there are conflicting views, then the court must bow down to the opinion of the experts. Judges are not and cannot be experts in all fields and, therefore, they must exercise great restraint and should not overstep their jurisdiction to upset the opinion of the experts.

15. In view of the above discussion we are clearly of the view that the High Court over stepped its jurisdiction by giving the directions which amounted to setting aside the decision of experts in the field. As far as the objection of the appellant - Rahul Singh is concerned, after going through the question on which he raised an objection, we ourselves are of the prima facie view that the answer given by the Commission is correct.

16. In view of the above discussion we allow the appeal filed by the U.P. Public Service Commission and set aside the judgment of the Allahabad High Court. The appeals filed by Rahul Singh and Jay Bux Singh and Others are dismissed. All pending applications stand disposed of.

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2018 (2) L.S. 56 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr. Justice
L. Nageswara Rao &
The Hon'ble Mr.Justice
Mohan M.Shantagoudar

Medical Council of India ..Appellant

Vs.

Vedantaa Institute of Academic Excellence Pvt. Ltd. & Others ..Respondents

INDIAN MEDICAL COUNCIL ACT, Sec.10-A – ESTABLISHMENT OF MEDICAL COLLEGE REGULATIONS, 1999,Regulation 8(3)(1) – ESTABLISHMENT OF MEDICAL COLLEGE REGULATION (AMENDMENT), 2010 – Regulation 8(3)(1)(a) – Entitlement for inspection – High Court allowed petition and directed Appellant Medical Council to inspect Respondent Medical College and submit report.

Held – Conclusion reached by High Court regarding manner in which inspection was conducted is also not correct - Bed occupancy at 45.30 per cent on random verification was claim of Respondents – However, inspection report shows that out of required minimum of 300 patients only 3 were available – Submission relating to cyclone being reason for number of

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patients being less is not acceptable – Resident Doctors are required to be in hospital at all points of time – In view of large scale deficiencies found in inspection report and in view of Regulation 8 (3)(1)(a)of Regulations, Respondents are not entitled to claim another inspection – Conclusion reached by High Court regarding manner in which inspection was conducted is not correct – Judgment of High Court is set aside – Appeal allowed.

J U D G M E N T

(per the Hon'ble Mr.Justice L. Nageswara Rao)

Leave granted.

1. Vedantaa Institute of Academic Excellence Pvt. Ltd. and Vedantaa Institute of Medical Sciences, Respondent Nos.1 and 2 herein filed Writ Petition No.4319 of 2018 in the High Court of Judicature at Bombay seeking a direction to the Appellant to send its Experts' team for the purpose of verifying the compliance of the deficiencies pointed out earlier. They also prayed for a direction to the Appellant to forward its recommendation to the Central Government before 30th April, 2018. They sought a further direction to Respondent No.3 herein, Union of India to consider the grant of renewal permission on the basis of the recommendations received from the Appellant. The High Court allowed the Writ Petition and directed the Medical Council of India to inspect Respondent No.2, Medical College and submit a report to the Union of India before 30th April, 2018. Aggrieved thereby, the Appellant Council has filed the above appeal.

2. Respondent No.1 submitted an application under Section 10-A of the Indian Medical Council Act, 1956 (hereinafter referred to as the 'Act') for starting a Medical College. A letter of intent was issued to Respondent No.1 after conducting an inspection. The Union of India issued a letter of permission dated 31.05.2017 to Respondent No.1 to admit the first batch of 150 students for the academic year 2017-2018. After issuance of a letter of permission, the Respondent No.2 College was included in the list of Colleges for centralised process of admission carried out by the State of Maharashtra. Students were allotted for the year 2017-2018 in the centralised counselling. The inspection for the purpose of granting first renewal for admission of students for the academic year 2018-2019 was conducted on 25.09.2017 and 26.09.2017. The Executive Committee of the Appellant Council considered the assessment report in its meeting held on 25.10.2017 and it was decided as under:-

"The Executive Committee of the Council considered the assessment report (25/ 26.09.2017) and noted the following:-

1. Deficiency of faculty is 84.05% as detailed in the report.

2. Shortfall of Residents is 87.23% as detailed in the report.

3. Pathology, Microbiology, Pharmacology, Forensic Medicine, Community Medicine departments are under construction

4. Bed Occupancy is 01% at 10 a.m. on day of assessment.

5. Wards: Majority of the wards were locked or under renovation and non-functional.

6. Data of OPD attendance, Radiological & laboratory investigations are inflated.

7. There was NIL Major, NIL Minor & NIL Daycare Operation on day of assessment.

8. There was NIL woman in Labour room.

9. Nursing staff: 164 Nursing staff are available against requirement of 175.

10. Paramedical & Non-teaching staff: 90 Paramedical & Non-teaching staff are available against requirement of 100.

11. MRD: There is no MRD Office.

12. O.T.: Non of O.T. was functional on day of assessment

13. ICU: There was NIL patient in ICCU & all ICUs on day of assessment.

14. 1 Mobile X-ray machine is available against requirement of 2.

15. Blood Bank is not functional.

16. Kitchen is not functional.

17. Examination hall: It is under construction.

18. Central Library: Librarian is not available.

19. Central Photography section: There is no staff.

20. Students' Hostels: Available accommodation is for 128 students against requirement of 226.

21. Residential quarters: 18 quarters are available for faculty against requirement of 20. 16 quarters are available for non-teaching staff against requirement of 32.

22. RHTC: It is not yet allotted.

23. UHC: It is not yet allotted.

24. There is no CME activity during the year.

25. Other deficiencies as pointed out in the assessment report.

The Executive Committee noted that Regulation 8(3)(1)(a) of the Establishment of Medical College Regulation (Amendment), 2010 (Part II), dated 16th April, 2010 and amended on 18th March, 2016 provided as under:-

"8(3)(1)…..

(a) Colleges in the stage of Letter of Permission upto II renewal (i.e. Admission of third batch)

It is observed during any inspection/ assessment of the institute that the deficiency of teaching faculty and/or Residents is more than 30% and/or bed occupancy is

In view of the deficiencies as noted above,

the Executive Committee of the Council decided to recommend to the Central Govt. to invoke Regulation 8 (3)(1)(a) of the Establishment of Medical College Regulation, 1999 and disapprove the application of the Vedantaa Institute of Medical Sciences, Palghar, Maharashtra under Maharashtra University of Health Sciences Nashik u/s 10A of the IMC Act, 1956 for renewal of permission of MBBS course 2nd batch (150 seats) for the academic year 2018-2019."

3. The said decision of the Executive Committee was approved by the Oversight Committee on 16.11.2017. The Appellant by a letter dated 21.11.2017 communicated the decision of the Executive Committee as approved by the Oversight Committee to the Union of India. By a letter dated 07.12.2017, the Respondent No. 3, Union of India directed the Respondent College to respond to the recommendation of the Appellant. A detailed reply was submitted by the College and even a personal hearing was given.

4. The High Court allowed the Writ Petition filed by Respondent No.1 and 2 mainly on two grounds. According to the High Court, Regulation 8 (3) (1) proviso (a) of the Establishment of Medical College Regulations, 1999 (hereinafter referred to as the Regulations) is not applicable to the case of Respondent No.1 and 2. The relevant portion of Clause 8 (3) (1) is extracted as under:-

"8 GRANT OF PERMISSION:

(3)(1). The permission to establish a medical College and admit students may be granted initially for a period of one year and may be renewed on yearly basis subject to verification of the achievements of annual targets. It shall be the responsibility of the person to apply to the Medical Council of India for purpose of renewal six months prior to the expiry of the initial permission. This process of renewal of permission will continue till such time the establishment of the medical College and expansion of the hospital facilities are completed and a formal recognition of the medical College is granted. Further admissions shall not be made at any stage unless the requirements of the Council are fulfilled. The Central Government may at any stage convey the deficiencies to the applicant and provide him an opportunity and time to rectify the deficiencies.

Note: In above clause, "six months" shall be substituted by "as per latest time schedule"

PROVIDED that in respect of a) Colleges in the stage of Letter of Permission upto II renewal (i.e. admission of third batch)

If it is observed during any inspection/ assessment of the institute that the deficiency of teaching faculty and/or Residents is more than 30% and/or bed occupancy is

5. The other point which found favour with the High Court is the manner in which the inspection was conducted. The High Court held that the inspection conducted by the Assessors was not fair.

6. Mr. Vikas Singh, learned Senior Counsel

appearing for the Appellant submitted that findings recorded by the High Court that Regulation 8 (3) (1) is not applicable to the Respondent College as it had sought for first renewal is clearly erroneous. He submitted that the High Court lost sight of the first proviso to Regulation 8 (3) (1). He contended that there is no ambiguity in the language of the first proviso to Regulation 8 (3) (1) which covers Colleges upto the second renewal. According to the said Regulation, Institutions having deficiency of teaching faculty and/or residents more than 30 per cent and/or bed occupancy less than 50 per cent will not be considered for renewal of permission for that academic year. In view of the large scale deficiencies found in the inspection conducted on 25.09.2017 and 26.09.2017, Mr. Singh submits that there is no question of an opportunity being given to Respondent No.1 to rectify the deficiencies. He also urged that the inspection was done strictly in accordance with the Assessors' Guide issued by the Medical Council of India. He pointed out that the general instructions issued to the Assessors clearly shows that it was mandatory to verify the attendance sheet of every department (completed before 11.00 am), signed by the faculty present on the day of assessment and duly counter-signed by the Head of Department. According to the Assessors' Guide the institutions should be asked to submit daily average clinical data for the last 12 months and clinical data of the first day of assessment. Bed occupancy was to be verified at 10.00 am, whereas OPD, Laboratory and Radiological Investigation data etc. are to be verified at 2.00 pm on the first day of assessment. In respect of verification of teaching faculty and resident doctors, the Assessors' Guide provides for checking of faculty attendance before 11.00 am on the first day of assessment. Only faculty/ residents who signed the attendance sheet before 11.00 am are to be verified. No verification should be done for the faculty/ residents coming after 11.00 am. Mr. Vikas Singh, learned Senior Counsel took us through the inspection notes to submit that the inspection done by the assessment team cannot be found fault with. He also relies upon the judgment of this Court in **Medical Council of India v. Kalinga Institute of Medical Sciences (KIMS) & Ors. (**(2016) 11 SCC 530- Para 24)**,** to state that the report of the Experts should not be interfered with by this Court.

7. Mr. Maninder Singh, learned Additional Solicitor General, appearing for the Union of India submitted that the provisos to Regulation 8 (3) (1) was inserted with a view to ensure that Institutions which do not satisfy the minimum infrastructure and faculty cannot to be given an opportunity to rectify their defects. According to him, the standards fixed by the Medical Council of India are the bare minimum and have to be strictly complied with to ensure the maintenance of basic minimum standards of medical education. Any lenience shown by this Court in providing an opportunity to such Institutions to rectify the defects will have a cascading effect in the succeeding years and would result in Colleges continuing to function with deficiencies as well as producing half baked and poor quality doctors. He showed us the predictions made by the Meteorological Department from 20th September, 2017 to

26th September, 2017. He submitted that thunderstorm and heavy rain is common in coastal areas and the situation was not as dangerous as projected by Respondent No.1 and 2. He further submitted that the minimum requirement of faculty and residents is 70 per cent. He stated that if 70 per cent of the strength of residence had to be present in the hospital on 24.09.2017 (i.e. the previous day of inspection), it is inconceivable that there could be shortage of 84 per cent teachers and 87 per cent of residents on the date of inspection. He also stated that a natural calamity like cyclone would result in increase in the number of patients.

8. Mr. Ranjit Kumar, learned Senior Counsel appearing for the Respondent No.1 and 2 supported the judgment of the High Court. He relied upon the judgment of this Court in **Royal Medical Trust (Registered) v. Union of India** (**2015) 10 SCC 19 paras 26 – 31)**to support his submission that an opportunity has to be given to a Medical Institute to rectify the deficiencies. He countered the submission of learned Senior Counsel for the Medical Council of India by submitting that the Regulations cannot over-ride the statute. According to him, Section 10-A as interpreted by this Court entitles the Respondent College to be provided with an opportunity to cure the defects pointed out during the inspection. Such provision cannot be over ridden by a Regulation. He relied upon the prediction of cyclone whereby the people of the locality were asked to stay indoors. He contended that a request was made to the team of Assessors to have another assessment on the same day. He further submitted that the inspection was not conducted in a fair manner and the report does not represent the correct picture. If another inspection is done by the Medical Council of India to verify the facilities available in the hospital and the College, the College would be able to satisfy the requirements. He relied upon the decision taken by the Medical Council of India in directing fresh inspection to be conducted in respect of a few Colleges where the deficiencies were more than the minimum prescribed in Regulation 8 (3) (1) (a). In reply to the submissions of Mr. Ranjit Kumar on this point Mr. Vikas Singh stated that a second inspection was permitted to be done only in respect of Government Medical Colleges.

9. Though Regulation 8 (3) (1) (a) was challenged in the Writ Petition filed by Respondent No.1 and 2, they did not press the relief. They restricted their challenge to the manner in which the inspection was done and for a direction to the Appellant-Council to carry out a fresh inspection. The interpretation of Regulation 8 (3) (1) (a) by the High Court is patently erroneous in as much as the High Court did not take note of the proviso to Regulation 8(3)(1). Without a proper examination of the provision, the High Court fell in error in holding that Regulation 8 (3) (1) (a) would be applicable only to the Colleges seeking second renewal i.e. admissions of the third batch. Admissions **upto** the second renewal i.e. admissions to third batch would fall under Regulation 8 (3) (1) (a). In other words, the proviso is not restricted only to second renewal cases. Even the first renewal is covered by proviso (a) to Regulation 8 (3) (1) as the language used is “upto second

renewal". We do not see any conflict between Section 10-A (3) and (4) of the Act on one hand and Regulation 8 (3) (1) (a) on the other. Regulation 8 (3) (1) (a) is complementary to Section 10-A of the Act. Fixing minimum standards which have to be fulfilled for the purpose of enabling a medical College to seek fresh inspection would not be contrary to the scheme of Section 10-A. In fact, Regulation 8 (3) (1) provides that an opportunity shall be given to the medical College to rectify the defects. But, the proviso contemplates that certain minimum standards are to be satisfied i.e. there should not be deficiency of teaching faculty and/or residents more than 30 per cent and/or bed occupancy should not be less than 50 per cent. This prescription of standards for availing an opportunity to seek re-inspection is not ultra vires either the Regulation or Section 10-A of the Act.

10. On perusal of the material on record, we are of the opinion that the conclusion reached by the High Court regarding the manner in which inspection was conducted is also not correct. Bed occupancy at 45.30 per cent on random verification was the claim of Respondent No.1 and 2. However, the inspection report shows that out of required minimum of 300 patients only 3 were available at 10.00 am on 25th September, 2017. This Court in **Kalinga (supra)** has held that medical education must be taken very seriously and when an expert body certifies that the facilities in a medical College are inadequate, it is not for the Courts to interfere with the assessment, except for very cogent jurisdictional reasons such as mala fides of the inspection team, ex facie perversity in the inspection, jurisdictional error on the part of the M.C.I., etc. The submission relating to the cyclone being a reason for the number of patients being less is not acceptable. We are in agreement with the submission made on behalf of the Appellant that the Resident Doctors are required to be in the hospital at all points of time.

11. In view of the large scale deficiencies found in the inspection report dated 25.09.2017 and 26.09.2017 and in view of Regulation 8 (3) (1) (a), the Respondent No.1 and 2 are not entitled to claim another inspection.

12. For the aforementioned reasons, the judgment of the High Court is set aside and the Appeal is allowed.

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