IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CWP No.1025 of 2001

Reserved on 26.9.2007

Date of decision 31.10.2007

Smt.Janki Devi and ors. Petitioners

Vs.

The Estate Officer, Govt. of India,
Shimla. Respondent

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting?[1] Yes.

For the Petitioner: Mr,R,K,Bawa, Senior Advocate, with Mr.Inderjit Singh Narwal, Advocate.

For the respondent: Mr.Sandeep Sharma, Assistant Solicitor General of India.

Rajiv Sharma, J.

The brief facts necessary for the adjudication of this petition are that Sh.Balak Ram, predecessor in interest of the present petitioners was employed as a Machine man in the Government of India Press, Tuti Kandi, Shimla. He was allotted Government residential accommodation/premises known as C-16/84, Phagli General Pool (Tupa-II) Residence Central Government, at Shimla-4. Sh.Balak Ram retired from the Government services on 31.3.1987. Petitioner No.3 Sh.Gopal Singh the son of late Sh.Balak Ram was also working in the Government of India Press prior to the retirement of said Sh.Balak Ram. He was living

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[1] Whether reporters of local papers are allowed to see the judgment? Yes.

with his father in the Government accommodation. He submitted an application for allotment of the same Government accommodation which was in occupation of his father. The request of the petitioner No.3 was turned down.

The petitioner No.3 filed an Original Application bearing No.161 of 1988 before the Central Administrative Tribunal which was rejected on 23.3.1988. The review petition filed by the petitioner No.3 was also dismissed by the Central Administrative Tribunal on 28.7.1989. The petitioner No.3 filed a SLP before the Hon'ble Supreme Court. The Hon'ble Supreme Court was pleased to grant an ex parte stay to the petitioner No.3 on 6.10.1989. But ultimately the SLP preferred by the petitioner No.3 was dismissed by the Hon'ble Court vide its order dated 12.8.1996. The premises in question, was handed over by the petitioner No.3 to the respondent on 28.9.1996.

A notice was issued by the respondent under sub section (2) of Section 7 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 on 1.9.1998 whereby he was called upon to show cause on or before 14.9.1998 why the order requiring him to pay the damages together with interest should not be made. As per notice dated 1.9.1998 the outstanding amount was Rs.2,14,740/-. Sh.Balak Ram filed reply to the show cause notice on 13.9.1998. He also filed objections against the show cause notice against the recovery of penal rent and damages on 19.9.1999. The Estate Officer vide order dated 28.12.1999 had directed Sh.Balak Ram to pay a sum of Rs.2,14,740/- in twenty equal monthly instalments of Rs.17,737/- payable by 10th of each month. Sh.Balak Ram filed an appeal under Section 9 of the Public Premises (Eviction of Unauthorized Occupants) Act,1971 before the learned District Judge, Shimla. The appeal was dismissed by the learned District Judge on 25.6.2001. It will be apt to observe at this stage that Sh.Balak Ram

appellant died during the pendency of the appeal before the learned District Judge and his legal representatives, including the petitioner No.3 were brought on record.

Shri R.K.Bawa, Senior learned counsel had strenuously argued that the order dated 28.12.1999 passed by the Estate Officer and judgment dated 25.6.2001 passed by the learned District Judge, Shimla are not sustainable in the eyes of law since the authorities while passing these orders have not followed the principles of natural justice. Mr.Bawa also contended that since the objections raised by the petitioner to the notice dated 1.9.1998 had not been considered at all in the order dated 28.12.1999 the same is nullity in the eyes of law and the specific plea raised by the petitioner before the appellate court that the objections filed by his client has not been considered by the Estate Officer have also been over looked by the learned District Judge thereby rendering his decision as void ab initio. Mr.Sandeep Sharma, learned Assistant Solicitor General of India had supported the orders dated 28.12.1999 passed by the Estate Officer and judgment dated 25.6.2001 passed by the learned District Judge, Shimla. Mr.Sharma further contended that the petitioner No.3 had lost the case up to the Supreme Court and is liable to pay the penal interest as well as damages.

I have heard the learned counsel for the parties and have also gone through the record carefully.

The court will firstly consider the submissions made by Mr.Sandeep Sharma with regard to SLP dismissed by the Hon'ble Supreme Court on 12.8.1996 preferred by the petitioner against the decision dated 28.7.1989 of the Central Administrative Tribunal. The petitioner No.3 had filed the Original Application seeking allotment of the same accommodation which was in occupation of his father. The plea raised by the petitioner was rejected. He filed a review application before the Central Administrative

Tribunal. The Central Administrative Tribunal dismissed the said review application on 28.7.1989. He preferred an appeal by way of S.L.P. before the Supreme Court which was also ultimately dismissed on 12.8.1996. The filing of the O.A. by the petitioner No.3 before the Central Administrative Tribunal and the rejection of the SLP by the Hon'ble Supreme Court had no direct nexus with the present lis since the same has been filed against the decision of the Estate Officer dated 28.12.1999 and the appellate order dated 25.6.2001. The notice was issued to the predecessor in interest of the petitioners on 1.9.1998 to which the reply and objections were filed and Balak Ram was directed to pay the damages/penal interest. It was against this decision that Balak Ram had preferred appeal before the learned District Judge and he died during the pendency of the appeal and subsequently his legal representatives were brought on record.

Now this Court has to consider the plea raised by the petitioners with regard to violation of principles of natural justice. Balak Ram predecessor in interest of the petitioners was issued notice by the Estate Officer on 1.9.1998. He had filed reply to the show cause notice on 13.9.1998 and objections on 19.9.1999. The order was passed by the Estate Officer against said Balak Ram on 28.12.1999. It is evident from the reading of order dated 28.12.1999 that the objections/reply had not been considered at all by the Estate Officer. The order dated 28.12.1999 is a non speaking order. The only bald assertion has been made that the objections filed by the petitioner were considered. There is total non application of mind by the Estate Officer. The Estate Officer was bound to consider the objections raised by the petitioner in his reply to the notice dated 1.9.1998 in a very objective manner. The objections were called for by the Estate Officer himself on 1.9.1998. The petitioner Balak Ram had brought to the notice of the Estate Officer vide his reply dated 13.9.1998

that representation dated 27.12.1996 made by his son to the Director of Estates was still pending and had not been decided till date and further prayed for withdral and cancellation of the notice on the ground that the principles of assessment of damages have not been properly disclosed and there was variations in damages from him and his son and the amount assessed was always at variance from each other. Balak Ram had also separately filed the objections on 19.9.1999, besides the earlier reply filed by him on 13.9.1998. Balak Ram had raised as many as seven objections as is evident from Annexure P-5 dated 19.9.1999. None of the objections have been considered by the Estate Officer. Consequently, it is held that the order dated 28.12.1999 was bad in law for non compliance with the principles of natural justice and the same was void ab initio. Balak Ram had filed appeal before the appellate Authority. He has specifically mentioned in para 5 that the estate Officer has not decided the objections/pleas raised by him in the reply to the show cause notice. He has specifically taken the ground that no speaking order has been passed and all the points relevant for the adjudication of the controversy have not been decided by a reasoned order. He also highlighted that he was not permitted to lead any evidence. He had assailed the manner in which the damages and penal interest was demanded from him. The learned District Judge has failed to take into consideration that the objections raised by Balak Ram were not at all considered by the Estate Officer. The learned District Judge has only in a very very cursory manner has mentioned that the deceased appellant was served with a show cause notice dated 1.9.1998. He had only noted the factum that the deceased appellant had filed objections to the notice on 19.9.1999. It was incumbent upon the appellate Authority to consider this point in detail and since it goes to the root of the matter. The purpose of issuing show cause notice is to enable the party to put forth his defence either orally or by way of evidence. The

learned District Judge un-necessarily laid stress in interpretation of allotment of Government Residences (General Pool in Shimla) Rules, 1963. The judgment dated 25.6.2001 is liable to be set aside only on the ground that the specific plea raised by the deceased appellant qua violation of the principles of natural justice by the Estate Officer has not been considered by the District Judge. It is settled by now that the principles of natural justice apply to procedural law as well.

Mr.Sandeep Sharma also argued that may be that the estate Officer has not considered the objections preferred by deceased Balak Ram but the said defect stood cured in appeal preferred by him.

A Division Bench of Orissa in **Laxmidhar Panigrahi v. The State of Orissa and others,** AIR 1974 Orissa 127 has held as under:

> "It is difficult at this stage to assess on the basis of the record in what manner and to what extent the confidential enquiries led to the final result of the proceeding. Besides, the nature of evidence collected in this case also is not in accordance with the provisions of the Evidence Act as indicated above. The enquiry, therefore, was vitiated. As was pointed out in Leary v. National Union of Vehicle Builders, (1970) 2 All ER 713, a failure of natural justice in a trial body cannot be cured by a sufficiency of natural justice in an appellate forum and where the evidence has not been properly received, the entire proceeding becomes vitiated because the foundation is not in accordance with law."

The Supreme Court in **Mysore State Road Transport Corporation v. Mirja Khasim Ali Beg and another**, AIR 1977 SC 747, has held that when an order of dismissal was without jurisdiction and as such void and inoperative having been passed in contravention of Article 311(1), the fact that the order was confirmed on appeal by Head of the Department cannot cure the initial defect. Their Lordships have held as under:

"The second contention urged on behalf of the appellants that as the General Manager of the Mysore Government Road Transport Department confirmed on appeal the orders of dismissal of the first respondents that should be considered as substantial compliance with the provisions of Article 311(1) of the Constitution is, in our judgment, devoid of substance. The original order of dismissal of the first respondents being without jurisdiction and as such void and inoperative having been passed in contravention of the provisions of Article 311(1) of the Constitution, the order passed on appeal by the General Manager could not cure the initial defect. In similar circumstances, the appellate order passed by the Director General of Prisons was not considered by the Madras High Court in N.Sundaram's case, (AIR 1956 SC 285) (supra) to remedy the invalidity of the original order passed by the Superintendent of Jails. To the same effect is the decision of the Nagpur High Court in Provincial Government, Central Provinces and Berar v. Shamshul Hussain Siraj Hussain, (AIR 1949 Nag 118)".

In **Smt.G.Rajalakshmi and others v. Appellate Authority (Chief Judge, City Civil Court, Hyderabad) and others**, AIR 1986 AP 100 the Hon'ble Single Judge while considering the provisions of the Public Premises (Eviction of Unauthorized Occupants) Act has held that the Estate Officer was bound to consider the objections filed by the occupants to the proposed eviction from the premises before making an order and the defect due to non consideration by him of the objections filed could not be cured by the Appellate Tribunal. The learned Single Judge has held as under :

> "The question debated in the circumstances of the case is:- Can a deficiency of natural justice before a trial tribunal be cured by sufficiency of natural justice before an appellate tribunal? In considering the issue, the powers of the appellate authority, to pass the impugned order are not questioned.
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> The question thus posed has to be considered on first principles. There is very little authority in the decisions of this Court or in the Supreme Court touching this aspect of the question. It may be recalled that in Ridge v. Baldwin (1)1964 AC 40, the House of

Lords had considered the scope of “notice” forming part of the principle of *audi alteram partem*. Lord Reid in his speech had stressed the principle of *audi alteram partem* is part and parcel of natural justice. That is not disputed. A similar question as in the instant case arose directly in Leary v. National Union of Vehicle Builders (2) (1970) 2 All ER 713 at p. 720. Leary the plaintiff in the suit was a member and organizer of National Union of Vehicle Builders. The ‘Union’ in the rules, Rule 26(2) had reserved authority to expel any member who had defaulted payment of contribution for six months. The Branch Committee of the Union by order on January 16, 1969 expelled Leary without hearing him for not paying the contributions for 27 weeks. The plaintiff (Leary) in vain attacked the order in appeal before the Appeals Council and urged $5 were paid by him. Before the Appeals Council Leary was heard and afforded all opportunities. Further in the appeal committee two council members were not served notice of the meeting and one Mr.Wattas, who was not a member, formed as member of the council. The order of the appeal council was challenged in a suit. Megarry J., posed the question on the above facts:- “If a man has never had a fair trial by the appropriate trial body, is it open to appellate body to discard its appellate functions and itself give the man the fair trial that he has never had” and captioned the circumstance as “unjust trial and a fair appeal” and answered the question as a general rule “I hold that a failure of natural justice in the trial body cannot be cured by sufficiency of natural justice in an appellate body”. The learned judge held bodies differ much in their views and approach and referred to the rules of the Union as having ‘confined’ in the Branch Committee for expulsion not in the fairness of appeal. I respectfully agree with the reasoning propounded in the decision. Adoption of such a course in my view curbs the tendency in “trial tribunals” to give a short shift to proceedings. The explanation Ex. A-1 in the instant case was received by the Estates Officer yet it was said by the said authority that no explanation was received. It is with reference to such devices Rt. Hon. Lord Hewart of Bury in his book “New Despotism” at page 49 observed some such decisions are rendered in “hole and corner” fashion. Decisions of administrative tribunals are generally criticized even those in whose favour the decision is

made; it is said as “mere piece of luck”. How can it be said such decisions rendered as in these proceedings are rendered under rule of law. In my view the proper course for the appellate tribunal is to remit the subject to the trial tribunal and by doing so, the principle of *audi alteram partem* and in turn the larger principle of natural justice stands vindicated and strengthened. I am aware that it is possible to take another view and such a view appears to have been taken in two of the commonwealth dominions, in three Canadian cases viz. Posluns v. Toronto Stock Exchange and Gardiner (3) (1964) 46 DLR (2d) 210, and in appeal of the same case in (4) CA (1965) 53 DLR (2d) 193, in King v. University of Sakatcheyan, (5) (1969) SCR 678 and one in a decision in New Zealand case in Denton v. Auckland City, (6) (1969) NZLR 256, but I had not the advantage of reading these decisions. I have understood the question as one not governed by any authority of this Court or that of the Supreme Court of India. The field in that sense is un-trodden. In view of the paucity of authority whether to adopt the view taken by the Courts in England as propounded by the Courts in England as propounded by Megarry J. in (2) (above) or to have course to the adoption of procedure followed in Canadian and New Zealand cases. A number of cases were cited during the debate. There is very little guidance on this aspect. There are observations, however, made by Ramaswami J. (as he then was) in Sheopujan v. State of Bihar , (7) AIR 1956 Pat 212, wherein the principle of *audi alteram partem* has been accepted to mean that the party affected must be given sufficient opportunity ‘at any stage’. The concept of natural justice, true it is, cannot be imprisoned in a strait-jacket or in a fixed formula. Whether a fair opportunity has been given to a party adversely affected or not, no general test can be formulated to apply in all circumstances. Ramaswami C.J. (the same learned Judge) in Hardutt Mutt Jute Mills v. State of Bihar (8) AIR 1957 Pat 21, reiterated what is stated in the case (7) (above) and speaking again of “general requirement” observed----

> “There is no such general requirement in the principles of ‘audi alteram partem’. On the contrary, the principle is satisfied if the party adversely affected is given sufficient opportunity to know the case he has to meet and to answer that case at some stage and not at all the stages of administrative proceeding.”

> The proceedings arose under Act 40 of 1971. The Estates Officer under the Act has to consider the objections and pass orders and not by the appellate tribunal. The analogy of Civil Courts having regard to the constitution, their power and the Code that regulates their procedure the analogy is not apposite.
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> To sum up: the estates Officer who had issued the notice under section 4, did not consider the representation made by the tenant. The appellate authority on this question came to the conclusion that such a representation in Ex.A-1 was made but was not considered. In such circumstances following the view taken by Megarry J. in Leary's case (2) (above) in United Kingdom I think it is not open for the appellate authority to consider the question in the appeal on merits of the disputes. There are two views possible in this regard and in my view it would strengthen the principle of natural justice in adopting the course decided in Leary's case (2)(supra). Therefore the order of the appellate authority in C.M.A. No.2 of 1978 dated July 6, 1978 and the order of the Estates Officer, Civil Aviation Department, Madras Region (the second respondent) dated December 15, 1977 in NOM/4 (2) ESJ are hereby quashed. The subject matter is remitted to the Estates Officer to consider the representation in Ex. A-1 made by the tenant on December 11, 1977 and to pass order in accordance with law. The writ petition is accordingly allowed. Order as to costs, Advocate's fee Rs.150/-."

Similarly the Apex Court in **Institute of Chartered Accountants of India v. L.K.Ratna and others,** (1986) 4 SCC 537 has held that there was manifest need to ensure that there was no breach of fundamental procedure in the original proceeding, and to avoid treating an appeal as an over all substitute for the original proceeding. Their Lordships have held as under:

> "But perhaps another way of looking at the matter lies in examining the consequences of the initial order as soon as it is passed. There are cases where an order may cause serious injury as soon as it is made, an injury not capable of being entirely erased when the error

> is corrected on subsequent appeal. For instance, as in the present case, where a member of a highly respected and publicly trusted profession is found guilty of misconduct and suffers penalty, the damage to his professional reputation can be immediate and far-reaching. “Not all the King’s horses and all the King’s men” can ever salvage the situation completely, notwithstanding the widest scope provided to an appeal. To many a man, his professional reputation is his most valuable possession. It affects his standing and dignity among his fellow members in the profession, and guarantees the esteem of his clientele. It is often the carefully garnered fruit of a long period of scrupulous, conscientious and diligent industry. It is the portrait of his professional honour. In a world said to be notorious for its blasé attitude towards the noble values of an earlier generation, a man’s professional reputation is still his most sensitive pride.”

Accordingly the writ petition is allowed and the orders dated 28.12.1999 and 12.6,2001 are quashed and set aside. The matter is remanded back to the Estate Officer to decide the matter afresh after taking into consideration the objections filed as per Annexures P-4 and P-5 dated 13.9.1998 and 19.9.1999, respectively. To avoid delay, the parties are directed to make themselves available before the Estate Officer on 18.12.2007.

October 31, 2007 (g) **(Rajiv Sharma), J.**