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IN THE HIGH COURT OF DELHI

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Judgment reserved on : 13.10. 2009

Judgment delivered on: 20.10.2009

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LPA 192/2000

M/S. MS SHOES EAST LTD. & ANR. ...Appellants

Through : Mr. Pawan Sachdeva
(CMD of appellant No.1 in person).

versus

UNION OF INDIA & ANR. ...Respondents

Through : Mr.Rajeev Sharma, Advocate
for respondent No.1.
Mr.Sanjay Kumar with Mr.Vaibhav
Mishra, Advocate for
respondent No.2.

LPA 282/2003

M/S. MS SHOES EAST LTD. & ANR. ...Appellants

Through : Mr. Pawan Sachdeva
(CMD of appellant No.1 in person).

versus

UNION OF INDIA & ORS. ...Respondents

Through : Mr.Rajeev Sharma, Advocate
for respondent No.1.
Ms.Sangeeta Chandra, Advocate
for respondent No.2.
Mr.Ashok Bhasin, Senior Advocate
with Mr.S.A.Hashmi, Advocate
for respondent No.3.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SURESH KAIT

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

PRADEEP NANDRAJOG, J.

1. The order which has been impugned in LPA No.192/2000 dated 11.1.2000 passed by a learned Single Judge of this Court dismissing WP(C) No.89/2000. The order reads as under:-

“This petition under Article 226 of the Constitution of India seeks a peculiar relief that a writ of mandamus be issued restraining the respondents from reviewing the decisions of the Hon’ble Minister dated June 7, 1998 and July 13, 1998 and for a further writ for implementation of the decision given in favour of the petitioner on his representation. The learned counsel for petitioner contends that there is no power of reviewing any order passed by the Minister and, in any case, if such an order is going to be reviewed, the petitioner is entitled to be heard in compliance with the principles of natural justice. The issue is not clearly justiciable and no orders can be passed in exercise of powers under Article 226 of the Constitution of India. The petition as a consequence is dismissed in limine.”

2. The order which is under challenge in LPA No.282/2003 dated 15.1.2003 whereby another learned Single Judge of this Court has dismissed WP(C) No.7251/1999.

3. The two appeals are being disposed of by a common order not on account of the fact that the appellant is the same in both the appeals, but on account of the reason that common question of law arises for consideration in both the appeals.

4. Relevant facts pertaining to LPA No.192/2000 are that the Government of India placed at the disposal of HUDCO a parcel of land at Andrews Ganj on which some shops, a restaurant and guest houses were constructed. The appellant participated in the bidding process when offers were invited by HUDCO for allotment of 25 shops, 9 guest house complexes and a restaurant. Appellant's bid being the highest was accepted and the first installment towards the bid was paid by the appellant.

5. Defaulting at the stage of the second installment which had to be paid, the appellant made a representation for time to be extended for payment of the second installment, which was refused by HUDCO resulting in HUDCO cancelling the allotment made in favour of the appellant with effect from 1.1.1996.

6. The appellant filed a civil suit challenging the action of HUDCO in cancelling the allotment. Declaration was sought in the said suit to declare void and inoperative certain terms of the allotment letter dated 31.10.1994. A decree of permanent injunction was prayed for to restrain HUDCO from cancelling the allotment. Mandatory injunction was prayed for against HUDCO to extend time for making the second installment.

7. The suit is pending.

8. Notwithstanding the pendency of the civil suit, the appellant thought it prudent to seek administrative redressal. The appellant made a representation to the Union of India, since the lands vested in the Union of India and were placed at the disposal of HUDCO for development and disposal; requesting the Union of India to intervene in the matter and direct HUDCO to receive the second installment.

9. Considering the representation addressed to the Union of India, the then Minister for Urban Development i.e. the Ministry in charge, recorded an order on the file on 17.6.1998, finding fault with the action of HUDCO and directed that the allotment be restored. The said order was not formally communicated to the appellant and remained in the noting sheet of the file.

10. The officers of HUDCO as also in the Ministry of Urban Development, Union of India, gave their opinion or made notings in the file, with reference to the order dated 17.6.1998 recorded by the Minister for Urban Development, Union of India, as per which notings, the directive of the Hon'ble Minister could not be implemented.

11. The file was placed before the Hon'ble Minister for Urban Development, who reiterated his opinion vide order dated 13.7.1998.

12. The order dated 13.7.1998 terminates with a direction: *'put up a draft of the direction to HUDCO for my perusal by 15.7.1998'*.

13. The officers in the Ministry of Urban Development made further notings and after considering the same, vide note dated 15.7.1998, the Minister for Urban Development reiterated his view.

14. No formal communication was addressed at any stage to the appellant.

15. The file was sent to the Prime Minister's Office. At the PMO, dealing with the file on the administrative side, opinion from the Ministry of Law and the Ministry of Finance was obtained, but before the matter could be formally placed before the Hon'ble Prime Minister, the new Minister for Urban Development, reviewed the earlier decisions taken by his predecessor and opined that it was not a fit case to direct HUDCO to restore the allotment and receive the second installment from the appellant.

16. WP(C) No.89/2000 was filed by the appellant praying that the respondents be restrained from reviewing the decisions taken by the Hon'ble Minister in the Ministry of Urban Development, Union of India. Mandamus was sought to direct implementation of the decisions dated 17.6.1998 and

13.7.1998 taken by the then Minister for Urban Development, Union of India.

17. The said writ petition, as noted above, has been dismissed vide order dated 11.1.2000, holding that no such mandamus could be issued.

18. Relevant facts pertaining to LPA No.282/2003 may now be noted.

19. In Andrews Ganj, adjoining the lands placed at the disposal of HUDCO by the Central Government, is a parcel of land placed at the disposal of Delhi Development Authority by the Central Government.

20. A piece out of said land was put up for auction. Appellant was the highest bidder and the bid of the appellant was accepted.

21. The bid amount had to be deposited as per the terms of the bid. The appellant defaulted but sought time to be extended. DDA refused to extend the time.

22. A writ petition registered as WP(C) No.2253/1995 was filed praying that a mandamus be issued to DDA to extend the time for depositing the further amount.

23. The writ petition was disposed of vide order dated 14.2.1996. Following directions were issued:-

“(1) The petitioner would be at liberty to make a representation to the Central Government, within two

weeks from today setting out facts in brief and its such other contentions as it may propose to raise for the consideration of the Central Government for the exercise of the later's power under S.41(3) of the Act read with Rule 45(2)(b) of the Rules. The petitioner may seek extension of time and on the alternative refund of the amount paid by it. Such a prayer if made, it shall be in the discretion of the Central Govt. to deal with the same and take a decision thereon in accordance with law consistently with the power conferred upon the Central Govt. by the aforesaid provisions.

(2) The petitioner would also be at liberty to seek such interim directions as the facts of the case may warrant to protect interest of justice.

(3) We make it clear that we have not expressed any opinion on the merits of the contentions raised by either party either on the pleadings or at the time of hearing and it will be in the discretion of the Central Govt. to form its own opinion on merits of petitioner's representation and take a decision thereon. The decision by Central Govt. may be taken on such representation within four weeks of the date of making the representation.

For the period of two weeks allowed to the petitioner for making representation and prayer seeking interim directions, the DDA shall not take any further action in the matter."

24. In terms of the directions issued vide order dated 14.2.1996 disposing of WP(C) No.2253/1995, the appellant made a representation to the Union of India which was rejected vide order dated 17.7.1996.

25. Order dated 17.7.1996 passed by the Union of India was challenged by the appellant by means of WP(C)

No.3185/1996, which writ petition was dismissed vide order dated 9.9.1996.

26. Order dated 17.7.1996 passed by the Union of India was upheld. The concluding paragraph of the decision dated 9.9.1996 disposing of WP(C) No.3185/1996 i.e. para 21, concluded the controversy as under:-

“21. We make it clear that the decision concludes the controversy to the extent of the petitioner’s challenge to the correctness/propriety of the decision of the Central Government dated 17.7.1996 and to the decision of the respondent-DDA refusing to extend the time for payment of the balance amount. So far as the forfeiture of the earnest money is concerned, the petitioner is at liberty to challenge the same before a competent forum pursuing such remedy as may be advised. No order as to the costs.”

27. Notwithstanding the finality of the order dated 9.9.1996 dismissing WP(C) No.3185/1996, after a lapse of about two years, on 19.6.1998, the appellant submitted a representation to the Hon’ble Minister in charge of the Ministry of Urban Development, Union of India, praying that directions may be issued to DDA to restore the allotment of the land in favour of the appellant and receive balance bid amount.

28. Surprisingly, the Hon’ble Minister in charge of the Ministry of Urban Development passed an order in the file on 7.8.1998 to the effect that the allotment of the land by DDA in favour of the appellant be restored and balance bid money be received.

29. Needless to state, due to a change of Minister in charge of the Ministry of Urban Development, the successor Minister recalled the opinion of his earlier predecessor. The appellant sent reminders taking a stand that the opinion dated 7.8.1998 of the Hon'ble Minister could not be reviewed. The appellant was informed vide letter dated 18.8.1998 that the request of the appellant for restoration of the land and issuance of any direction to DDA to receive the balance bid cannot be accepted.

30. The appellant thereupon filed another writ petition registered as WP(C) No.7251/1999 praying that the communication dated 18.8.1999 be quashed and a mandamus be issued against the Union of India directing Union of India to grant extension of time to the appellant to make payment.

31. The said writ petition has been dismissed vide order dated 15.1.2003.

32. A two-fold reason has been given by the learned Single Judge in the order dated 15.1.2003.

33. Firstly, that the directions in para 21 of the order dated 9.9.1996 disposing of WP(C) No.3185/1996 concluded the issue and that a belated request by the appellant to the Union of India to extend the time for making payment resulting in a denial by Union of India to do the needful cannot give rise

to a fresh cause of action. The second reason given is that the opinion/notings/orders passed by the Hon'ble Minister in charge of the Ministry of Urban Development in the file being not translated into an order as contemplated by the mandate of the Constitution requiring business of the Union to be transacted in the name of the President of India, the stand of the appellant that once the Minister took the decision on the file, the same has to be implemented, cannot be accepted.

34. Suffice would it be to state, that the question of law which arises for consideration in both the appeals is: What is the effect of decision/notings/orders, passed/recorded in the file maintained by the departments, but not communicated to any person? Can a mandamus be issued requiring compliance with such a note/order/direction?

35. The issue is no longer res integra and was settled as early as the year 1963.

36. In the decision reported as AIR 1963 SC 395 Bachhittar Singh vs. State of Punjab & Anr., the Hon'ble Supreme Court observed as under:-

"8. What we have now to consider is the effect of the note recorded by the Revenue Minister of Pepsu upon the file. We will assume for the purpose of this case that it is an order. Even so, the question is whether it can be regarded as the order of the State Government which alone, as admitted by the appellant, was competent to hear and decide an appeal from the order of the Revenue Secretary.

Article 166(1) of the Constitution requires that all executive action of the Government of a State shall be expressed in the name of the Governor. Clause (2) of Art.166 provides for the authentication of orders and other instruments made and executed in the name of the Governor. Clause (3) of that Article enables the Governor to make rules for the more convenient transaction of the business of the Government and for the allocation among the Minister of the said business. What the appellant calls an order of the State Government is admittedly not expressed to be in the name of the Governor. But with that point we shall deal later. What we must first ascertain is whether the order of the Revenue Minister is an order of the State Government i.e. of the Governor. In this connection we may refer to R.25 of the Rules of Business of the Government of Pepsu which reads thus:

“Except as otherwise provided by any other Rule cases shall ordinarily be disposed of by or under the authority of the Minister in charge who may by means of standing orders give such directions as he thinks fit for the disposal of cases in the Department. Copies of such standing orders shall be sent to the Rajpramukh and the Chief Minister.”

According to learned counsel for the appellant his appeal pertains to the department which was in charge of the Revenue Minister and, therefore, he could deal with it. His decision and order would, according to him, be the decision and order of the State Government. On behalf of the State reliance was, however, placed on R.34 which required certain classes of cases to be submitted to the Rajpramukh and the Chief Minister before the issue of orders. But it was conceded during the course of the argument that a case of the kind before us does not fall within that rule. No other provision bearing on the point having been brought to our notice we would, therefore, hold that the Revenue Minister could make an order on behalf of the State Government.

(9) The question, therefore, is whether he did in fact make such an order. Merely writing something on the file does not amount to an order. Before something

amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by cl.(1) of Art.166 and then it has to be communicated. As already indicated, no formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up the State Government cannot in our opinion, be regarded as bound by what was stated in the file. As long as the matter rested with him the Revenue Minister could well score out his remarks or minutes on the file and write fresh ones.

(10) The business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. The Constitution, therefore, requires and so did the Rules of Business framed by the Rajpramukh of Pepsu provide, that the action must be taken by the authority concerned in the name of the Rajpramukh. It is not till this formality is observed that the action can be regarded as that of the State or here, by the Rajpramukh. We may further observe that, constitutionally speaking, the Minister is no more than an adviser and that the head of the State, the Governor or Rajpramukh, is to act with the aid and advice of his Council of Ministers. Therefore, until such advice is accepted by the Governor whatever the Minister or the Council of Ministers may say in regard to a particular matter does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the Head of the State. Indeed, it is possible that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion. Which of them can be regarded as the 'order' of the State Government? Therefore, to make the opinion amount to a decision of the Government it must communicate to the person concerned. In this connection we may quote the following from the judgment of this Court in the State of Punjab vs. Sodhi Sukhdev Singh, AIR 1961 SC 493 at p.512:

“Mr.Gopal Singh attempted to argue that before the final order was passed the Council of

Ministers had decided to accept the respondent's representation and to reinstate him, and that, according to him, the respondent seeks to prove by calling the two original orders. We are unable to understand this argument. Even if the Council of Ministers had provisionally decided to reinstate the respondent that would not prevent the Council from reconsidering the matter and coming to a contrary conclusion later on, until a final decision is reached by them and is communicated to the Rajpramukh in the form of advice and acted upon by him by issuing an order in that behalf to the respondent."

Thus it is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over against and, therefore, till its communication the order cannot be regarded as anything more than provisional in character.

(11) We are, therefore, of the opinion that the remarks or the order of the Revenue Minister, PEPSU are of no avail to the appellant."

37. The said decision was followed in the decision reported as (1996) 2 SCC 26 Gulabrao Keshavrao Patil & Ors. vs. State of Gujarat & Ors. in paras 6 and 7 whereof it was observed as under:-

"6. Under Article 163, the Council of Ministers with the Chief Minister at the head is to aid and advice the Governor in the exercise of his functions, except insofar as he is by or under the Constitution required to exercise his functions or any of them in his discretion. The Chief Minister should be appointed by the Governor and the other Ministers are appointed on his advice by the Governor. The Council of Ministers under Article 164 shall be collectively responsible to the Legislative Assembly of the State.

Under Article 167, the Chief Minister shall hold the duty to communicate to the Governor all decisions of the Council of Ministers relating to the administration of the affairs of the State and proposals for legislation etc. It would, thus, be clear that the Chief Minister holds the ultimate responsibility to the Governor and is accountable to the people of the State for the good governance of the State with the assistance of his Council of Ministers. The executive power of the State is carried on by the Governor with the aid and advice of the Council of Ministers, Chief Minister being the head. In other words, the Cabinet transacts the business of the State and it is discharged by its Chief Minister to whom business of the State on specified subjects are allocated for convenient transaction of the business of the Government.

7. Article 166(1) and (2) of the Constitution state thus:

“166. Conduct of business of the Governor of a State – (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.”

In other words, Article 166(1) and (2) expressly envisage authentication of all the executive actions and shall be expressed to be taken in the name of the Governor and shall be authenticated in such manner specified in the rules made by the Governor. Under Article 166(3), the Governor is authorized to make the rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business insofar as it is not business with respect to which the Governor is by or under the Constitution required to

act in his discretion. In other words, except in cases when the Government in his individual discretion exercises his constitutional functions, the other business of the Government is required to be conveniently transacted as per the Business Rules made by Article 166(3) of the Constitution. If the action of the Government and the order is duly authenticated as per Article 166(2) and the Business Rule 12, it is conclusive and irrebuttable presumption arises that decision was duly taken according to Rules. The letter of the Section Officer is not in conformity with Rule 12 and Article 166(1) and (2), though under Rule 13 he is one of the authorized officers to communicate the decision of the Government. In *Major E.G.Barsay v. State of Bombay* this Court held that if an order is issued in the name of the President and is duly authenticated in the manner prescribed in Article 77(2), there is an irrebuttable presumption that the order is made by the President. Whereby the order does not comply with the provisions of Article 77(2), it is open to the party to question the validity of the order on the ground that it was not an order made by the President and to prove that it was not made by the Central Government. Where the evidence establishes that the Dy.Secretary on behalf of the Central Government made the order a delegate, the order cannot be questioned. Therefore, it is necessary to show whether decision of the Government is according to Business Rules.”

38. Suffice would it be to note that pertaining to the States, the constitutional provision applicable is Article 166 of the Constitution of India and pertaining to the Union the applicable constitutional provision is Article 77 of the Constitution of India.

39. Thus, pertaining to the affairs of the Union, mere writings on the file in the Ministry of the Union do not amount to an order. Before the writing amounts to an order of the

Union, two things are necessary. Firstly, the order has to be expressed in the name of the President as contemplated by Article 77(1) of the Constitution of India and secondly requires to be communicated to the party concerned.

40. In both cases, admittedly, this has not happened. Thus, the appellant cannot pray for any mandamus as claimed in the two writ petitions. There is an additional reason to deny relief in WP(C) No.7251/1991 being that the decision dated 9.9.1996 disposing of WP(C) No.3185/1996 concludes the issue against the appellant and a belated administrative redressal sought two years thereafter could not resurrect a dead claim.

41. Before concluding we may note that the Chairman-cum-Managing Director of the appellant who appeared in person cited 57 decisions to us, which we do not note, much less deal with, for the reason the said decisions have no applicability in the instant appeals. We may briefly note that the decisions cited can be classified in three categories:- (i) Decisions which held that there is no express set formula of words in which decisions in the name of the Governor have to be communicated and that the substance and not the form of an order has to be considered. (ii) Requirement of granting a hearing to a party before an administrative decision is taken which affects a substantive right of a party. (iii) If the party

affected is a juristic person, in what manner right of hearing has to be granted. Needless to state, no such issue arises for consideration in the instant appeals. It is not a case where an order passed on behalf of the Union was communicated to the appellant. Thus, the decisions in category-I are wholly inapplicable. The decisions pertaining to grant of hearing and granting of hearing to a juristic person are also inapplicable for the reason none was required as no vested right of the appellant was affected when the Minister in charge of the Ministry of Urban Development reviewed the decisions on the file passed by his learned predecessor, which decisions had not been communicated ever to the appellant. We may note that the grievance of the appellant is that when the Minister concerned reviewed the earlier decisions he did not afford an opportunity of hearing to the appellant. We record that it is not a case of the subsequent Minister in charge of the Ministry of Urban Development reviewing the decisions of his predecessor in the strict sense of how review has to be understood. It is a case where consultative process was on. After the Hon'ble Minister of Urban Development penned his opinion, the files were further processed and other officers gave their comments. Needless to state, the issues raised had financial implications and thus the officials of the Ministry of

Finance had to be consulted. With reference to the legal issues which arose, opinion of the Ministry of Law & Justice had to be obtained. At no stage was any decision communicated to the appellant. Had one been communicated, we could have understood the concept of the decision being reviewed being applicable.

42. We find no merit in the appeals which are dismissed with costs quantified in sum of Rs.25,000/- each, to be shared by the respondents proportionately.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

October 20, 2009
Dharmender