

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **LPA No.332 of 2011**

% Reserved on: 14th May, 2012
Pronounced on: 1st June, 2012

UNION OF INDIA & ORS. ...Appellants
Through: Mr. A.S. Chandhiok, ASG with
Mr. Jatan Singh, Mr. Ritesh
Kumar, Mr. Piyush Sanghi, Mr.
Siddharth Tyagi, Mr. Tushar
Singh, Advs. for UOI

VERSUS

VIJAY MAM ...Respondent
Through: Mr. R.K. Handoo, Mr. Manish
Shukla, Mr. Aditya Chaudhary,
Advocates

AND

+ LPA 330/2011

UNION OF INDIA & ORS ... Appellant

versus

HL KOUL ... Respondent

+ LPA 331/2011

UNION OF INDIA & ORS ... Appellant

versus

YOGINDER SINGH JAMWAL ... Respondent

+	LPA 332/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	VIJAY MAM	... Respondent
+	LPA 334/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	BHUSHAN LAL RAINA	... Respondent
+	LPA 337/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	MAHARAJ KRISHEN BAZAZ	... Respondent
+	LPA 338/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	PHOOLA RAINA	... Respondent
+	LPA 340/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	MOTI LAL KOUL	... Respondent

+	LPA 341/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	ASHA MUKOO & ORS	... Respondent
+	LPA 344/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	KANTIYANI GANJOO	... Respondent
+	LPA 345/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	AK TRISAL	... Respondent
+	LPA 349/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	SN KAUL	... Respondent
+	LPA 353/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	MK TIKOO	... Respondent

+	LPA 333/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	TN OGRA	... Respondent
+	LPA 335/2011	
	UNION OF INDIAN & ORS	... Appellant
	versus	
	TS BALI	... Respondent
+	LPA 336/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	PL KAUL	... Respondent
+	LPA 339/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	CL MISRI	... Respondent
+	LPA 342/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	PK KOUL	... Respondent

+	LPA 343/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	ASHOK KUMAR GIGOO	... Respondent
+	LPA 350/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	TEJ KISHAN	... Respondent
+	LPA 351/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	M.S. DULLU	... Respondent
+	LPA 352/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	CHUNI LAL RAINA	... Respondent
+	LPA 419/2011	
	UNION OF INDIA & ORS	... Appellant
	versus	
	PN KACHROO	... Respondent

+ LPA 421/2011

UNION OF INDIA & ORS

... Appellant

versus

SN BHAT

... Respondent

+ LPA 422/2011

UNION OF INDIA & ORS

... Appellant

versus

BHUSHAN LAL TAKROO

... Respondent

Advocates who appeared in the case:

For the Appellants:

Mr. A.S. Chandhiok, ASG with Mr. Jatan Singh, Mr. Ritesh Kumar, Mr. Piyush Sanghi, Mr. Siddharth Tyagi, Advs. for the Appellant/UOI

For the Respondents:

Mr. B.L. Wali, Adv. for Respondents in LPA Nos. 334/2011, 338/2011, 340/2011, 341/2011

Mr. Manoj V. George, Mr. Alex Joseph, Mr. K. Gireesh Kumar, Ms. Shilpa M. George, Advocates for Respondents in LPA Nos. 345/2011, 419/2011, 421/2011, 422/2011

R.K. Handoo, Mr. Manish Shukla, Mr. Aditya Chaudhary, Advs. for Respondents in LPA No. 330/2011, 332/2011, 337/2011, 344/2011, 349/2011, 353/2011

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, Acting Chief Justice

1. All these appeals, 24 in number, arise out of a common judgment and order dated 30th November, 2010 passed by the learned Single Judge disposing of as many petitions. The said judgment is rendered in the writ petitions which were filed by the respondents herein. All these respondents are Kashmiri Pandits with their permanent residence in the State of Jammu and Kashmir. They were employees of the Central Government and most of them were posted in Kashmir. However, due to the turbulence in that State resulting in putting their lives in danger, they were transferred to Delhi. In fact, most of these respondents were representing the intelligence agencies, paramilitary and defence forces as well as the Government media and had become the prime target of militants. So much so, list of such persons who had to be targeted was published and circulated in the localities. Many family members and friends of such Government employees were killed and their properties destroyed for the message to permeate. It was in these conditions when the safety and security of these respondents and their families was in great jeopardy in Kashmir, that the Government/appellant decided to transfer them to Delhi on emergency basis in order to protect their lives.
2. On their transfer and posting in Delhi, they were provided Government accommodation. They had right to continue in the Government accommodation till the time of their retirement. All

of them have since retired. However, as the conditions prevailing in Kashmir are still not conducive enough to ensure safe return of these respondents back to their native places where they are having their own residences, they are forced to stay in Delhi. In Delhi they do not have their own houses. For this reason, these respondents want to continue in the Government houses allotted to them. Their submission is that under the circumstances when they are forced to leave Kashmir valley because of the inability on the part of the Government to protect their lives, liberty and property, that too when they have become the target of militants because of their job profiles serving the Government of India, it becomes solemn obligation of the Central Government to provide them suitable accommodation in Delhi after their retirement till the conditions improve in Kashmir enabling them to go back to their native places. The respondents had filed the writ petitions with prayer for suitable accommodation by the Central Government and till that is provided, allow them to continue in the Government houses occupied by them.

3. The learned Single Judge, in a detailed judgment expounding on various aspects of the issues with flavour of human and fundamental rights of these respondents, allowed the writ petitions in the following terms:

“(i) The impugned orders cancelling the allotment of the petitioners; the orders of eviction passed in the proceedings held against the petitioners under the Public Premises (Eviction of Unauthorised Occupants) Act and the appellate orders which are detailed in para 13 are hereby set aside and quashed.

(ii) A direction is issued to the respondents to make all endeavours to adequately, effectively and reasonably rehabilitate and resettle the petitioners, making provisions for appropriate accommodations for them.

(iii) Till such time, the respondents are able to provide alternative accommodation to the petitioner and his/or her family anywhere in Delhi, the petitioners shall be allowed to retain and occupy the allotted accommodation (also detailed in column no. 2 of para 13 above) subject to payment of normal license fees.

(iv) Each of the petitioners shall be entitled to costs of Rs.25,000/- which shall be paid within a period of six weeks from the date of passing the order.

These writ petitions are allowed in the above terms.”

4. The Union of India, feeling aggrieved by the aforesaid orders, has filed these intra-court appeals under clause 10 of Letters Patent questioning the wisdom, legality and justifiability of the said judgment culminating into the aforesaid reliefs which are granted in favour of the respondents.
5. Though we have recapitulated the issue in brief, in order to have an in-depth analysis of the issue, controversy involved and our determination, we are taking note of facts of one case in brief, i.e. LPA No.342/2011 entitled Union of India v. P.K. Koul.
 - (i) The respondent was a resident of Srinagar in J&K. Due to his services with Central Government, respondent was transferred to Delhi.
 - (ii) The respondent was employed under Union of India as DG, BSF, Delhi. He retired from services on 31st July, 2002.

- (iii) The respondent was allotted Government accommodation No. H-52, Sarojini Nagar, New Delhi while he was in service.
- (iv) On his superannuation from Government service with effect from 31st July, 2002, the allotment of the aforesaid accommodation was cancelled in his name w.e.f. 11th December, 2002 vide letter dated 27/28.08.2002. By the said letter, the respondent was directed to vacate the accommodation immediately and it was stated that in failure to vacate, action to evict him under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as 'the PP Act') will be taken.
- (v) On 24th March, 2003, respondent made a representation to the Directorate of Estates to permit him to retain his accommodation on payment of the existing normal license fee. Similar representation was also submitted to the Prime Minister of India.
- (vi) Directorate of Estates rejected the request of the respondent to retain the accommodation vide letter dated 20th February, 2003.
- (vii) Directorate of Estates referred the matter of the respondent to proceed under the PP Act.
- (viii) Directorate of Estates vide its eviction order dated 20th September, 2003 in respect of quarter No. H-52, Sarojini Nagar, New Delhi directed the respondent and all persons who are in occupation of the said premises to vacate within 15 days from the publication of the order.

- (ix) Respondent challenged the eviction order before this Court by filing CWP No.6551/2003 and this Court vide order dated 15th October, 2003 directed as under:
- “However in view of the special circumstances prevailing in Kashmir, the petitioner made a representation on 16.01.2003 to the respondents to permit him to continue to retain the present quarter. No order has been made on the said representation. At this stage, the only direction that can be given in this petition is that the respondent/UOI shall consider the question of regularization of allotment in favour of the petitioner in view of the special circumstances. The present petition including its enclosure should also be considered while disposing of the petitioners’ representation. The directions will not come in the way of any proceedings pending under the Public Premises Act, 1971. The decision in this regard should be taken by the UOI within 4 weeks from today.”
- (x) Eviction order was passed by the Estates Officer on 23rd September, 2003.
- (xi) Against the eviction order dated 23rd September, 2003, the respondent had filed an appeal before the Ld. ADJ which was dismissed vide its order dated 10th September, 2004.
- (xii) Writ petition filed challenging the order passed by the Estates Officer and ADJ and also seeking a direction to allow the respondent to retain the quarter till the Government makes it possible for him to return to

Srinagar or till a suitable accommodation is provided to him.

(xiii) Vide the impugned order dated 30th November, 2010, the writ petition was allowed. As pointed out above, the learned Single Judge has directed the appellants to allow the respondents to continue to retain and occupy till such time the appellants take adequate, effective, reasonable steps to rehabilitate and resettle the respondents by making provisions for appropriate accommodation for the respondents.

6. Mr. A.S. Chandhiok, learned Additional Solicitor General of India argued on behalf of the appellants. His submission was that all these cases pertain to proceedings under the PP Act. His argument was that the respondents were allotted Government quarters while in service and the service conditions categorically provided that they were entitled to retain those quarters only for their duration in service. Once they had retired from service on attaining the age of superannuation, their allotment was specifically cancelled and they became unauthorized occupants. Under these circumstances, when their continuation of public premises was unauthorized and illegal, it was permissible for the Estate Officer to initiate action under the provisions of the PP Act. The Estate Officer had passed the eviction order after following the due procedure, recording specific finding that they were unauthorized occupants which finding was unassailable. Appeals of the respondents against the order of the Estate

Officer were also dismissed. The learned ADJ while passing the orders recorded that no evidence was led by the respondents to prove that they were occupying the premises by virtue of any lease or licence issued in their favour by the Government of India. The respondents could not claim even before the writ court that they were not unauthorized occupants. It was submitted that in these circumstances, the limited scope of enquiry was as to whether these respondents had any right to retain the Government accommodation allotted to them while in service, after their retirement.

7. It was further argued that there is a marked difference and distinction between right to shelter and right to occupy Government accommodation. Right to shelter does not mean right to Government accommodation. Right to shelter may be a fundamental right under the Constitution but certainly no person has any right to retain Government accommodation under the purported right to shelter which is to be enforced under the provisions of the Constitution. As far as Government accommodation is concerned, it can only be provided as per rules and regulations framed therefor. In so far as right to Government accommodation is concerned, it extinguishes after the retirement of a Government servant. Mr. Chadhiok also argued that sympathy is not a ground to grant public premises for unauthorized use as held by this Court in ***Shri Ram Prakash Sharma v. Union of India***, 110 [2004] DLT 459, in the following words:

“Secondly, learned counsel for the petitioner contended that petitioner's gratuity was not released. Under the Rules, no claim certificate and gratuity need not be released, when petitioner is found to be holding on illegally to government accommodation. Be that as it may, the mere fact that the petitioner wanted to purchase a house and in the absence of release of gratuity, could not purchase the same and Therefore could not vacate the accommodation is hardly a tenable ground. Despite the fervent appeals for grant of further time, in my view this is not a case which should call for sympathy and indulgence from the Court. The tendency to retain unauthorizedly Government accommodation for extended periods of time like in the present case from 1st July, 1997, till date, deserves to be curbed. The judgment passed by learned Additional District Judge is a reasoned one dealing with the aspects and grounds raised. No ground is made out for interference in the exercise of writ jurisdiction.”

8. On that basis, it was argued that there is no enforceable right in favour of the respondents on the basis of which they were claiming to retain the Government accommodation. Mr.Chandhiok also sought to buttress his argument by relying upon the following passage from the judgment of ***Maheshchandra Trikamji Gujjar v. State of Maharashtra, (2000) 3 SCC 295***, wherein the Supreme Court has held as under:

“The deletion of the words 'allowed by the State Government to remain' from Clause (b) of Section 5(1 -A) by Ordinance dated 26th December, 1997 also does not alter the status of an occupant like respondent No. 3. The word 'allowed' in the aforesaid provision may mean some positive sanction and not mere slackness on the part of the Competent Authority in not taking action for getting the premises vacated. It is evident that the accommodation or possession of the premises within the meaning of Clause (b) by a person who when allotted was a Government

employee has to be on account of some right to occupy or possess the premises. The continued occupation or possession without any such right would not confer on the occupant status of a Government allottee simply on account of such person being in occupation or possession of requisitioned premises even after retirement. The reason for authorities not taking any action to get such premises vacated is explainable on account of the said premises being not available for allotment again to any existing Government servant. On this account, the authorities may not initiate any proceedings for getting the possession but that would not confer on the occupant the status of 'Government Allottee' within the meaning of the term as defined in the Amendment Act. Thus, assuming the Amendments to be valid, we find that no right in favour of respondent No. 3 to continue with the possession of the premises even after the invalidity of the order of requisition dated 17th April, 1958 and his retirement. Respondent No. 3 cannot be treated as deemed tenant."

9. He argued that this principle of law has been reiterated by the Supreme Court in ***State of UP v. UP Rajya Khanij Vikas Nigam Sangharsh Samiti***, (2008) 12 SCC 675 and ***Pramod Kumar v. UP Secondary Education Services Commission***, (2008) 7 SCC 153.
10. Learned ASG further argued that it was not proper to mix up the issue of the purported constitutional right to shelter of the respondents, if any, with the right to occupy Government accommodation. In so far as right to shelter is concerned, it is the duty of the State to look into the settlement of migrants and not the Union of India. He also highlighted the fact of rehabilitation measures taken up by the Central Government for rehabilitating the Kashmiri migrants who were affected due to

the violent conditions prevalent in the valley which includes a package of 1600 Crores announced by the Prime Minister of India. Reference was made to the measures and steps undertaken under the Rehabilitation Scheme of Prime Minister's Package which are filed in tabulated form as under:

1.	Number of such migrant employed as per the appointment order	2169
2.	Number of such migrant who joined	1441
3.	Transit accommodation allotted to such migrants	495 units construction was started. 335 completed and have been allotted to the above migrants (1441).
4.	200 Flats are completed in Badgaon and are in occupation of the above said employees (1441). 18 Flats are completed in Matan and occupied by the above said employees (1441).	
5.	Total number of migrants all over the country.	58697 Migrants in Jammu – 38119. Out of these 17248 are getting monthly rehabilitation allowance of Rs.5000/- p.m. Migrants in Delhi – 19338. Out of these, 3353 are getting monthly rehabilitation allowance of Rs.5000/- p.m. Total number of migrants getting the monthly rehabilitation allowance is 20601.

		Total number of migrants in Union Territories and other States – 1240.
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11. Learned ASG also submitted that this aspect of shelter was considered by the Supreme Court in the case of ***J.L. Koul v. State of J&K, (2010) 1 SCC 371***, wherein it has held as under:

“During this period of 12 years this case remained pending and the Court had been insisting upon the State to frame the scheme of rehabilitation of the appellants and particularly for providing them accommodation. When the matter was heard on 29.4.2008, the State authorities were given time to prepare the rehabilitation scheme. But no steps were taken by the respondent-State. This Court vide order dated 3.12.2008 directed the respondent-State to frame the rehabilitation scheme within a period of six months and place it before the Court. As no material/scheme could be placed by the respondent-State before this Court, this Court vide order dated 17.9.2009 directed the Chief Secretary of the State to file his personal affidavit as to what steps had been taken in pursuance of the orders passed by this Court on 29.4.2008 and 3.12.2008.”

12. He pointed out that in pursuance of the said order, the Chief Secretary has filed the affidavit dated 6.10.2009. In the said affidavit, it has been disclosed that out of 54 respondents, 23 had already handed over the Government accommodation to the State Department and the same had been allotted to the Government employees. Only 31 migrants/retirees are presently in occupation of the Government accommodation. It has further been clarified that there are 37,280 families who have been registered for the relief including the accommodation and out of

them only 5000 families could be provided the accommodation in the camps. However, it had been undertaken that the Government would provide such facilities to all Kashmiri migrants till they are residing at the present places.

13. According to the learned ASG, if the impugned judgment is allowed to stand, then it would set a wrong precedent in law as the Government servant belonging to various places in India where insurgency, naxalite movement, terrorism, affected areas, are working in Delhi as Delhi being the seat of the Union and every such person after retirement would claim that there is no normalcy in the State they belong and as such, after retirement they would also be permitted to retain the Government accommodation which was allotted to them by virtue of them being the Government servants.
14. Learned ASG, at the end, made the following submissions with an attempt to find fault with the approach of the learned Single Judge in the impugned judgment:
 - (a) Reliance placed by the learned Single Judge on the judgment of Supreme Court in the case of ***J.L. Koul*** (supra) was not correct as the said judgment was rendered in case where the retired employees were of the State Government and not of the Central Government. Further in that case, petitioners had to flee from Srinagar to Jammu in view of terrorist activities and threats to their lives whereas in the instant cases, respondents were in the service of the Central

Government and were provided accommodation in Delhi because of that reason.

- (b) Learned Single Judge failed to appreciate that the courts while exercising the powers of judicial review under Article 226 of the Constitution do not sit in appeal over the decision of the executive or administrative bodies and can interfere only in the matters where the exercise of discretion is perverse or illegal and that there is a fault in the decision making of the administrative body.
- (c) Moreover, all the respondents herein are getting the pensionary benefits from Central Government and at the age of the respondents, it cannot be claimed by them that they are the only bread earners in the family and therefore cannot afford to rent a house for accommodation purpose.
- (d) Furthermore, in LPA No.341/2011 (Union of India v. Smt. Asha Mukoo & Ors.), it is pertinent to note that the respondent/allottee had died on 5.4.2008, i.e. during the pendency of the writ petition before the Learned Single Judge. In this regard, it was submitted that there is no law which permits inheritance of a license in favour of LRs of the deceased. The license is only upto the services of the allottee and once the said arrangement was over, there is no question of the Government accommodation being retained by the LRs of the said person.
- (e) The learned Single Judge has relied upon the judgment in the case of ***Hussainara Khatoon (III) v. Home Secretary, State of Bihar, (1980) 1 SCC 93***. However, the said

judgment only talks about the protective custody of women prisoners who are in jail without even being accused of any offence, merely because they happen to be victims of an offence or they are required for the purpose of giving evidence or they are in 'protective custody'. Whereas in the present case, the respondents are the migrated Kashmiris, who have come to Delhi during their course of employment with Central Government.

- (f) Likewise, reliance upon the judgment in the case of National *Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742, is misplaced as the said judgment is not applicable on the present case as in the case of Chakma Refugees they were not withholding Government accommodation and they were forcibly evicted from their homes.
15. Learned counsels appearing for the respondents made strong and passionate submissions with forceful vehemence, joining issue on each and every aspect argued by the learned ASG. They highlighted the dismal law and order situation which prevails in Kashmir even today in so far as it relates to return of the respondents. So far as rehabilitation of Kashmiri pundits back in the said valley is concerned, it was argued that there is no improvement at all. Learned counsels also highlighted the circumstances under which all these respondents were transferred to Delhi while in Central Government service. It was argued that they have no intention to continue to reside in Delhi

and would have loved to go back to their State, considered as paradise on the earth. However when the Government has miserably failed to create conditions favourable for their safe return back to the valley which is the obligation of the State, it becomes the solemn duty of the Government to provide shelter to these persons viz., ex employees of the Government. It was argued that the respondents wanted to enforce their right to shelter only till the time conditions are conducive for their safe return to their homes. Since appellants were failing to discharge this duty of theirs, the respondents have right to continue in the Government accommodation till the time alternative accommodation is provided and that is the only direction given by the learned Single Judge which is flawless and without blemish. Learned counsels also referred to various decisions of the Supreme Court where the Supreme Court had held that it was the duty of the appellant to provide shelters as welfare State. Learned counsels also extensively referred to the discussion contained in the impugned judgment submitting that a holistic, humanitarian and a just view, in consonance with constitutional spirit, was taken by the learned Single Judge and there was no reason to interfere with the same. We have taken note of the submissions of the counsels for the appellant in brief and referred to the same in detail while dealing with the arguments advanced on behalf of the appellants.

16. No doubt the matter raises certain fundamental issues. It is a mix of constitutional rights of the respondents on the one hand and the right of the Government to claim back the possession of

the accommodation after their retirement. It is also necessary to make a preliminary remark that the issue has arisen in exceptional circumstances and exceptional circumstances call for exceptional remedies. The underlined objective has to be to dispense justice, of course, justice in accordance with law, but at the same time justice pragmatic with mercy and compassion, wherever it is possible within the parameters of law and without doing violence to the legal principles.

17. The simplistic overtures, as perceived by the appellants taking it to be simple cases under PP Act, has to be denounced. The Court cannot countenance trivialization of the issue as sought to be projected. This matter definitely has strong hue of human rights. The approach of learned Single Judge in examining the matter from that angle is definitely reasonable, just and proper. The said approach is adopted with the purpose of doing justice in the broader sense of the matter keeping aside narrow and pedantic approach. Situations may arise when, to do complete justice in the matter, courts have to ignore the technicalities of law.
18. We have already noted above the circumstances in which services of the respondents were transferred from the Government establishments situated in Srinagar to New Delhi with primary objective of saving their lives. Most of these respondents have lost their residences in Srinagar. All of them have lost their hopes of returning back in near future. In a case like this, as stated in detail at a later stage, it becomes the duty of

the State to take care of their residential needs by providing adequate shelter. Correspondingly, it becomes the right of the respondents to claim that shelter. Throwing out these respondents from the Government accommodation they are occupying without providing alternate shelter would amount to gross violation of their fundamental rights under Article 14 and 21 of the Constitution. The entire matter, therefore, has to be dealt with by adopting an approach which is justice oriented.

19. Imparting justice has to be the prime consideration. With the growing complexity of social relations, new types of problems would come in the courts. There may not be perfect precedent to follow. If following an old principle yields wrong results or leads injustice, occasion would be ripe to formulate new principle. New situation demand new solutions. By treading the beaten path, one may not reach the goal. The goal is to do justice. In such situations social engineering has to be the guiding factor. It would be opportune to quote from the book **"The Nature of the Judicial Process"** which is a compilation of the Storrs lectures delivered by **Benjamin N. Cardozo** at Yale University. Quoting various eminent Jurists, Cardozo makes the following remarks:

"It is true, I think, today in every department of the law that the social value of a rule has become a test of growing power and importance. This truth is powerfully driven home to the lawyers of this country in the writings of Dean Pound. "Perhaps the most significant advance in the modern science of law is the change from the analytical to the functional attitude"(Refer :Pound, "Administrative Application of Legal Standards" Proceedings American Bar Association, 1919, pp. 441,

449). *"The emphasis has changed from the content of the precept and the existence of the remedy to the effect of the precept in action and the availability and efficiency of the remedy to attain the ends for which the precept was devised. (Refer: p.451, of. Pound, "Mechanical Jurisprudence, "Columbia L.R. 603. Foreign Jurists have the same thought: "The whole of the judicial function," says Gmelin, (Refer: Sociological method," trnasl., 9, Modern Legal philosophy Series, P. 131.) "has... been shifted. The will of the State expressed in decision and judgment is to bring about a just determination by means of the subjective sense of justice inherent in the judge, guided by an effective weighing of the interests of the parties in the light of the opinions generally prevailing among the community regarding transactions like those in question. The determination should under all circumstances be in harmony with the requirements of good faith in business intercourse and the needs of practical life, unless a positive statute prevents it; and in weighing conflicting interests, the interest that is better founded in reason and more worthy of protection should be helped to achieve victory."(Refer: Gmelin, supra; of. Ehrlich, "Die juristische Logik," p. 187; Duguit, "Les Transformations due profit deputies le Code Napoleon, "transl., Continental Lega Hist. Series, Vol.XI pp. 72, 70.) "On the other hand, "says Geny, (Refer :Op.cit., Vol II, p.92 Section 159) "We are to interrogate reason and conscience, to discover in our inmost nature, the very basis of justice; on the other, we are to address ourselves to social phenomena, to ascertain the laws of their harmony and the principles of order which they exact." And again: (Refer: Vol. II, p.91) "Justice and general utility, such will be the two objectives that will direct our course."*

20. It may also be added that one has to be more liberal while dealing with the procedural aspects of the case. In the field of procedure, major changes have been witnessed over a period of

time. The tendency today is in the direction of a growing liberalism. Cardozo in the aforesaid lectures, taking note of this tendency has also stated:

"The new spirit has made its way gradually; and its progress, unnoticed step by step, is visible in retrospect as we look back upon the distance traversed. The old forms remain, but they are filled with a new content. We are getting away from what Enrich calls "die spielerische und die mathematische Entscheidung" (Refer: Enrich, "Die juristische Logik," p.295; cf. pp.294, 296). The conception of a lawsuit either as a mathematical problem or as a sportsman's game. Our own Wigmore has done much to make that conception out of date. (Refer: Treatise on Evidence). We are thinking of the end which the law serves, and fitting its rules to the task of service."

21. We must adopt an active posture and view in a larger perspective the functionalism of legal humanism. If the situation demands adoption of a broad principle to meet the ends of justice, the court should not feel shy in adopting the same. 'The history of law is the history of the effort to mould legal institutions and doctrines to meet the felt necessities of each period in the Nation's development'. Access to justice is the demand of the day. The problem of access to justice has many dimensions. What is crucial is that people should be the participants and beneficiaries in the administration of justice. The Supreme Court has already given new dimensions to the access jurisprudence in expanding the principle of locus standi which led to the introduction of public interest litigation in this country.

Cappelletti clarified his view on the crucial aspect of access to court in the Administration of Justice thus:

"The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement-the most basic 'human right'-of a system which purports to guarantee of legal rights. (Australian law Reform Commission, Discussion Paper No.4, p.3)."

22. Though these cases triggered because of the action taken by the Estate Officer under the PP Act and appeals were also filed challenging the orders passed by the Estate Officer, however, we have to be mindful of the fact that while challenging the orders of the appellate authority, the respondents filed writ petitions under Articles 226 and 227 of the Constitution of India wherein it was permissible for them to not only challenge the order of the first appellate court but demand their constitutional rights as well. That precisely was the prayer in the writ petitions filed by these respondents and, therefore, learned Single Judge was perfectly justified in looking into the constitutional aspects.
23. Once we are able to find the way that too within the existing norms, of course, by giving it a new meaning, and more so when it advances the justicing process, there should not be any difficulty in adopting the same. Afterall it has also to be seen in

the present case that it is not in the nature of adversary litigation any longer.

24. When we examine the issue keeping in view the aforesaid parameters, we are constrained to observe that the entire attempt of the appellants is to trivialize the whole issue. We have taken note of the facts in the case of Mr. P.K. Koul (LPA No.342/2011) (position is same in other cases, rather worse in some of these cases). The facts cry out eloquently and vociferously that the respondents and their families, who are permanent residents of the State of J&K, did not leave their home State voluntarily. They were driven out of Srinagar valley. Their household goods were looted and the house was burnt by the terrorists. Apart from one residence in Srinagar destroyed by militants, this respondent - P.K. Koul does not own any other property anywhere in the country. His house lies in a desolate state which needs total reconstruction. State has not taken any action to construct. The atmosphere and the condition are not peaceful and conducive enough for him to go back and construct his house or to stay in his house. In fact the appellant cannot even dare dispute this harsh reality that it is not safe for the respondent to go back Srinagar valley and stay there whether in his own house or even by taking accommodation on rent.
25. Mr. Koul, at the relevant time, was working as Director General, BSF. Being in Central Government service and that too of the aforesaid nature, he had become the prime target of terrorists attack. His name was on the hit list which was

displayed/circulated by the militants. The appellants themselves realized this sad but harsh reality/fact and decided to move the respondent to the safe place. Being in Government service, he was transferred to Delhi. All other respondents are identically circumscribed. This exodus took place overnight when the entire community of Kashmiri Pandits were despatched to different places outside the Srinagar valley. The respondents herein landed in Delhi which was again a decision of the appellants for their posting in this city. Though other Kashmiris, not in Government service, who were settled at different places were given the doles, no such facilities were extended to the respondents, presumably because of the reason that they were Government employees and were provided Government accommodation. It is also not disputed that because of the sensitive nature of duty of these respondents which they continued to do even after their transfer to Delhi, threats kept looming over their heads. They were even provided personal security by the State. There were attempts on their lives at the hands of militants on some of them even after their posting in Delhi. The respondents are clamouring for their return, however, conditions are not right for this. Even the appellants do not dispute that these respondents are not in a position to go back to their place of origin. The respondents are thus refugees in their own country though legally they are not entitled to refugee status. In such a scenario, particularly qua these respondents (erstwhile Central Government employees), duty of the State to provide shelter with corresponding right of the

respondents to claim that shelter cannot be disputed. Even the appellants tacitly, nay, explicitly admit the same.

26. The learned Single Judge has embarked upon detailed discussion on the right to shelter to these respondents . The matter is examined from various angles, namely,
 - a. Constitutional guarantees under Article 19(1)(e) and Article 21 which, inter alia, includes right to shelter. Here, number of judgments of the Supreme Court are cited which guarantee such a fundamental right.
 - b. International Perspective – conventions; norms; guiding principles and their applicability to the present case. Here, the learned Single Judge has referred to Universal Declaration of Human Rights, 1948; International Convention on the Elimination of all forms of Racial Discrimination, 1965; International Covenant on Economic, Social and Cultural Rights; Declaration of Social Progress and Development, 1969; Vancouver Declaration of Human Settlements, 1976; Vancouver Declaration; Declaration on the Right to Development, 1986; International Year of the Homeless in 1987; Commission on Economic, Social and Cultural Rights; and Report of the Special Rapporteur on Adequate Housing.
 - c. UN Committee on Economic, Social and Cultural Rights; Report of May, 2008 wherein in its concluding observations on India, it called upon the Indian Government, particularly to address the issue of rising homelessness. Extensively quoting therefrom, it is observed that right to shelter as a

basic human right, essential for survival is recognized. It is apt to quote the following concluding remarks from the impugned judgment:

“34. The above narration shows that homelessness may result from several causes including natural disasters; development projects, economic deprivation as well as human rights violations. International law terms persons who stand displaced from their countries as “refugees” and recognizes that they are entitled to protection from being returned to places where their lives or freedom could be threatened.

*35. At the same time there are growing instances internationally of persons and even communities who are compelled to abandon homes on account of threat of imminent violence or stand forcibly evicted by use of violence and compelled to relocate to other places even within their own country. They cannot return to their homes within the boundaries of their own countries in the face of the continuing threat of persecution and danger to their properties. Such persons cannot be termed as “refugees” as described by learned counsels for the petitioners. In international parlance, persons compelled to relocate within the boundaries of their own countries stand categorised as “**Internally Displaced Persons**” (abbreviated as “**IDP**”s hereafter).*

36. The present petitioners along with several other families, have been compelled to relocate within India and would therefore fall under the category of such internally displaced persons ('IDPs') who have received either insufficient or no protection by the State, from or during their persecution.”

- d. In the process, reference is made to the “Guiding Principles on Internal Displacement presented to UNCHR by the Secretary General of United Nations in 1998” in the following manner:

*“39. In this regard, a guiding document has been framed by Francis Denge, the representative of the Secretary General of the United Nations on Internal Displaced Persons, in 1998 which is titled as **“Guiding Principles on Internal Displacement”** which was presented to the UNCHR. The Commission in a unanimously adopted resolution took note of these principles which address the specific needs of internally displaced persons worldwide and identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration. The introduction to these Guidelines defines “Internally Displaced Persons” (IDP’s) in Clause 2 as follows :-*

“2. For the purposes of these principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognized State border.”

40. So far as housing of IDPs is concerned, these guidelines contain the following important provisions:-

“Principle 3

1. National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.

2. Internally displaced persons have the right to request and to receive protection and humanitarian assistance from these authorities. They shall not be persecuted or punished for making such a request.

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Principle 7

Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternative exist, all measures shall be taken to minimize displacement and its adverse effects.

2. The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety nutrition, health and hygiene, and that members of the same family are not separated.

3. If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with:

(a)A specific decision shall be taken by a State authority empowered by law to order such measures;

(b)Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;

(c)The free and informed consent of those to be displaced shall be sought;

(d)The authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation;

(e)Law enforcement measures, where required, shall be carried out by competent legal authorities; and

(f)The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.

Principle 8

Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected.

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Principle 14

1. Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.

2. In particular, internally displaced persons have the right to move freely in and out of camps or other settlements.

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Principle 15

Internally displaced persons have:

(a)The right to seek safety in another part of the country;

(b)The right to leave their country;

(c) The right to seek asylum in another country; and

(d) The right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

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Principle 18

1. All internally displaced persons have the right to an adequate standard of living;

2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:

(a) Essential food and potable water;

(b) Basic shelter and housing;

(c) Appropriate clothing; and

(d) Essential medical services and sanitation.

3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.

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Principle 21

1. No one shall be arbitrarily deprived of property and possessions.

2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:

(a) Pillage;

(b) Direct or indiscriminate attacks or other acts of violence;

(c) Being used to shield military operations or objectives;

(d) Being made the object of reprisal; and

(e) Being destroyed or appropriated as a form of collective punishment.

3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.

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Principle 25

1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.

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Section V. Principles relating to return, resettlement and reintegration.

Principle 28

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety, and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.

2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

Principal 29

1. Internally displaced persons who have returned to their homes or places of habitual residence or *who*

have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.

2. Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.”

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51. It is noteworthy that there is no specific law, rule, regulation or instrument providing for treatment of IDPs or setting out any minimum standards for their protection, rehabilitation and relocation. The Guiding Principles on Internal Displacement reiterate the very right to shelter constitutionally guaranteed and recognized as a basic human right in the international instruments. These Guidelines thus consolidate and fill gaps in national and international law relating to such displaced persons. They also provide a valuable benchmark for what must be ensured as part of the basic human rights security of such persons and would guide consideration of the rights of the present petitioners.

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54. The petitioners are members of the larger group from their community which stands forcibly evicted from one part of the country rendering them homeless and resourceless. They are without resources at the place of their relocation and are faced with the threat of forcible eviction from their accommodation. By way of these writ

petitions, the petitioners seek protection and enforcement of their fundamental right to life which includes shelter. The international conventions recognise shelter as a basic human right. The Guiding Principles reiterate the same rights and responsibilities of the state so far as IDPs are concerned. Consideration of the petitioners' rights, therefore, would necessarily involve ensuring the objectives and declarations made in the above international instruments especially those endorsed by India reiterated by the Guiding Principles for IDPs."

- e. The Protection of Human Rights Act, 1993, Section 2(1)(d) whereof defines 'Human Rights' as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India.
- f. Binding Judicial Precedents are noted, particularly the judgment of Supreme Court in **SLP(C) No.7639/1999 titled *Shri J.L. Koul & Anr. v. State of Jammu & Kashmir & Ors.*** In that case, Shri J.L. Koul & the other petitioners were Kashmiri pandits who were employees of the State Government and being State Government servants, had been allotted residential accommodations in Jammu between 1989-90. Their houses in the valley were either destroyed or burnt down by militants. Even though they had retired from service, these petitioners were permitted to retain the Government accommodations in Jammu for safety reasons. Such a step was considered necessary and inevitable by the State Government as the atmosphere was not congenial for the appellants to return to the valley, more so when they had lost their respective houses. It appears that other state

Government employees awaiting allotment of official accommodation, could not get the same for the reason that these retired persons continued to occupy the official accommodation. They filed a writ petition before the High Court of Jammu and Kashmir complaining against the failure of the State Government to provide them with official accommodation. A learned Single Judge of the High Court of Jammu & Kashmir had allowed the writ petition and passed a judgment on 24th January, 1997 directing eviction of all those persons who had ceased to be Government servants for any reason but were still occupying the state accommodation. The learned Single Judge had also directed that the persons who were not in Government service but required Government accommodation because of security reasons, should be tried to be accommodated within one complex so that their security is ensured, reducing the burden on the State which would have to incur lesser amount for their security.

- g. For the reason that the State Government was attempting to evict these occupants without providing them with alternative accommodations, a challenge was laid to the judgment of the Single Judge dated the 24th of January, 1997 by a letters patent appeal. This appeal was dismissed by the Division Bench by a judgment dated 14th March, 1997, however, giving an opportunity to the appellants to approach the appropriate authority for relief. In this background, these persons led by Shri J.L. Koul, filed the above special leave

petition before the Supreme Court. On a consideration of the matter, an interim order dated 11th April, 1997 was passed by the court directing the state Government to maintain status quo regarding the possession of the property.

27. Various orders were passed from time to time thereafter. Ultimately, vide order dated 3rd December, 2008, State Government was directed to frame a rehabilitation scheme within a period of six months and to place the same before the Court. Finally, the appeal was disposed of on 27th October, 2009 giving various directions as to how these Kashmiris are to be given protection by the State and are to be provided shelter and expressing hope that the State shall take all endeavours to rehabilitate the persons who have been victim of terrorism and “till the State is able to rehabilitate and provide the appropriate accommodation to 31 appellants – reitrees/oustees, they shall continue to possess the accommodations which are in their respective possession on this date”.
28. We are in agreement with the learned Single Judge that the principle of law laid down in that case coupled with spirit behind that order applies to the present case as well with only difference that in that case, direction was given to the State Government (because of the reason that those persons were the ex employees of the State Government) whereas in the present case, it is to the Central Government as these respondents have retired from the services of the Central Government. Number of other judgments including *P.K. Handoo v. Estate Officer*, 132 [2006] DLT 672

are referred to which relate to the providing of accommodation to these Kashmiri Pandits in identical circumstances. In *P.K. Handoo* (supra), this Court had drawn sustenance from the judgment of the Supreme Court in *J.L. Koul* (supra).

29. We do not find any merit in the distinction sought to be drawn between the duty of the State to provide shelter whereas the accommodations in occupation of the respondents belong to Government. This distinction between the State and the Government is illusory in the instant case. No doubt, Government is different from State. State has three wings, namely, Parliament, Judiciary and the Executive. Here, it is the executive wing of the State, namely, the Government which has the duty to provide the shelter.
30. Going by all these considerations, we do not find any fault with the directions given by the learned Single Judge in the impugned judgment. However, we make it clear that these direction are given keeping in view the salient and peculiar facts of these cases and, therefore, cannot be treated as general directions in all types of cases pertaining to right to shelter. Directions are circumscribed by the following peculiar features of the instant case:
 - (i) All these respondents were the employees of Central Government who were posted in Srinagar, J&K at the relevant time.
 - (ii) Because of the turbulent conditions and turmoil in the valley coupled with the fact that lives of these respondents

and their family members were in gross danger, the Government itself took the decision to transfer them from Srinagar to Delhi. While in Delhi, they were allotted the Government accommodation.

- (iii) These respondents have their houses in Kashmir which have been destroyed by the extremists and they have not been able to reconstruct/restore them.
- (iv) These respondents or their families have no other residence in any part of the country.
- (v) Though they have retired, they are not in a position to go back to their native place because conditions are still not favourable for their safe return back to the valley.
- (vi) Respondents want to enforce their right to shelter only till such time conditions are conducive for their safe return to their homes or till the time Government provides alternate accommodation.

31. We also make it clear that the Central Government would be free to frame a rehabilitation scheme specifically for such retired employees like the respondents and in such a scheme, it can specify the terms and conditions on which such persons would be entitled to rehabilitate/alternate residence, which may include the term that these respondents or their family members do not have any residence in any part of the country. It would also be open to the Government to specify the nature of accommodation to which such retired Government servants would be entitled to or the place where they would be rehabilitated which may not necessarily be in Delhi but can be even in the NCR region.

After the scheme is framed, the cases of the respondents can be scrutinized in terms of that scheme and those not found eligible for rehabilitation in terms thereof can be ousted from the present accommodation.

32. Subject to our observations made immediately above, the appeals are hereby dismissed with costs.

ACTING CHIEF JUSTICE

**(RAJIV SAHAI ENDLAW)
JUDGE**

JUNE 01, 2012
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