***THE HONOURABLE SRI JUSTICE NOOTY RAMAMOHANA RAO**

+W.P. No.13599 of 2009

%18-09-2009

#Lakdev Ashok

….petitioner

Vs.

$ Government of A.P., rep. By its Principal Secretary (Revenue Vigillance-VII) Department an another.

…. Respondents

!Counsel for the Appellants: Sri P. Narasimha Rao

Counsel for the Respondents: G.P. for Revenue

<Gist :

>Head Note:

? Cases referred:

1. (2008) 1 SCC (L&S) 611
2. 1997(3) Supreme 147 : AIR 1997 SC 1125
3. (1996) 4 SCC 17
4. AIR 1995 SC 1364
5. 1995(2) SCC 513
6. 2001 AIR SCW 3339
7. 1997(5) Scale 660
8. AIR 1995 SC 1364

THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO

WP No. 13599 of 2009

ORDER:

This writ petition has been instituted seeking a declaration that the dismissal from service of the writ petitioner ordered by the State Government through their G.O.Ms. No. 575, dated 8.6.2009 as illegal.

The writ petitioner was working as Mandal Revenue Inspector at the relevant point of time. The Inspector of Police, Anti Corruption Bureau, Sanga Reddy, Nizamabad Range, has filed charge sheet against the writ petitioner on the file of the Principal Special Judge for SPE & ACB Cases, Hyderabad, alleging the commission of offences under Sections 7 & 13(1)(d) r/w Section 13(2) of The Prevention of Corruption Act, 1988 by the petitioner. It is alleged that the original complainant approached the writ petitioner with a request to enter his name and the names of his brothers in the pahanis and in the `record of rights' based upon certain orders passed by the civil court. For discharging this official act, the writ petitioner was alleged to have demanded a sum of Rs.18,000/- as illegal gratification. Since the complainant was not willing to pay for this illegal gratification, he lodged a complaint with the Anti Corruption Bureau on 7.2.2002. Accordingly, a trap has been laid by the ACB and when the writ petitioner has demanded and accepted a sum of Rs.10,000/- as part of illegal gratification, on 8.2.2002, he has been apprehended. Apart from recovering the illegal gratification from his possession, the phenolphthalein test conducted on the fingers of his both hands yielded a positive result. Hence, the writ petitioner has been proceeded against in CC No. 17 of 2003 before the

Principal Special Judge for SPE & ACB Cases, Hyderabad. After a full-fledged trial in the matter, by the judgment and order dated 6.3.2009, the writ petitioner has been convicted, of the charges framed against him under Section 248(2) of the Criminal Procedure Code. The writ petitioner was sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.5,000/-, in default of payment, he was ordered to undergo Rigorous Imprisonment for a period of one month. The writ petitioner has carried the matter by way of Criminal Appeal No. 287 of 2009 to this court. A Misc. Petition was moved therein seeking suspension of the execution of sentence passed by the Principal Special Judge for SPE & ACB Cases, Hyderabad on 6.3.2009 in CC No. 17 of 2003. Entertaining the said Crl Misc. Petition, this court was pleased to pass an order on 18.3.2009 to the following effect:

> "The sentence of imprisonment imposed on the petitioner alone is suspended on the same terms as ordered by the trial court."

Coming to know of the conviction handed down by the criminal court, the State Government examined the matter and considered that the conduct of the writ petitioner which led to such a conviction was such that his further continuation in public service was undesirable and consequently orders were passed through G.O. Ms. No. 575, Revenue (Vigilance VII) Department, dated 8.6.2009 dismissing the writ petitioner from service with immediate effect, exercising the power available under clause (X) of Rule 9 read with sub-rule (2) of Rule 35 of the Andhra Pradesh Civil Service (Classification, Control and Appeal) Rules, 1991. It is this order, which came to be challenged by the writ petitioner in this writ petition.

I have heard Sri P.Narasimha Rao, learned counsel for the

petitioner. Learned counsel would submit that the conviction handed down by the criminal court in CC No. 17 of 2003 has not attained finality and in fact an appeal preferred by the writ petitioner against the same was admitted and it is pending in this court and this court has already suspended the execution of the sentence imposed by the criminal court and therefore the State Government is not at all justified in proceeding against the writ petitioner and passing the impugned order of imposing the punishment of dismissal from service. According to the learned counsel, any prudent administration would have waited for the criminal appeal preferred by the writ petitioner to be decided by this court, instead of proceeding in haste to dismiss a public servant. A careful watch on the conduct and performance of duties of an employee, contends the learned counsel, would be a sufficient safeguard against any possible recurrence of unbecoming conduct by such employees. According to the learned counsel, the judgment and conviction handed down by the criminal court before it has attained finality, is not liable to be acted upon at all as the appellate court is entitled to reverse such a conviction, both on fact and law, if it is satisfied that such a conviction is not justifiable. Further, learned counsel would urge that the proportionality of punishment which is needed to be imposed upon an employee convicted of a criminal offence is needed to be weighed properly and carefully and the parameters in that regard have been laid down by the Supreme Court in the judgment rendered by it in **State of Madhya Pradesh v. Hazarilal**[1]**.** Contrary to the principles set out therein, the State Government has passed the impugned order and hence it warrants interference. Further, the learned counsel would urge that Section 28 of the Administrative Tribunals Act, 1985, which has ousted the jurisdiction of this court to entertain service disputes, is not an absolute bar for this court to entertain the above writ

petition inasmuch as the power of judicial review available to this court cannot be taken away by any legislation. Further, the Administrative Tribunals Act has proceeded upon a misconception that power of judicial review is available exclusively only to the Supreme Court and that such a power is not available to this court. This apart, the judgment rendered by the Supreme Court in **L.Chandra Kumar v. Union of India**[2] has also recognised the power of this court to entertain the writ petitions relating to and touching upon the service disputes of the government employees. Further, the learned counsel would urge that there is a difference of opinion between the judgments rendered by two different Division Benches of this court on the issue relating to the power of the State to proceed against a person convicted of an offence involving moral turpitude and such a difference of opinion is incapable of being resolved by the Andhra Pradesh Administrative Tribunal and hence it is only proper that this writ petition should be entertained by this court.

The following questions fall for consideration in this writ petition.

(1) Whether the conviction handed down by a competent criminal court against which an appeal is pending can form reasonable basis for an action to be taken by the State or not?

(2) What is the effect of suspending the execution of sentence during the pendency of the criminal appeal, in contrast to suspension of the conviction handed down by the criminal court?

(3) Whether this court has got power to entertain, at the very first instance, a writ petition wherein a serious dispute exists relating to the interpretation of the conditions of service of a public servant?

A civil servant of the Union or the State holds his office during the pleasure

of the President or the Governor, as the case may be. Consequently every civil servant is required to maintain and exhibit certain standard of conduct. What constitutes the good conduct required to be exhibited at all times by such civil servants, has, with varying degrees of precision, been codified and notified as Conduct Rules governing the service concerned. It is therefore imperative that a civil servant, being a servant of the State 24 hours a day and 365 days a year, is liable to maintain and bear all through good moral conduct. He has to set an example for the larger society to emulate him. The State, functions through the various human agencies and resources available at its disposal in the form of various classes of civil servants. Therefore, the State has considered it appropriate to retain such personnel on its rolls so long as they bear the good and decent conduct. Any person holding a civil post or a member of a civil service, if suspected of not bearing the requisite moral conduct, even when he is not physically rendering any services to the State, say beyond the normal office hours or on public holidays or when he is on approved leave of absence, he is still liable to be proceeded against for not bearing the requisite standards of conduct. It does not lie in the mouth of a civil servant to plead that his conduct is in no way directly relevant for discharge of the functions to the State. Therefore, the State Government is perfectly legitimate and justified in its expectation that persons who do not bear the requisite moral conduct are liable to be dealt with appropriately. In fact, it is this philosophy, which is enshrined under Clause (a) of the Second Proviso to Article 311(2) of our Constitution when it has been set out that a person who has been convicted of a criminal charge, obviously involving moral turpitude, need not be continued in service and he can be dismissed or removed from service on the ground of his conduct that led to such a conviction. In such situations the protection, which is otherwise

available under Article 311(2) will not be available. It is for the competent authority to decide which of the 3 major punishments is called for, proportionate to the gravity of offence held established by a civil servant. It will be appropriate to notice that it is not the conviction of every offence that can act as a catalyst for the State to swing into operation. Hence, conviction handed down for minor offences or offences not involving moral turpitude, is not liable to be taken note of or into consideration. The civil servant who is convicted of an offence involving moral turpitude alone is liable to be proceeded against. The question relating to what class of offences constitute moral turpitude and which others do not attract the elements of moral turpitude has been considered and appropriately dealt with by the Supreme Court in **Pawan Kumar v. State of Haryana**[3]. In the said judgment, the Supreme Court held as under:

> "…. Thereafter the opinion of the District Attorney, Bhiwani was sought. He opined that the offence punishable under Section 294 IPC was not a serious offence which could involve moral turpitude and the sentence of fine of Rs. 20 imposed on the appellant was not likely to embarrass him in the discharge of his duties and therefore there was no legal bar for his retention in service. A reference was also made to the Legal Remembrancer to the Government of Haryana, soliciting his opinion. This officer opined that it would not be desirable to appoint the appellant in government service since he had been convicted under Section 294 IPC, involving an offence of moral turpitude, as otherwise the very purpose of verification of character/antecedents would be frustrated. On the collection of such material, decision was taken and the services of the appellant were terminated vide order dated 30.9.1984, as no longer

required.

6. Challenging this order the appellant went in suit for declaration before the Civil Court, describing the order terminating his services as against law, equity, good conscience, and violative of principles of natural justice, claiming that he continued to be in service entitled to all benefits of service including salary etc. The State and the Chief Medical Officer resisted the suit. The only contentious issue which sprung up from the pleadings of the parties was :

Whether the order dated 30.9.1984 about the termination of service of the plaintiff is wrong, illegal and liable to be set aside as alleged ?
7. The trial court decided the said issue against the appellant. The lower appellate court on appeal affirmed the same. The High Court too in second appeal concurred with the decision of the courts below, basically on two grounds, namely, (i) that the conviction of the appellant under Section 294 IPC revealed an act which per se constituted moral turpitude; and (ii) the order of termination of service, bare facedly, on its plain language was not stigmatic. All the same it was never disputed by the defendants-respondents that since the character and antecedent verification had revealed the conviction of the appellant under Section 294 IPC, that was the reason why the services of the appellant were dispensed with and not regularised. Hence this appeal.

12. "Moral turpitude" is an expression which is used in legal as also societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity. The government of Haryana while considering the question of

rehabilitation of ex-convicts took a policy decision on February 2, 1973 (Annexure E in the Paper Book), accepting the recommendations of the Government of India, that ex-convicts who were convicted for offences involving moral turpitude should not however be taken in government service. A list of offences which were considered involving moral turpitude was prepared for information and guidance in that connection. Significantly Section 294 IPC is not found enlisted in the list of offences constituting moral turpitude. Later, on further consideration, the government of Haryana on 17/26th March, 1975 explained the policy decision of February 2, 1973 and decided to modify the earlier decision by streamlining determination of moral turpitude as follows :

... The following terms should ordinarily be applied in judging whether a certain offence involves moral turpitude or not :

(1) whether the act leading to a conviction was such as could shock the moral conscience of society in general.

(2) whether the motive which led to the act was a base one.

(3) whether on account of the act having been committed the perpetrator could be considered to be of a depraved character or a person who was to be looked down upon by the society.

Decision in each case will, however, depend on the circumstances of the case and the competent authority has to exercise its discretion while taking a decision in accordance with the above mentioned principles. A list of offences which involve moral turpitude is enclosed for your information and guidance. This list, however,

cannot be said to be exhaustive and there might be offence which are not included in it but which in certain situations and circumstances may involve moral turpitude.

Section 294 IPC still remains out of the list. Thus the conviction of the appellant under Section 294 IPC on its own would not involve moral turpitude depriving him the opportunity to serve the State unless the facts and circumstances, which led to the conviction, met the requirements of the policy decision above-quoted.

14. Before concluding this judgment we hereby draw attention of the Parliament to step in and perceive the large many cases which per law and public policy are tried summarily, involving thousands and thousands of people throughout the country appearing before summary courts and paying small amounts of fine, more often than not, as a measure of plea-bargaining. Foremost among them being traffic, municipal and other petty offences under the Indian Penal Code, mostly committed by the young and/or the inexperienced. The cruel result of a conviction of that kind and a fine of payment of a paltry sum on plea-bargaining is the end of the career, future or present, as the case may be, of that young and/or inexperienced person, putting a blast to his life and his dreams. Life is too precious to be staked over a petty incident like this. Immediate remedial measures are therefore necessary in raising the toleration limits with regard to petty offences especially when tried summarily. Provision need be made that punishment of fine upto a certain limit, say upto Rs. 2000 or so, on a summary/ordinary conviction shall not be treated as conviction at all for any purpose and all the more for entry into and retention in government service. This can

brook no delay, whatsoever."

Let us note how `The Living Webster Encyclopedic Dictionary' of the English Language described the following expressions:

depraved : Corrupted; Perverted; immoral

base : of illegitimate birth; morally low; without dignity of sentiment; mean – spirited; befitting or characteristic of an inferior person or thing; Unworthy; menial; not classical or refined; of little comparative value.

vile : Wretchedly bad; highly offensive or objectionable; repulsive or disgusting, as to the senses or feelings; morally base, depraved or despicable.

Therefore, the elements of moral turpitude are attached to only certain classes of offences, which are considered to be incompatible with a decent social order. Civilised society is not expected to bear the rough of the presence of such individuals amongst themselves. The conduct which led to the conviction of an offence which involves moral turpitude has therefore come to be recognised as offering a reasonable basis for the State to initiate action against such civil servant in terms of Article 311 of our Constitution. Undoubtedly, seeking gratification for rendering an official act is recognised as a form of corruption. Corruption in public services will have the demoralising effect on the efficacy and efficiency of the State. The State through its regular grants by making budgetary provision has been paying all its civil servants, within its means of economic capacity, reasonably commensurate salary and allowances.

Every civil servant is therefore paid for rendering services to the State. Therefore, for performing his official duties and functions – ironically even when one does not perform such functions – the State pays for him without fail. It is only by way of approved punitive action, the payment of salary can be withheld. Otherwise, as a matter of course, every civil servant gets remunerated appropriately by the State. When once the State itself has been paying up for the services rendered by such civil servants, it is perfectly legitimate for the State to expect its civil servants not to aspire for further gratification from private sources. It has therefore, come to be recognised that demanding or accepting any such illegal gratification amounts to a form of corruption. Hence, as a public policy, the State is not entitled to tolerate corruption amongst its public servants. State's, as also Larger public interest, demand, no tolerance to be shown to corruption. Corruption is a form of moral perversion and perverted integrity. It stems from a dishonest and putrefactive decomposition of intellect. Hence it is recognised as reflective of base conduct of an individual. Hence, such an offence attracts mortal turpitude.

The principle enshrined under clause (a) of the second proviso to Article 311 has fallen for consideration on several occasions, before the Supreme Court. But, however, a useful reference to the case of **Dy. Director of Collegiate Education (Administration), Madras v. S.Nagoor Meera**[4] can be had, wherein, it was held as under:

> (3) ON 27/10/1993 the Deputy Director of Collegiate Education issued a notice to the respondent calling upon him to show cause why he should not be dismissed from service in view of his conviction by the criminal court. The show cause notice expressly recites that in as much as the High Court has only suspended the sentence, his conviction is still in force. The notice also recites the

nature of the offence for which the respondent was convicted.

(4) SOON after receiving the show cause notice, the respondent filed Original Application No. 6851 of 1993 before the Tamil Nadu Administrative Tribunal. His submission, which has been upheld by the Tribunal is that inasmuch as the sentence imposed upon him by the criminal court has been suspended by the appellate court (High Court), no proceedings can be taken for terminating his services under and with reference to clause (a) of the second proviso to Article 311 (2) of the Constitution of India. The Tribunal has quashed the aforesaid show cause notice on the following reasoning :

"therefore, it is clear that once the sentence has been suspended admitting the appeal, the criminal proceedings of the Lower Court which ended in conviction and sentence of the applicant is being continued in the appellate court and it can end only when the proceedings in the appellate court come to an end. Till then the applicant cannot be proceeded under the provisions of the T. N. C. S. (C. C. A) Rules as has been done in this case. Yet another flaw is that there has been inordinate delay of two years and eight months after the conviction and sentence was passed by the Lower Court in issuing the impugned show cause notice. This inordinate delay is unexplained. Therefore, the show cause notice to the applicant is not sustainable in law till the appellate court disposes of the Criminal Appeal. "

(5) THE correctness of the said order is questioned by the Deputy Director of the Collegiate Education this appeal.

(8) WE need not, however, concern ourselves any more with the power of the appellate court under the Code of Criminal Procedure for the reason that what is relevant for clause (a) of the second proviso to Article 311 (2) is the "conduct which has led to his conviction on a criminal charge" and there can be no question of suspending the conduct. We are, therefore, of the opinion that taking proceedings for and passing orders of dismissal, removal or reduction in rank of a government servant who has been convicted by a criminal court is not barred merely because the sentence or order is suspended by the appellate court or on the ground that the said government servant-accused has been released on bail pending the appeal.

(9) THE Tribunal seems to be of the opinion that until the appeal against the conviction is disposed of action under clause (a) of the second proviso to Article 311 (2) is not permissible. We see no basis or justification for the said view. The more appropriate course in all such cases is to take action under clause (a) of the second proviso to Article 311 (2) once a government servant is convicted of a criminal charge and not to wait for the appeal or revision, as the case may be. If, however, the government servant-accused is acquitted on appeal or other proceeding, the order can always be revised and if the government servant is reinstated, he will be entitled to all the benefits to which he would have been entitled to had he continued in service. The other course suggested, viz. , to wait till the appeal, revision and other remedies are over, would not be advisable since it would mean continuing in service a person who has been convicted of a serious offence by a criminal court. It should be remembered that the action under clause (a) of the second proviso

> to Article 311 (2) will be taken only where the conduct which has led to his conviction is such that it deserves any of the three major punishments mentioned in Article 311 (2).
>
> (10) WHAT is really relevant thus is the conduct of the government servant which has led to his conviction on a criminal charge. Now, in this case, the respondent has been found guilty of corruption by a criminal court. Until the said conviction is set aside by the appellate or other higher court, it may not be advisable to retain such person in service. As stated above , if he succeeds in appeal or other proceeding, the matter can always be reviewed in such a manner that he suffers no prejudice.

I have, therefore, no hesitation to hold that convictions handed down by a competent criminal court for an offence involving moral turpitude to a civil servant offers an adequate platform or basis for the State to initiate action against such defaulting servant in terms of Article 311(2) of the Constitution of India.

That takes us to the next question to examine, as to the power available to an appellate court to suspend the conviction. In fact, Section 389 of the Code of Criminal Procedure has vested with the necessary powers in the hands of the appellate court to order that the execution of the sentence or order appealed against be suspended pending such an appeal. Thisery question as to whether in exercise of such power, the appellate court is entitled to suspend merely the execution of a sentence handed down upon conviction of the accused or the appellate court can also suspend the execution of the conviction handed down as well, has fallen for consideration before the Supreme Court in **Rama Narang Vs. Ramesh Narang and Ors.**[5] The Supreme

Court was called upon to decide as to the nature of power available to the appellate court in terms of Section 389 of the Code of Criminal Procedure, particularly when convictions handed down of offences involving moral turpitude can have certain grave impact upon the convicted individual under various enactments. In **Rama Narang's case (supra),** the person convicted of an offence involving moral turpitude was appointed as a Managing Director of a company. Whether such a person has attracted any disqualification to continue as a Managing Director of a company, in terms of Section 267 of the Companies Act, was one of the important questions that was called upon to be decided by the Supreme Court. Dealing with Section 267 of the Companies Act in paragraph (10) of the judgment, this is what the Supreme Court has stated:

> "On a plain reading of this Section it seems clear to us from the language in which the provision is couched that it is intended to be mandatory in character. The use of the word 'shall' brings out its imperative character. The language is plain, simple and unambiguous and does not admit of more than one meaning, namely, that after the commencement of the Companies Act, no person who has suffered a conviction by a court of an offence involving moral turpitude shall be appointed or employed or continued in appointment or employment by any company as its managing or whole-time Director. Indisputably, the appellant was appointed a Director in 1988 and Managing Director in 1990 after his conviction on 22nd December, 1986. On the plain language of Section 267 of the Companies Act, the Company had, in making the appointments, committed an infraction of the mandatory prohibition contained in the said provision. The Section not only prohibits appointment or employment after conviction but also

> expects discontinuance of appointment or employment already made prior to his conviction. This in our view is plainly the mandate of Section 267. …….. The law considers it unwise to appoint or continue the appointment of a person guilty of an offence involving moral turpitude to be entrusted or continued to he entrusted with the affairs of any company as that would not be in the interests of the share-holders or for that matter even in public interest. As a matter of public policy the law bars the entry of such a person as Managing Director of a company and insists that if he is already in position he should forthwith be removed from the position. The purpose of Section 267 is to protect the interest of the shareholders and to ensure that the management of the affairs of the company and its control is not in the hands of a person who has been found by a competent court to be guilty of an offence involving moral turpitude and has been sentenced to suffer imprisonment for the said crime. …….. Such a person must be above board and beyond suspicion.

Thereafter, dealing with the powers available to the appellate court under Section 389 of the Code, the Supreme Court has held as under:

> "Section 389 of the Code is entitled "suspension of sentence pending the appeal, release of appellant on bail". Sub-section (1) then provides that pending any appeal by a convicted person the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond. On a plain reading of Sub-section (1) of Section 389 of the Code it becomes clear that

pending an appeal by a convicted person, the Appellate Court may order that the execution of the sentence or order appealed against be suspended.

12. Chapter XVIII relates to trial before a Court of Sessions. Sections 225 to 227 relate to the stage prior to the framing of charge. Section 228 provides for the framing of charge against the accused person. If after the charge is framed the accused pleads guilty, Section 229 provides that the Judge shall record the plea and may, in his discretion, convict him thereon. However, if he does not enter a plea of guilty, Sections 230 and 231 provide for leading of prosecution evidence. If, on the completion of the prosecution evidence and examination of the accused, the Judge considers that there is no evidence that the accused committed the offence with which he is charged, the Judge shall record an order of acquittal. If the Judge does not record an acquittal under Section 232, the accused would have to be called upon to enter on his defence as required by Section 233. After the evidence-in-defense is completed and the arguments heard as required by Section234, Section 235 requires the Judge to give a judgment in the case. If the accused is convicted, sub-section (2) of Section 235 requires that the Judge shall, unless he proceeds in accordance with the provisions of Section360, hear the accused on the question of sentence and then pass sentence on him according to law. It will thus be seen that under the Code after the conviction is recorded, Section 235(2) inter alia provides that the Judge shall hear the accused on the question of sentence and then pass sentence on him according to law. The trial, therefore, comes to an end only after the sentence is awarded to the convicted person.

13. Chapter XXVII deals with judgment. Section 354 sets out the contents of judgment. It says that every judgment referred to in Section 353 shall, inter alia, specify the offence (if any) of which and the Section of the Indian Penal Code or other law under which, the accused is convicted and the punishment to which he is sentenced. Thus a judgment is not complete unless the punishment to which the accused person is sentenced is set out therein. Section 356 refers to the making of an order for notifying address of previously convicted offender. Section 357 refers to an order in regard to the payment of compensation. Section 359 provides for an order in regard to the payment of costs in non-cognizable cases and Section 360 refers to release on probation of good conduct. It will thus be seen from the above provisions that after the court records a conviction, the accused has to be heard on the question of sentence and it is only after the sentence is awarded that the judgment becomes complete and can be appealed against under Section 374 of the Code.

15. Under the provisions of the Code to which we have already referred there are two stages in a criminal trial before a Sessions Court, the stage upto the recording of a conviction and the stage post-conviction upto the imposition of sentence. A judgment becomes complete after both these stages are covered. Under Section 374(2) of the Code any person convicted on a Trial held by a Sessions Judge or an Additional Sessions Judge may appeal to the High Court. Section 384 provides for summary dismissal of appeal if the Appellate Court does not find sufficient ground to entertain the appeal. If, however, the appeal is not summarily dismissed, the Court must cause

notice to issue as to the time and place at which such appeal will be heard. Section 389(1) empowers the Appellate Court to order that the execution of the sentence or order appealed against be suspended pending the appeal. What can be suspended under this provision is the execution of the sentence or the execution of the order. Does 'Order' in Section 389(1) mean order of conviction or an order similar to the one under Sections 357 or 360 of the Code? Obviously the order referred to in Section 389(1) must be an order capable of execution. An order of conviction by itself is not capable of execution under the Code. It is the order of sentence or an order awarding compensation or imposing fine or release on probation which are capable of execution and which, if not suspended, would be required to be executed by the authorities. ***Since the order of conviction does not on the mere filing of an appeal disappear it is difficult to accept the submission that Section 267 of the Companies Act must be read to apply only to a 'final' order of conviction. Such an interpretation may defeat the very object and purpose for which it came to be enacted. It is, therefore, fallacious to contend that on the admission of the appeal by the Delhi High Court the order of conviction had ceased to exist. If that be so why seek a stay or suspension of the Order?***

16. In certain situations the order of conviction can be executable, in the sense, it may incur a disqualification as in the instant case. In such a case the power under Section 389(1) of the Code could be invoked. ***In such situations the attention of the Appellate Court must be specifically invited to the consequence that is likely to fall to enable it to apply its mind to the***

issue since under Section 389(1) it is under an obligation to support its order 'for reasons to be recorded by it in writing'. If the attention of the Court is not invited to this specific consequence which is likely to fall upon conviction how can it be expected to assign reasons relevant thereto? ***No one can be allowed to play hide and seek with the Court; he cannot suppress the precise purpose for which he seeks suspension of the conviction and obtain a general order of stay and then contend that the disqualification ceased to operate.*** In the instant case if we turn to the application by which interim 'stay' of the operation of the impugned judgment was secured we do not find a single the effect that if the operation of the conviction is not stayed the consequence as indicated in Section 267 of the Companies Act will fall on the appellant. How could it then be said that the Delhi High Court had applied its mind to this precise question before granting 'stay'? That is why the High Court order granting interim stay does not assign any reason having relevance to the said issue. By not making a specific reference to this aspect of the matter, how could the appellant have persuaded the Delhi High Court to stop the coming into operation of Section 267 of the Companies Act? And how could the Court have applied its mind to this question if its pointed attention was not drawn? As we said earlier the application seeking interim stay is wholly silent on this point. That is why we feel that this is a case in which the appellant indulged in an exercise of hide and seek in obtaining the interim stay without drawing the pointed attention of the Delhi High Court that stay of conviction was essential to avoid the disqualification under Section 267 of the Companies Act. ***If such a precise request was made to the Court pointing out the***

consequences likely to fall on the continuance of the conviction order, the Court would have applied its mind to the specific question and if it thought that case was made out for grant of interim stay of the conviction order, with or without conditions attached thereto, it may have granted an order to that effect. There can be no doubt that the object of Section 267 of the Companies Act is wholesome and that is to ensure that the management of the company is not in soiled hands. As we have pointed out earlier the Managing Director of a company holds a fiduciary position qua the company and its shareholders and, therefore, different considerations would flow if an order is sought from the Appellate Court for staying the operation of the disqualification that would result on the application of Section 267 of the Companies Act.

18. ……. We are afraid the appellant did not approach the Delhi High Court with clean hands if the intention of obtaining the stay was to avoid the disqualification under Section 267 of the Companies Act. That is why we have said that a litigant cannot play hide and seek with the court and must approach the court candidly and with clean hands. It would have been so if the intention of the appellant in obtaining the interim stay was to avoid the disqualification he was likely to incur by the thrust of Section 267 of the Companies Act. If that was his intention he was clearly trying to hoodwink the court by suppressing it instead of coming clean. If he had frankly and fairly stated in his application that he was seeking interim stay of the conviction order to avoid the disqualification which he was likely to incur by virtue of the language of Section 267 of the Companies Act, the Delhi High Court

would have applied its mind to that question and would have, for reasons to be stated in writing, passed an appropriate order with or without conditions. We are, therefore, satisfied that the scope of the interim order passed by the Delhi High Court does not extend to staying the operation of Section 267 of the Companies Act.

19. That takes us to the question whether the scope of Section 389(1) of the Code extends to conferring power on the Appellate Court to stay the operation of the order of conviction. As stated earlier, if the order of conviction is to result in some disqualification of the type mentioned in Section 267 of the Companies Act, ***we see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case.*** The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction. ……. But while granting a stay of suspension of the order of conviction ***the Court must examine the pros and cons and if it feels satisfied that a case is made out for grant of such an order, it may do so*** and in so doing it may, if it considers it appropriate, impose such conditions as are considered appropriate to protect the interest of the shareholders and the business of the company.

> 20. For the above reasons we are of the opinion that since the interim order of stay did not specifically extend to the stay of conviction for the purpose of avoiding the disqualification under Section 267 of the Companies Act, there is no substance in the appeal and the appeal is, therefore, dismissed…….".
>
> **(emphasis is brought out)**

To my mind, **Narang's case (supra)** is a profound authority for two principles:-

(1) In terms of Section 389 of the Code of Criminal Procedure, in case of necessity, also reading it along with Section 482 of the said Code, the appellate court has got undoubted powers to suspend or stay the execution of conviction handed down of an offence involving moral turpitude of an accused. But, however, while doing so, the attention of the court must be pointedly drawn to the possible consequences that might flow to the accused under any other statute or provisions having statutory force. Then the appellate court would consider the matter and pass a reasoned order suspending the execution of the conviction with or without attaching any conditions. If the attention of the appellate court has not been so pointedly drawn and if the appellate court has not been called upon to exercise its mind precisely with regard to the follow up consequences likely to visit the accused person from out of a conviction of an offence involving moral turpitude, it would not be proper to assume the orders passed by the appellate courts normally suspending the execution of sentence as staying the execution of the conviction.

(2) The 2nd principle that is that the order of conviction handed down by a competent criminal court does not disappear on the mere filing of an appeal by the accused person. As a consequence, it is also not necessary that the fall out situations that emerge from handing down a conviction need towait for the finality to be achieved to the order of conviction.

Therefore, the contention canvassed by Sri Narasimha Rao, learned counsel for the petitioner that the conviction handed down to the writ petitioner herein has not attained finality as the appeal preferred there against is still pending and therefore the State Government ought not have taken the follow up action without allowing the order of conviction to attain finality, is a fallacious contention. As was already noticed supra, a similar contention, in clear and unambiguous terms, has been repelled by the Supreme Court in **Narang's case (supra)**.

Conviction in ordinary parlance means a final pronouncement of the guilt of an accused person. Sentencing such convicted person is a consequential action to the order of conviction. In fact, as already noticed supra, in **Narang's case,** the trial of a criminal case comes to an end only upon pronouncement of the sentence, which must follow an order of conviction. It is therefore manifestly clear that sentencing an accused person convicted of an offence is a consequential aspect. Various other parameters will be taken into consideration while sentencing the offender. The court is bound to take into account and consideration, the sentence prescribed as liable to be imposed under the penal statute concerned. Further, the learned single judge of this court while entertaining the Criminal Appeal No. 287 of 2009 preferred the writ petitioner has taken care to pass an order setting out that execution of the sentence "alone" is stayed. Therefore, the learned appellate judge of this court has not stayed the execution of the conviction handed down to the writ petitioner and hence the conviction handed down to the writ petitioner by the criminal court is subsisting and staring him at his face. He cannot avoid the glare of it so long as the same is not set aside by the appellate court. When a public servant is found guilty of indulging in corrupt practices, while discharging his official duties and functions, the State

could not have possibly passed any other order than imposing the punishment of dismissal, unless such a servant has retired from service, in the meantime. I am therefore, not convinced by the plea of the learned counsel for the petitioner that the State has imposed a disproportionate punishment against the writ petitioner. Therefore, no exception can be taken to the order passed by the State Government based upon the conduct of the writ petitioner which led to the conviction involving an offence committed by him under Section 7 r/w Section 13 of the Prevention of Corruption Act.

Learned counsel for the writ petitioner has drawn my attention to the judgment rendered by the Division Bench of this court in WP No. 16102 of 2002 dated 7.8.2007 and contended that the Division Bench has taken the view that when once a criminal appeal is pending, the conviction handed down by the ACB court cannot be treated to have become final. In all fairness, it should be stated that the learned counsel for the writ petitioner has also pointed out that in a batch of writ petitions Nos. 13421 of 2006 and batch, another Division Bench by its judgment dated 27.9.2006 has held that the conviction handed down by the competent criminal court can form the basis for action against the civil servants under Rule 25 of the Andhra Pradesh Civil Services CCA Rules, 1991. It is worthy to notice that the Division Bench which dealt with WP No. 16102 of 2007 has not been informed of the earlier judgment of the Division Bench rendered in WP NO. 13421 of 2006 and Batch of cases on 27.9.2006. This apart, the attention of the Division Bench which dealt with WP No. 16102 of 2007 has not been drawn to the binding precedents on the subject rendered by the Supreme Court such as **Rama Narang Vs. Ramesh Narang and Ors (supra),** noticed supra as well as **K.C.Sareen**

v. CBI, Chandigarh[6] and **Union of India v. V.Ramesh Kumar**[7] and **Deputy Director of Collegiate Education (Admn.) v. S.Nagoor Meera**[8]. This apart, a perusal of the judgment rendered by the Division Bench in WP NO. 16102 of 2007 leaves an impression that the said Division Bench has been led to believe that the appellate court has stayed the execution of the order of conviction and sentence handed down to the accused person therein. Hence the Division Bench held in it's judgment as under:

> "…. But at this juncture, it is not out of place to mention that on the conviction and sentence imposed against the applicant by the ACB Court, the applicant has preferred an appeal before this Court in Crl. A.371 of 2007 wherein the sentence imposed by the ACB Court has been suspended and the said appeal is pending adjudication. At this stage, the G.O., in question has been issued by the 1st respondent dismissing the applicant. In this regard, it is needless to observe that in view of the pendency of the criminal appeal as well as the suspension of the sentence imposed by the ACB Court, the judgment passed by the ACB Court has not become final. Therefore, passing of G.O. Ms. No. 91 at this stage, amounts to violation of the special procedure as laid down under Rule 25 of the Rules and thereby, the same is hit by the principle of subjudice."

As was already noticed supra, in **Narang's case (supra),** the contention that a conviction handed down, which is appealed against is not liable to be treated to have attained finality has been very effectively repelled in the following words:

> ***"….. Since the order of conviction does not on the mere filing of an appeal***

disappear it is difficult to accept the submission that Section 267 of the Companies Act must be read to apply only to a 'final' order of conviction. Such an interpretation may defeat the very object and purpose for which it came to be enacted. It is, therefore, fallacious to contend that on the admission of the appeal by the Delhi High Court the order of conviction had ceased to exist. If that be so why seek a stay or suspension of the Order?"

I am of the firm opinion that if only the attention of the Division Bench, which dealt with WP No. 16102 of 2007, had been drawn to the ratio laid down in **Narang's case and Nagoor Meera's case (supra cited),** it would not have preferred to ignore the principles enunciated by the Supreme Court on the subject. Similarly, if only its attention has been pointedly drawn to all the above noted binding precedents, in terms of Article 141 of our Constitution, the Bench would have surely followed them, both in letter and spirit. Therefore, I hold that the judgment rendered by the Division Bench on 7.8.2007 in WP No. 16102 of 2007 is not an authority for the proposition of law that a person who has been convicted of an offence involving moral turpitude such as the offence under the Prevention of Corruption Act is not liable to be proceeded against as the said conviction has not attained finality, by merely filing an appeal there against. Unless the appellate court has suspended the execution of the conviction by assigning appropriate reasons therefor, the fall out consequences of such a conviction are there to be attracted.

The last question addressed by the learned counsel for the writ petitioner in my considered opinion is equally misconceived. The power of judicial review is conferred both on the Supreme Court as well as

on the High Courts by our constitution. It is hard to assume that the Parliament is not conscious of the same, when it enacted the Administrative Tribunals Act, 1985. But, at the same time by creating another adjudicatory forum in terms of Article 323A of the Constitution and to that extent excluding the jurisdiction of the High Courts, to entertain disputes of a certain class or nature at the first instance, does not amount to doing away with power of judicial review available to the High Courts. That very question has been answered by the Supreme Court in **L.Chandra Kumar v. Union of India (supra cited).**

> (1) Whether the power conferred upon Parliament or the Stale Legislatures, as the case may be, by Sub-clause (d) of Clause (2) of Article 323A or by Sub-clause (d) of Clause (3) of Article 323B of the Constitution, totally exclude the jurisdiction of 'all courts', except that of the Supreme Court under Article 136, in respect of disputes and complaints referred to in Clause (1) of Article 323A or with regard to all or any of the matters specified in Clause (2) of Article 323B, runs counter to the power of judicial review conferred on the High Courts under Articles 226/227 and on the Supreme Court under Article 32 of the Constitution?
>
> 17. We may now apply ourselves to analysing the decision which has been impugned in one of the matters before us, C.A. No. 169 of 1994. The judgment, Sakinala Harinath and Ors. v. State of A.P., rendered by a full Bench of the Andhra Pradesh High Court, has declared Article 323A (2)(d) of the Constitution to be unconstitutional to the extent it empowers Parliament to exclude the jurisdiction of the High Courts under Article 226 of the Constitution; additionally, Section 28 of the Act has also been held to be unconstitutional

to the extent it divests the High Courts of jurisdiction under Article 226 in relation to service matters.

The Judgment of the Court, delivered by M.N. Rao, J. has in a elaborate manner, viewed the central issues before us against the backdrop of several landmark decisions delivered by Constitution Benches of this Court as also the leading authorities in the comparative constitutional law. The judgment has embarked on a wide-ranging quest, extending to the American, Australian and British jurisdictions, to ascertain the true import of the concepts of 'judicial power', 'judicial review' and other related aspects. The judgment has also analysed a contention based on Article 371D of the Constitution, but, since that aspect is not relevant to the main controversy before us, we shall avoid its discussion.

18. The Judgment of the Andhra Pradesh High Court has, after analyzing various provisions of our Constitution, held that under our constitutional scheme the Supreme Court and the High Courts are the sole repositories of the power of judicial review. Such power, being inclusive of the power to pronounce upon the validity' of statutes, actions taken and orders passed by individuals and bodies falling within the ambit of the impression "State" in Article 12 of the Constitution, has only been entrusted to the constitutional courts, i.e., the High Courts and this Court. For this proposition, support has been drawn from the rulings of this Court in **Kesavananda Bharati v. State of Kerala : AIR 1973 SC 1461 , Special Reference No. 1 of 1964, [1965] 1 SCR 413; Indira Nehru Gandhi v. Raj Narain : [1975]3SCR854 ; Minerva Mills Ltd. v. Union of India : [1981]1 SCR 206 , Kihoto Hollohan v.**

Zachillu and Ors: [1992]1 SCR 686 and certain other decisions, all of which have been extensively analysed and profusely quoted from.

19. Analysing the decision in **Sampath Kumar's case** against this back-drop, it is noted that the theory of alternative institutional mechanisms established in **Sampath Kumar's case** is in defiance of the proposition laid down in **Kesvananda Bharati's case**, Special reference case and **Indira Gandhi's case**, that the Constitutional Courts alone are competent to exercise the power of judicial review to pronounce upon the constitutional validity of statutory provisions and rules. The High Court, therefore, felt that the decision in **Sampath Kumar's case**, being *per incuriam*, was not binding upon it. The High Court also pointed out that, in any event, the issue of constitutionality of Article 323A (2) (d) was neither challenged nor upheld in **Sampath Kumar's** case and it could not be said to be an authority on that aspect.

20. Thereafter, emphasising the importance of service matters which affect the functioning of civil servants, who are an integral part of a sound governmental system, the High Court held that service matters which involve testing the constitutionality of provisions or rules, being matters of grave import, could not be left to be decided by statutorily created adjudicatory bodies, which would be susceptible to executive influences and pressures. It was emphasised that in respect of constitutional Courts, the Framers of our Constitution had incorporated special prescriptions to ensure that they would be immune from precisely such pressures. The High Court also cited reasons for holding that the sole remedy provided, that of an appeal

under Article 136 to this Court, was not capable of being a real safeguard. It was also pointed out that even the saving of the jurisdiction of this Court under Article 32 of the Constitution would not help improve matters. It was, therefore, concluded that although judicial power can be vested in a Court or Tribunal, the power of judicial review of the High Court under Article 226 could not be excluded even by a constitutional Amendment.

56. To express our opinion on the issue whether the power of judicial review vested in the High Courts and into the Supreme Court under Articles 226/227 and 32 is part of the basic structure of the Constitution, we must first attempt to understand what constitutes the basic structure of the Constitution. The Doctrine of basic structure was evolved in **Kesvananda Bharati's** case. However, as already mentioned, that case did not lay down that the specific and particular features mentioned in that judgment alone would constitute the basic structure of our Constitution. Indeed, in the judgments of Shelat & Grover, JJ., Hegde & Mukherjee, JJ. and Jaganmohan Reddy, J., there are specific observations to the effect that their list of essential features comprising the basic structure of the Constitution are illustrative and are not intended to be exhaustive. In Indira Gandhi's case, Chandrachud, J. held that the proper approach for a Judge who is confronted with the question whether a particular facet of the Constitution is part of the basic structure, is to examine, in each individual case, the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of our Constitution as a fundamental instrument for the governance of the country, (supra at

pp. 751-752). This approach was specifically adopted by Bhagwati, J. in Minerva Mill's case (supra at pp. 671-672) and is not regarded as the definitive test in this field of Constitutional Law.

57. We find that the various factors mentioned in the test evolved by Chandrachud, J. have already been considered by decisions of various Benches of this Court that have been referred to in the course of our analysis. From their conclusions, many of which have been extracted by us in toto, it appears that this Court has always considered the power of judicial review vested in the High Courts and in this Court under Articles 226 and 32 respectively, enabling legislative action to be subjected to the scrutiny of superior courts, to be integral to our constitutional scheme. While several judgments have made specific references to this aspect [Gajendragadhkar, CJ in Special Reference case, Beg, J. and Khanna, J. in Kesavananda Bharti's case, Chandrachud, CJ and Bhagwati, J. in Minerva Mills, Chandrachud, CJ in Fertiliser Kamgar, K.N. Singh, J. in Delhi Judicial Service Association, etc.] the rest have made general observations highlighting the significance of this feature.

58. The legitimacy of the power of Courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the

independence of the judiciary. These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions. The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man Tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts

under Articles 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.

59. We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided.

80. However, it is important to emphasise that though the subordinate judiciary or Tribunals created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental--as opposed to a substitution - role in this respect. That such a situation is contemplated within the constitutional scheme becomes evident when one analyses Clause (3) of Article 32 of the Constitution which reads as under:

32. Remedies for enforcement of rights conferred by this Part.--(1)..

(2) ..

(3) Without prejudice to the powers conferred on the Supreme Court by Clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers

exercisable by the Supreme Court under Clause (2).

(Emphasis supplied)

61. If the power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can be additionally conferred upon "any other court", there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of this Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the provisions of the Constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323B of the Constitution. It is to be remembered that, apart from the authorisation that flows from Articles 232A and 323B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power is available to Parliament under Entries 77, 78, 79 and 95 of List I and to the State Legislatures under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose.

91. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Article 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is

> questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

Therefore, the exclusion of the power of the High Court to entertain service disputes of the civil servants and holders of civil posts under the State at the first instance does not amount to doing away WITH the power of judicial review available TO the High Court.

I do not find any merit in the contentions canvassed on behalf of the writ petitioner and hence I dismiss this writ petition. No costs.

---

knk **JUSTICE N.RAMAMOHANA RAO**

Dt : 18.9.2009

---

[1] (2008) 1 SCC (L&S) 611
[2] 1997(3) Supreme 147 : AIR 1997 SC 1125
[3] (1996) 4 SCC 17
[4] AIR 1995 SC 1364
[5] 1995(2) SCC 513
[6] 2001 AIR SCW 3339
[7] 1997(5) Scale 660
[8] AIR 1995 SC 1364