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

Reserved on: 03.11.2015
Pronounced on: 19.11.2015

+ **LPA 963/2013**

SETH POKHARMAL EDUCATIONAL SOCIETY (REGD)

.....Appellant

Through: Ms. Asha Jain, Advocate.

Versus

DELHI DEVELOPMENT AUTHORITY

.....Respondent

Through: Sh. Ajay Verma, Sr. Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. The appellant is aggrieved by the judgment – dated 29.11.2013, dismissing its writ petition (W.P.(C) 7445/2013), seeking direction for the allotment of a plot of land at the rates determined by the Central Government under Rule 5 of the Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 (“the 1981 Rules”).

2. First, the facts: The appellant is a society, which engages itself in providing education through its institutions; it had applied for allotment of land under the 1981 Rules, to the Delhi Development Authority (DDA), the

respondent in this case. It had earlier filed a writ petition (W.P.(C)18728/2004, hereafter “first writ petition”) that was decided by a learned Single Judge of this Court on 17.04.2006. The Court upheld its plea that it was entitled to be considered for allotment of a plot of land at the rates determined by the Central Government under Rule 5 of the 1981 Rules. The court held, in Paras 45 and 46 of the judgment in the first writ petition, that:

“45. To sum up, entitlement of the petitioners for allotment of Nazul Land under Rule 5 requires DDA to identify the sites which it intends to allot to societies for setting up higher/technical institutes. This would include a decision to identify the sites for setting up higher/technical institutes to be established by companies, firms or trusts to whom allotment has to be made at a premium determined at auction. Further, fairness in action would require that if number of plots identified for allotment to societies is less than the number of existing societies whose entitlement has been scrutinized, allotment be made by draw of lots or any other reasonable criteria. If number of plots available exceed the number of societies, DDA would be obliged to forthwith allot specific plots to the petitioners and charge premium as per rates determined by the Central Government.

46. Writ petitions stand disposed of declaring that the petitioners would be entitled to be considered for allotment of Nazul Land under Rule 5 of the DDA (Disposal of Developed Nazul Lands) Rules, 1981 for setting up higher/technical institutes at a premium determined by the Central Government. Policy decision dated 15.12.2003 in so far it requires allotment of Nazul land to societies for setting up high/technical institutes at a premium determined through auction is quashed. Mandamus is issued to DDA to identify available plots for setting up higher/technical institutes and apportion the same for allotment to societies (falling in one class) and companies, firms and trusts (falling in second class); simultaneously, DDA would identify the societies whose entitlement has been cleared. If plots to be

allotted to societies are more than the number of eligible societies, specific plot be allotted within a period of 3 months from today and premium charged as determined by the Central Government. If number of societies exceed the number of available plots, DDA is directed to evolve a reasonable criteria and as per criteria allot the specified listed plots to the eligible societies within 3 months.”

3. The DDA appealed to the Division Bench,(LPA 1642/2006) aggrieved by the learned Single Judge’s directions in the first writ petition. Barely two days after the judgment in the first writ petition, on 19.04.2006 the 1981 Rules were amended by DDA. These rules were challenged by writ petitions preferred by several institutions, which were referred to a Division Bench of this Court. Those bunch of writ petitions,(W.P.(C) 2459-60/2005 titled *Bhagwan Mahavir Education Society (Regd.) & Anr. v. DDA & Ors.* on 25.03.2011), culminated in a judgment dated 25.11.2011; the court held that disposal of Nazul lands for higher educational and technical institutions can only be through public auction, under Rule 5 read with Rule 20 of the amended Rules.

4. After the Division Bench ruling in *Bhagwan Mahavir (supra)*, DDA sought to withdraw its appeal against the judgment in the first writ petition (LPA 1642/2006). The appellant resisted the withdrawal of DDA’s appeal. Nevertheless, the court permitted withdrawal of the said appeal. The appellant, in the circumstances, wrote to the DDA on 31.05.2011 requesting it to allot land in terms of the directions in the first writ petition. Since no response was forthcoming from DDA, reminders were sent to DDA on 14.06.2011 and 01.09.2011. The second reminder dated 01.09.2011 written by the appellant alluded to the DDA’s withdrawal of its appeal before the

Division Bench, (against the directions given by the learned Single Judge in the first writ petition) and stated that *“the appeal filed by DDA in the above LPA has been withdrawn by DDA on dated 05.05.2011 and stands disposed off (copy enclosed). Thus, the order of the Ld. Single Judge dated 17.04.2006 has attained finality and therefore, in terms of the said judgment DDA is obliged to consider the case of the society for allotment of land for setting up Higher/Technical Institute at rates determined by the Central Government.”* The appellant also stated that it was provided exemption from payment of Income Tax under Section 12A and Rules 10 (23C) of the Income tax Act and was eligible for allotment of Nazul land under the 1981 Rules for setting up a Higher educational /Technical Institute. It sought for compliance with directions of the learned Single Judge in the first writ petition. The DDA, however, did not comply with the request and allot a plot, as was sought by the appellant. The latter, moved the Court under Sections 11/12 of the Contempt of Courts Act, 1971. It was argued in the contempt proceeding that since DDA withdrew its appeal (LPA 1642/2006) it had to decide about the allotment of the land to the Petitioner in terms of the judgment in the first writ petition. A learned Single Judge dismissed the contempt petition on 02.12.2011 and observed that:-

“13. Having heard learned counsel for the parties, I am of the view that there is no merit in the petitioners submission that there is any breach, much less willful or deliberate breach, of the judgment of the learned Single-Judge dated 17.04.2006. The direction issued by the learned Single-Judge was to consider the petitioners case for allotment in terms of the pre-existing policy as it existed prior to 19.04.2006. There was no specific direction for allotment of any particular identified plot. No allotment has ever been made by the DDA to the petitioner. Within the period granted by the learned Single-Judge for carrying out the exercise

of identifying the plots for allotment to societies, the amendment in the rules came into force on 19.04.2006. It is clear from the decision of the Division Bench that since the rules with regard to allotment of land to societies had undergone amendment during the pendency of the application of the petitioner, it is the changed rules which would apply to the petitioner's case. Clearly, the said amendment was applicable in the case of the petitioner as well. Therefore, the withdrawal of the L.P.A.s by the DDA cannot be said to vest any right in the petitioner inasmuch, as, the respondent/DDA has acted in terms of the judgment of the learned Single-Judge in W.P. (C.) No. 18748/2004 dated 17.04.2006 by applying principle laid down by the Division Bench in Bhagwan Mahavir Education Society (supra). The action of the DDA is, therefore, in compliance of the judgment of the learned Single-Judge dated 17.04.2006 and cannot be said to be in breach thereof.”

5. The appellant approached the Supreme Court through a special leave petition, aggrieved by the order, (dated 02.12.2011 of the learned Single Judge rejecting its contempt petition). The special leave petition was, however, withdrawn by the appellant on 21.02.2012, who was given liberty to approach the learned Single Judge with a review petition. The Review Petition came to be dismissed on 27.03.2012. Thereafter, the Petitioner again approached the Supreme Court (SLP No. 24180-24181/2012). The special leave petition was dismissed on 04.09.2013. The Court observed that:

“... In our considered view in the factual scenario which is succinctly noticed by the High Court in the impugned order(s), as also reiterated by Shri P.P. Rao at the time of hearing of these petitions, we cannot hold and conclude that the respondents in not implementing the order passed by the High Court in Writ Petition No. 18728 of 2004 have committed any wilful disobedience of the order(s) and directions(s) issued by it.

In view of the above, we decline to entertain these special leave petitions and the same are disposed of accordingly.

We clarify that we have not expressed any opinion on the correctness or otherwise of the view taken by the Division Bench of the Delhi High Court in the case of Bhagwan Mahavir Education Society (Regd.) and Anr. vs. DDA and Ors.

Ordered accordingly.”

The appellant, in these circumstances approached this court with a fresh writ petition, which was rejected by the learned Single Judge through the impugned judgment.

Impugned judgment

6. It was contended by the appellant that firstly the present writ petition was maintainable, because what transpired after the decision in the first writ petition was its attempt to enforce obedience of the previous mandamus through contempt proceedings and that its present (second) writ petition was not barred due to rejection of the said contempt petition. The appellant relied on *Karnataka Housing Board v. C. Muddaiah* (2007) 7 SCC 689. It was argued, secondly- and substantively that the withdrawal of the DDA's appeal before the Division Bench, (against the judgment in the first writ petition) resulted in finality of the directions in the first writ petition. The appellant submitted that the DDA was duty-bound to comply with those directions, regardless of change in policy or rules, because its (the appellant's) entitlement to allotment was unaffected by subsequent rules of prospective operation.

7. The learned Single Judge- in the impugned judgment- was

unpersuaded by the appellant's submissions; he distinguished the holding in *Karnataka Housing Board* (supra) and thereafter held that:

“11. The facts of the instant case are, however, entirely different. The learned Single Judge categorically held that the direction issued by the learned Single-Judge was to consider the petitioner's case for allotment in terms of the pre-existing policy as it existed prior to 19.04.2006. There was no specific direction for allotment of any particular identified plot. No allotment has ever been made by the DDA to the petitioner. Within the period granted by the learned Single-Judge for carrying out the exercise of identifying the plots for allotment to societies, the amendment in the rules came into force on 19.04.2006. It is clear from the decision of the Division Bench that since the rules with regard to allotment of land to societies had undergone amendment during the pendency of the application of the petitioner, it is the changed rules which would apply to the petitioner's case. Thus the matter stands concluded between the parties.

12. Thus, the instant petition is frivolous and misconceived being barred by the principles of res judicata; the same is accordingly dismissed in limine with costs of ₹1,00,000/-.”

Contentions of the parties

8. The appellant-society argues that the learned Single Judge fell into error in holding that the second writ petition (i.e. the writ petition decided by the impugned order) was barred by *res judicata*. Ms. Asha Jain Madan, learned counsel for the appellant contended that the learned Single Judge was unduly swayed by the rejection of the contempt petition. Those proceedings were only a mode for enforcement of directions given in the first writ petition, which had been allowed by a learned Single Judge. Emphasizing the distinction between contempt proceedings, which are

aimed at ensuring compliance with court directions and decrees, and substantive proceedings, such as writ petitions, counsel argued that there is nothing in law, which prevents the filing of a writ petition for ensuring that the directions in the first writ petition were complied with. The dismissal of contempt petition meant only that the court disagreed with the mode of enforcement, but did not mean that the court denied the right (arising from the judgment in the first writ petition) altogether.

9. It is urged that the directions in the first writ petition resulted in crystallized rights for the appellant, which could not have been taken away except in accordance with law. It was argued that the court's writ could not have been undermined, except by either the higher court's reversal of the decision, or a valid law which overrode those directions, learned counsel submitted that the mere promulgation of a later law of prospective effect did not denude the rights created, and vested in or under the previous law or pre-existing law. In support of this submission, Ms. Madan relied on the larger (seven judge Bench) decision of the Supreme Court in *Madan Mohan Pathak v Union of India* 1978 (3) SCR 334. She relied on the passage in the said judgment which reads as follows:

“...even though the real object of the Act may be to set aside the result of the mandamus issued by the Calcutta High Court, yet, the section does not mention this object at all. Probably this was so because the jurisdiction of a High Court and the effectiveness of its orders derived their force from Article 226 of the Constitution itself. These could not be touched by an ordinary act of Parliament. Even if Section 3 of the Act seeks to take away the basis of the judgment of the Calcutta High Court, without mentioning it, by enacting what may appear to be a law, yet, I think that, where the rights of the citizen against the State are concerned, we should adopt an interpretation which upholds

those rights. Therefore, according to the interpretation I prefer to adopt the rights which had passed into those embodied in a judgment and became the basis of a mandamus from the High Court could not be taken away in this indirect fashion.”

It was submitted that similarly, in the present case too, the amendment to the Nazul Rules became effective on 19.04.2006, i.e. after the judgment in the first writ petition. There was nothing in the new amendments that sought to take away or nullify the effect of rights arising from judgments rendered prior to its existence.

10. Mr. Ajay Verma, learned counsel for the DDA, urged this court not to disturb the findings and judgment of the learned Single Judge in the impugned judgment. He submitted that the judgment in the first writ petition itself recognized that in the absence of allotment, the petitioner – or for that matter, any other applicant seeking land allotment could not lay claim on any particular plot of land. It was submitted that the learned Single Judge who decided the first writ petition had observed that the petitioner had relied on file notings, which could not create any enforceable right. It was submitted that the directions in the first writ petition were to consider the petitioner’s application for allotment of land, and communicate a decision within three months. Such direction had to necessarily lead to action in accordance with the DDA’s policies. Before anything further could be done, the amended rules came into force, which mandated that all allotments of land – including lands to educational and technical institutions was to be on the basis of public auction. The appellant could not, therefore, claim a direction that it ought to be allotted land otherwise than by the process spelt

out in the rules; nor could DDA lawfully allot any plot of land without the petitioner successfully participating in public auction.

Analysis and conclusions

11. The foregoing factual account of this case, would reveal that the petitioner had approached this court earlier, through the first writ petition. Its grievance was that despite the DDA's conclusions- drawn from the official file notings, earmarking a plot and indicating that it was eligible for allotment, nothing had been done. A direction was sought to DDA. The learned Single Judge allowed the writ petition. However, the learned Single Judge, in the said judgment, noted that the law did not *entitle* the petitioner to the plot of land, because mere file notings could not result in an enforceable claim. For so concluding, the Single Judge relied on the Supreme Court ruling in the decision in *Bachhitar Singh v. State of Punjab*¹. It was after holding that the petitioner could not claim entitlement to allotment, on the basis of file notings, that the learned Single Judge held that having regard to the prolonged delay in arriving at a decision, the DDA had to complete the process and allot a plot, within a time frame. Para 45 of the learned Single Judge's decision in the first writ petition mandated DDA to carry out the exercise of earmarking plots, identifying the eligible societies and applicants, etc. It was directed that if the number of plots was less than

¹*Bachhitar Singh-vs- State of Punjab* (AIR 1963 SC 395) holds that the order of an executive authority or officer has no effect unless it is communicated to the person likely to be affected by the decision. The appellant had relied on the file notings of a minister to demand that he be reinstated in employment. Rejecting the contention, the court held:

"...until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, therefore, till its communication the order cannot be regarded as anything more than provisional in character. We are, therefore, of the opinion that the remarks or the order of the Revenue Minister, PEPSU are of no avail to the appellant."

the number of eligible applicants, the allotment had to be finalized after a draw of lots; if the position was reverse, i.e. if there were more number of plots than the applicants, DDA had to allot the plots to the eligible applicants. Three months' time was granted to the DDA to complete this process.

12. This court is of the opinion that there is merit in the appellant's submission that the learned Single Judge's judgment in the second writ petition (i.e. the impugned judgment) was erroneous, to the extent it held that the claim was barred by *res judicata*. The learned Single Judge held that since the contempt proceedings led to adverse orders, the appellant was precluded from agitating the matter. The learned Single Judge, with respect, fundamentally erred in applying the principle of *res judicata*. It is well known that in contempt proceeding, a court has to merely examine whether there was willful disobedience or violation of a court direction or judgment.² Once shown conditions that can qualify for compliance (though that might lead to further contentious issues requiring fresh resolution) or alteration of conditions that render compliance unrealistic or impossible, the court discharges contempt. Nor can a court adjudicate substantive disputes in contempt proceedings.³ If these jurisdictional limitations are kept in mind, it is obvious that the reasoning in a judgment which declines exercise of

²K.G. Derasari v Union of India (2001 (10) SCC 496)

³Director of Education v Ved Prakash Joshi (2005) 6 SCC 98 and V.M.Manohar Prasad v. N.Ratnam Raju and Anr (2004) 13 SCC 610. It was held in Ved Prakash Joshi that:

“While dealing with an application for contempt the Court cannot traverse beyond the order, non-compliance of which is alleged. In other words, it cannot say what should not have been done or what should have been done. It cannot traverse beyond the order. It cannot test correctness or otherwise of the order or give additional direction or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible.”

contempt jurisdiction cannot be considered a final decision. The impugned judgment, to that extent, is in error.

13. The above findings are, however, not conclusive as to the final outcome. The question really is whether the appellant's claim in the writ petition could have been entertained on merits. As noted earlier, the substantive claim of the appellant in the second writ petition was that its *entitlement to allotment of a plot had crystallized into a right which was unaffected by change in the rules*. To support this claim of a crystallized right, the appellant had relied on *Madan Mohan Pathak (supra)*. Now, in that decision, a Calcutta High Court decision had upheld that employees' right to bonus, which had been assured as part of a settlement, that applied for a specific period. With the amendment to the Payment of Bonus Act, bonus was discontinued. The learned Single Judge held that bonus could not be divested or deprived, for the relevant period and directed its payment. That judgment became final; even the appeal preferred by the Life Insurance Corporation was withdrawn. Parliament intervened and sought to take away the right to bonus. The Supreme Court then ruled that the mandamus issued by the Calcutta High Court had not been effaced and had in fact survived, notwithstanding the change in law.

14. *Madan Mohan Pathak's (supra)* reasoning has been followed in a multitude of subsequent decisions which have held that while it is open to the competent legislature to overcome the effects of the normative content of a judgment – i.e. overriding the legal principle or interpretation enunciated or adopted by the court, provided that such legislation or rule does not conflict with established Constitutional norms and cures “the defects” noticed in the judgment- the binding nature of the *adjudicatory process*,

would not be undone. In other words, even though the basis of the decision were to be reversed by the subsequent decision, the judgment, *inter parties* would stand, unless it were to be vacated by the appellate court. The courts have recognized that even the underlying decision *inter parties* can be overridden provided (a) the subsequent legislation expressly says so; (b) such subsequent legislation should be valid under the Constitution (i.e. the defects should be such as can be removed and the legislation overriding the judgment must be able to stand Constitutional muster).⁴ These principles no doubt, were enunciated in the backdrop of subsequent validating or retrospective legislation (in some cases, both).⁵

15. A clear indication of what *kind* of subsequent legislation or rule which renders impermissible the effacement or nullification of a binding court order, may be seen by the observations in *Chairman Railway Board v C.R. Rangadhamaiah* 1997 (6) SCC 623. The Railway Board had by retrospective rules redefined a pension calculating criteria that resulted in reduction of pension of superannuated employees and reduction, in *future*, of their pensionary rights. The court cited previous rulings to say that pension payment was not a “bounty”; it amounted to deferred salary and that the receipt and right to receive pension was in the form of a vested right. It was in that context that the court pertinently observed as follows:

“In many of these decisions the expressions “vested rights” or “accrued rights” have been used while striking down the

⁴*P. Kannadasan v State of Tamil Nadu Indian Aluminium Company v State of Kerala* (1996) 7 SCC 637; *State of Kerala v People’s Union for Civil Liberties* (2009) 8 SCC 46; *Agricultural Income Tax Officer v Goodricke Group Ltd* 2015 (42) SCD 540.

⁵*A.V. Nachane v Union of India* AIR 1982 SC 1126; *Union of India v T.R. Mohanty* 1994 (5) SCC 450; *P.D. Agarwal v State of U.P.* AIR 1987 SC 1676

impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in Roshan Lal Tandon (supra), B.S. Yadav (supra) and Raman Lal Keshav Lal Soni & Ors. (supra).

In these cases we are concerned with the pension payable to the employees after their retirement. The respondents were no longer in service on the date of issuance of the impugned notifications. The amendments in the rules are not restricted in their application in futuro. The amendments apply to employees who had already retired and were no longer in service on the date the impugned notifications were issued.”

16. The question then is how relevant is the *ratio* of *Madan Mohan Pathak (supra)* to the present case? If one examines the declaration of the seven judge decision it is evident that the *right to bonus did not arise from the judgment, which merely directed its disbursal, after rejecting that the amendment to the Payment of Bonus Act did not result in deprivation of that right to claim specific amounts which related to the particular period.* In other words, the rights of employees to approach the court for bonus and seek its release, after due calculation, had already vested in them- akin to property. The change brought about by legislation subsequently did not alter the circumstance one whit, because the law did not overbear or override the

right to the specific amounts. Here, however, the appellant is on much shakier ground. Its claim for a direction to allot was expressly rejected since it was based on file notings. The court nevertheless directed consideration. Now this consideration meant that the DDA had to follow several steps, as part of the process- evaluation of the number of plots available; the total number of applicants, and processing of their needs, valuation of the price at which the plot was to be offered given the nature of the plot (professional higher technical educational institution, management institution, etc.). Hardly had the ink dried, (so to speak) after the judgment, the existing rules were amended; Nazul land could be allotted only on the basis of auction. Though these rules had prospective effect, the DDA is bound to apply it to all allotments and applications, which were to be considered after it came into force. This meant identification of the sites or plots available, the number of and kind of institutions which had applied, and the suitability of the plots given the level of education they were to provide. The court- in the first writ petition, had given three months for completion of the process. Within two days of delivery of judgment, the law did not permit allotment through the existing criteria but insisted that allotment should be through bidding. So the appellant's application for allotment had to be considered only in accordance with the new norms. As a consequence, it could not have insisted on allotment on the basis of the previous criteria. The writ petition seeking a direction for allotment *sans* participation in a public auction, therefore, was not maintainable. The learned Single Judge was correct in concluding that the appellant could not seek the relief that it approached the court for.

17. For the foregoing reasons, this Court is of the opinion that the appeal has to ultimately fail; it is accordingly dismissed without order on costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

NOVEMBER 19, 2015

