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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.08.2017
PRONOUNCED ON : 21.08.2018

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

W.A.No. 1451 of 2015
in
W.P.No.9037 of 2004

- 1.State of Tamil Nadu, represented by
its Secretary to Government,
Revenue Department, Fort. St.George,
Chennai – 600 009.
 - 2.The Special Commissioner and
Commissioner of Land Administration,
Chepauk, Chennai – 600 005.
 - 3.The District Revenue Officer, Thanjavur.
 - 4.The Revenue Divisional Officer, Thanjavur.
 - 5.Thi Tahsildar, Thanjavur.
 - 6.The State of Tamil Nadu represented by
its Principal Secretary to Government
Home (Prisons) Department, Chennai – 600 009.
 - 7.The Additional Director General of Police /
Inspector General of Prisons,
CMDA Tower -II, Egmore, Chennai-600 008.
- (Appellants 6 and 7 are impleaded as per
order in CMP.No.2480 of 2017 vide order
dated 11.08.2017)
- ... Appellants

Vs.



1. Shanmuga Arts, Science, Technology and
Research Academy (SASTRA),
Deemed to be University, having its
main campus at "Shanmuga Campus"
Thirumalaisamudram,
Thanjavur 613 402, HQ at Madras
represented by its Registrar Prof.R.Kandaswamy.

2. VEE SEE BEE Trust Administering
Shanmuga Polytechnic, having its
main campus at "Shanmuga Campus"
Thirumalaisamudram,
Thanjavur 613 402, HQ at Madras
represented by its Managing Trustee,
Prof.R.Sethuraman. ... Respondents

PRAYER: Writ Appeal filed under clause 15 of the Letters Patent
against the order dated 04.09.2014 made in W.P.No.9037 of 2004
and WPMP No.10545 of 2004

For Appellants : Mr.C.Manisankar
Additional Advocate General
Assisted by Mr.T.N.Rajagopalan
Government Pleader
and Mr.K.Krishnamoorthy
Government Advocate

For Respondents: M/s.G.R.Associates
1.Mr.G.Rajagopalan
Senior Counsel
2.Mr.N.Venkataraman
Senior Counsel
3.Mr.Sathish Parasaran
Senior Counsel

**JUDGMENT**

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W.A.No.1451 of 2015 has been filed by the State of Tamil Nadu, represented by its Secretary to Government, Revenue Department, Chennai and Special Commissioner and Commissioner of Lands Administration, Chennai, the District Revenue Officer, Tanjavur, the Revenue Divisional Officer, Tanjavur, and the Tahsildar, Tanjavur, challenging the order in W.P.No.9037 of 2004 dated 04.09.2014 and in W.P.M.P.No.10545 of 2004, dated 18.12.2014.

2.The Writ Appeal had been filed against the Shanmuga Arts, Science, Technology and Research Academy (SASTRA), Deemed to be a University, Thirumalaisamudram, Thanjavur and VEE SEE BEE Trust Administering Shanmuga Polytechnic, having its main campus at “Shanmuga Campus”, Thirumalaisamudram, Thanjavur, who were the writ petitioners in W.P.No.9037 of 2004. On the date of pronouncement of the judgment on 11.08.2017, the Division Bench in the Writ Appeal had impleaded two further appellants, namely, the State of Tamil Nadu, represented by its Principal Secretary to Government, Home (Prisons) Department,



Chennai and the Additional Director General of Police / Inspector General of Prisons, Chennai.

3.The writ appeal did not have a decisive ending. The two judges differed in their opinions, reasons and conclusions. The lead judgment affirmed the order passed by the learned Single Judge in the writ petition. In the dissenting judgment, the said order was set aside. In view of the conflicting decisions, taking recourse under clause 36 of Letters Patent of the Madras High Court, the Honourable The Chief Justice had referred the writ appeal for adjudication to this Court. Clause 36 of Letters Patent of the Madras High Court is as follows:

“36. Single Judges and Division Courts:-

And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Madras, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, (in pursuance of Section 108 of the Government of India Act, 1915), and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided (they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case included who those first heard it.)”



4.A reading of clause 36 reveals that if a Division Bench composed of two Judges stand equally divided in their opinion as to the decision to be given on any point, such point shall be heard and decided by one or more other Judges. It had also been provided in Clause-36 that when the Judges stand equally divided they shall state the point upon which they differ. Clause-36 had come for interpretation in **(2007) 2 Law Weekly 1)**, in the case of **All India Anna Dravida Munnetra Kazhagam vs. The State Election Commissioner, represented by D.Chandrasekaran and others**. The relevant portion had been given in para 182, which is as follows:

“182. Even though Clause 36 of the Letters Patent requires that if the opinion of the Judges should be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including who those first heard it, no specific point on which difference has arisen has been specified. When the matter was placed before me, at the threshold this aspect was highlighted by me and the learned counsels appearing for all the parties have stated that even though points of difference have not been specifically pointed out by the Division Bench, the difference as apparent from various discussions and conclusions of the two learned Judges should be culled out and should be decided on that basis without returning the matter for spelling out the difference.”



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5. The ratio laid down in the above judgment is that the points of difference apparent from the various discussions and conclusions of the two Judges should be culled out and should be decided. This judgment had also been referred to with much advantage in the case of ***STAR India Private Limited and another vs Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, New Delhi and others*** reported in ***2018-SCC Online Mad-1595***, wherein, reference was necessitated to be made to a third Judge under Clause 36 of Letters patent and the learned third Judge, observed as follows:

“4.2. The role required to be played by a single Judge is accordingly distinctly marked. This specific role assigned is to confirm either of the decisions on a point of difference. Even in a case where the exact point of difference is not indicated, the Reference Court can formulate and proceed to answer it on a reading of the respective views. Such a role would encompass both fact and law. For concurring with a view of one as against another, the Reference Court can give its own reasons by supplementing it. On the same score, if the ultimate decision is one and the same, but reasons being different, the Reference Court cannot go beyond it. The power available cannot be equated with that of a review nor an exercise resulting in sitting in judgment over the other.”

With the above, as the finding factors, the reference in the instant writ appeal shall be taken up for discussion.

**W.P.No.9037 of 2004:-**

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6.This Writ Petition had been filed by Shanmuga Arts, Science, Technology and Research Academy (SASTRA), deemed to be a University, Thirumalaisamudram, Thanjavur and VEE SEE BEE Trust Administering Shanmuga Polytechnic, having its main campus at “Shanmuga Campus”, Thirumalaisamudram, Thanjavur against the State of Tamil Nadu, represented by its Secretary to Government, Revenue Department and four others impugning an order passed on 01.03.2004, by the Special Commissioner, Land Administration, Chennai, who was shown as the second respondent in the writ petition. The petitioner institutions had been established in the year 1984. They claim that they are one of the very few institutions in India, where the courses are accredited by National Council on Accreditation. They further claim that the Government of India has also recognised them as a Centre for Relevance and Excellence in Advance Computing and Information Courses. The first writ petitioner was declared as a Deemed to be a University in April'2001.

7.They had acquired about 50 acres of dry land and when the buildings were under construction, they noticed that there



were also dry lands measuring 58.17 acres belonging to the Government, situated as an island within the college campus. It came to their knowledge that the Government had notified the said land for construction of an Open Air Prison. They claimed that a former Chief Minister of this State had orally granted them permission to enter upon such land, even though it had been allotted for construction of an Open Air Prison. W.P.Nos.14718 and 14719 of 1998 were filed by them seeking a Writ of Mandamus forbearing the Government from implementing the decision to allot the lands for construction of an Open Air Prison. Both the writ petitions were dismissed by order dated 13.07.1998. During the pendency of the writ petition, pursuant to an interim direction, the Government was directed to consider their representations offering alternative lands. The Government had rejected the representation and passed G.O.Ms.1030 Prison (Home) Department, dated 25.07.1996 stating that the lands offered were in Pudukottai District. It must also be stated that either earlier or pending the writ petitions, the petitioner institutions had encroached 20.62 acres and taking advantage of the interim stay granted by the Court of construction of the Open Air Prison, had constructed their own buildings on the lands



encroached. Challenging the order of the learned Single Judge, dated 13.07.1998 in W.P.No.14718 and 14719 of 1998, W.A.Nos.974 and 975 of 1998 were filed. They were also dismissed by judgment dated 22.09.1998.

8.The Tahsildar, Thanjavur, then issued a notice under the provisions of the Tamil Nadu Land Encroachment Act, 1905, on 18.01.1999. Orders were passed on 24.05.1999 directing removal of encroachment. This was challenged in W.P.Nos.9287-9292 of 1999. These writ petitions came up for consideration on 01.06.1999 and were rejected by this Court. It was pointed in the writ petitions that after service of notice under the provisions of the Tamil Nadu Land Encroachment Act, 1905, request was sought to submit objections but still an order of eviction had been passed. It was observed by the Court that there was a remedy of appeal and therefore, the writ petitions were not even admitted and rejected. However, it was directed that the possession should not be disturbed for a period of six weeks to enable appeal to be filed before the appellate authority.

9.Thereafter, as against the order of Tahsildar, dated



24.05.1999, appeal had been preferred before the Revenue Divisional Officer, Thanjavur. The Officer rejected the appeal by order dated 15.10.1999. As against this order, a revision had been preferred before the District Revenue Officer. The District Revenue Officer, Thanjavur remitted the matter back to the Tahsildar, Thanjavur, directing him to receive objections and pass orders on merits. The Tahsildar, Thanjavur, on receiving the papers on remand, passed orders on 21.02.2000 again confirming removal of encroachment. As against that order, an appeal was again preferred. The Revenue Divisional Officer, Thanjavur, the appellate authority, again rejected the appeal by order, dated 26.06.2000. A revision was again filed before the District Revenue Officer, Thanjavur, who also rejected the revision on 26.12.2000. Thereafter, a further revision was filed before the Commissioner of Land Administration, Chennai. On 20.03.2001, stay order was granted. Final orders were passed on 01.03.2004. W.P.No.9037 of 2004 had been filed challenging the the said order.

10.It must also be mentioned that, by initiating parallel proceedings, the writ petitioners had been submitting representations seeking assignment of the lands and the said



representations were also processed at various stages and by various officials. Finally, vide letter dated 19.12.2002, the Secretary, Revenue Department had rejected grant of assignment of the lands. This letter formed the basis of the impugned order dated 01.03.2004. It must also be mentioned that though 58.17 acres lands had been allotted for the Prison Department, 20.62 acres of the lands were encroached and eviction had been ordered in the impugned order.

11. In the writ petition, the learned Single Judge, by order dated 04.09.2014 had quashed the order of the Commissioner of Land Administration, Chennai, dated 01.03.2004 and resultantly, directed assignment of lands at the minimum cost as per the Government valuation during the period of 1984. Subsequently, by order dated 18.12.2004, an amendment was made by including further survey numbers but retaining the same directions.

W.A.No.1451 of 2015:- The respondents in the writ petition filed the appeal. Judgement was delivered on 11.08.2017. However, the two learned Judges differed on their conclusions.



12. In the lead judgment, the direction given in the writ petitions were upheld and, it was additionally directed that the Government should consider the various Government Orders passed by it with respect to other educational institutions and take an appropriate decision. It was further stated that the writ petitioners should remit a sum of Rs.10 crores to the Government within 30 days from the date of the order.

13. In the dissenting judgment, the order in the writ petition was set aside and additionally, the Government was directed to evict the writ petitioners from the encroached lands and were further directed to take possession of the same within a period of 4 weeks and also to fence the lands by providing security. The Superintendent of Police, was directed to provide adequate protection to the District administration for eviction of the respondents and the District Administration was directed to recover appropriate compensation / fees / penalty from the writ petitioners for the period, in which they were in illegal accommodation of the Government lands and further the State was directed to conduct an enquiry and initiate appropriate penal / disciplinary action against the Government officials / employees,



who were found to have supported the encroachment. The Principal Secretary to the Government, Revenue Department was directed to monitor the entire action taken by the officials in this regard.

14. In view of the divergent findings, the matter had been referred to this Court for further adjudication.

15. Heard the arguments advanced by Mr. C. Manisankar, learned Additional Advocate General, Assisted by Mr. T. N. Rajagopalan, learned Government Pleader and Mr. K. Krishnamoorthy, learned Government Advocate for the appellants and Mr. G. Rajagopaln, learned Senior Counsel, Mr. N. Venkataraman, learned Senior Counsel and Mr. Sathish Parasan, learned Senior Counsel for the respondents. It must be stated that the proceedings before this Court spluttered to many a false start in the initial stages. There grew a fear that it would meander to nowhere. The notes of hearing reveal the frantic efforts of this Court, calling upon the learned Senior Counsel on either side to assist in framing points of difference, so that the arguments can be addressed with more focuss on those issues.



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16. However, the proceedings took a U-turn and the learned Additional Advocate General and the learned Senior Counsel for the respondents stated that a fresh proposal dated 23.01.2018 had been given by the respondents in the writ appeal and that it was under consideration of the District Collector, Thanjavur. The learned Additional Advocate General sought time to examine the issue. It was subsequently informed that the Land Administration Department had put up a note on 12.02.2018 before the Government with a proposal and it was under consideration by the Government. It was then again informed that the Government was considering the proposal. Adjournments were sought on these grounds. After granting some time, this Court stated that if effective progress was not made to argue the case, affidavits will have to be called for from the officials of the Government and from the respondents. The learned Senior Counsel were also called upon to elucidate whether this Court, as a reference Court under Clause 36 Letters Patent, can be bound by any concurrence given by the Government to any proposal of the respondents. Elucidation was not forthcoming, but adjournments were sought. Finally, the learned Senior Counsel on both sides, condescended



to putforth their arguments before this Court. Arguments were heard on 16.07.2018, 17.07.2018, 18.07.2018, 01.08.2018 and finally on 02.08.2018. Written submissions on the side of respondents were filed on 09.08.2018, in the Principal Bench and later forwarded to the Madurai Bench. In the discussion below, the parties shall be referred as appellants and respondents. To be again noted, the lead Judge in the writ appeal had upheld the order of learned Single Judge in the Writ Petition and the dissenting Judge had set aside the order of the learned Single Judge.

17.It is the contention of the learned Senior Counsel for the respondents that they had been offering continuously alternative lands for construction of Open Air Prison and they had also sought assignment of the lands encroached on payment of cost. The request for assignment of the lands had been rejected by the Government by letter dated 19.12.2002. It had been further contended that assignment should have been granted to the respondents since, the Government had granted assignment on payment of cost to a similarly placed institution, namely, Periyar Maniammai University.



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18. In the lead judgment, the order directing eviction was set aside and a direction was given to the Government to consider the representation of the respondents, keeping in mind the decision taken by the Government for assigning the lands to other educational institutions, particularly, Periyar Maniyammal University. The respondents were directed to deposit a sum of Rs.10 crores towards the cost of the land. In the dissenting judgment, it had been held that having encroached upon lands, the respondents cannot seek assignment and consequently, the Government was directed to take possession of the lands after removing the encroachment.

The points of difference :-

19. The learned Senior Counsel on either side stated that though in the dissenting judgment, the points of difference had been given, this Court should revisit the points framed. The respondents contended that they were not encroachers and that they were permitted to occupy the lands by an oral order of a former Chief Minister of the State. This stand had been rejected by both the Judges and in fact even by the Revenue authorities.



Even in the lead judgment, it was observed that though an affidavit had been filed by a Minister affirming such grant of permission, the said affidavit cannot be relied upon. In a democracy, a Chief Minister cannot orally gift away 58.12 acres of land overlooking the fact that it had been allotted for a public purpose for constitution of an Open Air Prison. The respondents are encroachers and any submission to the contrary have been always rejected.

20. The very fact that in the lead judgment, the order directing eviction of encroachment was set aside and the Government was directed to re-examine the representation submitted for assignment of lands would indicate that the respondents had encroached upon the Government land. Superfluous arguments had been advanced, particularly, on behalf of the respondents that the contents in the supporting affidavit of the Minister had not been rejected. The said arguments have been advanced more with hope than with any conviction. The respondents cannot live in denial and proclaim innocence and seek indulgence.



21. The further fact is that the respondents, having encroached on the Government lands have constructed buildings.

If they constructed buildings on their own lands, there would have been no necessity for any litigation against the Government at all, except the original litigation in W.P.Nos.14718 and 14719 of 1997, wherein, they had protested locating an Open Air Prison in close proximity to the educational institution. I hold that the averments regarding oral assignment of lands, which had been rejected by the Tahsildar, Revenue Divisional Officer, District Revenue Officer, Commissioner of Land Administration, and also by the High Court in earlier writ petitions is a false plea by the respondents. They have not pleaded this fact in the affidavit filed in support of W.P.Nos.14718 and 14719 of 1997. They have pleaded that only in the reply affidavit, when they had been granted the opportunity to spin a yarn drawing the name of a former Chief Minister of the State. No Court of law can pay heed to a representation that a Chief Minister or any political functionary for that matter can assign 58 acres of land by word of mouth and further hold that there need not be any official written order in that regard. The law demands that written orders are required for assignment and the respondents do not have them



and have not produced them. Consequently, I hold that the issue that they are encroachers is not in dispute in both lead and the dissenting judgments.

22.The point of difference in the two judgments arose as to the next course of action to be taken. In the lead judgment, the impugned order in the writ petition directing eviction was set aside and the Government was directed to reconsider the representation for assignment of the lands encroached keeping in mind the orders of the Government assigning the lands to other educational institutions.

23.Consequently, the points of difference between the lead judgment and the dissenting judgment is whether the order impugned in the writ petition, which is the proceedings dated 01.03.2004 of the Special Commissioner / Commissioner of Land Administration, Chennai should be quashed and a direction can be given to the Government to assign lands or whether the order impugned in the writ petition should be uphold and a direction be given to the Government to repossess the lands.



24. In fact, in the lead judgment, the impugned order dated 01.03.2004 was quashed, whereas, in the dissenting judgment, it was upheld. As a corollary, in the lead judgment, the Government was directed to examine the representation of the respondents for assignment of the lands, whereas, in the dissenting judgment, the Government was directed to repossess the lands. Conditions were imposed in the lead judgment that the respondents should deposit a sum of Rs.10 crores and in the dissenting judgment, it was held that the lands should be repossessed by erecting a fence within a period of four weeks and security must be provided and further an enquiry must be made against the officials, who had permitted such encroachment.

The points of difference discussed:-

25. The proceedings for encroachment against the respondents were for an extent of 20.62 acres. By the impugned order, which was challenged in the writ petition, the Special Commissioner / Commissioner of Land Administration had vacated the stay granted earlier on 20.03.2001 and dismissed the revision petition. The revision petition had been filed against the proceedings dated 20.12.2000 of the District Revenue Officer. By



the said proceedings, the revision preferred by the respondents was dismissed order of the Revenue Divisional Officer was confirmed. The Revenue Divisional Officer, by proceedings dated 26.06.2000, had dismissed the appeal filed by the respondents against the order of the Tahsildar. The Tahsildar, by order dated 21.02.2000, had directed removal of encroachment under Tamil Nadu Land Encroachment Act, 1905.

26. The learned Additional Advocate General in the course of arguments, pointed out that the respondents indulged in initiating parallel proceedings. They first filed a writ petition complaining that an Open Air Prison should not be constructed adjoining the Institution, since that would cause serious prejudice to the students who study in the institution. They obtained an interim stay and the writ petition was dismissed after 10 years in 1998. Thereafter, in the second set of proceedings, the Tahsildar initiated proceedings by issuing notice under the provisions of Tamil Nadu Land Encroachment Act, 1905. The respondents were not, according to them, granted opportunity to effectively participate in that proceedings. Subsequently, orders were passed directing eviction. They then filed a writ petition complaining lack



of opportunity. This Court had directed them to file an appeal before the appellate authority. They preferred an appeal before the Revenue Divisional Officer, who by proceedings dated 15.10.1999, dismissed the appeal. They, then, preferred a revision before the District Revenue Officer, who by proceedings dated 03.01.2000, remanded the matter back to the Tahsildar, leading to fresh commencement of the third set of proceedings. The Tahsildar, by proceedings dated 21.02.2000, again ordered removal of encroachment. This was taken before the Revenue Divisional Officer, who by proceedings dated 26.06.2000, confirmed the order of Tahsildar. This order was again challenged before the District Revenue Officer, who also by proceedings dated 26.12.2000 confirmed the order of both Tahsildar and Revenue Divisional Officer and dismissed the revision. Again this was challenged before the Special Commissioner / Commissioner of Land Administration, Chennai. The said officer initially granted stay of further proceedings on 20.03.2001.

27. In the meanwhile, the next proceedings were initiated by the respondents, apart from filing writ petitions and shadow



participating in the proceedings before the revenue authorities challenging order of eviction. This was by submitting giving representations to the Government seeking assignment of encroached lands for value and also offering alternative lands. These proceedings went through a parallel line and there were several correspondences from the Special Commissioner / Commissioner of Lands Administration to the Secretary to the Government, Revenue Department on 01.02.2000 and then to the District Collector and the Tahsildar dated 25.02.2002. Then there was a letter from the District Collector, Tahsildar to the Special Commissioner / Commissioner of Land Administration, dated 27.05.2005. Finally, the said representation was rejected by the Revenue Department, by letter dated 19.12.2002. Based on such rejection, the Special Commissioner / Commissioner of Land Administration, who was examining the revision against the order directing removal of encroachment, also dismissed the said revision by proceedings dated 01.03.2004. This was challenged in W.P.No.9037 of 2004 and interim stay was granted. The writ petition was allowed on 04.09.2014 and an amendment incorporating further survey numbers was made on 18.12.2004. This writ appeal had been preferred against the said order.



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28.A careful analysis of the above facts, leads to the following inferences:

1)The respondents have encroached 20.62 acres of lands out of 58.71 acres allotted for constitution of an Open Air Prison.

2)Taking advantage of grant of stay in various proceedings they have constructed buildings.

3)Their representation for assignment of the lands had been rejected.

29.It is the contention of the learned Additional Advocate General that in view of the fact that the proceedings were continuously initiated by the respondents before one authority or other, the Government was not able to utilise the lands for construction of the Open Air Prison. It must be noted that the Prison Department was granted permission to enter upon the land as early as on 03.12.1985. However, out of the 58.71 acres allotted for construction of an Open Air Prison, the respondents had encroached upon 20.62 acres. They also constructed buildings in the said lands. They had encroached and constructed



buildings, even when petitions were pending before the High Court, pending before the revenue authorities and representations were pending before the Government. It were under these circumstances, the authorities were not able to move forward and utilise the land for construction of Open Air Prison.

30. On the other hand, the learned Senior Counsel appearing for the respondents stated that the respondents are honourable Educational Institutions, imparting knowledge to hundreds of thousands of students and therefore, they wanted to retain the land adjacent to the institution. They claimed that they were granted permission by a former Chief Minister of the State. The said stand had been effectively rejected by this Court in earlier writ petitions. Even in the lead judgment, the affidavit procured from the Minister, who was stated to be present at that time when such permission was alleged to have been granted, was not considered and it was observed that it would be safe not to rely on such affidavit. However, the learned Senior Counsel in unison argued that the representations of the respondents deserve special consideration by the Government. They claim they have not sought lands for free, but have offered alternative lands and



have also sought assignment on payment of costs. They also stated that the achievements of the institution, which is educating a large number of students, in furtherance of a social cause, demands protection of the interests of the institution.

31.This argument has proved to be the divergent point between the lead judgment and the dissenting judgment. In the lead judgment, the arguments advanced by the learned Senior Counsel for the respondents were accepted and a direction was given to the Government to consider assignment of lands keeping in mind the assignments granted by the Government to other educational institutions and a further direction was also issued that the respondents should deposit a sum of Rs.10 crores as a pre-condition for the Government to consider the representation. In the dissenting judgment, the arguments of the learned Senior Counsel for the respondents were rejected and the Government was directed to take possession of the lands within a period of four weeks.

32.While adjudicating as a third judge, the scope of this Court is very narrow. The Court has to examine the facts and



concur with either one of the two courses taken in the lead judgment and in the dissenting judgment. To decide that, this Court can also supplement its own reasons.

33. One very crucial aspect that had been missed out probably deliberately by the learned Senior Counsel for the respondents is that they have simply brushed under the carpet, the plight of the children of a lesser God.

34. The Government allotted 58.17 acres of land for construction of an Open Air Prison. In the Prison Manual 1982, an Open Air Prison and a Special prison for women are categorised as a Special Jail. The relevant portion reads as follows:

“3. Kinds of prisons-Prisons shall be of three kinds. Central Prisons, Special Prisons and Special Sub-Jails.

Explanation-Open Air Prison and State Prison for women, Vellore are classified as Special Prisons.”

35. Courts across the country, particularly, the Supreme Court, have expressed anguish the state of prisons in the Country. They have recommended again and again that Open Air Prisons are required for reformation of particularly adolescent prisoners,



since if they are permitted to mix with regular prisoners / convicts in a central prison, it will cultivate a habit and tendency to commit further crimes. By effectively preventing an Open Air Prison being constructed, the respondents had destroyed generations of youth of the State, who could have been reformed by access to an Open Air Prison in Thanjavur.

36.The learned Senior Counsel for the respondents spoke glowingly about the contributions made by the respondents for the upliftment of the society. I fear that quite deliberately, the respondents have actually destroyed one section of the society, who needed help and guidance. They have brought about tears in the eyes of thousands of mothers, who have watched their children getting entangled in the world of crime without any scope for reformation, which would have been possible had the concept of Open Air Prison fructified as a reality.

37.In **1979-3-SCC-645**, in the case of ***Dharambir And Anr vs State of Uttar Pradesh***, the Honourable Supreme Court stated that the accused should be accommodated in an Open Air Prison. The Supreme Court had observed as follows:



“....3. We, however, notice that the petitioners in this case are in their early twenties. We must naturally give thought to the impact on these two young lives of a life sentence which means languishing in prison for years and years. Such induration of the soul induced by indefinite incarceration hardens the inmates, not softens their responses. Things as they are, long prison terms do not humanise or habilitate but debase and promote recidivism. A host of other vices, which are unmentionable in a judgment, haunt the long careers of incarceration, especially when young persons are forced into cells in the company of callous convicts who live in sex-starved circumstances. Therefore, the conscience of the court constrains it to issue appropriate directions which are policy-oriented, as part of the sentencing process, designed to make the life of the sentence inside jail restorative of his crippled psyche. One of the principal purposes of punitive deprivation of liberty, constitutionally sanctioned, is decriminalization of the criminal and restoration of his dignity, self-esteem and good citizenship, so that when the man emerges from the forbidding gates he becomes a socially useful individual. From this angle our prisons have to travel long distances to meet the ends of social justice.

4. In the present case, we think it proper to direct that the State Government and the Superintendent of the Prison concerned will ensure that the two prisoners are put to meaningful employment and, if permissible, to open prisons, as an experimental measure.....”

(Emphasize Supplied)

38. Again in **1979-4-SCC-765**, in the case of **Sushil Chowdry vs State of Bihar**, the Honourable Supreme Court again commented on the need for reformation in an Open Air Prison for the appellant, whose appeal was dismissed. The Supreme Court observed as follows:

“3.....Nevertheless, it is important to remember that Babua Marandi was aged 15 years at time of the offence. It is regrettable-and this Court has pointed this out more than once-that there is no Children Act in Bihar, and in



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this International Year of the Child we have to emphasize that the Legislature is expected to do its duty by the children of Bihar by considering the passing of a measure like the Children Act which long ago had been circulated by the Central Government and which exists in some other states in the country. Be that as it may, we are unable to deal with Babua Marandi as a child for the simple reason that absence of legislation cannot be made up for by Judicial legislation. All that we can do, in the hapless circumstances of the case and in the helpless situation of legislative vacuum, is to direct that Babua Marandi be placed either in an open prison or in a model prison or any other prison available in the State where young offenders are kept apart from the adult offenders. The special reason which induces us to make this direction is that, as is well known, adolescents should be separated from adults in prison campuses. The vices are obvious and we, therefore, direct accordingly.

(Emphasize Supplied)

39. The Honourable Supreme Court, however, found that the Government did not respond to their cries for reformation. In ***Ramamurthy Vs. State of Karnataka*** reported in ***(1997) 2 Supreme Court Cases 642***, the Honourable Supreme Court had again emphasized the necessity of construction of Open Air Prisons in every district in every State. The direction issued were as follows:



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“47. Open air prisons play an important role in the scheme of reformation of a prisoner which has to be one of the desideratum of prison management. They represent one of the most successful applications of the principle of individualization of penalties with a view to social readjustment as stated by B. Chandra in the Preface to his book titled "Open Air Prisons". It has been said so because release of offenders on probation, home leave to prisoners, introduction of wage system, release on parole, educational, moral and vocational training of prisoners are some of the features of the open air prison (camp) system. Chandra has stated in the concluding portion of Chapter 3 at page 150 (of 1984 edition) that in terms of finances, open institution is far less costly than a closed establishment and the scheme has further advantage that the Government is able to employ in work, for the benefit of the public at large, the jail population which would have otherwise remained unproductive. According to the author, the monetary returns are positive, and once put into operation, the camps pay for itself.

48. Reference may also be made to what has been stated in Chapter 5 about the change in the human and social outlook, which activities and programmes of these camps bring about. The whole thrust is to see that after release the prisoners may not relapse into crimes, for which purpose they are given incentives to live normal life, as they are trained in the fields of agriculture, horticulture etc. Games, sports and other recreational facilities, which form part of the routine life at the open air camps, inculcate in the prisoners a sense of discipline and social responsibility. The prayers made regularly provide spiritual straight.

.....

50. Open air prison, however, create their own problem which are basically of management. We are, however, sure that these problems are not such which cannot be sorted out. For the greater good of the society, which consists in seeing that the inmates of a jail come out, not as a hardened criminal but as a reformed person, no managerial problem is insurmountable. So, let more and more open air prisons be opened. To start with, this may be done at all the District Headquarters of the country.

51. We have travelled a long path. before we end our journey, it would be useful to recapitulate the directions we have given on the way to various authorities. These are:

.....



(10) To ruminate on the question of introduction of open air prisons at least in the District Headquarters of the country.”

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40. In our State, in Thanjavur, when the Government had allotted lands for construction of an Open Air Prison, the respondents encroached those lands and claim that they are doing a service by educating adolescent children, when, as a matter of fact, they were doing disservice to a large class of adolescent children, who required guidance and assistance. Consequently, the respondents cannot claim assignment as a matter of right or even hold out that they would handover consideration for such assignment. They stand on a totally different footing from every other institution for whom assignment had been granted by the Government. The respondents have directly, by their encroachment, effectively prevented the reformation of a large number of successive generations of adolescent children for the past over thirty years. From the year 1985 till this date, at least two generations of adolescent children have been deprived of the opportunity to reform themselves and the respondents have to be mulcted with the charge of directly turning a blind eye to the needs of society, to the need of wiping the tears of young mothers and sisters, who have witnessed their children and husband being



drawn into a world of crimes without any hope even a slight hope, of being reformed or having an opportunity of being reformed. The future of the children had been destroyed by this act of encroachment.

41.As a matter of fact, in **2017-10-SCC-658** in ***Re-Human Condition in 1382 Prisons***, the matter, which is still under consideration of the Honourable Supreme Court, in an order dated 15.09.2017, the Honourable Supreme Court had observed as follows:

“58.10.The suggestion given by the learned Amicus Curia of encouraging the establishment of “open jails” or “open prisons” is certainly worth considering. It was brought to our notice that the experiment in Shimla (Himachal Pradesh) and the semi-open prison in Delhi are extremely successful and need to be carefully studied. Perhaps there might be equally successful experiments carried out in other states as well, and if so, they require to be documented, studied and emulated.

.....

59.We expect the above directions to be faithfully implemented by the Union of India and the State Governments.”
(Emphasize Supplied)

42.The Madras High Court has also urged the construction of an Open Air Prison in the Union Territory of Puduchery and in in Tamil Nadu in every district in Tamil Nadu. The Madras High



Court has been conscious that construction of such jails are required for betterment of society. In **2006-SCC online Madras 1203**, in the case of ***Bharathi vs Union Territory of Pondichery and others***, a Division Bench had issued a direction to the Government of Pondichery to construct an Open Air Prison for the benefit of prisoners as directed in Rama Murthy case (1997 (2) SCC 642) with the aim of reforming them. The direction issued reads as follows:

*“9. In view of the above discussion, the grievance expressed by the petitioner/prisoner in Puducherry Central Jail, various directions of the Apex Court as referred to above and the stand of the Chief Superintendent of Jails, Puducherry, we issue the following directions for due compliance,
a. The union territory of Pondicherry shall fully implement and follow the directions issued by the Supreme Court in Sunil Batras case (AIR 1978 SC 1675 & AIR 1980 SC 1579) and Rama Murthy's case (1997 (2) SCC 642).”*

43.The Madurai Bench of the Madras High Court, in **2017-SCC Online Madras-25932**, in the case of ***K.R.Raja vs. The State of Tamil Nadu and another***, had issued directions to follow the direction laid in ***Ramamurthy Vs. State of Karnataka*** reported in **(1997) 2 Supreme Court Cases 642**, wherein, Open Air Prisons were directed to be constructed in every district. The Madurai Bench of the Madras High Court had also directed the Government to construct Open Air Prison in



every district in Tamil Nadu.

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44. Thus, it is seen that the Madras High Court had directed Open Air Prisons to be constructed in every District under its domain in Tamil Nadu and Pondichery. However, the respondents, had directly prevented the construction of Open Air Prison in Thanjavur District.

45. It had been contended by the learned Senior Counsel for the respondents that they have encroached only 20.62 acres out of the 58.17 acres and the remaining lands had not been used by the Prison Department at all. This argument conveys no meaning. When a plan is drawn for construction of Open Air Prison, the master plan would encompass the entire area and if nearly more than 20 acres of land, is plucked out through encroachment, then the Prison Department can never build an Open Air Prison.

46. The learned Senior Counsel for the respondents had urged this Court to hold that since assignment had been granted to Periyar Maniyammai University and other educational institutions, the land encroached by the respondents should also



be assigned to them. If this contention is to be considered then between the respondents and Periyar Maniyammai University, then, it would be necessary to examine the nature of ownership / management of both institutions, the surplus lands available for both institutions, the nature of courses conducted by both the institutions, background of students who are enrolled by both institutions, the course curriculum offered by both institutions, the qualification and experience and background of the Professors of both institutions and more importantly, whether the lands were allotted for same public purpose had been still assigned overlooking the grant / allotment of lands for such public purpose. In the present case, these details had been probably deliberately not furnished by the respondents. Even otherwise, the Government had rejected the assignment of lands to the respondents on 19.02.2002 and had granted assignment to Periyar Maniyammai University, after that date. If the Government had rejected the representation made by the respondents for assignment, after granting assignment to Periyar Maniyammai University, then the respondents can to a limited extent, seek equal treatment. The respondents have very cleverly shifted the burden to the Courts to render a finding of equal



treatment when they have not called for the records leading to assignment of the lands to Periyar Maniyammai University and all other educational or other institutions and have not made those institutions as parties respondents to the writ petition. In the absence of the requisite details and in the absence of granting opportunity to those institutions, the Court cannot be drawn to render a finding on this aspect. The claim of the respondents on this ground is rejected by me. Plain and simple, they have encroached the Government lands and at the same time prevented the construction of an Open Air Prison.

47.*In 2015 (5) LW-397*, in the case of ***Shanmugam vs State of Tamil Nadu***, a Full Bench of this Court had explained Public Trust Doctrine. Though the Full Bench was concerned with encroachment of water bodies affecting the rights of the public, the principle can be applied to encroachment of lands meant for public purpose, which will also include construction of Open Air Prison. Such construction is only for public benefit. In that judgment, it was held as follows:

“32.....Res communes were excluded from private control and the trustee was charged with the duty of preserving the resources in a manner that made them available for certain public purposes. It has been further explained that the legal or



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moral concept of common ownership later emerged as more of a reservation of 'a series of particular rights to the public' to engage in certain activities, thus limiting 'the prerogatives of private ownership'.....

32. Whatever approach is taken, the fundamental emphasis is on communal rather than private rights. In cases where communal rights protector negates the rights of some, it implies a denial of the application of the Public Trust Doctrine.Where the resources are held by a state, the essence of the Public Trust Doctrine is that the state or governmental authority, as trustee, has a fiduciary duty of stewardship of the public's 'environmental capital'.

34. In *Michigan Law Review*, Vol. 68, No. 3 (Jan. 1970), Pages 471-566, Prof. Sax said that three types of restrictions on governmental authority are often thought to be imposed by the public trust doctrine, namely:

- '1. the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public;
2. the property may not be sold, even for fair cash equivalent;
3. the property must be maintained for particular types of use (i) either traditional uses, or (ii) some uses particular to that form of resources.'

48. In **2017-SCC Online - SC 1297**, in the case of ***National Institute of Medical Science University, Rajasthan and another vs State of Rajasthan and others***, the Honourable Supreme Court had considered a case with strikingly similar facts as the instant case. The facts in that case had been related in the following paragraphs:



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“14.The petitioner is a University and presumably it is a University of some repute and responsibility. It made an application for allotment of land in village Jugalpur, Tehsil Amer in District Jaipur to the District Collector of Jaipur on 10th May 2002. However, the application for allotment did not include Khasra No. 526 with which we are concerned. NIMS apparently did not receive any reply to the application.

15.For reasons that are not quite clear, NIMS sent a letter to the Chief Minister of Rajasthan on 28thFebruary 2005 to the effect that it had allegedly encroached upon Khasra No. 526. Having denied the allegation, NIMS then sought allotment of that Khasra being No. 526 Rakba 14.44 hectare.

16.According to NIMS, it made several subsequent representations for allotment of Khasra No. 526 but received no reply from any of the authorities for as long as 10 years. During this period, NIMS presumed that the silence of the State Government meant that it had no objection to the allotment. Accordingly, it claimed to have purchased several parcels of land including Khasra No. 526 from various Khatedars and claimed that demarcation of the land was also carried out by the Revenue authorities. On the presumption that there was no objection to the allotment of the land, NIMS made massive construction on Khasra No. 526.

17.Eventually and since no favourable action was taken on the representations made, NIMS filed S.B. Civil Writ Petition No. 1814 of 2012 in the High Court praying that directions may be issued in its favour for allotment of land including Khasra No. 526 for its University. The writ petition came to be dismissed by a learned Single Judge of the High Court by a judgment and order dated 1st November 2012.

18.Around that time, NIMS was issued a notice dated 13th February 2012 under Section 72 of the Jaipur Development Authority Act, 1982 in respect of the alleged encroachments on Khasra No. 526.

19.Feeing aggrieved by the notice, NIMS preferred Appeal No. 37 of 2012 before the Appellate Tribunal, Jaipur Development Authority. After hearing NIMS, the Appellate Tribunal dismissed the appeal by its judgment and order dated 12th October 2012. This led NIMS to prefer S.B. Civil Writ Petition No. 16836 of 2012 in the High Court. This writ petition was clubbed along with S.B.



Civil Writ Petition No. 1814 of 2012 and both were dismissed by a learned Single Judge on 1st November 2012.

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20. Feeling aggrieved by the dismissal of both the writ petitions, NIMS preferred special appeals before the Division Bench of the High Court and these were registered as D.B. Civil Special Appeal (Writ) Nos. 1455-1456 of 2012. Both the appeals were heard by the Division Bench and dismissed by the impugned judgment and order dated 26th November 2012.”

49. The Single Judge and the Division Bench of the Rajasthan High Court dismissed the writ petition and the writ appeal filed by the National Institute of Medical Science University, Rajasthan, seeking assignment of encroached lands. Before the Division Bench, it was also contended that they had put up massive constructions and no useful purpose would be served by demolishing the said constructions. However, the Division Bench rejected that contention and also held that if steps are not taken to remove the encroachment, it would only encourage others to encroach upon lands and seek regularisation of illegal construction made thereon. Before the Honourable Supreme Court, it was observed that the Chief Minister was not the competent authority to grant the allotment. The competent authority was only the Collector. The Honourable Supreme Court, finally, held as follows:



“42.Keeping in mind the view expressed by this Court in these and other decisions, we also direct the demolition of the unauthorized construction by or on behalf of NIMS on Khasra No. 526. The demolition should be carried out by the Jaipur Development Authority with the assistance of the State Government and the Collector of Jaipur District on or before 30th November, 2017. The Director General of Police of Rajasthan is directed to render all necessary assistance in the process of demolition. The cost of demolition and removal of rubble etc. will be at the expense of NIMS. Any pending application made by NIMS for compounding the unauthorized construction or regularizing it stands superseded in view of our decision.”

50.The learned Senior Counsel for the respondents contrasted the facts in the above case with the facts in the instant case. It was stated that National Institute of Medical Science University, Rajasthan had encroached upon a water body, whereas, the respondents herein had not done so. This contention is rejected by me. As pointed out, the respondents herein had encroached upon the lands allotted for Open Air Prison which serves an equal, if not more important public purpose.

51.In paragraph of 32 of the above judgment, one further fact had been stated, which reads as follows:

32.One of the factual conclusions arrived at by the High Court is that NIMS had made a request for allotment of Khasra No. 526 for the first time only on 28th February 2005 and that too before the Chief Minister who was not the competent authority to make the allotment - the competent authority being the Collector of Jaipur district. Why NIMS chose to directly approach the Chief Minister is a mystery which can be solved only by NIMS.”



Even in the present case, the respondents had chose to directly approached a former Chief Minister. The observation made in the paragraph extracted above would directly apply to the facts of this case.

52.I would like to add that teachings and preachings made, standing on encroached soil, would only soil the values and ethics of such teachings and preachings. The respondents must realise that the officials, who granted permission to construct buildings, who turned a blind eye at the encroachment made by them are officials who have actually acted to the direct detriment of the values, which the respondents proclaim to adhere.

53.The respondents have more than abundant additional unused lands and they would be serving a far greater cause, if they voluntarily vacate and construct the buildings in their own lands. They must realise that they have prevented the construction of an Open Air Prison, which would also have imparted education through reformation to an equal number of adolescent children. By the act of encroachment, the respondents have directly prevented the reformation of these unfortunate



adolescent children. Viewed from any angle, the respondents who proclaim to do public service, have also done public disservice. In the present case, the respondents have enjoyed 20.62 acres of lands for the past more than 30 years without paying a single naya paise for such occupation.

Conclusion:-

54. These reasons compel me to concur with the dissenting judgment.

55. In the result, this reference with respect to the point of difference stands ordered concurring with the dissenting judgment. No costs.

cmr
Index: Yes/No
Web: Yes/No
Speaking/Non Speaking
Note: Issue order copy on 23.08.2018

21.08.2018



To
WEB COPY

- 1.The Secretary to Government,
State of Tamil Nadu,
Revenue Department, Fort. St.George,
Chennai – 600 009.
- 2.The Special Commissioner and
Commissioner of Land Administration,
Chepauk, Chennai – 600 005.
- 3.The District Revenue Officer, Thanjavur.
- 4.The Revenue Divisional Officer, Thanjavur.
- 5.Thi Tahsildar, Thanjavur.
- 6.The Principal Secretary to Government,
State of Tamil Nadu,
Home (Prisons) Department, Chennai – 600 009.
- 7.The Additional Director General of Police /
Inspector General of Prisons,
CMDA Tower -II, Egmore, Chennai-600 008.



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C.V.KARTHIKEYAN, J.

cmr

Pre-delivery Judgment in
W.A.No.1451 of 2015

21.08.2018