

BEFORE THE NATIONAL GREEN TRIBUNAL (SOUTHERN REGION)

AT CHENNAI

Appeal No. 17 of 2017

M/s V.V. Mineral

... Appellant

Versus

The Member-Secretary

Tamil Nadu Coastal Zonal

Management Authority

... Respondent

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Dated at Chennai this the 16th day of January 2021



COUNSEL FOR APPELLANT

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WRITTEN SUBMISSIONS

A. BRIEF FACTS:

1. The Appellant is a private entity engaged in the beach sand mineral industry.
2. During the year 2012, the Appellant resolved to incorporate a separate unit for operating a Special Economic Zone (SEZ).
3. The Appellant accordingly applied to the Ministry of Commerce through the Board of Approvals for setting up a Specific Mineral Based SEZ, including captive port.
4. The Board of Approvals at its meeting dt. 05.12.2012 approved the Appellants proposal to set up a Special Economic Zone.
5. It is crucial to note here that what is being set up is not a Monazite Processing unit, but an SEZ where diverse mineral related activities were to be carried out.
6. As stated above, during the processing of beach sand minerals, various minerals are obtained like Rutile, ilmenite, leucoxene, zircon. Therefore, it was mentioned in the Application for permission from CRZ authorities that Monazite is also one of the minerals obtained during the processing of beach sand minerals. [Please see Pg. 1 of the Respondent's Convenience Set]
7. The CZMA granted the CRZ clearance on 10.08.2016. In the order, [page 19 of the Appellants book] at pt. 21 in Para 6, the list of proposed activities are enumerated. These include (a) Cracking of Monazite, (b) Processing of Titanium, (c) Processing of Zirconium and other activities

8. On 5.10.2016, the Respondent herein passed Suo motu revocation order, revoking the permission, without issuing a Show Cause Notice or giving the Applicants an opportunity of hearing. The basis for this order was said to be an internal communication from the Department of Atomic Energy dt. 30.9.2016 purportedly stating that Monazite cannot be cracked by private parties. [Please see Pg. 25 of the Appellant's Paper book]. Neither this document was shared with the Appellant, nor was the Appellant was given any chance to show cause.

B. PLEADINGS

1. **Appellant's Case:** The Appellant's case is that it had a valid approval (from Board of Approvals) for setting up an SEZ, and that it had also got a valid CRZ approval. The Appellant's case is that the valid CRZ Approval was suo motu revoked by the Respondent, without following principles of natural justice.

2. **Respondent's Case:** In the Respondent's Counter, it has been fairly conceded that no opportunity of hearing was given. Furthermore, the failure to furnish the DAE Communication dt. 30.09.2016, was not disputed. Hence, the failure of natural justice was writ large on the face of the proceedings.

3. **Over and above the pleadings**, the learned Additional Advocate General has raised three submissions:-

(a) Appeal is bad for non-joinder of necessary parties

(b) Appellant can never operate any SEZ because of numerous litigations and orders.

(c) Even assuming natural justice is violated, it will be a Useless Formality to remand the matter back to the CZMA.

C. POINTS FOR DETERMINATION:

Based on the above pleadings and submissions, it is humbly submitted that the following are POINTS FOR DETERMINATION in this Appeal:-

I. Is the Appeal bad for non-joinder of necessary parties?

II. Has the Respondent complied with principles of natural justice?

III. Even if natural justice is violated, can Respondent invoke the Useless Formality argument?

IV. Is the Hon'ble NGT required to await the outcome of PILs and other proceedings?

D. SUBMISSIONS

1. Is the Appeal bad for non-joinder of necessary parties?

1.1. The submission of the Learned AAG is based on the misunderstanding of the provisions of the NGT Act and Rules.

1.2. The present Appeal arises under Sec. 16 and is directed against the order of CZMA dt 5.10.2016. Admittedly, the order is passed without a hearing. It is not as though the CZMA is an adjudicatory body deciding disputes between the DAE and the Appellant. This is a case where the necessary party to the Appeal is CZMA. The Appeal has been presented in accordance with Sec. 16 of the Act read with Rule 13 of the Rules. The Appeal has been scrutinized Under Rule 9 and found to be in order. The Respondent has not raised the plea of non-joinder of necessary parties in its Counter. It is well settled by the judgement of the Hon'ble Supreme Court in *Udit Narayan V. Additional Member* reported in **AIR 1963 SC 786** held as follows:

“The law on the subject is well settled: It is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.”

1.3. Applying the above test in *Udit Narayan*, it cannot be said that DAE is a necessary party. At best, it is only a proper party.

1.4. Further, the plea of non-joinder being a technical one, ought to have been raised in the pleadings at the earliest time. Since it is not expressly pleaded, it is to be treated as waived.

2. Has the Respondent complied with principles of natural justice?

2.1. At the outset, the Appellant submits that the impugned order is liable to be set aside on the ground of violation of principles of natural justice.

2.2. Admittedly, the Appellant has not been provided with an opportunity of hearing before passing the impugned order.

2.3. As stated above, the impugned order was passed on the sole ground that there has been suppression on the part of the Appellant at the time of filing the Application. The impugned order is cryptic as to what the suppression was. The statutory requirement for getting EIA Clearance and TOR is to submit the application in

prescribed Form-1. All the information required under the above said form was furnished. Hence the question of suppression on the part of the petitioner does not arise.

2.4. Form-1 of the EIA Notification, 2006, is self-explanatory. It contains a total of 24 columns. The Appellant has submitted correct answer for each and every column. All the information are furnished. The impugned order is bald and bereft of any particulars as to what information was allegedly incorrect.

2.5. Without even asking the Appellant as to what information, if any, was wrongly submitted, the impugned order was abruptly passed.

2.6. It is submitted that, apart from the fact that **no** hearing was granted, the Respondent also did not furnish the DAE Letter relied on by the Respondent for passing the impugned order. Non-furnishing of material evidence during the course of proceedings also violates principles of natural justice. [Please see *Dakeshwari Cottons Mills V. Union of India* reported in **AIR 1955 SC 65** at Para 9 and *Natwar Singh V. Director of Enforcement* reported in **2010 13 SCC 255** at Para 25-36]

2.7. The Appellant also submits that the impugned order of the CZMA is not traceable to any express statutory provision. There is no power under the CRZ Notification 2011 or under the Environmental Protection Act empowering the CZMA to revoke its own orders.

2.8. Once an environmental clearance is issued, its correctness can ordinarily be agitated only under the provisions of the Environmental Appellate Authority Act, 1997 (Act No. XXII of 1997). On this aspect alone this revocation order liable to be quashed. The impugned order does not even mention that it is passed in exercise of powers under Section 21 of the General Clauses Act. Even assuming for arguments' sake that it is so, the law is well settled that the power under the General Clauses Act to revoke an order is not absolute. The law on this aspect is laid down in **State of Kerala v Madhavan Pillai**.

2.9. In *State of Kerala v Madhavan Pillai* reported in **AIR 1989 SC 49**, the Hon'ble Supreme Court held that the power of rescindment under the General Clauses Act has to be determined in the light of the "*subject matter, context and the effect of the relevant provisions of the statute*". When one examines the subject matter context and effect of the CRZ Notification, it would be clear that excepting in cases of suppression,

the power of revocation is not available and the only remedy of the State is to follow the procedure enumerated under Act No. XXII of 1997.

2.10. When rights of the Appellant are being abridged and if the order passed by the Respondent has civil consequences, the Respondent ought to have provided an opportunity of hearing. Please see *DK Yadav V. JMA Industries Ltd.* reported in **(1993) 3 SCC 259**.

2.11. The only ground on which the impugned order has been passed is that the Appellant herein suppressed that it would undertake the activity of cracking of Monazite. This is erroneous. Moreover when there is no suppression the impugned order cannot stand. In fact, they have passed this order without power under EIA as well as CRZ Notification and even under Environmental Protection Act, 1986. On this aspect alone, it has to be quashed.

2.12. The Appellant at the time of filing the Application had submitted that there are various other activities apart from cracking of Monazite. [Please see Pg. 1 at 6 in Respondent's convenience Paper book].

2.13. The only ground on which the impugned order is passed is ex-facie erroneous. Under such circumstances, the Respondent herein does not have the jurisdiction or the power to unilaterally revoke the license.

3. *Even if natural justice is violated, can Respondent invoke the Useless Formality argument?*

3.1. It is the Respondent's case that there is no useful purpose in giving an opportunity of hearing due to the following reasons:

3.1.1. There is a ban on mining.

3.1.2. There are allegations of illegal mining.

3.1.3. The DAE's Order dated 5.1.2021 has rejected the Appellant's Application to crack monazite.

The Respondent herein relies on *Aligarh Muslim University v Mansoor Ali Khan* reported in **(2000) 7 SCC 529** to state that providing a hearing is only an empty formality.

3.2. At the outset, the Appellant submits as under:

3.2.1. As on date, the Respondent has not produced any order to show that there is a ban on mining. The Respondent has made baseless allegations without any supporting

proof. Moreover ban on mining in any way will not affect operation of the SEZ. Any unit setting up operations in the SEZ can procure minerals from anywhere; they can purchase the same either from Government companies, or by import, or by using legally mined stocks. As argued during the course of hearing (and as seen from the Annexure B (Mineral Yearbook) many many companies in India are using beach sand minerals day in and day out, for activities like paint manufacture, dental implants, surgical implants and abrasives. The arguments of the State are purely arguments of prejudice without any basis in fact or science.

3.2.2. A bald allegation of illegal mining can never be a ground to refuse an EIA Clearance, much less to suo motu revoke an existing clearance. None of the said grounds are reflected in the rejection order. The said grounds are created now only prejudice this Hon'ble Tribunal. Moreover, there is no ban on processing of minerals passed by the Hon'ble Madras High Court on the issue of illegal mining, there are no orders prohibiting functioning of a particular plant. Pendency of proceeding, will not bar this Hon'ble Tribunal from exercising its jurisdiction and quashing the impugned order, that too, when the same is issued without providing an opportunity of hearing.

3.2.3. The argument that the Appellant's proposed activities are banned in the PIL proceeds from a fundamental misconception as to what activity is proposed to be carried on. The Appellant approached the CZMA with a request for clearance to operate an SEZ. The list of activities proposed to be carried on in the SEZ has been set out in the Pollution Control Board Proceedings dt. 26.11.2012 (Page 3 of Respondents' convenience set @ page 6). It is stated in further detail in the executive summary of EIA contained in page 12 of the Respondents paper book at page 20 & 21.

Respondents' main contention was that cracking of Monazite is a banned activity. Since it is only one of the several activities to be carried on in the SEZ, there cannot be any embargo on the other activities.

The Respondent has invited the Hon'ble NGT's attention to the Court Orders contained in Page 357, Page 443 & Page 491 of the convenience set. All of these Orders expressly state that there is no ban on carrying out these very same activities after compiling with the legal proceedings. **(Please see Para 5 of Hon'ble Madras High Court Order dt. 27.1.2017 at Pg. 357 and Para 10 of Hon'ble Kerala High Court Order 03.09.2018 @ page 448 and para 3 & 4 of Hon'ble Supreme Court dt. 04.07.2019 at page 491).**

If all the activities were totally banned, none of the Hon'ble High Courts or the Supreme Court would have been correct in passing these orders. From the above, it is clear that the contention of the State Government that processing and exporting these minerals are totally banned is a wrong submission.

3.2.4. On the issue of ban on cracking of Monazite, it is submitted that while the Under Secretary of the Department of Atomic Energy may have expressed a view, that will not affect the SEZ activities in any way. Firstly, the order is not final and is liable to challenge. Secondly, the CRZ clearance was already issued for number of activities, of which only one is cracking monazite.

As has been seen in the preceding paragraph, the Hon'ble High Courts and Supreme Court have categorically held that beach sand minerals can be processed and exported after obtaining necessary approvals.

From the list of activities, enumerated in the EIA Report, it may be seen that cracking of Monazite is only one of the minerals which will be produced.

The Appellant submits herewith the Safety Guidelines issued by the Atomic Energy Regulatory Board (these are filed as Annexure A, and are hereinafter referred to as “AERB Guidelines”). These are statutory rules. Paragraph 2.1 of the AERB Guidelines contains a schematic sketch which is extracted below :

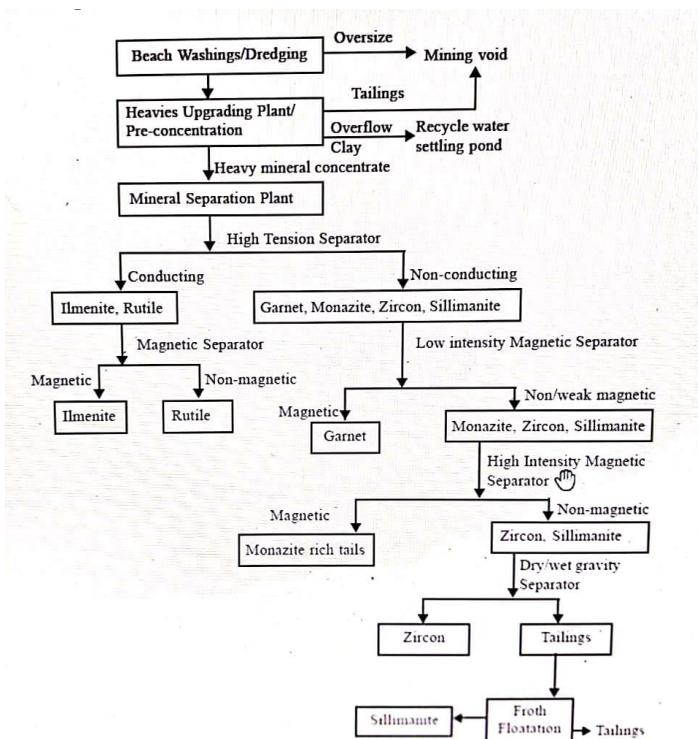


FIG.1 : TYPICAL FLOW CHART SHOWING SEPARATION OF HEAVY MINERALS

This sketch makes it very clear that Monazite is completely separate and is dealt with independently of other minerals.

After Monazite is obtained, it undergoes a process of treatment with Acids, which is called “cracking”. Since cracking of Monazite is prohibited as on date, these AERB Guidelines contains detailed instructions vide Paragraphs 5 and 6 as to what is to be done with the Monazite sand after the harmless and inert minerals like Ilmenite and Zircon are taken out.

Any unit holder within the SEZ who undertakes processing of beach sand which is a permitted activity, will therefore have to follow these AERB Guidelines in relation to the

Monazite sands that are generated. Naturally, no one can crack such sands unless and until permitted to do so.

For avoidance of doubt, it is clarified that cracking of Monazite is a completely different process from separation of beach sand. Beach sand can be processed without cracking Monazite. All that is required in such cases is that the Monazite should be stored in accordance with the aforementioned guidelines.

3.2.5. To further satisfy the Hon'ble NGT that Ilmenite and Garnet are not only harmless but also very useful, the Appellant files herewith the Government of India Publication titled "Indian Minerals Year Book" (filed herewith as **Annexure B**). All of these useful and beneficial activities can be carried out legally by any entity holding a unit within the SEZ.

3.2.6. It has always been the case of the Appellant that the mining processes are always severable. It is submitted that rejection of Appellant's Application for cracking of Monazite does not prohibit extraction of other minerals.

3.2.7. It is humbly submitted according to Section 51 SEZ Act, the SEZ Act will override other acts. According to Chapter-III, Section 9(2)(e) of the SEZ Act, the Board can approve license for any type of industries. Moreover, the decision of the Board shall be binding all the ministries and Department of Central Government. All orders of the Board of Approvals are issued only after getting inputs from all concerned ministries, and therefore, there is no need for the State Government to needlessly raise apprehensions and cast aspersions on the SEZ approval.

3.3. Therefore, as seen from above, all the facts are disputed. The Respondent is in fact cloaking its prejudice and closed mind with useless formality theory. It is submitted in *Aligarh Muslim University* (cited Supra), the Hon'ble Supreme Court in paragraph 35 held that there is only one possible conclusion and for the same reason, the case falls under the exception to the principles of natural justice and there is no prejudice caused by not giving an opportunity of hearing. The said case does not apply to the present factual matrix as the facts are not undisputed and hence, the violation of natural justice is prejudicial to the interest of the Applicant.

3.4. None of the submissions of the Learned AAG were based on the impugned Order. Not a single argument was raised to sustain the impugned Order on the face of the record. Every single submission made was on matters which were extraneous to the impugned Order and which constitute an attempt to improve upon the impugned Order, possibly because the State is acutely conscious that the Order cannot stand.

3.5. Moreover, the Respondent herein, by way of filing submissions and copious amounts of records, is now bringing out a fresh case which was never put to the Appellant. The impugned order has to be tested on the grounds on which it was passed and not with additional reasons as stated in the Affidavit or documents during the time of the Appeal. The Appellant herein relies on *Mohinder Singh Gill V. The Chief Election Commissioner* reported in (1978) 1 SCC 405. The relevant portion of the said Judgement is extracted as under:

The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in Ms mind, or what he intended to, do. Public orders made by public authorities are meant to have public effect and are intended to effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older.

3.6. Therefore, to sum up:

3.6.1. The various contentions of the State on the alleged illegality of mineral processing are strongly contested and refuted.

3.6.2. Even according to the State, there is no final decision in the matter and a PIL is pending.

3.6.3. Pendency of Litigations cannot be construed as a ban on any activity, much less an SEZ which is not covered by the PIL.

3.6.4. Having granted the CRZ Clearance, the *Suo Motu* withdrawal thereof cannot be justified on any grounds nor is the same supported by the judgement in Aligarh Muslim University case.

3.6.5. There is no power to the authorities to cancel the environmental clearance once granted by themselves. It can be agitated only by following act No. XXII of 1997.

4. Is the Hon'ble NGT required to await the outcome of PILs and other proceedings?

4.1. The learned Additional Advocate General has stated there are a large number of disputed issues of fact and law which are pending adjudication in a PIL before the Hon'ble Madras High Court.

GUIDELINES NO. AERB/FE-FCF/SG-5

GUIDELINES NO. AERB/FE-FCF/SG-5



GOVERNMENT OF INDIA

AERB SAFETY GUIDELINES

**RADIOLOGICAL SAFETY IN HANDLING
BEACH SAND MINERALS AND
OTHER NATURALLY OCCURRING
RADIOACTIVE MATERIALS**



ATOMIC ENERGY REGULATORY BOARD

AERB SAFETY GUIDELINES NO. AERB/FE-FCF/SG-5

**RADIOLOGICAL SAFETY IN HANDLING
BEACH SAND MINERALS AND
OTHER NATURALLY OCCURRING
RADIOACTIVE MATERIALS**

**Atomic Energy Regulatory Board
Mumbai-400 094
India**

July 2013

Price:

Order for this Guidelines should be addressed to:

The Chief Administrative Officer
Atomic Energy Regulatory Board
Niyamak Bhavan
Anushaktinagar
Mumbai-400 094
India

FOREWORD

Activities concerning establishment and utilisation of nuclear facilities and use of radioactive sources are to be carried out in India in accordance with the provisions of the Atomic Energy Act, 1962. In pursuance of the objective of ensuring safety of members of the public and occupational workers as well as protection of environment, the Atomic Energy Regulatory Board (AERB) has been entrusted with the responsibility of laying down safety standards and enforcing rules and regulations for such activities. The Board has, therefore, undertaken a programme of developing safety standards, safety codes and related guides and manuals for the purpose. While some of the documents cover aspects such as siting, design, construction, commissioning, operation, quality assurance, decommissioning of nuclear and radiation facilities, the other documents cover regulatory aspects of these facilities.

Safety codes and safety standards are formulated on the basis of internationally accepted safety criteria for design, construction and operation of specific equipment, structures, systems and components of nuclear and radiation facilities. Safety codes establish the objectives and set requirements that shall be fulfilled to provide adequate assurance for safety. Safety guides and guidelines elaborate various requirements and furnish approaches for their implementation. Safety manuals deal with specific topics and contain detailed scientific and technical information on the subject. These documents are prepared by experts in the relevant fields and are extensively reviewed by advisory committees of the Board before they are published. The documents are revised, when necessary, in the light of the experience and feedback from users as well as new developments in the field.

A graded approach to regulation is one of the key principles embodied in the IAEA safety standards, which state that the application of the requirements for practices 'shall be commensurate with the characteristics of the practice or source and with the magnitude and likelihood of the exposures'. In line with this, this 'Guidelines' has been prepared to provide regulatory requirements and guidance with respect to radiological safety, waste management and transportation aspects relevant to facilities processing beach sand minerals, columbite tantalite ore, rock phosphate and phosphogypsum.

Consistent with the accepted practice, 'shall', 'should', and 'may' are used in the guidelines to distinguish between a firm requirement, a recommendation and a desirable option, respectively. Appendices are integral part of the document, whereas Annexures and bibliography are included to provide further information that might be helpful to the user. Approaches for implementation, different to those set out in the guidelines may be acceptable, if they provide comparable assurance against undue risk to the health and safety of the occupational workers and the general public, and protection of the environment.

For aspects not covered in this document, applicable national and international standards, codes and guides acceptable to AERB should be followed.

This 'Guidelines' has been prepared by a consultant. It has been reviewed in-house by the Industrial Plants Safety Division, AERB and the 'Advisory Committee on Safety Documents relating to Fuel Cycle Facilities other than Nuclear Reactors' (ACSD-FCF), consisting of experts from Atomic Energy Regulatory Board, Bhabha Atomic Research Centre and Heavy Water Board.

AERB wishes to thank all individuals and organisations who have prepared and reviewed the draft and helped in its finalisation. The list of persons, who have participated in this task, along with their affiliations, is included for information.



(S. S. Bajaj)
Chairman, AERB

DEFINITIONS

Accident

An unplanned event resulting in (or having the potential to result in) personal injury or damage to equipment which may or may not cause release of unacceptable quantities of radioactive material or toxic/hazardous chemicals.

ALARA

An acronym for 'As Low As Reasonably Achievable'. A concept meaning that the design and use of sources, and the practices associated therewith, should be such as to ensure that exposures are kept as low as reasonably practicable, with economic and social factors taken into account.

Approval

A type of regulatory consent issued by the regulatory body to a proposal.

Atomic Energy Regulatory Board (AERB)

A national authority designated by the Government of India having the legal authority for issuing regulatory consent for various activities related to the nuclear and radiation facility and to perform safety and regulatory functions, including their enforcement for the protection of site personnel, the public and the environment against undue radiation hazards.

Competent Authority

Any official or authority appointed, approved or recognised by the Government of India for the purpose of the Rules promulgated under the Atomic Energy Act, 1962.

Consent

A written permission issued to the "consentee" by the regulatory body to perform specified activities related to nuclear and radiation facilities. The types of consents are 'licence', 'authorisation', 'registration' and 'approval', and will apply according to the category of the facility, the particular activity and radiation source involved.

Dose

A measure of the radiation received or absorbed by a target. The quantities termed absorbed dose, organ dose, equivalent dose, effective dose, committed equivalent dose, or committed effective dose are used, depending on the context. The modifying terms are used when they are necessary for defining the quantity of interest.

Dose Limit

The value of the effective dose or the equivalent dose to individuals from controlled practices that shall not be exceeded.

Exposure

The act or condition of being subject to irradiation. Exposure can be either external (irradiation by sources outside the body) or internal (irradiation by sources inside the body). Exposure can be classified as either normal exposure or potential exposure; either occupational, medical or public exposure; and in intervention situations, either emergency exposure or chronic exposure. The term 'exposure' is also used in radiation dosimetry to express the amount of ions produced in air by ionising radiation.

Inspection

Quality control actions, which by means of examination, observation or measurement determine the conformance of materials, parts, components, systems, structures as well as processes and procedures with predetermined quality requirements.

Licence

A type of regulatory consent, granted by the regulatory body for all sources, practices and uses for nuclear facilities involving the nuclear fuel cycle and also certain categories of radiation facilities. It also means authority given by the regulatory body to a person to operate the above said facilities.

Normal Operation

Operation of a plant or equipment within specified operational limits and conditions.

Registration

The regulatory consent shall be the registration for sources and practices that include

- (i) medical diagnostic X-ray equipment including computed tomography (CT) and therapy simulator;
- (ii) analytical X-ray equipment used for research;
- (iii) nucleonic gauges;
- (iv) radio immuno assay laboratories;
- (v) radioactive sources in tracer studies;
- (vi) bio-medical application and research using radioactive materials; and
- (vii) any other source and practice notified by the competent authority.

Regulatory Body

See 'Atomic Energy Regulatory Board'

SPECIAL DEFINITIONS
(Specific for the present 'Guidelines')

Beach Sand Washings Collection

The process of manual collection of beach sands enhanced with heavy mineral concentrates due to repeated wave action.

Heavy Minerals

Minerals occurring in the beach sands with density greater than that of quartz (density > 3000 kg/m³).

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1. INTRODUCTION

1.1 General

This 'safety guidelines' on 'Radiological Safety in Handling Beach Sand Minerals and Other Naturally Occurring Radioactive Materials' is prepared under the programme of publishing codes and guides on various topics on nuclear and allied industries by the Atomic Energy Regulatory Board.

The predominant industrial processes which require handling of Naturally Occurring Radioactive Materials (NORM) are processing of Beach Sand Minerals (BSM), Columbite Tantalite Ore, Rock Phosphate and Phosphogypsum.

In India, heavy mineral sand deposits containing ilmenite, rutile, leucosene, zircon, garnet, sillimanite and monazite occur mostly along the coastal areas of the peninsular regions and in the form of inland sand dunes near the coast. Mining and processing of these heavy Beach Sand Minerals (BSM) other than monazite is carried out in different parts of the country by many Private and Public Sector Industries. However, during preferential separation of BSM other than monazite, the tailings generated get enriched in monazite containing uranium and thorium. Similarly processing of Columbite Tantalite Ore and Rock Phosphate (for phosphoric acid production) results in generation of uranium and thorium bearing slag and radium bearing phosphogypsum respectively.

The presence of uranium, thorium and radium in these NORMs warrants the need to control exposures of workers and members of the public in accordance with the various regulatory and safety requirements.

Other NORMs such as oil and gas shales, fly ash, metal slag from processing of aluminium, zinc, tin, copper etc are not dealt specifically in this guidelines. However, radiation protection aspects in facilities handling these NORMs will have to be assessed on a case to case basis.

AERB has already published a Safety Guidelines on 'Thorium Mining and Milling' (AERB/NF/SG/IS-6) which deals with the mining and separation of monazite and its chemical processing and therefore, this aspect is not included in the present guidelines.

This document outlines the various radiological safety aspects related to the processing of beach sand minerals and handling/disposal of the NORM residues.

1.2 Objective

The objectives of this 'guidelines' are:

- (i) To lay down guidelines for safety procedures and systems to be followed at various stages of design and operation with the overall objective of protecting workers, public and the environment from the harmful effects of radiation associated with the operations.
- (ii) To provide guidelines for adopting monitoring and control techniques/procedures.
- (iii) To provide detailed information on implementing a graded regulatory approach for the protection of workers and members of the public against radiation exposure.

1.3 Scope

The 'guidelines' presents the radiological safety aspects related to mining and processing of beach sand minerals, columbite tantalite ore, rock phosphate and phosphogypsum and handling/ disposal of NORM residues by private and public sector industries. Radiological safety and waste management aspects to be considered during the mineral separation of BSM, processing of columbite tantalite ore, processing of rock phosphate and use of phosphogypsum in commercial applications in order to minimize the radiation exposure to occupational workers and members of the public are described along with the monitoring and control measures required for achieving the objective.

2. PROCESS DESCRIPTION

2.1 Processing of Beach Sand Minerals (BSM)

Heavy-mineral sand deposits occur underwater or may form part of sea beaches or coastal dunes created by wind action over long periods of time. They may also occur inland in coastal strips up to a few kilometers wide. These deposits are richest during periods of intense wave action (eg. south west monsoon), following which, if left un-recovered, they are likely to become wholly or partly washed away.

The composition of heavy-mineral sand deposits varies according to location of their occurrence. The total heavy-mineral content of raw sand is typically in the range of 5-50%. Table 1 gives typical composition of beach sand minerals. Ilmenite constitutes the bulk of the raw sand followed by zircon, rutile, garnet and sillimanite. Monazite and leucoxene are minor constituents. All of these minerals have densities greater than 3000 kg/m³, hence their designation as heavy minerals. The composition, properties and uses are given in Table 2.

TABLE 1 : TYPICAL COMPOSITION OF BEACH SAND MINERALS

MINERALS	PERCENT CONTENT		
	West Coast	South West Coast	East Coast
ILMENITE	61	46	8 - 9
RUTILE	4 - 7	2 - 27	0.3 - 0.4
ZIRCON	5 - 8	4 - 6	0.3 - 0.5
SILLIMANITE	4 - 8	2 - 3	3 - 4
GARNET	---	7 - 14	6 - 7
MONAZITE	0.5 - 1	3 - 4	0.1 - 0.5
LEUCOXENE	1 - 1.5	0.5 - 1	---

TABLE 2 : THE COMPOSITION, PROPERTIES AND USES OF VARIOUS BSM

Mineral	Chemical Composition	Sp.Gravity	Properties	Typical Uses
Ilmenite	TiO ₂ FeO	4.5 - 5.0	Conducting and strongly magnetic	Manufacture of titanium dioxide pigment, synthetic rutile and titanium sponge
Rutile	TiO ₂	4.1 - 4.25	Conducting and non magnetic	Manufacture of titanium dioxide pigment, titanium sponge and welding electrode fluxes
Zircon	ZrSiO ₄	4.6 - 4.7	Non conducting and non magnetic	In ceramics, refractories, foundries and nuclear reactors
Sillimanite	Al ₂ SiO ₅	3.2 - 3.25	Non conducting and non magnetic	Refractories
Garnet	Fe ₃ (SiO ₄) ₃	3.1 - 4.3	Non conducting and moderately magnetic	Abrasive for sand blasting, in water –jet cutting and glass polishing
Monazite	(Ce,La,Th,Nd,Y) PO ₄	4.6 - 5.7	Non conducting and weakly magnetic	As raw material for production of rare earth, uranium and thorium
Leucoxene	Fe-Ti oxide mixture (Granular alteration product of titanium minerals)	4.3 - 4.6	Conducting and strongly magnetic	Raw material for titanium dioxide pigment and welding rod flux

The Beach Sand Mineral Facilities are primarily involved in:

- (a) Mining and mineral separation of beach sands to produce one or more of the following minerals : titanium minerals (ilmenite, rutile, leucoxene), garnet, sillimanite, zircon and monazite.
- (b) Procurement of ilmenite or garnet rich tailings with enhanced monazite content for further recovery of ilmenite or garnet.
- (c) Purification, Chemical processing and value addition of titanium minerals.
- (d) Chemical processing of zircon for the production of Zirconium compounds and value addition.

2.1.1 Mining and Mineral Separation

Extraction of beach sand deposits is carried out either by beach washings collection or by using a suction dredge in a planned and pre-determined path. Beach sands at certain locations with favourable topography have higher concentration of heavy minerals due to repeated washings by wave action. 'Beach sand washings collection' involves collection of these beach sands and transporting it to concentration up-gradation units. The dredge unit is used for mining inland placers.

Dredge: a dredge unit usually has a cutter on its cutter ladder which cuts the sand, loosens it and keeps the sand grains in suspension enabling the suction pump to lift it. The dredge breaks the face of the sand deposits which collapses into the dredge pond as the dredge unit advances forward in its cutting path.

Head Feed Bin: the dredged out slurry is pumped in the head feed bin unit, which consists of a surge bin and a rotating trommel. The trommel screens the over sized pebbles, grass roots etc and the screened underflow is collected in the surge bin.

Wet Concentrator : the slurry from the surge bin is pumped at a specified pulp density to a wet concentrator unit for pre concentration of minerals. The wet concentrator unit consists of series of spirals. The tailings is normally used to backfill the mined out areas. The pre-concentrated slurry is subjected to further concentration in heavy minerals up-gradation units, which consist of several circuits of spirals and wet tables for further up-gradation of heavy minerals to 95 to 97%.

The heavy mineral concentrate from heavy mineral up-gradation units is subjected for separation of individual minerals. The separation of individual minerals is done based upon their physical properties listed in Table 2.

Equipment normally used for the separation of magnetic and non magnetic minerals are induced roll magnetic separators, high intensity roll magnetic separators, semi lift magnetic separators, rare earth drum separators, cross belt magnetic separators, etc. Equipment normally used for separation of conducting and non conducting minerals are high tension separators, electrostatic plate separators, electro-screen separators etc. In addition, a number of dryers are needed to eliminate moisture in the feed concentrate and products from wet separators and also to heat dry solids prior to high tension separation. Fig. 1 gives a simplified general flow sheet of the mining and mineral separation processes.

Based on the raw material input and monazite enriched tailings generated, the BSM facilities can be classified into the following four major types.

Type I. Facilities carrying out mining and mineral separation of beach sands and producing ilmenite and/or garnet. Such facilities generate large quantities of monazite enriched tailings and the monazite content in these tailings is generally <5%.

Type II. Facilities carrying out mining and mineral separation of beach sands and producing all the major constituent minerals such as ilmenite, rutile, garnet, zircon and sillimanite. Such facilities generate relatively less quantities of monazite enriched tailings and the monazite content in these tailings is generally 20-70%.

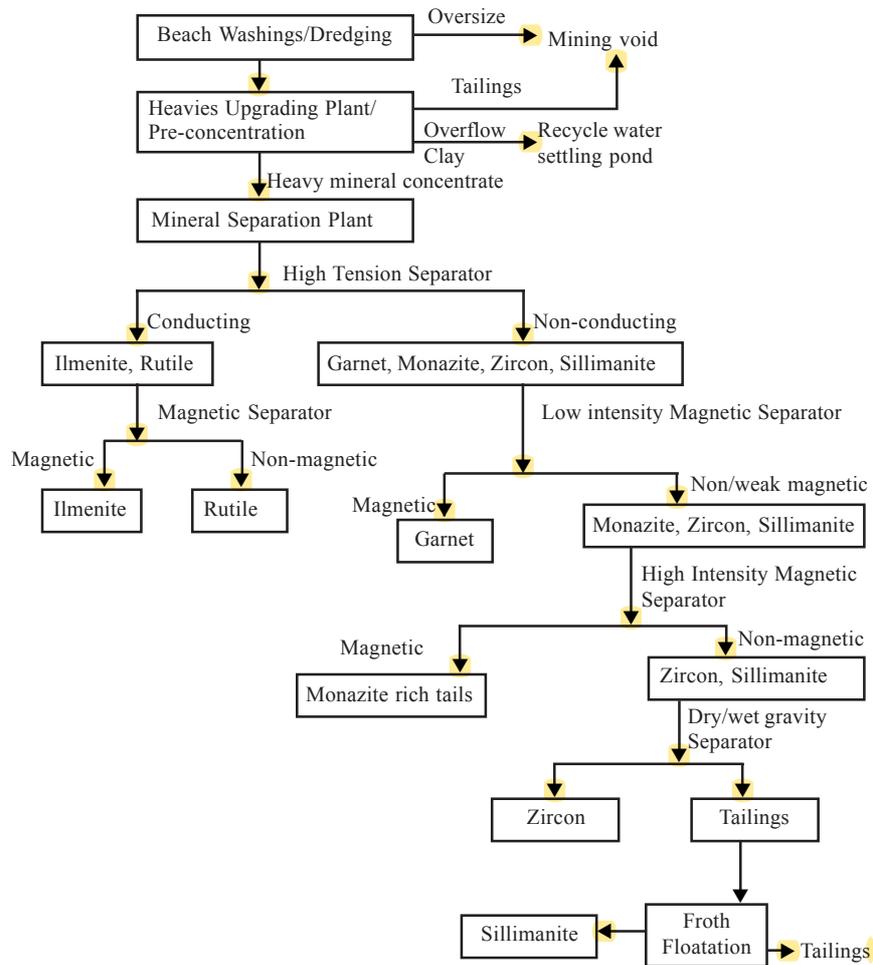


FIG.1 : TYPICAL FLOW CHART SHOWING SEPARATION OF HEAVY MINERALS

Type III. There are certain facilities procuring ilmenite for value addition. Such facilities prior to chemical processing of ilmenite subject it to further physical separation for purification and in the process generate small quantities of monazite enriched tailings and the monazite content in these tailings is generally about 5%.

Type IV. Finally, there are facilities which procure the monazite enriched tailings for recovery of the other heavy minerals. Such facilities generate small quantities of monazite enriched tailings and the monazite content in these tailings is generally 20-70%.

2.2 Processing of Columbite -Tantalite Ore

Columbite is an ore of niobium (also called columbium) and Tantalite is an ore of tantalum. In view of similar atomic size (lanthanide contraction) and other chemical and physical properties, these two metals remain invariably associated with each other in nature. However, columbite/tantalite also contains small but recoverable amount of uranium and traces of thorium. The ore is chemically processed to obtain salts of niobium and tantalum and also for obtaining niobium and tantalum metal.

The process in general involves grinding of ore, dissolution in hydrofluoric acid, solvent extraction with Tributyl Phosphate (TBP)/kerosene to separate niobium and tantalum stream and subsequent recovery of the products. The residue obtained after dissolution of the ore contains enhanced concentration of uranium, thorium and radium-226.

2.3 Processing of Rock Phosphate and Use of Phosphogypsum

The fertilizer plants in India are presently processing rock phosphates imported from countries like Jordan, Morocco, Egypt, Senegal, Togo, China and others for production of phosphoric acid/fertilizers. Rock phosphates are known to contain enhanced concentrations of naturally occurring radionuclides especially uranium and its daughter products like Radium-226.

During wet processing of Rock Phosphate, it is reacted with dilute sulphuric acid to produce phosphoric acid and phosphogypsum is obtained as by product as shown in the following reaction.



In the chemical processing of rock phosphates, the radionuclides get selectively separated into the phosphoric acid and solid waste. About 86% of uranium goes into the phosphoric acid and 80% of Ra-226 goes into the phosphogypsum. Phosphogypsum is used in various commercial applications such as in manufacture of cement, fly ash brick, plaster of paris, plaster board, glass fibre reinforced gypsum panels (GFRGP) and also in agriculture.

3. RADIOLOGICAL SAFETY

3.1 General

Monazite, columbite tantalite ore and rock phosphate contain thorium and uranium chain radionuclides in secular equilibrium and do not exhibit any appreciable change in activity with respect to time. Figures 2 (A) and 2 (B) give the U- 238 and Th- 232 decay series respectively. In the decay scheme of naturally occurring thorium, one atom of ^{232}Th emits six alpha particles, 4 beta rays and several gamma rays before becoming the stable end- product, ^{208}Pb . The alpha energies range from 4.0 MeV to 8.78 MeV. The chain also shows high-energy beta and gamma rays of 2.26 MeV and 2.61 MeV respectively. Each atom of ^{238}U in natural uranium decays to stable lead

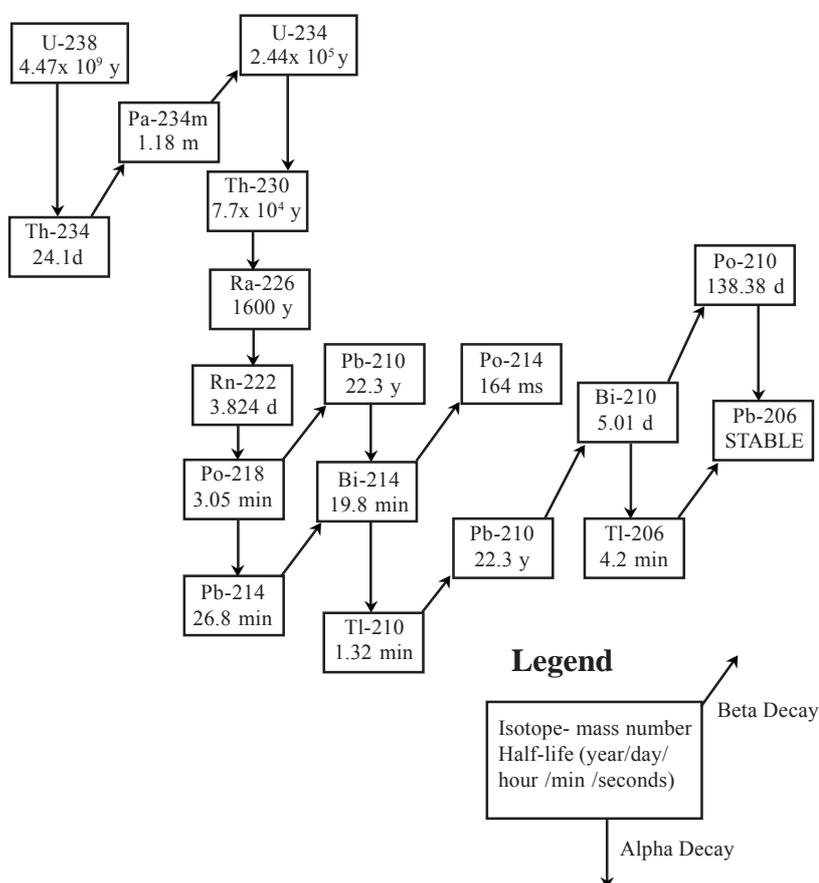


FIG. 2(A) : URANIUM DECAY SERIES

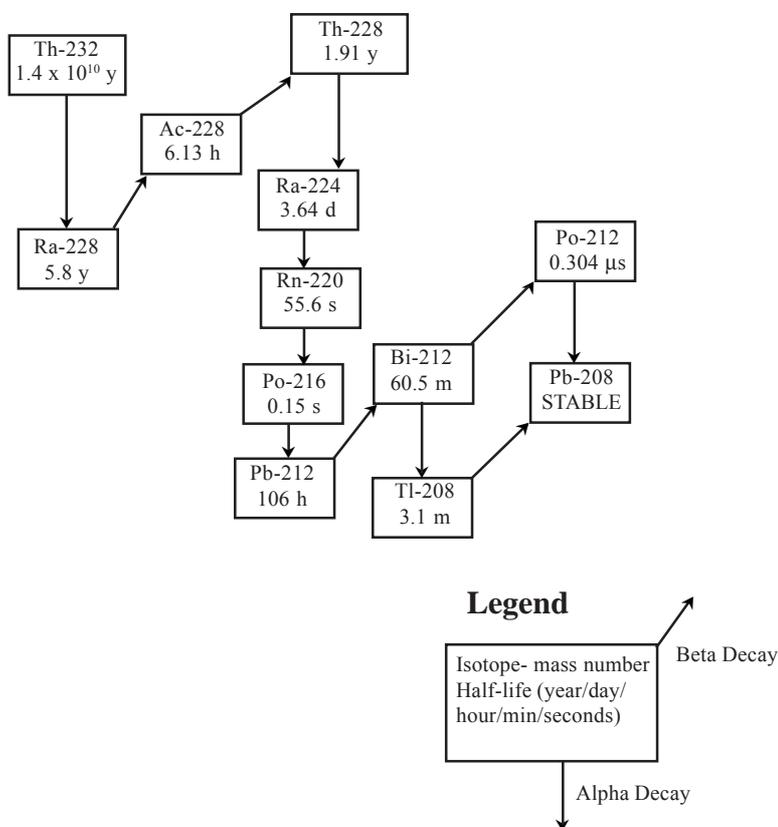


FIG. 2(B) : THORIUM DECAY SERIES

(^{206}Pb) through the emission of 8 alpha particles and 6 beta rays along with accompanying gammas. The maximum energies of emissions are 7.69 MeV, 3.26 MeV and 1.76 MeV for alpha, beta and gamma respectively. The daughter radionuclides equilibrium gets disturbed during chemical processing of these minerals.

3.2 Processing of Beach Sand Minerals

The mineral monazite found in beach sands is the principal ore of Rare Earths and Thorium. Monazite contains around 0.35% uranium as U_3O_8 and 9 % thorium as ThO_2 with Th-232 series activity concentration in the range 40 – 600 Bq/g. Zircon also contains uranium and thorium in the crystal lattice. Their current levels, for most commercial zircons, would be about 250–350 ppm uranium and about 100–200 ppm thorium. Therefore, the radiological hazards associated in the BSM facilities are due to the presence of thorium, uranium and their decay products in the mineral constituents of the feed, process streams, products and the tailings.

The hazards in BSM facilities can be both from external and internal sources. External hazards are due to high energy beta and gamma rays of thorium series and internal hazards are mainly due to alpha emitting radionuclides deposited inside the body. Internal hazard is mainly by way of inhalation of air borne thorium bearing mineral sand particles. Uranium concentrations encountered in the BSM facilities are insignificant to constitute any external or internal exposure problems. Radon/thoron concentrations observed in mineral processing are also too low to be of any radiological safety concern. Thorium is almost always associated with its immediate daughter product ^{228}Ra which is chemically much more mobile than thorium. Radium can easily get leached out from the site of deposition and is trans-located to different organs. Ingestion by way of food and drinking water is another possible route of entry of thorium and daughter products into the human body. However internal exposure via ingestion is unlikely to require consideration under normal operational circumstances.

3.2.1 Mining and Mineral Separation

The mineral separation plants are situated at the natural high background areas and the background radiation level in these areas is generally in the range of 1 to 3 μGyh^{-1} . Radiation fields in the plant area are dependent upon the inventory of monazite in each process stream. The fields buildup through different stages of mineral separation and show direct proportionality to the monazite content in each stream. The external radiation may come from the emission of gamma radiation from the feed storage area, machinery containing sand of higher monazite content, spillages of monazite enriched tailings or intermediate stockpiles of monazite enriched tailings. Most of the external radiation exposures in mineral sand processing plants occur from being in close proximity to the tailings such as during sun drying of intermediate sand concentrate.

In Type I and Type III BSM facilities (described in section 2.1.1), the monazite throughput in the plant is relatively less and the tailings contain monazite less than 5%. The radiation field varies from background to 10 μGyh^{-1} . The annual individual external dose in such facilities is within 2mSv. However, in Type II and IV facilities (described in section 2.1.1), the monazite throughput in the plant is quite significant and the monazite content in the tailings may vary in the range 20-70%. The radiation fields on contact with the tailings can be of the order 50 - 150 μGyh^{-1} . The annual individual external dose in such facilities could be as high as 6 mSv.

Internal exposure at BSM facilities is mainly due to fine air borne particulates of monazite and silica bearing dust. In the minerals separation plants nearly 75% of the airborne dust is non-respirable. Some specific sources of air-borne dust and air activity are:

- (i) Conveying of sand using open belt conveyors and elevators.
- (ii) Re-suspension of dust settled on surfaces of equipment, floor, window sills etc by movement of men and vehicles.
- (iii) Fall of sand from blocked conveyors and elevators and during power failures.
- (iv) Receiving chutes of conveyors, elevators and dryers.
- (v) Carryover of slime from the raw sand feed.

The air activity levels due to thorium encountered in these plants are of the order of less than 1/20 of the corresponding Derived Air Concentration. Internal dose attributable to thoron and thoron daughters is not significant in the mineral separation plants as the emanation of thoron from the mineral is very low.

3.3 Processing of Columbite - Tantalite Ore

The uranium and thorium concentration in columbite tantalite ore varies significantly with the geographical locations. Indian ore contains uranium in the range 1000 - 2500 ppm as (U_3O_8) and thorium in the range 400 - 600 ppm. However, U-238 content in imported columbite tantalite ore may range upto 1300 ppm and Th-232 may range upto 5500 ppm.

Exposure to direct gamma and inhalation of airborne dust containing uranium and thorium nuclides are the two routes of radiation exposure to occupational workers in these industries. The exposure of a worker during the processing of columbite tantalite is not likely to exceed 3mSv/y. Exposure due to radon and thoron progeny to workers is insignificant in these plants. Processing of columbite and tantalite ores for the extraction of niobium and tantalum leaves residues containing significant concentrations of U-238 (~ 300 Bq/g), Th-232 (~ 100 Bq/g) and Ra -226 (~ 500 Bq/g).

3.4 Processing of Rock Phosphate and Use of Phosphogypsum

Rock phosphate imported in India contains U-238 typically in the range of 0.8 - 1.85 Bq/g and Ra-226 in the range of 0.5-1.7 Bq/g. The phosphogypsum obtained as byproduct during wet processing of these imported rock phosphates contains U-238 typically in the range of 0.1-0.2 Bq/g and Ra-226 typically in the range 0.5-1.3 Bq/g. The exposure of a worker during the processing of rockphosphate is likely to be in the range of 1- 2 mSv/y. Disposal of phosphogypsum should be in engineered storage yards located away from public residences and water bodies.

Use of phosphogypsum in commercial applications resulting in annual dose in the range 0.3 - 1 mSv to the public is permitted. This is in line with AERB directive No. 01/09 on Phosphogypsum disposal.

4. RADIATION SURVEILLANCE

4.1 Radiation Monitoring

Physical measurement of the parameters relevant for radiation protection, provides information necessary for ensuring radiation safety and helps in estimating the occupational exposures and public exposure. This is required to be carried out in BSM and Columbite Tantalite Processing facilities. In view of extremely low radiation hazard in rockphosphate processing facilities, the requirement of radiation monitoring may not be warranted.

To meet the requirements for limiting radiological risks, the licensee should prepare plant specific radiation protection procedures which *inter alia* will include programme for individual assessment of occupational exposures and doses. The dose assessment programme should demonstrate compliance with the radiation dose limits for individuals; it should also demonstrate that doses are as low as reasonably achievable, economic and social factors being taken into account, and provide information for individual dose records.

Two approaches - individual monitoring and workplace monitoring - may be used (either as alternatives or in combination where appropriate) to determine exposure levels for the purposes of individual dose assessment.

4.1.1 Personnel Monitoring (Individual Monitoring)

Personnel exposures comprise of two components, viz. external exposure arising from external sources of radiation and internal exposure arising mainly from inhalation of airborne dust/gases containing radioactivity. However, in most of the NORM industries the internal exposure is insignificant and only external exposure needs to be considered for dose estimation.

Individual exposures are (i) based on personal radiation dosimeter records which give the cumulative radiation dose or (ii) estimated based on plant area monitoring for radiation fields and occupancy periods at the work place. Personal radiation dosimeter should be provided if the dose rates are likely to give rise to annual individual external doses of 6 mSv or above, such as in Type II and Type IV BSM facilities.

Thermo Luminescent Dosimeters (TLD) should be issued to the workers on a quarterly basis. TLD racks should be provided preferably near the entrance in a low background area where each radiation worker is allotted a marked slot for keeping the TLD when off duty. Compliance of TLD use should be ensured by spot checks and checking of the TLD racks. After the end of the quarter the TLDs should be changed and the used TLDs should be monitored for surface contamination. The dosimeters should be collected and sent to the Head, PMS/RPAD of the Bhabha Atomic Research Centre or any other

duly authorized agency for dose evaluation. The details of the TLD service are maintained in TLD form and TLD issue Register.

For other cases such as Type I and Type III BSM facilities and Columbite Tantalite Processing facilities, estimates of individual doses based on Ambient Dosimetry should be sufficient which are calculated based on workers' occupancy and the prevailing radiation level in that area.

4.1.2 Workplace monitoring (Plant/Area Monitoring)

Plant/area monitoring surveys should include:

- (i) levels of external radiation in all occupied areas of the plant and tailings/slag disposal area;
- (ii) concentration of airborne radionuclides.

4.1.2.1 *Measurement of External Radiation*

- (a) Radiation monitoring at the place of work should be carried out with dose rate measuring instruments, which are count rate meters based on GM counters/scintillometers. Instruments based on ionization chambers duly protected from moisture can also be used for beta-gamma dose rate measurements.
- (b) The frequency of measurements should be normally once in a month and should be specified in the radiation protection procedures of the plant.
- (c) Each working area should be surveyed, with particular attention paid to fixed working locations and to other areas where workers may remain for a large part of their work. Pipelines carrying radioactive material/slurry or having potential of sludge deposition (such as iron oxide carrying pipelines in ilmenite processing facilities) should be surveyed to assess any build up of activity.
- (d) Details of the workplaces surveyed and the dose rates determined should be recorded.
- (e) Instruments used to measure dose rates should be calibrated (once in a year) and maintained regularly under a quality assurance programme as specified in the radiation protection procedures of the plant.

The requirements of Radiation Monitoring Equipment are given in Table 3.

TABLE 3 : REQUIREMENTS OF RADIATION MONITORING EQUIPMENT

S.No.	Type of Facility	Type of Instrument in working condition	Minimum No.
1	Columbite Tantalite and Type I & III BSM Facilities	G.M. Survey meter (0 - 20 mR/h)	1
2	Type II & IV BSM Facilities	G.M. Survey meter (0 - 20 mR/h) Scintillometer (low range) - desirable Thermo Luminescent Dosimeters	1 - Workers having potential to exceed dose of 6 mSv/y.

4.1.2.2 Measurements of Radioactive Dust, Radon/Thoron and Radon/Thoron Progeny Concentrations

Concentrations of radioactive dust, radon/thoron and radon/thoron progeny should normally be got monitored by approved agencies once in a year. Open face filter paper air sampling with a suction head, tubing and attached suction pump with flow measuring facility should be used for air monitoring for dust and particulate activity in the working environment. Long duration air samples are analyzed for gross radioactivity (alpha/beta) and the concentrations per unit volume are arrived at for internal dose estimates. For radon/ thoron measurements in the working atmosphere short duration filter paper air sampling with programmed alpha activity measurements or dedicated radon/ thoron detection devices may be used. The ambient conditions of humidity, temperature and ventilation should be monitored so as to be able to estimate their influence on the radon/thoron assessment.

The locations at which workplace monitors are deployed for measuring contaminant concentrations in air should be selected to be representative of the air breathed by workers, particularly where workers move through areas with differing contaminant concentration. Instrumentation used to measure contaminant concentrations should be calibrated and maintained regularly under a quality assurance programme. Where grab sampling is used, it should be demonstrated that the samples are representative of average ambient conditions. As a method, it is only appropriate in environments for which conditions are known to be generally stable.

The monitoring programme and frequency should be described in the radiation protection procedures of the plant.

4.1.3 Environmental Monitoring

A suitable environmental monitoring programme appropriate to the level of operations and in line with the classification cited earlier should be established to assess the impact of the facility on the environment. The programme should include radiation monitoring in the vicinity of the plant for assessment of variation, if any, in the background radiation levels. This may be carried out by using calibrated dose rate measuring instruments, which are count rate meters based on GM counters, ionization chambers or scintillators. The environmental monitoring programme should comply with the regulatory requirements prescribed on a case to case basis.

4.1.3.1 *Beach Sand Minerals Facilities*

- (i) Mining and monazite enriched tailings disposal sites (trenches/backfilled areas) should be monitored for the background radiation level.
- (ii) Integrity of the topping of the trenches should be ensured by quarterly monitoring.

The mined and refilled areas are to be preferably replanted and rehabilitated. There should be a continuous programme for restoring the ecological balance to the maximum extent possible.

4.1.3.2 *Columbite - Tantalite Processing Facilities*

Monitoring of water bodies such as river, stream, or lake into which the liquid effluent may be discharged should be carried out once in a quarter.

4.2 **Monitoring Records**

All the monitoring data of individuals, workplace and environment should be recorded and maintained. Dose records should be preserved during the working life of each worker, and afterwards until the worker attains or would have attained the age of seventy five years, or not less than thirty years after the termination of the work involving occupational exposure whichever is later.

5. CONTAINMENT OF RADIOACTIVE MATERIAL AND CONTROL OF RADIATION EXPOSURES

Engineered, operational and administrative control measures are adopted for keeping the exposures As Low As Reasonably Achievable (ALARA).

5.1 External Exposure Control

Control measures to protect the health of workers are basically achieved by confinement/containment of radioactive material within the process equipment. The processes should largely be automated, thus minimizing direct contact with the material. The processes, equipments and working practices should be so designed as to reduce the exposure of personnel to radioactive material both during operations and maintenance.

5.1.1 Engineered Control

5.1.1.1 *Beach Sand Minerals Facilities*

- (i) Sand bins containing sand concentrates and fractions enriched in monazite should be properly shielded, if needed, to control the radiation exposure to personnel working in their vicinity.
- (ii) Overhead sand conveyors (especially passing above passage and worker occupied areas) should be provided with suitable covers to prevent spillage of mineral.
- (iii) All packaging and handling of zircon powder should be mechanized to avoid direct handling.
- (iv) Mechanised methods should be adopted for segregation, collection, transport and storage of tailings to storage sites.
- (v) Iron oxide slurry during ilmenite processing should be transported in pipelines.

5.1.1.2 *Columbite - Tantalite Processing Facilities*

- (i) Uranium and thorium bearing slag should be contained in high integrity structures.
- (ii) Dykes should be provided for all process tanks
- (iii) Mechanised methods should be adopted for collection and bagging of slag.

5.1.1.3 *Rock Phosphate Processing Facilities*

- (i) Phosphogypsum slurry should be transported in closed pipelines.

- (ii) Phosphogypsum should be stored in engineered disposal facilities having water proof lining to prevent migration of radionuclides into ground water and there should also be a proper leachate collection system.

5.1.2 Operational Control Measures

- (i) Raw materials should be stored in controlled locations (sheds/ storages) where the occupancy should be limited based on the radiation fields. Storage areas and other high radiation areas should be properly identified by suitable methods and caution boards should be prominently displayed with radiation monitoring details.
- (ii) Structures and process equipment such as pipelines, conduits, conveyors, tanks with elevated radiation field (due to enhancement of radionuclide concentration during process operation) should be identified for necessary control.
- (iii) Monazite enriched tailings/uranium thorium bearing slag/ phosphogypsum should be stored away from areas normally occupied by workers.
- (iv) Good working practices and house keeping such as prevention of spillage of radioactive material (raw material/intermediate/slag/residue) and prompt removal of spillage if any from working areas should be adopted.
- (v) Pipelines carrying radioactive material in the form of liquid/slurry should be tested periodically.

5.1.3 Administrative Control

The control measures to be implemented are:

- (i) Access control to prohibit unnecessary occupancy in high radiation areas.
- (ii) Exposure control by Radiological Work Permits (RWP) in situations of anticipated high exposures (such as in monazite tailings stockyard).
- (iii) Job rotation of the individual to limit individual exposures.

5.2 Internal Exposure Control

Normally no forced ventilation is required in NORM industries for internal exposure control. However, radial exhausts may be provided on the roofs to ensure enough air movement to reduce the levels of air borne radio activity and dust. Provision of master roofs adds to the air circulation. Other control measures that may be adopted are:

5.2.1 Engineered Control

The belt conveyers and bucket elevators and especially the transfer point should be provided with appropriate enclosures. The gap between the discharge end of conveyors and the receiving chutes should be kept minimum and hoods with local exhausts should be provided to prevent the release of dust.

The dust generating equipment such as grinders should be housed in engineered enclosures at small negative pressure to prevent escape of fine dust to occupied areas.

5.2.2 Operational Control Measures

- (i) Wet methods of mining and processing should be adopted wherever possible.
- (ii) Spillages and dust deposited on surfaces should be promptly removed by vacuum cleaning/wet mopping.
- (iii) Dust generating machineries like Electrostatic and magnetic separators, grinders, air tables etc should always be kept enclosed to prevent escape of dust to workplace.
- (iv) Sufficient settling time should be provided for the recycled water used for pre-concentration and wet processing to reduce the dust load carried into the process stream. Settling ponds should be regularly de-silted.

5.2.3 Administrative Control

- (i) Appropriate respirators/Personnel Protective Equipments (PPE) should be used to prevent inhalation of airborne dust and activity.
- (ii) Access controls, barriers, restricted/no entry areas should be enforced in dust generating areas.

6. WASTE MANAGEMENT

6.1 Processing of Beach Sand Minerals

6.1.1 Mining and Mineral Separation

Beach washing collection and dredge mining of inland placers generate large volume of overburden which include topsoil, clay, silica sand, slime, peat, organic waste (vegetation, trees, roots. etc.), screen - overs and shells. Solid tailings containing shells and organic waste (shreds of roots etc) and screen overs are generated from trommel operations. This can be preserved at mine site for topping the refilled areas to facilitate eco-restoration.

Silica waste is generated during the pre-concentration and concentrate up-gradation operations. The volume of silica waste generated depends on the heavy mineral concentration in the mined raw sand and the recovery effected in the processes. The silica waste, which contain around 80% quartz, is depleted of monazite (field of 0.1 - 0.3 $\mu\text{Gy/h}$) and need not be subjected to any regulatory control and can be used for backfilling the mined out sites.

Separation of individual minerals namely ilmenite, rutile, leucoxene, garnet, zircon and sillimanite leads to generation of monazite enriched tailings, upto 5 % and in extreme cases it may go up to 70 %. The disposal of such tailings, having radiation level upto 150 $\mu\text{Gy/h}$, on the land or in sea has radiological implications. Disposal of these tailings on land will create radiation 'hot-spots' that will lead to higher public exposure. The area along with radioactive tailings may be abandoned by the operators after the lease period. It is difficult to have effective post control/ surveillance over such waste disposal. The practice of sea disposal of these tailings results in ultimate re-concentration of monazite and re-deposition of the same on the beaches. In this way the natural background radiation level on the beach may get enhanced over a period of time resulting in increased population exposure.

The tail water released after mining , pre-concentration and separation of minerals does not carry any enhanced radioactivity levels and hence may be pumped /drained to the settling ponds and re-circulated and/or disposed to water bodies (canal, sea) after settling. The airborne releases from mining and mineral separation are insignificant.

6.1.1.1 Disposal of Monazite Enriched Tailings

The radiological criteria for disposal of the tailings should be mainly governed by the external radiation field which is contributed by the monazite present in the tailings. The criteria for tailings disposal in an area should be on the basis of minimum external radiation field as measured during pre operational monitoring. For example, if the radiation fields in the mining areas range

from 1 to 3 $\mu\text{Gy/h}$ on pre operational monitoring the post operational limit should be fixed at 1 $\mu\text{Gy/h}$. In this manner it is ensured that the practice does not result in additional exposure to members of public at the Naturally High Background Radiation Areas (NHBRA). The different methods for disposal of monazite enriched tailings are as follows:

(i) **Recycling**

As much as possible the tailings should be recycled in the process along with fresh feed with a view to reduce the total quantity generated to the minimum.

(ii) **Disposal in Trenches**

Disposal of the tailings in earthen trenches (earthen pits or brick lined pits) located within the plant premises and topping with silica rich sand should be adopted by facilities when the monazite content in the tailings is high (more than 5 %) and the quantity of tailings generated is comparatively less as encountered in Type II and Type IV facilities. Trenches should be periodically topped with silica tailings to reduce the radiation fields to natural levels encountered in the area.

The trenches should not be filled up to the surface with monazite enriched tailings. Sufficient free board space (preferably one metre) should be left in the trenches for topping with silica rich tailings so as to prevent the topping from getting eroded by wind action and exposing the monazite enriched tailings. The surface of the trenches after filling should be leveled with the surface topography and the boundary of the pits should be demarcated with proper identification.

The design of the earthen trenches should take into consideration the prevailing water table in the area. The monazite enriched tailings should be transported by mechanized means such as pumping, conveyors, and covered trucks and dump trucks/bins to the disposal site.

These trenches should be under the institutional control of the facilities. Institutional control consists of those actions, mechanisms, and arrangements implemented to maintain control of a waste management site after closure, as required by the AERB. This control should be active (for example, monitoring, surveillance, remedial work) or/and passive (for example, land use control).

(iii) **Disposal by Mixing with Inactive Silica Tailings and Backfilling**

The option is advisable for Type I BSM facilities where the quantity

of tailings generated is large and the monazite content in the tailings is relatively low (less than 5%). The monazite enriched tailings should be homogenously mixed with silica tailings and then used for backfilling the mined out areas so that radiation level in the backfilled area is close to background. Since the concentration of monazite varies from place to place, the exact specification for dilution has to be given on a case-by-case basis based on the lower range of the observed monazite concentration in raw sand.

(iv) **Sale to Other Facilities/Returning Back to Suppliers**

The monazite enriched tailings containing other minerals may also be sold to other facilities having valid AERB licence under the Atomic Energy (Radiation Protection) Rules, 2004 for further recovery of other associated mineral values or may be returned back to the supplier (from whom raw material was procured).

6.2 Processing of Columbite - Tantalite Ore

The radioactivity content in the liquid and gaseous effluents released during processing of columbite tantalite is generally insignificant. Depending on the uranium/thorium content in the slag, it should either be handed over to facilities for further recovery of uranium/thorium values as per the direction of Department of Atomic Energy or stored in secured near surface disposal facilities as per the guidelines of regulatory body.

6.3 Processing of Rock Phosphate and Use of Phosphogypsum

The radioactivity content in the liquid and gaseous effluents released during processing of rock phosphate is generally insignificant. Phosphogypsum should be stored in engineered storage ponds as per the regulatory guidelines.

6.4 Waste Management Records

6.4.1 Processing of Beach Sand Minerals

Records should be maintained of the amount of monazite enriched tailings generated, monazite content (%) in the tailings, amount of silica tailings mixed with monazite enriched tailings, final content of the monazite in the tailings after mixing, location of disposal site/backfilled area and radiation level in the backfilled area/over the trenches. Any other records related to measurement of radioactivity in gaseous/liquid streams as directed by AERB should also be maintained.

6.4.2 Processing of Columbite - Tantalite Ore

Records of quantity of slag along with uranium, thorium and radium content in the slag should be maintained. Any other records related to measurement

of radioactivity in gaseous/liquid streams as directed by AERB should also be maintained.

6.4.3 Processing of Rock Phosphate and Use of Phosphogypsum

Analysis report of every consignment of rock phosphate processed and the resultant phosphogypsum produced w.r.t U-238 and Ra-226 content along with amount of phosphogypsum stored /sold for commercial applications should be maintained. Any other records related to measurement of radioactivity in gaseous/liquid streams as directed by AERB should also be maintained.

7. TRANSPORTATION OF NORMS

Transport regulations do not apply to natural materials and ores containing naturally occurring radionuclides which are not intended to be processed for use of these radionuclides provided the activity concentration of the material does not exceed 10 times the values specified in the regulations ie 10 Bq/g.

7.1 Monazite Enriched Tailings

Monazite enriched tailings should be transported in such a manner that under routine conditions of transport there is no escape of the radioactive contents from the conveyance nor there is any loss of shielding. However, when the monazite content in the tailings is more than 10 Bq/g (approximately 25%) necessary approval from AERB should be obtained.

7.2 Uranium and Thorium Bearing Slag

Uranium and thorium bearing slag generated during the processing of columbite-tantalite ore should be transported as industrial package with prior approval from AERB. The main purpose of these packages is to carry bulk quantity of radioactive material for economical transport.

7.3 Rock Phosphate and Phosphogypsum

As the activity of rock phosphate and phosphogypsum is less than 10 Bq/g, transportation of these materials do not warrant any regulation from AERB.

8. GRADED APPROACH TO REGULATION OF NORMS

The graded approach applies to all sources of radiation subject to regulation. However, it is particularly relevant to operations involving exposure to natural sources, because the exposures are generally (but not always) moderate with little or no likelihood of approaching or exceeding the dose limit (Appendix A), little or no likelihood of extreme radiological consequences from accidents and because occupational health and safety measures already in place to control other (non-radiological) hazards in the workplace may well provide some protection against radiological hazards as well.

The values of activity concentration for radionuclides of natural origin, derived using the exclusion concept and based on AERB Safety Directive No. 01/2010 on “Exclusion, Exemption and Clearance of Radionuclides in Solid Materials”, are given in Table 4.

TABLE 4 : VALUES OF ACTIVITY CONCENTRATION FOR RADIONUCLIDES OF NATURAL ORIGIN

Radionuclide	Activity concentration (Bq/g)
K-40	10
All other radionuclides of natural origin	1

8.1 Regulatory Requirements for Different Types of Facilities

All BSM processing facilities are required to apply for licence under Rule 3 of the Atomic Energy (Radiation Protection) Rules, 2004 as per the gazette notification S.O. 1210 dated April 24, 2009 given in Appendix B.

- (i) Approval: Where the regulatory body has determined that exemption is not the optimum option, the minimum requirement is to formally obtain an *approval* from the regulatory body for the intention to carry out the practice. Though the annual effective dose is a small fraction of the applicable dose limit, it provides the added reassurance that the regulatory body remains informed of all such practices. (Eg. rock phosphate by fertilizer plants). Such facilities need not have a Radiological Safety Officer and periodical radiological monitoring is also not mandatory. Periodic regulatory inspection of such facilities by regulatory body is not required. However, if desired, regulatory body may carry out special inspection of these facilities. The application format for approval/renewal of approval is given in Annexure I. Use of Phosphogypsum in Building Materials and Agriculture shall be as per the guidelines specified in the safety directive given in Appendix C.

- (ii) Registration: Where the level of exposure to NORM is such that neither exemption nor the minimum regulatory requirement of approval is the optimum regulatory option, the facility operator has to meet additional (but limited) obligations to ensure that exposed individuals are adequately protected. These obligations would typically involve measures to keep exposures under review and to ensure that the working conditions are such that exposures remain moderate, with little likelihood of doses approaching or exceeding the dose limit. The mechanism for imposing such obligations on the applicant is the granting of consent in the form of a *registration*. Based on this approach, facilities processing Columbite Tantalite, Type I and III BSM facilities should obtain registration. Availability of Radiological Safety Officer is mandatory with periodical radiological monitoring of the facility and regulatory inspections by regulatory body will be carried out once in five years. The application format for registration/renewal of registration is given in Annexure II.
- (iii) Licence: Where an acceptable level of protection can only be ensured through the enforcement of more stringent exposure control measures, consent in the form of a licence may be required. Type II and IV facilities processing beach sand minerals should be issued *licences*. Availability of Radiological Safety Officer is mandatory with periodical radiological monitoring of the facility and regulatory inspections by regulatory body will normally be carried out once in a year. The application format for licence/renewal of licence is given in Annexure III.
- (iv) Exemption: However, based on graded approach, the following facilities are *exempted* from regulation:
- (a) Chemical processing of ilmenite and zircon.
 - (b) Value addition of separated beach sand minerals other than monazite.
 - (c) Facilities engaged only in mining of beach sand minerals and no further processing.
 - (d) Trading of separated beach sand minerals other than monazite.

Along with the application form for obtaining registration/licence, radiation protection procedures and application for approval of radiological safety officer should be submitted, the formats for which are given in Annexure IV & V respectively.

8.2 Submission of Reports to Regulatory Body

Beach sand minerals and columbite tantalite ore processing facilities should submit quarterly and annual health physics reports covering the monitoring results of workers, workplace, waste and environment as per the format given in the Annexure VI and Annexure VII respectively. In addition, any radiological safety related significant event should be intimated to AERB within 24 hrs of the occurrence of the event.

Rock phosphate processing facilities should submit quarterly analysis report giving the activity concentration of U-238 and Ra-226 in every consignment of rockphosphate imported and the resultant phosphogypsum generated as per the format given in the Annexure VIII.

APPENDIX - A

DOSE LIMITS FOR EXPOSURES FROM IONISING RADIATION FOR WORKERS AND THE MEMBERS OF THE PUBLIC

In exercise of Rule 15 of the Atomic Energy (Radiation Protection) Rules, 2004, the Chairman, Atomic Energy Regulatory Board, being the Competent Authority under the said rules, hereby issues an order prescribing the dose limits for exposures from ionising radiations for workers and the members of the public, which shall be adhered to.

Dose Limits

General

- (i) The limits on effective dose apply to the sum of effective doses from external as well as internal sources. The limits exclude the exposures due to natural background radiation and medical exposures.
- (ii) Calendar year shall be used for all prescribed dose limits.

A1. Occupational Dose Limits

A1.1 Occupational Workers

The occupational exposures of any worker shall be so controlled that the following limits are not exceeded:

- (a) an effective dose of 20 mSv/year averaged over five consecutive years (calculated on a sliding scale of five years);
- (b) an effective dose of 30 mSv in any year;
- (c) an equivalent dose to the lens of the eye of 150 mSv in a year;
- (d) an equivalent dose to the extremities (hands and feet) of 500 mSv in a year and
- (e) an equivalent dose to the skin of 500 mSv in a year;
- (f) limits given above apply to female workers also. However, once pregnancy is declared the equivalent dose limit to embryo/fetus shall be 1 mSv for the remainder of the pregnancy.

A1.2 Apprentices and Trainees

The occupational exposure of apprentices and trainees between 16 and 18 years of age shall be so controlled that the following limits are not exceeded:

- (a) An effective dose of 6 mSv in a year
- (b) An equivalent dose to the lens of the eye of 50 mSv in a year
- (c) An equivalent dose to the extremities (hands and feet) of 150 mSv in a year
- (d) An equivalent dose to the skin of 150 mSv in a year.

A2. Dose Limits for Members of the Public

The estimated average doses to the relevant members of the public shall not exceed the following limits:

- (a) An effective dose of 1 mSv in a year
- (b) An equivalent dose to the lens of the eye of 15 mSv in a year
- (c) An equivalent dose to the skin of 50 mSv in a year.

APPENDIX - B

GAZETTE NOTIFICATION FOR LICENSING REQUIREMENT OF BSM FACILITIES

EXTRACT FROM THE GAZETTE OF INDIA : PART II, SEC. 3, SUB-SEC. (ii)

Appearing on Page No. 2315

Dated 9-5-2009

परमाणु ऊर्जा नियाम परिषद

ATOMIC ENERGY REGULATORY BOARD

अधिसूचना

नई दिल्ली, 24 अप्रैल, 2009

का. आ. 1210.- परमाणु ऊर्जा (विकिरण संरक्षण) नियम, 2004 के नियम 3(3) (X) तथा परमाणु ऊर्जा विभाग अधिसूचना (भारत सरकार के दिनांक 12-10-2006 के राजपत्र में प्रकाशित का. आ. सं. 4072) के अनुसार प्रदत्त शक्तियों का प्रयोग करते हुए यह अधिसूचित किया जाता है कि बीच सैंड मिनेरल्स (BSM) प्रोसेसिंग फैसिलिटिज, जो इल्मेनाईट, रूटाईल, ल्यूकोजीन, ज़कान, सिलिमेनाईट, गार्नेट तथा मोनाजाईट के उत्पादन हेतु खनन एवं खनिजों का पृथक्करण करती है तथा इन बीच सैंड खनिजों का भौतिकीय अथवा रासायनिक प्रक्रिया संसाधन करती हैं, उन्हें परमाणु ऊर्जा (विकिरण संरक्षण) नियम, 2004 के नियम 3 के तहत अनुज्ञप्ति प्राप्त करने के लिए आवेदन प्रस्तुत करना आवश्यक है ।

[संदर्भ: एईए/16(1)/2008-ईआर/1120]

सुरेन्द्र कुमार शर्मा, अध्यक्ष

परमाणु ऊर्जा नियामक परिषद, सक्षम प्राधिकारी

NOTIFICATION

New Delhi, the 24th April, 2009

S.O. 1210.- In exercise of the powers conferred by Rule 3 (3) (x) of the Atomic Energy (Radiation Protection) Rules, 2004 and the Department of Atomic Energy Notification (S. O. No. 4072 published in the Gazette of India dated 12-10-2006), it is hereby notified that Beach Sand Minerals (BSM) processing facilities carrying out mining and mineral separation for production of ilmenite, rutile, leucosene, zircon, sillimanite, garnet & monazite and physical or chemical processing of these BSM are required to apply for licence under Rule 3 of the Atomic Energy (Radiation Protection) Rules, 2004.

[Ref. AEA/16(1)/2008-ER/1120]

S.K. SHARMA, Chairman

Atomic Energy Regulatory Board

Competent Authority

APPENDIX - C

USE OF PHOSPHOGYPSUM IN BUILDING AND CONSTRUCTION MATERIALS AND IN AGRICULTURE

Rockphosphates imported in India by the fertilizer plants for production of phosphoric acid contain small concentrations of radioactive nuclides, viz., Uranium-238 and Radium-226. Phosphogypsum produced as byproduct during wet processing of these rockphosphates contains activity concentration of U-238 typically in the range 0.1-0.2 Bq/g and Ra-226 typically in the range 0.5-1.3 Bq/g.

The subject of processing of imported rockphosphates and the use of phosphogypsum so produced in commercial applications like Building and Construction Materials and in Agriculture has been examined in the Atomic Energy Regulatory Board (AERB) from the radiological safety considerations and the following directives are issued.

- (i) **Analysis of RockPhosphate and Phosphogypsum:** All rockphosphate processing industries shall carry out analysis to determine U-238 and Ra-226 content in each imported consignment of rockphosphate as well as in the phosphogypsum produced from its processing and shall report the results to AERB on quarterly basis. This data will be reviewed in AERB for a period of about two years for deciding on the frequency of such analysis in future.
- (ii) **Sale of Phosphogypsum by Fertilizer Plants:** AERB approval is not required for selling phosphogypsum for its use in building and construction materials provided the activity concentration of Ra-226 in it is less than or equal to 1 Bq/g. [If Ra-226 concentration in phosphogypsum is more than 1Bq/g, it is to be mixed with other ingredients such that the Ra-226 activity concentration in bulk material is less than or equal to 1.0 Bq/g.]
- (iii) **Manufacturing and Use of Phosphogypsum Panels and Blocks:** AERB approval is not required for manufacturing and use of phosphogypsum panels or blocks provided they have Ra-226 activity less than 40 kBq/square metre area of any surface of the panels/blocks.
- (iv) **Use in Agriculture:** There is no restriction for use of phosphogypsum in agricultural applications from the radiological safety considerations.

ANNEXURE - I

Form ID: AERB/IPSD/ RP/APP
Government of India
Atomic Energy Regulatory Board

Niyamak Bhavan,
 Anushaktinagar,
 Mumbai - 400 094

APPLICATION FOR APPROVAL/RENEWAL OF APPROVAL FOR OPERATION OF FACILITIES PROCESSING ROCK PHOSPHATE

-
- (a) *This application would be considered by the competent authority for issuance of licence, under the Atomic Energy (Radiation Protection) Rules, 2004. (AERPR-2004)*
- (b) *The duly filled-in form should be sent to Head/Director, Industrial Plants Safety Division, (IPSD) AERB, Niyamak Bhavan, Anushaktinagar, Mumbai-400094 with the necessary documents.*
- (c) *Incomplete applications and those without all relevant documents are liable to be rejected.*
- (d) *All the forms pertaining to BSM facilities can be downloaded from the website www.aerb.gov.in*
- (e) *Attach extra sheets wherever required*
-

PART A

GENERAL PARTICULARS

- A.1 Name and address (with PIN Code) of the facility:
 Telephone No. (LandLine)
 Fax No.
 Email
- A.2 Name and designation of the applicant[#]:
 Telephone No. (LandLine)
 Fax No.
 Email
 Mobile No.
- A.3 Name of the Head of the Facility[§]:
 Telephone No. (LandLine)
 Fax No.
 Email
 Mobile No.

A.4 Application for

	Ref. No	Date	Validity of existing approval
New Approval/renewal (strike out whichever are not applicable)			

Applicant is the person in whose name the consent may be issued, under AERPR-2004, and who would have the responsibilities of "licencee" prescribed in AERPR-2004 and should be a full time employee of the institution.

\$ The head of the institution is the person who would have the responsibilities of "employer" prescribed in AERPR-2004.

PART B
PARTICULARS OF THE FACILITY

B.1 Facility Details:

(Facilities yet to start operation are required to provide the estimated figures & facilities already in operation are required to provide actual figures)

Source Location and Country from where Rock Phosphate is Imported	Quantity of Rock Phosphate to be Imported in a year	Analysis Result of Rock Phosphate Imported		Quantity of Corresponding Phosphogypsum Produced in a year from Processing of Rock Phosphate	Analysed/Anticipated Result of Corresponding Phosphogypsum Produced from Processing of Rock Phosphate	
		U-238 (Bq/g)	Ra-226 (Bq/g)		U-238 (Bq/g)	Ra-226 (Bq/g)

B.2 End use Details of the Phosphogypsum

1. End Use of Phosphogypsum (by the fertilizer plants):
End Use: _____
2. If Phosphogypsum is sold, please provide (attach separate sheet if necessary)
 - (i) the complete address, telephone no. fax, email of the buyers
 - (ii) quantity of phosphogypsum sold in a year
 - (iii) its end use by the buyers

3. For phosphogypsum panels/blocks manufacturers
- (i) Indicate the surface density of the panels: _____ kg/sq.metre
 - (ii) Ra-226 concentration in the phosphogypsum used for manufacturing panels/blocks _____ Bq/g
4. If phosphogypsum is stored / disposed by the fertilizer plants, please indicate
- (i) The quantity stored/disposed in this quarter _____
 - (ii) Distance of nearest residence from the storage/disposal yard _____
 - (iii) Distance of nearest surface water body from the storage/disposal yard (river, lake etc) _____
 - (iv) If any protection measures to prevent air borne activity/seepage to groundwater have been provided (for example covering of phosphogypsum heaps with polythene sheets, lining of the storage/disposal yard etc) _____

PART C

UNDERTAKING

I/We hereby certify that

- (a) all the statements made above are correct to the best of my/our knowledge and belief;
- (b) no activity shall be carried out for purposes other than those specified in this form;
- (c) the operation of the facility shall not be commenced without approval from AERB;
- (d) all provisions of the Atomic Energy (Radiation Protection) Rules, 2004 shall be strictly complied with;
- (e) the facility shall not be transferred/sold/ rented by me/us to another without the prior permission of the competent authority;
- (f) full facilities will be accorded by me/us to any authorised representatives of the competent authority to inspect this installation at any time;
- (g) all recommendations made from time to time by the competent authority in respect of radiation safety measures will be duly implemented;

- (h) keep AERB informed about any changes in the information furnished above.

In case, it is found, at any stage, that the information provided by me/us is false and/or not authentic, then I/we hereby accept that appropriate regulatory actions may be initiated against me/us and our institution, in accordance with the applicable Rules.

ANNEXURE - II**Form ID: AERB/IPSD/CT/REG****Government of India
Atomic Energy Regulatory Board**Niyamak Bhavan,
Anushaktinagar,
Mumbai - 400 094**APPLICATION FOR REGISTRATION/RENEWAL OF REGISTRATION
FOR OPERATION OF FACILITIES PROCESSING
COLUMBITE - TANTALITE ORE**

-
- (a) *This application would be considered by the competent authority for issuance of licence, under the Atomic Energy (Radiation Protection) Rules, 2004. (AERPR-2004)*
- (b) *The duly filled-in form should be sent to Head/Director, Industrial Plants Safety Division, (IPSD) AERB, Niyamak Bhavan, Anushaktinagar, Mumbai-400094 with the necessary documents.*
- (c) *Incomplete applications and those without all relevant documents are liable to be rejected.*
- (d) *All the forms pertaining to BSM facilities can be downloaded from the website www.aerb.gov.in*
- (e) *Attach extra sheets wherever required*
-

PART A**GENERAL PARTICULARS**

- A.1 Name and address (with PIN Code) of the facility:
Telephone No. (LandLine)
Fax No.
Email
- A.2 Name and designation of the applicant[#]:
Telephone No. (LandLine)
Fax No.
Email
Mobile No.
- A.3 Name of the Head of the Facility[§]:
Telephone No. (LandLine)
Fax No.
Email
Mobile No.

A.4 Application for

	Ref. No	Date	Validity of existing registration (not required if application is for new licence)
New Registration/Modification/renewal (strike out whichever are not applicable)			

Applicant is the person in whose name the consent may be issued, under AERPR-2004, and who would have the responsibilities of "licencee" prescribed in AERPR-2004 and should be a full time employee of the institution.

\$ The head of the institution is the person who would have the responsibilities of "employer" prescribed in AERPR-2004.

PART B**PARTICULARS OF THE FACILITY**

B.1 Facility Details:

1.1 Operational status of the facility
(strike out whichever is not applicable): operating/ yet to start operation

1.2 Design capacity of the plant _____

1.3 Does the facility carry out/plan to carry out
mining of columbite - tantalite ore Yes No

If Yes, provide the following information

(i) Mining lease (Ref. No.) _____

(ii) Date of grant of mining lease _____

(iii) Validity of the mining lease _____

(iv) Location of mining area _____

1.4 Details of material to be processed

(i) Raw material description (strike out whichever are not applicable)
Raw columbite - tantalite ore/ ore concentrates/metal rejects/scraps/
others (please specify) _____

(ii) Source of the raw material (if procured/imported, give the details
from where it is procured) _____

B.2 Process Details

- 2.1 Details of raw materials, products and slag
(Facilities yet to start operation are required to provide the estimated figures & facilities already in operation are required to provide actual figures)

	Raw material used			Final product(s)	Uranium/thorium bearing slag	Other solid waste
	Raw ore	Ore concentrates	metal rejects/scraps			
				Niobium/tantalum or their compounds		
Quantity/annum (tons)						
Uranium (Bq/g)						
Thorium (Bq/g)						
Radium (Bq/g)						

B.3 Radiological Safety Details:

3.1 Radiological Safety Officer (if available for the facility):

- (i) Name _____
(ii) Reference No. of AERB approval _____
(iii) Validity of AERB approval _____

Else, apply for approval for RSO in prescribed format along with this application.

3.2 Radiation monitoring instruments

Name of the instrument	Detector type	Quantity	Range	Accuracy	Make

3.3 Workplace monitoring: (applicable for operating facilities)

Location (all locations of the plant including storage area of ore and slag should be covered)	Radiation level (microGray/hour)

- 3.4 Radiation worker and dose details: (facilities yet to start operation are required to provide the estimated figures & facilities in operation are required to provide actual figures)
- (i) Number of Permanent employees _____
 - (ii) Number of Contractor's Workers _____
 - (iii) Average Individual Dose _____
 - (iv) Maximum Individual Dose _____
- B.4 Radioactive Waste Management Details:
(Facilities yet to start operation are required to provide the estimated figures & facilities in operation are required to provide actual figures)
- 4.1 Method of disposal of radioactive slag (tick whichever is applicable)
- (i) Disposed in secured landfill
 - (ii) Sold to other facilities
 - (iii) Others (please specify) _____
- 4.2 If radioactive slag disposed/to be disposed in landfill, provide the following information.
- (i) Quantity to be disposed in a year _____
 - (ii) Location of landfill site _____
- 4.3 If radioactive slag disposed/to be disposed by sale, provide the following information.
- (i) Copy of agreement of the facility with the buyer
 - (ii) Name and address of the buyer of the radioactive slag
 - (iii) Quantity of radioactive slag sold/to be sold per year
- 4.4 Disposal of liquid effluent (If discharged to the environment)
- (i) Volume of liquid effluent discharged in a year _____
 - (ii) Analysis of liquid effluent (gross alpha and gross beta) _____
- B.5 Environmental Safety Details:
- 5.1 Background radiation level of the
- (i) Mining area (if applicable): _____
 - (ii) Plant premises: _____
- 5.2 Radiation level at slag disposal area:
(facilities yet to start operation are required to provide the estimated figures & facilities already in operation are required to provide actual figures)
On top of landfill: _____

- 5.3 Measures proposed to prevent spread of radioactivity by water/wind to nearby areas during normal operation and emergency conditions.
-
- 5.4 Distance of the nearest population centre from the plant _____
- 5.5 Population of the area nearest to plant _____
- B.6 Enclosures:
- (1) Approved Mine Plan: if applicable.
 - (2) Site Plan: showing the Plant and the landfill site (if applicable): information on site condition for external events such as seismicity, flood, cyclone, tsunami etc.
 - (3) Process Details: Write up of the process, flow sheet indicating generation of slag, disposal method for slag, treatment of liquid effluent, material balance.
 - (4) Lay out: plant and equipment layout
 - (5) Design Details: Codes/standards used for plant and equipment design, details of instrumentation and control system, design for containment for radioactive material and ventilation system for controlling radiation exposures, design of landfill (if applicable) for disposal of slag.
 - (6) Quality assurance: For structures containing radioactive material
 - (7) Radiation Protection Procedures
 - (8) Application for approval of RSO (if RSO not available)
 - (9) Other statutory clearances of the plant.

PART C

UNDERTAKING

I/We hereby certify that

- (a) all the statements made above are correct to the best of my/our knowledge and belief;
- (b) no activity shall be carried out for purposes other than those specified in this form;
- (c) the operation of the facility shall not be commenced without Registration from AERB;
- (d) all provisions of the Atomic Energy (Radiation Protection) Rules, 2004 shall be strictly complied with;

- (e) the facility shall not be transferred/sold/ rented by me/us to another without the prior permission of the competent authority;
- (f) full facilities will be accorded by me/us to any authorised representatives of the competent authority to inspect this installation at any time;
- (g) radiation surveillance of all persons engaged in radiation work as required by the competent authority will be duly carried out at my/our expense;
- (h) radioactive slag will be disposed off in a safe manner as per the regulations and the radioactive slag shall not be used for surfacing operations or any other purposes;
- (i) transport of radioactive materials shall be in accordance with relevant safety regulations;
- (j) all recommendations made from time to time by the competent authority in respect of radiation safety measures will be duly implemented;
- (k) duly qualified/experienced radiological safety officer(s) will be appointed before the commencement of operation of the facility;
- (l) the requirements laid down by competent authority regarding closure and reuse of the site will be strictly complied with;
- (m) keep AERB informed about any changes in the information furnished above.

In case, it is found, at any stage, that the information provided by me/us is false and/ or not authentic, then I/we hereby accept that appropriate regulatory actions may be initiated against me/us and our institution, in accordance with the applicable Rules.

Place:

Signature:

Date:

Name of the Applicant:

Designation:

Signature:

Name of Head of the Institution:

Designation:

(Seal of the institution)

ANNEXURE - III

Form ID: AERB/IPSD/ BSM/LIC
Government of India
Atomic Energy Regulatory Board

Niyamak Bhavan,
 Anushaktinagar,
 Mumbai - 400 094

APPLICATION FOR LICENCE/REGISTRATION OR ITS RENEWAL FOR OPERATION OF BEACH SAND MINERALS (BSM) FACILITIES CARRYING OUT PHYSICAL MINERAL SEPARATION (OTHER THAN MONAZITE)

-
- (a) *This application would be considered by the competent authority for issuance of licence, under the Atomic Energy (Radiation Protection) Rules, 2004. (AERPR-2004)*
- (b) *The duly filled-in form should be sent to Head, Industrial Plants Safety Division, (IPSD) AERB, Niyamak Bhavan, Anushaktinagar, Mumbai-400094 with the necessary documents.*
- (c) *Incomplete applications and those without all relevant documents are liable to be rejected.*
- (d) *All the forms pertaining to BSM facilities can be downloaded from the website www.aerb.gov.in*
- (e) *Attach extra sheets wherever required*
-

PART A

GENERAL PARTICULARS

- A.1 Name and address (with PIN Code) of the facility:
 Telephone No. (LandLine)
 Fax No.
 Email
- A.2 Name and designation of the applicant[#]:
 Telephone No. (LandLine)
 Fax No.
 Email
 Mobile No.
- A.3 Name of the Head of the Facility[§]:
 Telephone No. (LandLine)
 Fax No.
 Email
 Mobile No.

B.2 Process Details

2.1 Details of raw materials, products and tailings

(BSM facilities yet to start operation are required to provide the estimated figures & BSM facilities already in operation are required to provide actual figures)

	Raw material used			Final product(s)						Tailings generated		
	Mined out sand	Pre Con plant output	Pro-cured raw material	Ilme-nite Rutile	Leuco-xene	zircon	garnet	silli-ma nite	mona zite	Mined out sand	Silica rich tailings	Monazite enriched tailings
Quantity/ annum (tons)												
Monazite (%)												

B.3 Radiological Safety Details:

3.1 Radiological Safety Officer (applicable for operating BSM facilities):

- (i) Name _____
- (ii) Educational qualifications _____
- (iii) Type of training (including place and duration) _____
- (iv) Experience in BSM facility _____
- (v) Reference No. of AERB approval _____
- (vi) Validity of AERB approval _____

3.2 Radiation monitoring instruments available (applicable for operating BSM facilities):

Name of the instrument	Detector type	Quantity	Range	Accuracy	Make

3.3 Workplace monitoring: (applicable for operating BSM facilities)

Location	Radiation level (microGray/hour)
Pre-Concentration Plant (if applicable)	
Mineral Separation Plant (give break up location wise)	

- 3.4 Radiation worker and Dose details: (BSM facilities yet to start operation are required to provide the estimated figures & BSM facilities in operation are required to provide actual figures)
- (i) Number of Permanent employees _____
 - (ii) Number of Contractor's Workers _____
 - (iii) Average Individual Dose _____
 - (iv) Maximum Individual Dose _____
- B.4 Radioactive Waste Management Details:
(BSM facilities yet to start operation are required to provide the estimated figures & BSM facilities in operation are required to provide actual figures)
- 4.1 Method of disposal of monazite enriched tailings (tick whichever is applicable)
- (i) disposed by backfilling of mined out sites:
 - (ii) disposed in trenches
 - (iii) sold to other BSM facilities
 - (iv) Others (please specify) _____
- 4.1.1 If monazite enriched tailings is disposed/to be disposed by backfilling of mined out sites, provide the following information.
- (i) Quantity of monazite enriched tailings mixed with silica rich sand in a year to reduce the radiation level to background _____
 - (ii) Quantity of silica rich sand mixed with monazite enriched tailings in a year _____
 - (iii) Monazite (%) after mixing _____
 - (iv) Location of backfilled sites _____
- 4.1.2 If monazite enriched tailings disposed/to be disposed in trenches, provide the following information.
- (i) Quantity of monazite enriched tailings disposed in a year _____
 - (ii) Location of backfilled sites _____
 - (iii) Material used for topping of trenches to reduce the radiation level

 - (iv) Thickness of topping of trenches _____
 - (v) Location of trenches _____
- 4.1.3 If monazite enriched tailings disposed/to be disposed by sale, provide the following information.

- (i) Quantity of monazite enriched tailings sold/to be sold per year
 - (ii) Name and address of the buyer of the tailings
 - (iii) Does the buyer have a valid AERB licence _____
If Yes, provide the licence number and validity _____
- B.5 Environmental Safety Details:
- 5.1 Background radiation level of the
 - (i) Mining area (if applicable): _____
 - (ii) Plant premises: _____
 - 5.2 Radiation level at monazite enriched tailings disposal area:
(BSM facilities yet to start operation are required to provide the estimated figures & BSM facilities already in operation are required to provide actual figures)
 - (i) At backfilled site after mixing with silica rich sand: _____
 - (ii) On top of trenches after topping: _____
 - 5.3 Measures proposed to prevent spread of radioactivity by water/wind to nearby areas during normal operations and emergency conditions.

 - 5.4 Distance of the nearest population centre from the tailings disposal site

 - 5.5 Population of the area nearest to tailings disposal site _____
- B.6 Enclosures:
- (1) Approved Mine Plan: showing the mining area and tailings disposal site (backfilled areas/trenches) if applicable.
 - (2) Site Plan: showing Mineral Separation Plant and the tailings disposal site (trenches): information on site condition for external events such as seismicity, flood, cyclone, tsunami etc.
 - (3) Process Details: Write up of the process including, mining, preconcentration and mineral separation, disposal method for tailings, block diagrams with details of generation of tailings with their monazite content (%) at each stage and material balance.
 - (4) Lay out: plant and equipment layout
 - (5) Design Details: Codes/standards used for plant and equipment design, details of instrumentation and control system, design for containment for radioactive material and ventilation system for controlling radiation exposures, design of trenches (if applicable) for disposal of monazite enriched tailings.

- (6) Quality assurance: For structures conveying/containing radioactive material
- (7) Radiation Protection Procedures
- (8) Application for approval of RSO (if RSO not available)
- (9) Other statutory clearances of the plant.

PART C

UNDERTAKING

I/We hereby certify that

- (a) all the statements made above are correct to the best of my/our knowledge and belief;
- (b) no activity shall be carried out for purposes other than those specified in this form;
- (c) the operation of the facility shall not be commenced without Licence from AERB;
- (d) all provisions of the Atomic Energy (Radiation Protection) Rules, 2004 shall be strictly complied with;
- (e) the facility shall not be transferred/sold/rented by me/us to another without the prior permission of the competent authority;
- (f) full facilities will be accorded by me/us to any authorised representatives of the competent authority to inspect this installation at any time;
- (g) radiation surveillance and medical surveillance of all persons engaged in radiation work as required by the competent authority will be duly carried out at my/our expense;
- (h) radioactive tailings will be disposed off in a safe manner as per the regulations and the radioactive tailings shall not be used for surfacing operations or any other purposes;
- (i) transport of radioactive materials shall be in accordance with relevant safety regulations;
- (j) all recommendations made from time to time by the competent authority in respect of radiation safety measures will be duly implemented;
- (k) duly qualified/experienced radiological safety officer(s) will be appointed before the commencement of operation of the facility;

- (l) the requirements laid down by competent authority regarding decommissioning and reuse of the site of the decommissioned facility will be strictly complied with;
- (m) keep AERB informed about any changes in the information furnished above.

In case, it is found, at any stage, that the information provided by me/us is false and/or not authentic, then I/we hereby accept that appropriate regulatory actions may be initiated against me/us and our institution, in accordance with the applicable Rules.

Place: _____ Signature: _____

Date: _____ Name of the Applicant: _____

Designation: _____

Signature: _____

Name of Head of the Institution: _____

Designation: _____

(Seal of the institution)

ANNEXURE - IV**CONTENTS FOR RADIATION PROTECTION PROCEDURES FOR
BSM-NORM INDUSTRIES**

1. Brief description of the plant
2. Measures to control radiation exposure
3. Work place monitoring - external radiation, airborne contamination
 - (a) The quantities to be measured
 - (b) The location and frequency
 - (c) Measurement methods
4. Individual monitoring
 - (a) External exposure
 - (b) Dose estimation methodology
 - (c) TLD issue procedure (where applicable)
5. Radioactive waste disposal
 - (a) Solid waste monitoring, disposal
6. Environmental monitoring - external radiation measurement location and frequency
7. Syllabus on radiation protection training
8. Responsibilities of Plant Management and RSO

ANNEXURE - V**APPLICATION FOR APPROVAL OF NOMINATION OF RADIOLOGICAL
SAFETY OFFICER FOR BSM-NORM FACILITIES**

(To be submitted to the Industrial Plants Safety Division, AERB, Niyamak Bhavan,
Anushaktinagar, Mumbai 400 094)

PART - 1 : PARTICULARS OF THE INSTITUTION

1. Name and address of the institution:

2. Name, designation and address of :
the person-in-charge of the institution
Telegraphic address :
FAX No. :
Telex No. :
Telephone No. (Office) :
Telephone No. (Residence) :
e-mail address :

PART - II : PARTICULARS OF THE RSO DESIGNATE

Please affix here a
passport size
photograph of the
RSO designate

1. Name of the person to be designated as RSO :
2. Address of the nominee with tel.no.
Office:
Residence:
3. Academic qualification

Degree/Diploma	University/Board of examination	Year of passing	Subjects of study

4. (a) Experience in radiation work

Year(s) of work	Name of the institution	Type of radiation work handled	Radiation source & activity (Bq/Ci) handled, if any	Personal monitoring number, if personal monitoring service is being/ was availed

4. (b) Particulars of radiation safety training and year of passing:
5. Additional responsibilities assigned to the RSO Designate, if any:
6. (a) I hereby certify that the information furnished above is correct to the best of my knowledge and belief.
- (b) I undertake to abide by the conditions stipulated by the competent authority from time to time and follow guidelines in discharging the duties and responsibilities as Radiological Safety Officer.
- (c) I further undertake to inform the Industrial Plants Safety Division, AERB immediately, in case I am relieved of my service as RSO.
- (d) I undertake to maintain radiation safety in the institution and submit a radiation safety status report in the prescribed format quarterly and annually to IPSD, AERB every year.
- (e) I undertake to abide by the conditions stipulated in the RSO approval certificate issued by the competent authority.

Signature of RSO Designate

Place:

Date:

7. (a) I hereby certify that all the statements made in the application are correct to the best of my knowledge and belief
- (b) I hereby undertake to provide all necessary facilities to the RSO for discharge his duties and functions effectively.
- (c) I further undertake to inform IPSD, AERB immediately in case the RSO leaves this institution and or is relieved of his duties.

Signature and seal of the office
of the employer

Place:

Date:

ANNEXURE - VI

QUARTERLY/ANNUAL HEALTH PHYSICS REPORT FOR BEACH SAND MINERALS (BSM) FACILITY

Name of the facility : _____
 Location of the facility : _____
 Period of Reporting : _____ to _____

1.0 Dose Statistics

		No. of persons monitored	Collective dose (person-mSv)	Average individual dose (mSv) Individual	Maximum dose (mSv)
Quarter	Regular				
	Temporary				
Cumulative in the year	Regular				
	Temporary				

1.1 Individual Dose Statistics (cumulative in the year)

Dose range (mSv)	Number of persons in year		
	Regular	Temporary	Total
Less than 2			
2 - 6			
> 6 - 20			
> 20 - 30			
> 30			
TOTAL			

2.0 Monazite Enriched Tailings Details

		Raw Material Used (whichever is applicable)			Final Product(s) (whichever is applicable)						Tailings Generated	
		Mined out sand	Pre Con plant output	Procu- red raw materi- al	Ilme- nite	Rutile	Leuco- xene	Zircon	garnet	Sillima- nite	Silica rich tail- ings	Mona zite enrich- ed
Quar- ter	Quan- tity (tons)											
	Mo- nazite (%)											
Cu- mula- tive in the year	Quan- tity (tons)											
	Mo- nazite (%)											

2.1 Method of disposal of monazite enriched tailings
(tick whichever is applicable)

- (i) Disposed by backfilling of mined out sites
- (ii) Disposed in trenches within the plant boundary
- (iii) Sold to other BSM facilities

3.0 Radiation Monitoring Results* (whichever is applicable)

Location	Radiation level (microGray/hour)
Mining area	
Backfilled area (with monazite enriched tailings mixed with silica rich sand)	
Pre concentration plant	
➤ General background	
➤ Raw material storage	
➤ Pre concentration plant output	
➤ Pre concentration plant tailings	
Mineral processing plant (physical mineral separation and/or chemical processing)	

Location	Radiation level (microGray/hour)
➤ General background of plant premises	
➤ Raw material storage	
➤ Inside mineral separation plant (e.g magnetic separators, high tension separators etc)	
➤ Monazite Enriched Tailings storage area	
➤ On top of trenches filled with monazite enriched tailings and topped with silica rich sand	
➤ Inside chemical processing plant having mineral separation unit (roaster, calciner, digester, effluent pipelines like iron oxide slurry pipelines etc)	

* The table is indicative in nature. If necessary, facility may include other areas also.

(Signature of Radiological Safety Officer)

(Signature of the Employer with Official Seal & Date)

Director, Industrial Plants Safety Division
Atomic Energy Regulator Board
Niyamak Bhavan-A
Anushaktinagar, Mumbai-400 094
Maharashtra

ANNEXURE - VII

QUARTERLY/ANNUAL HEALTH PHYSICS REPORT FOR COLUMBITE - TANTALITE (CT) PROCESSING FACILITY

Name of the facility : _____
 Location of the facility : _____
 Period of Reporting : _____ to _____

1.0 Dose Statistics

		No. of persons monitored	Collective dose (person-mSv)	Average individual dose (mSv) Individual	Maximum dose (mSv)
Quarter	Regular				
	Temporary				
Cumulative in the year	Regular				
	Temporary				

1.1 Individual Dose Statistics (cumulative in the year)

Dose range (mSv)	Number of persons in year		
	Regular	Temporary	Total
Less than 2			
2 - 6			
> 6 - 20			
> 20 - 30			
> 30			
TOTAL			

2.0 Analysis Results

Consign-ment of CT ore imported with date of import in a quarter	Source location and Country from where ore is imported	Quantity of CT ore imported in each consign-ment	Analysis result of CT ore imported in each consignment			Quantity of slag produced from processing of CT ore in each consign-ment	Analysis result of corresponding slag produced from processing of CT in each consignment		
			U-238 (Bq/g)	Th-232 (Bq/g)	Ra-226 (Bq/g)		U-238 (Bq/g)	Th-232 (Bq/g)	Ra-226 (Bq/g)
1									
2									
3									

2.1 Total quantity of CT ore processed in a year _____

2.2 Total quantity of slag produced from processing of CT ore in a year _____

3.0 Radiation Monitoring Results*

Location	Radiation level (microGray/hour)
inside plant	
plant premises	

* The table is indicative in nature. If necessary, facility may include other areas also.

4.0 End Use Details of the Uranium Bearing Slag

(i) End use of slag (by the CT processing facilities plants):

End Use: _____

Quantity used in a quarter: _____

(ii) If slag is sold, please provide (*attach separate sheet if necessary*)

(a) the complete address, telephone no. fax, email of the buyers

- (b) quantity of slag sold in a quarter
- (c) its end use by the buyers
- (iii) If slag is stored/disposed by the CT processing facility, please indicate
 - (a) The quantity stored/disposed in this quarter _____
 - (b) Distance of nearest residence from the storage/disposal yard _____
 - (c) Distance of nearest surface water body from the storage/disposal yard _____
 - (d) If any protection measures to prevent air borne activity/seepage to groundwater has been provided (for example covering of slag with polythene sheets, lining of the storage/disposal yard etc) _____

Date: _____

Signature of Head of the Unit
with Official Seal

(Signature of Radiological Safety Officer)

(Signature of the Employer with Official Seal & Date)

Director, Industrial Plants Safety Division
Atomic Energy Regulator Board
Niyamak Bhavan-A
Anushaktinagar, Mumbai-400 094
Maharashtra

ANNEXURE - VIII

QUARTERLY ANALYSIS REPORT FOR ROCKPHOSPHATE PROCESSING FACILITIES

Name of the plant : _____

Address : _____

Telephone and Fax : _____

Email : _____

Quarter : _____ (Jan-March/April - Jun/Jul - Sep/Oct -Dec)

Year : _____

Consign- ment of rock phosphate imported with date of import	Source location and Country from where rock phosphate is imported	Quantity of rock phosphate imported in each consign- ment	Analysis Result of rock phosphate imported in each consignment		Quantity of correspon- ding phos- phogypsum produced from proce- ssing of rockphos- phate in each consignment	Analysis Result of corresponding phosphogypsum produced from processing of rock phosphate in each consignment		
			U-238 (Bq/g)	Ra-226 (Bq/g)		U-238 (Bq/g)	Th-232 (Bq/g)	Ra-226 (Bq/g)
1								
2								
3								

If any phosphogypsum sample has Ra-226 greater than 1 Bq/g, indicate the quantity of other ingredients and the phosphogypsum mixed together to bring down the Ra-226 content in the bulk material to 1Bq/g _____

End Use Details of the Phosphogypsum

1. End use of phosphogypsum (by the fertilizer plants):
 End use: _____
 Quantity used in a quarter: _____
2. If Phosphogypsum is sold, please provide (*attach separate sheet if necessary*)
 - (i) The complete address, telephone no. fax, email of the buyers
 - (ii) Quantity of phosphogypsum sold in a quarter
 - (iii) Its end use by the buyers
3. For phosphogypsum panels/blocks manufacturers
 - (i) Indicate the surface density of the panels: _____ kg/sq.metre
 - (ii) Ra-226 concentration in the phosphogypsum used for manufacturing panels/blocks _____ Bq/g
4. If phosphogypsum is stored/disposed by the fertilizer plants, please indicate
 - (i) The quantity stored/disposed in this quarter _____
 - (ii) Distance of nearest residence from the storage/disposal yard _____
 - (iii) Distance of nearest surface water body from the storage/disposal yard (river, lake etc) _____
 - (iv) If any protection measures to prevent air borne activity/seepage to groundwater has been provided (for example covering of phosphogypsum heaps with polythene sheets, lining of the storage/disposal yard etc) _____

Date: _____

 Signature of Head of the Unit
 with Official Seal

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LIST OF PARTICIPANTS

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Smt Soumya Varghese : AERB

Reviewer:

Shri R. Bhattacharya : AERB

Shri K. Srivasista : AERB

**ADVISORY COMMITTEE ON SAFETY DOCUMENTS
RELATED TO FUEL CYCLE FACILITIES OTHER
THAN NUCLEAR REACTORS (ACSD-FCF)**

Dates of meeting : March 29, 2012
October 1, 2012

Members and Invitees of the Committee:

Members:

Shri S. Vasant Kumar (Chairman) : AERB (Former)
Shri P.K. Ghosh : AERB (Former)
Shri P.B. Kulkarni : BARC (Former)
Shri S. Majumdar : BARC (Former)
Shri V.D. Puranik : BARC
Shri D.D. Bajpai : BARC (Former)
Shri T.N. Krishnamurthi : AERB (Former)
Shri Manoj Kumar : HWB (Former)
Shri R. Bhattacharya : AERB
Shri V.V. Pande (Member Secretary) : AERB

Invitees

Dr. P.M.B. Pillai : BARC (Former)
Shri Soumen Sinha : AERB
Shri S.M. Kodolkar : AERB
Shri P.V. Mohandas : AERB
Smt Soumya Varghese : AERB

**LIST OF REGULATORY DOCUMENTS FOR
FRONT END FUEL CYCLE FACILITES**

Reference No.	Title	Year of Publication
AERB/NF/SG/IS-6	Safety in Thorium Mining and Milling	2006
AERB/FE-FCF/SG-2	Radiological Safety in Uranium Mining and Milling	2007
AERB/FE-FCF/SG-3	Uranium Oxide Fuel Fabrication Facilities	2009
AERB/FE-FCF/SG-4	Safety Guidelines on Siting, Design, Construction, Commissioning, Operation, Closure and Monitoring of Tailings Management Facilities for Uranium Ore Processing	2013
AERB/FE-FCF/SG-5	Radiological Safety in Handling Beach Sand Minerals and Other Naturally Occurring Radioactive Materials	2013
AERB/FE&BE-FCF/SG-1	Renewal of Licence for Operation of Nuclear Fuel Cycle Facilities other than Nuclear Power Plants and Research Reactors	2010
AERB/NF/SS/FPS (Rev.1)	Fire Protection Systems for Nuclear Facilities	2010
AERB/NRF/SG/IS-1 (Rev.1)	Control of Works	2011
AERB/SG/IS-2	Preparation of Safety Report of Industrial Plants other than Nuclear Power Plants in the Department of Atomic Energy	2001
AERB/SG/IS-3	Personal Protective Equipment	2004
AERB/SG/IS-4	Guidelines for Pre-employment Medical Examination and Fitness for Special Assignments	2005
AERB/SG/EP-3	Preparation of Site Emergency Preparedness Plans for Non-Nuclear Installations	2000

**LIST OF REGULATORY DOCUMENTS FOR
FRONT END FUEL CYCLE FACILITIES (CONTD.)**

Reference No.	Title	Year of Publication
AERB/SG/EP-4	Preparation of Off-site Emergency Preparedness Plans for Non-Nuclear Installations	2000
AERB/NF/SG/G-2	Consenting process for Nuclear Fuel Cycle Facilities and Related Industrial Facilities other than Nuclear Power Plants and Research Reactors	2006
AERB/NF/SG/ RW-5	Management of Radioactive Waste from Mining and Milling of Uranium and Thorium	2007
AERB/SM/IS-1	Safety Manual on Data Base Management for Accidents/Diseases Happening due to Occupation and Implementation of the same in the Department of Atomic Energy	1991
AERB/NF/SM/O-2 (Rev. 4)	Radiation Protection for Nuclear Facilities	2005
AERB/NF/SM/G-2	Regulatory Inspection and Enforcement in Nuclear Fuel Cycle Facilities and Related Industrial Facilities other than Nuclear Power Plants and Research Reactors	2007

AERB SAFETY GUIDELINES NO. AERB/FE-FCF/SG-5

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ILMENITE AND RUTILE



Indian Minerals Yearbook 2013

(Part- III : MINERAL REVIEW)

52nd Edition

ILMENITE AND RUTILE

(FINAL RELEASE)

GOVERNMENT OF INDIA
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27 Ilmenite & Rutile

India is endowed with large resources of heavy minerals which occur mainly along coastal stretches of the country and also in inland placers. Heavy mineral sands comprise a group of seven minerals, viz, ilmenite, leucoxene (brown ilmenite), rutile, zircon, sillimanite, garnet and monazite. Ilmenite (FeO.TiO_2) and rutile (TiO_2) are the two chief minerals of titanium. Titanium dioxide occurs in polymorphic forms as rutile, anatase (octahedrite) and brookite. Though, brookite is not found on a large-scale in nature, it is an alteration product of other titanium minerals. Leucoxene is an alteration product of ilmenite and found associated with ilmenite.

RESOURCES

Ilmenite and rutile along with other heavy minerals are important constituents of beach sand deposits found right from Moti Daman-Umbrat coast (Gujarat) in the west to Odisha coast in the east. These minerals are concentrated in five well defined zones:

- * Over a stretch of 22 km between Neendakara and Kayamkulam, Kollam district, Kerala (known as 'Chavara' deposit after the main mining centre).
- * Over a stretch of 6 km from the mouth of Valliyar river to Colachal, Manavalakurichi and little beyond in Kanyakumari district, Tamil Nadu (known as MK deposit).
- * On Chatrapur coast stretching for 18 km between Rushikulya river mouth and Gopalpur lighthouse with an average width of 1.4 km in Ganjam district, Odisha (known as 'OSCOM' deposit after IREL's Orissa Sands Complex).
- * Brahmagiri deposit stretches for 30 km from Girala nala to Bhabunia villages with an average width of 1.91 km in Puri district, Odisha.
- * Bhavanapadu coast between Nilarevu and Sandipeta with 25 km length and 700 m average width in Srikakulam district, Andhra Pradesh.

The AMD of the Department of Atomic Energy has been carrying out exploration of these mineral deposits. So far, about 3,799 km coastal tract and

160.72 sq km inland areas in Tamil Nadu and West Bengal have been investigated for over six decades by AMD. The ilmenite resources estimation for the areas explored up to 2012 has been completed and the resources are up from 520.38 million tonnes to 593.50 million tonnes (including leucoxene), inclusive of indicated, inferred and speculative categories. Resource estimation for the areas explored during 2012-13 is under progress. The most significant deposits which are readily available and attract attention of industry for large-scale operations are as follows:

State/Deposit	Ilmenite reserves (In million tonnes)
Andhra Pradesh	
1. Bhavanapadu Hukumpet	10.18
2. Kakinada (Phase I-VIII)	13.84
3. Kalingapatnam	5.80
4. Narasapur	2.92
5. Nizampatnam	19.26
6. Srikurman (South)	8.60
7. Visakhapatnam (Bhimunipatnam)	2.88
8. Amalapuram (Phase I-III)	3.10
9. Pandurangapuram-Voderevu (Bapatla-Chirala coast)	10.39
10. Vetapalem Coast (Chirala coast)	5.31
	82.28
Kerala	
1. Chavara Barrier beach	13.17
2. Chavara Eastern Extension (Phase-I)	17.02
3. Chavara Eastern Extension (Phase-II)	49.26
4. Trikkunnapuzha-Thotapally Beach & Eastern Extension	9.50
5. Alapuzha-Kochi	5.88
	94.83
Maharashtra	
Ratnagiri	3.68
Gujarat	
Moti Daman-Umbrat coast	2.77
Odisha	
1. Brahmagiri (Phase IV)	37.98
2. Chatrapur	26.72
3. Gopalpur (Phase I-IV)	6.39
	71.09
Tamil Nadu	
1. Kudiraimozhi	22.86
2. Ovari-Periyatalai-Manapadu (Teri)	24.01
3. Sattankulam Teris	41.26
4. Cuddalore-Pudupattuchavadi	4.67
5. Vayakallur (Block I-IV)	3.54
6. Manavalakurichi	2.04
7. Midalam	1.64
	100.02

Source: Department of Atomic Energy, Mumbai.

ILMENITE AND RUTILE

The average grade of total heavy minerals in these deposits is 10-25% of which 30-35% is ilmenite. The overall statewise reserves of ilmenite and rutile which occur together in beach sand deposits are given in Table-1.

Table – 1 : Resources of Ilmenite and Rutile

(In million tonnes)	
State	Total in situ #
Ilmenite* : Total	593.50
Andhra Pradesh	163.05
Jharkhand/Bihar	0.73
Gujarat	2.77
Kerala	145.70
Maharashtra	3.74
Odisha	96.44
Tamil Nadu	179.02
West Bengal	2.05
Rutile : Total	31.35
Andhra Pradesh	10.25
Jharkhand/Bihar	0.01
Gujarat	0.02
Kerala	8.41
Maharashtra	(2300 tonnes)
Odisha	4.47
Tamil Nadu	8.00
West Bengal	0.19

Source: Department of Atomic Energy, Mumbai.
Inclusive of indicated, inferred and speculative categories.
* Including leucoxene.

As per the UNFC system as on 1.4.2010 compiled by IBM, the total resources of titanium minerals are placed at 394 million tonnes comprising ilmenite (335.6 million tonnes), rutile (13.4 million tonnes), leucoxene (1.0 million tonnes), anatase (3.3 million tonnes) and titaniferous magnetite (40.6 million tonnes).

EXPLORATION & DEVELOPMENT

IREL carried out exploration work at Chatrapur sand deposit, district Ganjam, Odisha for the ilmenite & rutile, zircon, monazite, sillimanite and garnet. The area explored was 2464.054 hectares, work started by AMD, DAE in the year 1969. A total of 394 boreholes was drilled and 2349 samples for mineralogical analysis have been done during the year 2012-13 and future plan is to drill 942 boreholes in next three years. The deposit is beach placer deposit, length 18 km along the coast of Bay of Bengal between Rushikulya river and Gopalpur with an average width of 1.4 km.

The survey and exploration carried out by AMD during 2008-09, 2009-10, 2010-11, 2011-12 and 2012-13 included parts of West Bengal, Odisha, Andhra Pradesh, Tamil Nadu, Kerala, Karnataka, Maharashtra and Gujarat. The details of exploration activities carried out by AMD during 2012-13 are furnished in Table-2.

Table – 2 : Exploration Activities by AMD for Ilmenite, Rutile, Monazite, Zircon and other Heavy Minerals, 2012-13

Location	Activity		Remarks
	Reconnai- ssance survey (sq km)	Detailed survey (sq km)	
Parts of Odisha, Andhra Pradesh, Karnataka and Tamil Nadu	256.80 (Coastal tracts) Inland areas	13.04	Reconnaissance survey was undertaken to delineate potential heavy mineral concentrations along the coastal and inland tracts: (a) Eastern extension of Brahmagiri deposit, District Puri, Odisha records THM ranging from 1.73 to 24.78% with an average of 5.76% upto the depth of 18 m. (b) Joydebkasba-Dhobimu-Lechanpur sector, District Balasore, Odisha records THM upto 18% with an average of 1.15%. (c) Tiruppulani block, District Ramanathapuram, Tamil Nadu records average THM of about 4%. (d) Pudumadam block, Ramnad basin, District Ramanathapuram, Tamil Nadu records THM upto 35.87% with an average of 2.53%. (e) Murudeshwar-Dhareshwar tract, District Uttara Kannada, Karnataka records THM of 2 to 12%. In addition to reconnaissance surveys, detailed survey was carried out in Malikipuram deposit, East Godavari district, Andhra Pradesh to upgrade the resources from inferred to indicated category. Further work is in progress.

Source: Department of Atomic Energy, Mumbai.

ILMENITE AND RUTILE

PRODUCTION AND PRICES**Ilmenite**

The production of ilmenite at 739 thousand tonnes in 2012-13 decreased by 2% as compared to that in the preceding year. Tamil Nadu was the leading producer of ilmenite during the year under review, contributing 66% of the total production followed by Odisha 25% and Kerala 9 per cent.

Rutile

The production of rutile at 17 thousand tonnes in 2012-13 registered nominal decrease as compared to that in the previous year. Odisha was the leading producer of rutile accounting for 43% of the total production followed by Tamil Nadu 38% and Kerala 19 per cent.

Production and prices of ilmenite and rutile are furnished in Tables - 3 to 5.

**Table – 3: Production of Ilmenite and Rutile
2010-11 to 2012-13
(By States)**

State	(In tonnes)		
	2010-11	2011-12(R)	2012-13(P)
ILMENITE			
India : Total	663217	751163	738524
Kerala	113240	86454	68555
Odisha	206139	188000	184570
Tamil Nadu	343838	476709	485399
RUTILE			
India : Total	26593	16598	16527
Kerala	5969	5664	3075
Odisha	8043	7874	7170
Tamil Nadu	12581	3060	6282

**Table – 4 : Prices of Rutile
2010-11 to 2012-13**

(₹ per tonne)

Year	Grade	Price	Remarks
IREL			
2010-11			
2010-11	Q	35749	Ex-works, Bagged
2010-11	MK	35478	Ex-works, Bagged
2010-11	OR	35748	Ex-works, Bagged
2011-12			
2011-12	Q	81187	Ex-works, Bagged
2011-12	MK	89241	Ex-works, Bagged
2011-12	OR	86466	Ex-works, Bagged
2012-13			
2012-13	Q	121578	Ex-works, Bagged
2012-13	MK	121767	Ex-works, Bagged
2012-13	OR	117048	Ex-works, Bagged
	SR (TiO ₂)		
KMML			
2010-11	93.2% (TiO ₂)	40,000	
2011-12	93.2% (TiO ₂)	1,09,000	
2012-13	93.2% (TiO ₂)	1,09,000	
V.V. Mineral (Average)			
2010-11	NA	37565	Average
2011-12	Premium & Standard	70610	Average
2012-13	-do-	116158	Average

Source: Department of Atomic Energy, Mumbai.

Note: Q : Quilon; MK: Manavalakurichi; OR: Odisha

**Table – 5: Prices of Ilmenite
2010-11 to 2012-13**

(₹ per tonne)

Period	Grade	Price	Remarks
IREL			
2010-11			
2010-11	Q	5366	Ex-works, loose
2010-11	MK	4989	Ex-works, loose
2010-11	OR	3916	Ex-works, loose
2011-12			
2011-12	Q	10337	Ex-works, loose
2011-12	MK	11084	Ex-works, loose
2011-12	OR	12298	Ex-works, loose
2012-13			
2012-13	Q	17420	Ex-works, loose
2012-13	MK	16693	Ex-works, loose
2012-13	OR	14765	Ex-works, loose
	(SR/TiO ₂)		
2012-13	OR	14958	Ex-works, loose
	(Non SR/TiO ₂)		
KMML			
2010-11	59.88% TiO ₂	8050	
2011-12	59.88% TiO ₂	12650	
2012-13	59.88% TiO ₂	17900	

(Contd.)

ILMENITE AND RUTILE

Table - 5 (Concl.d.)

Period	Grade	Price	Remarks
V.V. Mineral (Average)			
2010-11	NA	5940	
2011-12	NA	11174	
2012-13	NA	15269	
BMC			
2010-11	TiO ₂ : 48-50%	4500 (US\$100)	f.o.b.Thoothukudi
2011-12	TiO ₂ : 49-51%	6500 (US\$130)	f.o.b.Thoothukudi
2012-13	TiO ₂ : 49-51%	8500 (US\$140)	f.o.b.Thoothukudi
DCW Ltd			
2010-11	NA	6375	
2011-12	NA	7693	
2012-13	NA	20552	

Source: Department of Atomic Energy, Mumbai.

Note: Q: Quilon; MK: Manavalakurichi; OR: Odisha

MINING & PROCESSING

Mining and processing of beach sand are carried out by the IREL, a Government of India Undertaking, KMML, a Kerala State Government Undertaking and two private sector producers; viz, M/s V. V. Mineral, Thoothukudi (Tamil Nadu) and M/s Beach Minerals Co. Pvt. Ltd, Kuttam (Tamil Nadu). IREL is exploiting beach sand deposits located at Chavara in Kerala, Gopalpur in Odisha and Manavalakurichi in Tamil Nadu.

At IREL, Chavara, Beach Sand was collected over a stretch of 22 km between Neendakara and Kayamkulam in Kerala and was transported to plant site. The unit has adopted wet mining operations involving use of two Dredge and Wet Concentrator (DWC) of 100 tph capacity each to exploit the inland deposits away from the beaches. Chavara ilmenite is the richest in TiO₂ content (75.8% TiO₂) and has great demand in India and abroad for manufacture of pigments.

At Manavalakurichi, deposit is spread over 300 hectares at Thuthoor-Ezudesam villages, Vilavancode tehsil, district Kanyakumari, Tamil Nadu. All the raw sand required to operate the separation plant at its full capacity is collected from nearby beaches by the fishermen of surrounding villages and supplied to the unit at cost. Deposits are also exploited by DWC of 100 tph capacity. Manavalakurichi is next to Chavara in terms of TiO₂ content which is more than 55%.

The sand deposits of OSCOM at Chatrapur, district Ganjam extend along the coast of Bay of Bengal with an average width of 1.4 km and average

depth of 7.5 m. Mining operations involve suction dredging to 6 m depth below water level on a much larger scale (500 tph) augmented by a smaller sized (100 tph) supplementary. The ilmenite from OSCOM is inferior in grade in terms of TiO₂ content (50%) in comparison to Chavara and Manavalakurichi. The Synthetic Rutile Plant of OSCOM is presently not working. As a result, the majority of OSCOM ilmenite produced today is finding its way in the international market as feed stock for production of both slag grade and anatase grade pigment.

In dry mining, beach washings laden with 40-70% Heavy Minerals (HM) are collected through front end loaders and bulldozers for further concentration to 90% HM at land-based concentrators. Dry mining is very simple and economic as well. However, it is facing opposition by local people on the ground that removal of sand causes sea erosion. Therefore, collection of beach washings has reduced significantly in recent past.

As an alternate approach, IREL has adopted wet mining involving dredging and wet concentration (DWC) from inland areas away from the beach lines. In this mode, an artificial pond is created, the sand bed is cut and the slurry is pumped to spiral concentrator for removal of quartz. Manavalakurichi was the first plant to install a DWC (100 tph) followed by one (500 tph) at OSCOM and two (each 100 tph) at Chavara. The concentrate (90% HM) of beach washing plant from DWC is further upgraded to 97% HM grade at a Concentrate Upgradation Plant (CUP) before sending it to Mineral Separation Plant (MSP).

KMML collects seasonal accretions of heavy mineral sand from the beach front. The pit so formed gets filled by fresh accretions of heavy mineral sand. The mineral sand is collected using bulldozers and wheel loaders and transported in tippers to Mineral Separation Plant.

The mineral separation plants use variety of equipment such as gravity concentrators, high tension electrostatic separators and magnetic separators. Making use of difference in physical properties like electrical conductivity, magnetic susceptibility and difference in specific gravity, etc., individual minerals like ilmenite, rutile, zircon, sillimanite and garnet are separated. The mined beach sands are pre-concentrated and dried after sieving (30-mesh) to separate the heavies from rejects. The heavy minerals are passed through electrostatic separators where conducting minerals – ilmenite and rutile – are separated from other non-conducting minerals. Ilmenite and rutile are further subjected to low-intensity magnetic separators where magnetic fraction - ilmenite is separated from rutile.

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Similarly, non-conducting fractions are subjected to high-intensity magnetic separators where weak magnetic fraction (monazite and garnet) is separated from non-magnetic fraction (zircon and sillimanite). The fractions are further processed on wind tables to separate garnet from monazite and sillimanite from zircon.

IREL carried out trial runs of expansion of capacity of ilmenite to 200,000 tonnes at Chavara plant in Kerala and has commissioned it successfully. The company

has plan to expand MSP capacity at OSCOM to produce 4.7 lakh tonnes of ilmenite and associated minerals by the end of 2014. Trimex Group is understood to be gearing up to begin its 200,000 tpy ilmenite, 6,000 tpy zircon, 60,000 tpy garnet and 50,000 tpy sillimanite, rutile project in Srikakulam district, Andhra Pradesh.

Installed capacity and production of ilmenite, rutile and other associated heavy minerals by various separation plants are furnished in Table-6.

Table – 6 : Installed Capacity & Production of Ilmenite, Rutile and Other Heavy Minerals, 2010-11 to 2012-13

(In tonnes)

Company/ Location	Mineral	Specification	Installed capacity (tpy)	Production		
				2010-11	2011-12	2012-13
Indian Rare Earths Ltd						
Manavalakurichi,	Ilmenite	55% TiO ₂ (min)	90000	43222	35009	33260
Distt. Kanyakumari,	Rutile	94% TiO ₂ (min)	4000	1628	1534	1381
Tamil Nadu.	Zircon	65% ZrO ₂ +HfO ₂ (min)	10000	3542	3182	2688
	Sillimanite	58% Al ₂ O ₃	-	150	-	-
	Monazite	96% pure	6000	-	-	-
	Garnet	97% pure (min)	8500	14909	11797	10240
Chavara,	Ilmenite	58% TiO ₂ (min)	154000	74320	43051	23309
Distt. Kollam,	Rutile	95% TiO ₂ (min)	10000	3556	2769	1224
Kerala.	Zircon	65% ZrO ₂ +HfO ₂ (min)	12000	7500	5231	1992
	Rare Earths	-	4500*	NA	-	-
	Sillimanite	58% Al ₂ O ₃ (min)	10000	8243	7667	4936
	Leucoxene	-	-	110	529	105
	Zirflor	-200 mesh	6000	2545	1886	1161
	(includes Microzir)	-300 mesh	500	-	-	940
Orissa Sands Complex,	Ilmenite	50.25% TiO ₂ (min)	220000	206138	188000	184570
Distt. Ganjam,	Rutile	94.25% TiO ₂ (min)	10000	8044	7874	7170
Odisha.	Zircon	64.25% ZrO ₂ +HfO ₂ (min)	5000	5979	6170	6235
	Sillimanite	56.5% Al ₂ O ₃ (min)	10000	17889	17489	12314
	Garnet	93.5% garnet (min)	24000	18474	19889	23898
Kerala Minerals & Metals Ltd						
Chavara,	Ilmenite	59.88% TiO ₂	63000	38920	43403	45240
Distt. Kollam.	Rutile	93.20% TiO ₂	4000	2413	2600	1850
Kerala.	Zircon	64.81% ZrO ₂	6480	2838	5213	3960
	Sillimanite	NA	3600	-	339	1265
V.V. Mineral						
Distt. Thoothukudi,	Ilmenite	51.0-52.5% TiO ₂	450000	372000	405700	447000
Tamil Nadu.	Rutile	95% TiO ₂ (min)	12000	6750	1500	7000
	Zircon@	66% ZrO ₂ +HfO ₂ (min)	18000	13350	6200	6250
	Zircon-sillimanite	NA	24000	8200	4600	11500
	Garnet	NA	150000	120000	-	-
Beach Minerals Co. Pvt. Ltd						
Kuttam,	Ilmenite	KU grade 49-51% TiO ₂	150000	34000	35150	61211
Distt. Tirunelveli,						
Tamil Nadu.						

Source: Department of Atomic Energy, Mumbai and IREL.

** In terms of rare earths chloride.*

@ Besides, 8,200 tonnes, 4,600 tonnes and 11,500 tonnes production of zircon-sillimanite are also reported during 2010-11, 2011-12 and 2012-13 respectively.

ILMENITE AND RUTILE

INDUSTRY

For manufacture of titanium dioxide pigment, ilmenite is first treated chemically to obtain upgraded ilmenite, commonly called as synthetic rutile. There are two major pigment production processes namely chloride process and sulphate process depending on different operating characteristics and feedstock requirements. Plants employing chloride process consume high TiO₂ content feedstocks like synthetic rutile and chloride slag. On the other hand, plants employing the sulphate process use lower grade ilmenite and sulphate slags.

Ilmenite obtained from Mineral Separation Plant (MSP) is chemically treated to remove impurities such as iron to obtain synthetic rutile (90% TiO₂) in Synthetic Rutile Plant (SRP). Indian Synthetic Rutile Plants are based on reduction roasting followed by acid leaching with or without generation of hydrochloric acid. Plants of IREL (OSCOM) and KMML depend on acid regeneration from the leach liquor while those of Cochin Minerals & Rutile Ltd (CMRL) and DCW use fresh acid and recover ferric chloride from the leach liquor for its use in water purification.

At OSCOM plant of IREL, reduction-roasting of ilmenite with coal is followed by leaching with HCL to separate iron as soluble ferrous chloride. The leached ilmenite is calcined to yield synthetic rutile and the acidic leach liquor is treated in an acid regeneration plant to recover HCl for recycling with iron oxide as waste. The unit stopped production in 1997 as it was not viable economically. IREL intends to set up titanium slag plant based on OR ilmenite at Odisha and has signed MoU with NALCO for this purpose. Depending upon feasibility, further value addition to TiO₂ pigment and Ti sponge shall be taken up subsequently.

KMML is manufacturing rutile grade titanium dioxide pigment by chloride route at its Sankaramangalam plant near Chavara in Kerala. The project for the production of one lakh tonnes of TiO₂ in a phased manner is under implementation. The company also has plans to enhance pigment capacity to 60,000 tpy for which detailed project report is under preparation. In 2009, the company had developed Nano Titanium Dioxide particles on laboratory scale and in July 2011, India's first commercial plant for synthesis of nano-titanium dioxide was commissioned. KMML is setting up a plant for producing 500 tpa of Titanium sponge with technology from DMRL.

Subsequently, the company plans to expand the capacity to 1,000 tpa. The production of titanium sponge during 2011-12 & 2012-13 was 15.184 tonnes & 88.296 tonnes, respectively.

The DCW Ltd procures ilmenite from Manavalakurichi which is then roasted with coke fines to convert Fe₂O₃ into FeO. The reduced ore is leached with concentrated hydrochloric acid to remove oxides of iron and other metals. The leached ore is washed and calcined to get upgraded ilmenite which contains more than 95% TiO₂. The upgraded ilmenite is micronised to 2 microns by using high-pressure steam. This is marketed as Titox. The liquor from ilmenite leaching process contains fine TiO₂ particles and chlorides. The TiO₂ recovered by filtration & washing in filter process is marketed as Utox. The company has plans to increase the capacity of plant to 48,000 tpy and also to install facilities for the manufacture of ferrite grade iron oxide from the effluent of the ilmenite plant.

Cochin Minerals and Rutile Ltd (CMRL), which began production at its 10,000 tpy synthetic rutile plant in Kerala in 1990 as a 100% EOU, has gradually raised the production capacity to around 45,000 tpy since 2008-09 for exports. It also has ferric chloride & ferrous chloride plants having capacities 24,000 tpy & 72,000 tpy, respectively.

The Travancore Titanium Products Ltd (TTPL), a Kerala State Govt. Undertaking, manufactures titanium dioxide pigment by sulphate process at its plant at Kochuveli, Thiruvananthapuram. Ilmenite is reacted with sulphuric acid in digesters and a porous cake is formed. The mass in the solid form is dissolved in dilute sulphuric acid to get titanium in solution as titanium oxysulphate along with other metallic ingredients in ilmenite as their sulphate. The liquor is reduced using scrap iron, when ferric iron gets completely reduced to the ferrous state. The liquor is clarified, concentrated and boiled to precipitate the titanium content as hydrated titania which is then filtered by vacuum filters and calcined. Sulphuric acid required for captive consumption is produced at site using elemental sulphur. Till recently TTPL was the only unit producing anatase grade titanium dioxide pigment in India. TTPL has capacity to produce 17,000 tpy of titanium dioxide modernise and diversify in stages to produce both anatase and rutile grades titanium dioxide pigment.

ILMENITE AND RUTILE

Tata Steel has proposed a project to produce 100,000 tonnes per year titanium dioxide from ilmenite mined from beach sands of Tirunelveli and Thoothukudi districts in southern Tamil Nadu.

The NMDC has signed an MoU with KSIDC and IREL for setting up a synthetic rutile plant in Kerala. The company has applied for prospecting licences in various areas in Odisha, Kerala and Tamil Nadu and sought Swedish technology for mineral separation plant. The Beach Minerals Co. Pvt. Ltd also has plans for production of synthetic rutile from ilmenite. Presently, it only has facility of pilot plant. M/s V. V. Mineral has plans to set up a 5 lakh tpy titanium pigment plant. The project is at approval stage.

Present domestic titanium metal production is negligible. KMML has set up a 500 tpy titanium sponge

plant with Defence Metallurgical Research Laboratory (DMRL) technology and first batch of titanium was delivered in September 2011. The plant will be further expanded to 1,000 tpy. IREL is to set up a 10,000 tpy titanium sponge plant at OSCOM for which proposals have been invited on build, operate and own basis. IREL intends to set up titanium slag plant based on ilmenite from OSCOM, Odisha and has signed an MoU with NALCO for this purpose. Depending upon feasibility, further value addition to TiO₂ pigment and titanium sponge will be taken up subsequently. Titanium sponge is imported by Mishra Dhatu Nigam Ltd. Midhani for further processing in the country.

The available data on plantwise capacities & production of synthetic rutile and TiO₂ pigment from 2010-11 to 2012-13 are given in Table-7.

Table –7 : Installed Capacity and Production of Synthetic Rutile/Titanium dioxide Pigment, 2010-11 to 2012-13

Plant	Location	Specification	Installed capacity (tpy)	Production		
				2010-11	2011-12	2012-13
Total			243000 (Synthetic rutile)	80936	75331	59426
			85600 (TiO ₂ Pigment)	64393	54768	23459
IREL	Orissa Sands Complex, Dist. Ganjam, Odisha.	90.5% TiO ₂ (min)	100000 (Synthetic rutile)	–	–	–
KMML	Chavara, Dist. Kollam, Kerala	92%-93% TiO ₂	50000 (Synthetic rutile)	36879	29117	–
			40000 (TiO ₂ - Chloride Process)			
DCW Ltd	Sahupuram, Dist. Thoothukudi Tamil Nadu.	95% TiO ₂	48000 (Synthetic rutile)	44761	47331	40696
CMRL	Edayar, Dist. Ernakulam, Kerala.	96.5% TiO ₂	45000 (Synthetic rutile)	36175	28000	18730
TTPL	Kochuveli, Dist. Thiruvananthapuram, Kerala.	97.5% TiO ₂	17000 (TiO ₂ -Sulphate Process)	15749	12701	11550
VVTi Pigments Pvt. Ltd* (formerly Kilburn Chemicals)	Thoothukudi, Tamil Nadu.	98% TiO ₂ (min)	25000 (TiO ₂ -Sulphate Process)	11441	12122	11909
Kolmak Chemicals Ltd	Kalyani, Dist. Nadia, West Bengal.	NA	3600 (TiO ₂ -Sulphate Process)	324	828	NA

Source: Department of Atomic Energy, Mumbai and individual companies.

Note: KMML captively consumes synthetic rutile while CMRL and DCW export synthetic rutile.

* Including Kilburn Chemicals.

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USES

Ilmenite is used mainly for the manufacture of ferro-titanium and synthetic rutile i.e., titanium dioxide, a white pigment. Because of a unique combination of its superior properties of high refractive index, low specific gravity, high hiding power and opacity and non-toxicity, titanium dioxide finds application in the manufacture of all types of white and pastel shades of paints, white-walled tyres, glazed papers, plastics, printed fabrics, flooring materials like linoleum, pharmaceuticals, soaps, face powders and other cosmetic products, etc. Because of its non-toxic nature, it is used in cosmetics, pharmaceuticals, and even added to foodstuffs as well as in toothpastes to improve their brightness. Titanium dioxide is used in the manufacture of many sunscreen lotions and creams because of its non-toxicity and ultra violet absorption properties. Synthetic rutile is used for coating welding electrodes as flux component and for manufacture of titanium tetrachloride which in turn is used in making titanium sponge. Synthetic rutile is also used as ingredient of special abrasives. Titanium metal is a versatile material with exceptional characteristics. The lightness, strength and durability of the metal make it an essential metal for the aerospace industry. It is also used in desalination and power generation plants and corrosive chemical industries because of its inertness and resistance to corrosion and high thermal conductivity. Its non-reactive property makes titanium metal one of the few materials that can be used in the human body for orthopaedic use and in pacemakers.

CONSUMPTION

The ilmenite consumption is placed at 190,900 tonnes in 2012-13. Bulk ilmenite was consumed for manufacturing synthetic rutile (99%), followed by welding electrode and ferro-alloys industry. The consumption of rutile in 2012-13 was 25,700 tonnes compared to 24,900 tonnes in 2011-12. Bulk consumption was in paint industry followed by electrode industry. In 2012-13, the consumption of ferro-titanium was 1,234 tonnes. About 84% consumption was in iron and steel industry and 15% in alloy steel and foundry industries (Table - 8).

Table – 8 : Consumption of Ilmenite, Rutile and Ferro-titanium, 2010-11 to 2012-13 (By Industries)

(In tonnes)			
Industry	2010-11	2011-12(R)	2012-13(P)
ILMENITE			
All Industries	189900	190500	190900
Electrode	300(6)	900(20)	1300(26)
Ferro-alloys	300(5)	300(5)	400(5)
Synthetic rutile (Chemical)	189300(5)	189300(5)	189200(5)
Other (Iron & Steel, Paint, Refractory)	++(4)	++(4)	++(4)
RUTILE			
All Industries	22800	24900	25700
Electrode	5500(29)	7600(42)	8500(48)
Paint	16700(12)	16700(12)	16600(12)
Paper	300(2)	300(2)	300(2)
Others (Cosmetic, electrical, rubber)	300(4)	300(4)	300(6)
FERRO-TITANIUM			
All Industries	1215	1232	1234
Alloy steel	191(6)	191(6)	191(6)
Iron & steel	1020(9)	1037(9)	1037(9)
Foundry	4(1)	4(1)	4(1)
Electrode	++	++	2(1)

Figures rounded off.

Figures in parentheses denote the number of units in organised sector reporting consumption.*

*(*Includes actual reported consumption and/or estimates made wherever required).*

POLICY

The Government of India had notified in October 1998 a policy on exploitation of beach sand minerals in the country, which inter alia allows participation of private sector with or without foreign companies subject to conditions stipulated. This will encourage further exploitation of mineral deposits through a judicious mix of public & private sector participation including foreign collaboration. The ceiling on FDI on mining of titanium minerals has been raised to 100 percent.

Joint ventures with foreign participation were being pursued by IREL for production of value-added products, keeping in view the Beach Sand Mineral Policy of the Government.

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The minerals ilmenite and rutile were grouped as 'prescribed substances' as per notifications issued under the Atomic Energy Act, 1962. However, as per the revised list of Prescribed Substances, Prescribed Equipment and Technology notified by Department of Atomic Energy vide S.O.No.61(E), dated 20.1.2006, the titanium ore minerals like ilmenite, rutile and leucosene have been delisted as prescribed substances by the Department of Atomic Energy subject to the note as below:

"These minerals shall remain prescribed substances only till such time the policy on Exploration of Beach Sand Minerals notified vide Resolution No.8/1(1)/97-PSU/1422, dated 6.10.1998, is adopted/revised/modified by the Ministry of Mines or till 1.1.2007, whichever occurs earlier and shall cease to be so thereafter".

As per the Foreign Trade Policy, 2009-2014 and the policy on exports and imports, titanium ores and concentrates under heading 2614 (comprising ilmenite unprocessed and upgraded, i.e., beneficiated ilmenite including ground ilmenite) and rutile sand can be imported/exported freely.

SUBSTITUTES

There are no cost-effective substitutes for titanium dioxide pigments. Synthetic rutile made from ilmenite can be substituted for natural rutile. Nickel steels, stainless steels and some non-ferrous metal alloys can sometimes replace titanium alloys in industrial uses although at the expense of performance or economics. Tungsten carbide competes with titanium carbide for surface cutting machine tools. Titanium slag competes with ilmenite and rutile.

Environmental awareness indicates that titanium dioxide plants are likely to use chloride technology in future as it produces much less quantity of waste products. Synthetic rutile or slag (made from ilmenite) is likely to be used as feed in increasing amount. There is also a strong pressure to reduce the radioactive content of feed stocks because it affects the marketability of beach sand ilmenite. Titanium alloys may be replaced in aerospace applications by lithium-aluminium alloys or carbon-epoxy composites.

WORLD REVIEW

World resources of anatase, ilmenite and rutile are more than 2 billion tonnes. World reserves of ilmenite are estimated at 700 million tonnes in terms of TiO₂ content. Major reserves are in China (29%), Australia (23%), India (13%), South Africa (9%), Brazil and Madagascar (6% each), Norway (5%) and Mozambique (2%). The world reserves of rutile are 48 million tonnes in terms of TiO₂ content. Major rutile reserves are located in Australia (50%), followed by South Africa (17%), India (15%), Sierra Leone (8%) and Ukraine (5%).

World production of ilmenite and rutile concentrates was 11.40 million and 0.84 million tonnes, respectively, in 2012. Canada contributed 23% of ilmenite production, followed by South Africa and Australia (12% each). Australia produced 52% of world rutile output, followed by South Africa with 15% and Ukraine 12%. World reserves and production of titanium minerals, viz, ilmenite and rutile, are furnished in Tables - 9 to 11, respectively.

Table – 9 : World Reserves of Ilmenite and Rutile (By Principal Countries)

(In '000 tonnes of contained TiO₂)

Country	Reserves	
	Ilmenite	Rutile
World: Total (Ilmenite+Rutile) : 748000		
World: Total (Rounded)	700000	48000
Australia	160000	24000
Brazil	43000	1200
Canada	31000	–
China	200000	–
India*	85000	7400
Madagascar	40000	–
Mozambique	14000	510
Sierra Leone	–	3800
Norway	37000	–
South Africa	63000	8300
Ukraine	5900	2500
USA	2000	–
Vietnam	1600	–
Other countries	26000	400

Source: Mineral Commodity Summaries, 2014.

* As per NMI, the total resources of titanium minerals in India are estimated at about 549.49 million tonnes.

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**Table – 10 : World Production of Ilmenite
(By Principal Countries)**

(In '000 tonnes)

Country	2010	2011	2012
World: Total (wt. of concs)	10400	10900	11400
Australia	1339	1277	1344
Canada ^{(e)@}	2400	2500	2700
China ^(e)	1000	1100	1100
India*	663	700 ^e	700 ^e
Mozambique	678	637	574
Madagascar	273 ^e	490	530
Norway	864	870	831
South Africa ^e	1200	1369	1400 ^e
USA ^e	200	300	300
Vietnam ^e	881	870	1164
Ukraine ^(e)	600	600	600
Other countries	294	184	158

Source: World Mineral Production, 2008-2012.

* *Figures rounded off*

Note: Some ilmenite is converted to synthetic rutile in Australia, India, Japan, Taiwan and USA.

@ *Canada produces some ilmenite which is sold as such and not processed into slag, but tonnages are small.*

* *India's production of ilmenite in 2010-11, 2011-12 and 2012-13 was 663,217 tonnes, 751,163 tonnes and 738,524 tonnes, respectively.*

**Table – 11 : World Production of Rutile
(By Principal Countries)**

(In '000 tonnes)

Country	2010	2011	2012
World: Total (wt. of concs)	800	840	840
Australia	438	474	439
India	27	27 ^e	27 ^e
South Africa	135	129	130
Sierra Leone	68	68	94
Ukraine ^(e)	100	100	100
Other countries	32	42	50

Source: World Mineral Production, 2008-2012.

India's production of rutile in 2010-11, 2011-12 and 2012-13 was 26,593 tonnes, 16,598 tonnes and 16,527 tonnes respectively.

World production of TiO₂ contained in titanium mineral concentrates was 8.31 million tonnes in 2012, reported decrease of 4% compared with that of 2011. The leading sources of world imports of titanium mineral concentrates were Australia, China, South Africa and Vietnam.

Metal

Commercial production of titanium metal involves the chlorination of titanium-containing mineral concentrates to produce titanium tetrachloride (TiCl₄), which is reduced with magnesium (Kroll process) or sodium (Hunter process) to form a commercially pure form of titanium metal. As the metal is formed, it has a porous appearance and is referred as sponge. Titanium ingot and slab are produced by melting titanium sponge or scrap or a combination of both, usually with various other alloying elements.

Pigment

Global TiO₂ pigment production capacity was estimated to be 5.7 million tonnes per year. TiO₂ pigment produced by either process is categorised by crystal form as either anatase or rutile. Rutile pigment is less reactive with the binders in paint when exposed to sunlight than the anatase pigment and is preferred substance in outdoor paints. Anatase pigment has a bluer tone than rutile, is somewhat softer, and is used mainly in indoor paints and in paper manufacturing. Depending on the manner in which it is produced and subsequently finished, TiO₂ pigment can exhibit a wide range of functional properties, including dispersion, durability, opacity, and tinting.

Australia

In Australia, production of rutile decreased by 7% and production of ilmenite increased by 5% from that of 2011, as pigment producers switched to lower grade ilmenite feedstocks owing to the sharp increase in rutile prices.

In 2012, Iluka Resources Ltd. produced 220,000 t of rutile and 2,48,000 t of synthetic rutile from its operations in the Eucla Basin, Perth Basin and Murray Basin in Australia; reported decrease of 22% and 13%, respectively from the year 2011. Iluka's production of ilmenite from these basins was 459,000 t in 2012, reported an increase of 23% from 2011.

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Gunson Resources Ltd. established the reserves at its Coburn heavy mineral sands project to 49,500 tpy of zircon, 109,000 tpy of ilmenite, and 23,500 tpy of higher titanium dioxide mineral products (rutile and leucoxene combined into a 90% TiO₂ product). The anticipated mine life was reduced to 19 years from 23 years.

Murray Zircon Pty. Ltd. restarted mining operations at its Mindarie Mineral Sands project in South Australia in October. The mixed heavy mineral concentrates, containing ilmenite, leucoxene, rutile are further shipped to China for further processing. The Mindarie Mineral Sands was expected to produce 120,000 tpy of mixed heavy mineral concentrate over a period of 15 years.

Tronox completed the acquisition of Exxaro Resources Ltd.'s mineral sand operations in Western Australia and South Africa. The acquisition also included Exxaro's Tiwest Joint Venture in Western Australia that was jointly owned with Tronox. The combined capacity of these three operations is 723,000 tpy of titanium feedstock and 265,000 tpy of zircon production.

Matilda Zircon Ltd. continued the development of the Keysbrook deposit, 70 kilometers south of Perth. Matilda planned to begin construction of mine in 2013 and mining in early 2014. The Keysbrook project was expected to operate for at least 7 years with a potential expansion to 15 years with additional approvals. Average annual production was expected to be 62,200 tpy of leucoxene and 28,700 tpy of zircon.

China

The exports of sponge and mill products were 4,500 t and 12,300 t, respectively in the year 2012. The 14 leading manufacturers produced 81,000 t of sponge in 2012, reported an increase of 25% from that of 2011, and 52,000 t of titanium mill products, a slight increase from that in 2011. China produced 1.9 million tonnes of TiO₂ pigment in 2012, an increase of 8% from that of 2011, with a utilization rate of 48% of an estimated 4.0 million tpy of capacity.

Henan Billions Chemicals Co., Ltd. signed an agreement with PPG Industries under which PPG was to provide chloride-based titanium dioxide technologies for use at Henan Billions' TiO₂ production facilities in China. Subsequent to the agreement, Henan Billions signed an agreement with Ti-Cons to build and operate a

100,000 tpy chloride-based TiO₂ production facility. Production is expected to begin in 2015.

Japan

The Export of titanium sponge was about 30,700 t in 2012, reported an increase of 22% from that of 2011, which accounted 62% exports of total to the United States, reported an increase of 18% compared with 2011 owing to aerospace industry demand.

Kenya

Base Resources Ltd was to begin mining operations at its Kwale prospects in July, 2013. A production of 3,30,000 tpy of ilmenite, 79,000 tpy of rutile, and 30,000 tpy of zircon will be envisaged during the first 7 years of operation.

Mozambique

The Jinan Yuxaio Group of China was granted a mining license for a heavy-mineral sands deposit in the Zambeze province along the Quelmaine coast.

Kenmare Resources plc produced 772,000 tonnes concentrate of heavy-mineral at its Moma operation, which is 10% less from that of 2011. The production of ilmenite at 574,500 tonne showed a decrease of 10% from that of 2011. Kenmare plans to increase its capacity from 800,000 tpy to 1.2 million tpy which was Scheduled for completion by 2013.

Norway

TiZir Ltd.'s Tyssedal ilmenite enhancing facility in southwest Norway produced 181,100 t of titanium slag in 2012, reported a slight increase from that of 2011. Ilmenite for the Tyssedal operation was mostly sourced from the production of Titania AS's nearby Tellnes Mine in Norway.

Russia

IRC Ltd. produced 125,000 t of ilmenite at its Kurankh deposit, an increase of 97% from that of 2011. The Kurankh deposit is located in the Amur region in the Russian Far East (IRC Ltd., 2013).

Saudi Arabia

Cristal Global announced that the titanium slag plant originally scheduled to be built in Yanbu had been

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relocated to Jazan Economic City. The plant was to have an initial capacity of 500,000 tpy of 85% titanium slag with 235,000 tpy of pig iron as a co product and was scheduled to commence its operation in 2014.

Senegal

Astron Ltd. updated its ore reserve estimate for the Niafarang mineral sands project, south of Dakar. The Probable ore reserves were 4.7 million tonnes containing 11% heavy minerals. The heavy mineral suite included 75% ilmenite, 14% zircon, and 2.3% rutile.

Mineral Deposits continued with development and construction of the mine and separation plants at its Grande Cote heavy-minerals deposit. Mineral Deposits entered into a joint-venture agreement with ERAMET SA (Paris, France), whereby Mineral Deposits 90% stake in the Grande Cote deposit was combined with ERAMET's 100% stake in the Tysedal ilmenite upgrading plant in Norway to form a new entity, TiZir Ltd. After the Grande Cote Mine and separation plants are operational, TiZir is expected to produce an average of 575,000 tpy of ilmenite, 85,000 tpy of zircon, and small amounts of rutile and leucogene over a mine life of 20 years.

Sierra Leone

Sierra Rutile Ltd. (SRL) produced 94,490 t of rutile in 2012, reported a 39% increase from 2011. SRL announced the development of its Gangama dry mining project, which was projected to produce on an average 83,400 tpy of rutile, 46,000 tpy of ilmenite and 9,500 tpy of zircon and other concentrates for 6 years.

Ukraine

Volnogorsk AG announced expansion of its rutile and ilmenite capacity from its deposits in the Dnepropetrovsk region. By 2015, Volnogorsk expected to increase its capacity to produce 90,000 tpy of rutile and 950,000 tpy of ilmenite from the current levels of 60,000 tpy and 720,000 tpy, respectively.

Vietnam

VSMPO-Avisma of Verkhnyaya Salda, Russia, signed a memorandum of understanding with the Vietnam National Coal-Mineral Industries Holding Corp. (Vinacomin). The two companies planned to create a joint venture to process titanium

minerals after Vinacomin secured licenses to develop mineral resources in the Binh Thuan province.

FOREIGN TRADE

Exports

As per the data from DGCI & S, Kolkata exports of titanium ores & conc. decreased to 0.80 million tonnes in 2012-13 as compared to 0.91 million tonnes in the preceding year. Exports in 2012-13 comprised ilmenite (791,735 tonnes), rutile (2,322 tonnes) and other titanium ores (6,750 tonnes). Main destinations were China (54%), Netherlands (21%) and Japan (13%).

Exports of titanium and alloys (including waste & scrap) were 202 tonnes in 2012-13 as compared to 399 tonnes in the previous year. Exports were mainly to USA, UK and France. Exports of titanium oxide and dioxide (total) decreased to 38,011 tonnes in 2012-13 from 50,194 tonnes in 2011-12. Out of total exports in 2012-13, those of titanium dioxide were 3,470 tonnes and other titanium oxides were 34,541 tonnes. Exports were mainly to Japan (79%), Singapore (9%) and USA (5%) (Tables-12 to 19).

Imports

As per the data from DGCI&S, Kolkata, imports of titanium ores & conc. rose to 77,819 tonnes in 2012-13 as compared to 68,501 tonnes in the preceding year. Out of total imports of titanium ores & conc. in 2012-13, those of ilmenite were 65,876 tonnes, rutile 9,826 tonnes and other titanium ores were 2,117 tonnes. Main suppliers were Mozambique (77%), Australia (8%) and Sri Lanka (7%).

Imports of titanium and alloys (including waste & scrap) were 1,310 tonnes in 2012-13 as compared to 1,504 tonnes in the previous year. Imports were mainly from USA, Russia and China. Imports of titanium oxide and dioxide (total) were 18,803 tonnes in 2012-13 as compared to 23,110 tonnes in the preceding year. Bulk of these imports was of titanium dioxide (17,825 tonnes) and those of other oxides were 978 tonnes in 2012-13. Imports were mainly from China (27%), Germany (12%), Rep. of Korea (13%) and Czech Republic (12%) (Tables - 20 to 27).

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**Table – 12 : Exports of Titanium Ores & Conc. : Total
(By Countries)**

Country	2011-12		2012-13	
	Qty (t)	Value (₹ '000)	Qty (t)	Value (₹ '000)
All Countries	912979	12442284	800807	14571902
China	472383	5966675	431073	7130962
Japan	90044	2494763	101081	3419034
Netherlands	166026	1869760	166734	2420782
Korea, Rep. of	56180	676672	50020	746858
Malaysia	40221	282076	39631	477269
Singapore	2680	202144	1500	184868
Korea, Dem. Rep. of	20	917	10000	119240
Bangladesh	601	31683	361	32823
Ukraine	729	57298	100	15374
Philippines	396	38473	132	13637
Other countries	83699	821823	175	11055

Source: DGCI & S, Kolkata.

**Table – 13 : Exports of Titanium Ores & Conc. (Ilmenite)
(By Countries)**

Country	2011-12		2012-13	
	Qty (t)	Value (₹ '000)	Qty (t)	Value (₹ '000)
All Countries	879522	11499101	791735	14158888
China	446953	5525027	423751	6882540
Japan	87048	2368140	100440	3396923
Netherlands	164196	1735036	166480	2380516
Korea, Rep. of	56000	658665	50000	743475
Malaysia	40000	262912	39400	449184
Singapore	2680	202144	1500	184868
Korea, Dem. Rep. of	-	-	10000	119240
Chinese Taipei/Taiwan	96	1471	44	1018
Bangladesh	58	2509	90	773
UAE	-	-	10	204
Other countries	82491	743197	20	147

Source: DGCI & S, Kolkata.

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**Table – 14 : Exports of Titanium Ores & Conc. (Rutile)
(By Countries)**

Country	2011-12		2012-13	
	Qty (t)	Value (₹ '000)	Qty (t)	Value (₹ '000)
All Countries	6699	507305	2322	253625
China	717	43805	1224	108704
Netherlands	1830	134724	254	40266
Malaysia	221	19164	231	28084
Bangladesh	522	28347	139	19837
Ukraine	729	57298	100	15374
Japan	996	90201	141	14750
Philippines	396	38467	132	13637
Kenya	40	3196	47	5513
Iran	587	28295	33	4050
Korea, Rep. of	180	18007	20	3383
Other countries	481	45801	1	27

Source: DGCI & S, Kolkata.

**Table – 15 : Exports of Titanium Ores & Conc. (Others)
(By Countries)**

Country	2011-12		2012-13	
	Qty (t)	Value (₹ '000)	Qty (t)	Value (₹ '000)
All Countries	26758	435878	6750	159389
China	24713	397843	6098	139717
Bangladesh	21	827	132	12213
Japan	2000	36423	500	7360
UAE	-	-	20	98
Other countries	24	785	++	1

Source: DGCI & S, Kolkata.

**Table – 16 : Exports of Titanium & Alloys (Incl. Waste & Scrap)
(By Countries)**

Country	2011-12		2012-13	
	Qty (t)	Value (₹ '000)	Qty (t)	Value (₹ '000)
All Countries	399	338371	202	268751
France	10	17246	20	41605
Malaysia	6	6080	9	37724
USA	169	57496	68	34659
Saudi Arabia	7	33977	4	29321
UAE	3	119928	8	28565
Norway	1	16535	7	21122
UK	21	8459	31	19791
Kuwait	++	629	1	12273
Philippines	2	8101	1	9040
Germany	118	24024	12	4019
Other countries	62	45896	41	30632

Source: DGCI & S, Kolkata.

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**Table – 17 : Exports of Titanium oxide & Dioxide : Total
(By Countries)**

Country	2011-12		2012-13	
	Qty (t)	Value (₹'000)	Qty (t)	Value (₹'000)
All Countries	50194	3138303	38011	4519600
Japan	30085	1612813	27738	3192277
Singapore	8016	318131	3000	359003
USA	955	121378	2057	272234
Italy	1033	171963	1366	212115
Thailand	582	77397	846	110507
Nigeria	476	31860	475	61082
Iran	44	7172	274	51568
China	3600	184572	500	40761
UAE	548	55803	329	40064
Turkey	1198	159353	271	37219
Other countries	3657	397861	1155	142770

Source: DGCI & S, Kolkata.

**Table – 18 : Exports of Titanium dioxide
(By Countries)**

Country	2011-12		2012-13	
	Qty (t)	Value (₹'000)	Qty (t)	Value (₹'000)
All Countries	5011	781078	3470	527827
Italy	925	155995	1312	200852
Japan	360	57885	414	67791
USA	161	22305	387	63681
Iran	44	7138	233	37247
UAE	324	54029	310	37226
Turkey	1040	150453	180	25373
Nepal	47	8634	54	10225
Spain	720	106764	80	9966
Kuwait	-	-	48	9503
Nigeria	21	3236	41	8943
Other countries	1369	214639	411	57020

Source: DGCI & S, Kolkata.

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**Table – 19 : Exports of Titanium oxide
(Other than Titanium Dioxide)
(By Countries)**

Country	2011-12		2012-13	
	Qty (t)	Value (₹'000)	Qty (t)	Value (₹'000)
All Countries	45183	2357225	34541	3991773
Japan	29725	1554927	27324	3124486
Singapore	8016	318131	3000	359003
USA	794	99073	1670	208553
Thailand	465	62219	829	108264
Nigeria	455	28624	434	52138
China	3600	184572	500	40759
Malaysia	717	42104	116	16000
Iran	++	34	41	14321
Turkey	158	8900	91	11846
Italy	108	15968	54	11263
Other countries	1145	42673	482	45140

Source: DGCI & S, Kolkata.

**Table – 21 : Imports of Titanium Ores & Conc.
(Ilmenite)
(By Countries)**

Country	2011-12		2012-13	
	Qty (t)	Value (₹'000)	Qty (t)	Value (₹'000)
All Countries	48150	389054	65876	1403236
Mozambique	43406	320241	59573	1222768
Sri Lanka	3490	46910	4535	99308
Australia	313	9795	626	58811
Malaysia	908	10774	875	17487
Thailand	23	599	250	2992
Germany	10	735	9	994
Mexico	-	-	5	500
UK	-	-	2	273
China	-	-	1	103

Source: DGCI & S, Kolkata.

**Table – 20 : Imports of Titanium Ores &
Conc. : Total
(By Countries)**

Country	2011-12		2012-13	
	Qty (t)	Value (₹'000)	Qty (t)	Value (₹'000)
All Countries	68501	1731291	77819	2842107
Mozambique	43406	320241	59573	1222768
Australia	10904	813202	6573	769953
Sri Lanka	6519	156245	5534	283442
South Africa	1180	85997	1214	149638
China	605	41295	741	109105
Vietnam	200	13821	889	65955
Malaysia	1472	47053	1390	64870
Ukraine	1774	105694	429	57600
Brazil	-	-	260	38600
Italy	104	6508	212	22911
Other countries	2337	141235	1004	57265

Source: DGCI & S, Kolkata.

**Table – 22 : Imports of Titanium Ores &
Conc. (Rutile)
(By Countries)**

Country	2011-12		2012-13	
	Qty (t)	Value (₹'000)	Qty (t)	Value (₹'000)
All Countries	14647	1065112	9826	1254835
Australia	8695	670087	5139	624251
Sri Lanka	1348	79992	999	184134
South Africa	920	69374	1088	136189
China	418	32491	740	109002
Ukraine	766	54711	429	57600
Vietnam	125	8375	739	54926
Brazil	-	-	260	38600
Malaysia	428	30688	202	19779
UAE	-	-	52	8000
USA	260	11558	52	7708
Other countries	1687	107836	126	14646

Source: DGCI & S, .Kolkata.

ILMENITE AND RUTILE

Table – 23 : Imports of Titanium Ores & Conc. (Others) (By Countries)

Country	2011-12		2012-13	
	Qty (t)	Value (₹'000)	Qty (t)	Value (₹'000)
All Countries	5704	277125	2117	184036
Australia	1896	133320	808	86891
Malaysia	136	5591	313	27603
Italy	-	-	212	22911
South Africa	260	16623	126	13449
Vietnam	75	5446	150	11029
Sierra Leone	-	-	397	10270
Iran	-	-	52	5932
Chinese Taipei/Taiwan	56	2109	52	5704
Germany	52	2089	4	136
Singapore	-	-	3	110
Other countries	3229	111947	++	1

Source: DGCI & S, Kolkata.

Table – 25 : Imports of Titanium oxide & Dioxide : Total (By Countries)

Country	2011-12		2012-13	
	Qty (t)	Value (₹'000)	Qty (t)	Value (₹'000)
All Countries	23110	3545107	18803	3300512
China	7268	1018172	5006	747778
Germany	2794	440848	2219	455173
Korea, Rep. of	2292	354553	2357	432019
USA	2777	471130	1986	385375
Czech Republic	1170	180613	2303	359151
Japan	1065	203897	933	201436
Ukraine	1405	189968	1200	176582
Malaysia	201	33717	508	99887
Italy	209	25282	426	73831
Australia	620	107914	345	70382
Other countries	3309	519013	1520	298898

Source: DGCI & S, Kolkata.

Table – 24 : Imports of Titanium & Alloys (Incl. Waste & Scrap) (By Countries)

Country	2011-12		2012-13	
	Qty (t)	Value (₹'000)	Qty (t)	Value (₹'000)
All Countries	1504	2149522	1310	2455456
USA	471	571037	309	589685
Russia	64	89236	308	455008
China	191	243696	208	358803
UK	52	121507	104	327384
Italy	184	267345	61	152217
Germany	57	86497	52	122842
Korea Rep. of	34	51880	47	95674
France	93	159201	15	76223
Japan	198	310154	62	47270
Kazakhstan	-	-	60	44374
Other countries	160	248969	84	185976

Source: DGCI & S, Kolkata.

Table – 26 : Imports of Titanium dioxide (By Countries)

Country	2011-12		2012-13	
	Qty (t)	Value (₹'000)	Qty (t)	Value (₹'000)
All Countries	22635	3490219	17825	3178780
China	6940	983819	4593	714673
Germany	2793	440212	2090	438366
Korea, Rep. of	2280	352616	2137	392238
USA	2766	467628	1903	378977
Czech Republic	1170	180613	2303	359151
Japan	1058	201477	928	199977
Ukraine	1405	189968	1200	176582
Malaysia	201	33717	508	99886
Australia	620	107914	345	70382
Italy	138	21162	382	68867
Other countries	3264	511093	1436	279681

Source: DGCI & S, Kolkata.

ILMENITE AND RUTILE

**Table – 27 : Imports of Titanium oxides
(Other than Titanium Dioxides)
(By Countries)**

Country	2011-12		2012-13	
	Qty (t)	Value (₹'000)	Qty (t)	Value (₹'000)
All Countries	475	54888	978	121732
Korea Rep. of	12	1937	220	39781
China	328	34353	413	33105
Germany	1	636	129	16807
Chinese Taipei/Taiwan	-	-	60	13415
USA	11	3503	83	6398
Italy	71	4120	44	4963
France	1	514	3	2368
Indonesia	-	-	20	2085
Japan	7	2420	5	1459
UK	1	180	1	1057
Other countries	43	7225	++	294

Source: DGCI & S, Kolkata.

FUTURE OUTLOOK

The major chunk of consumption of ilmenite is for the manufacture of synthetic rutile. The future demand of ilmenite during the 12th Plan period at the GDP growth rate of 8%, 9% and 10% is estimated at 3.19 lakh, 3.27 lakh and 3.35 lakh tonnes, respectively, as per the Report of Working Group on Mineral Exploration and Development (other than coal & lignite) for the 12th Five Year Plan (2012-17), Planning Commission of India.

Demand for rutile for next five years is projected at 44,000 tpy to 45,000 tpy as per the GDP growth rate of 8%, 9% and 10%. The production projected is 30,000 tpy as per the Working Group.

The Working Group has observed that no substantial progress in exploration activities for Beach Minerals was witnessed during the 11th Plan and has stressed on the need to take substantive steps to develop beach sand reserves of the country to its full potential by adopting suitable exploration strategy with modern techniques.

Global demand growth for TiO₂ expected to trend with economic growth and the production of paint, paper and plastics.

Acrospace, defence and industrial uses were expected to strongly influence consumption of titanium metal for the foreseeable future.

(1955) 1 SCR 941 : AIR 1955 SC 65 : (1954) 26 ITR 775

In the Supreme Court of India
(BEFORE MEHR CHAND MAHAJAN, C.J. AND SUDHI RANJAN DAS, GHULAM HASAN, N.H.
BHAGWATI AND T.L. VENKATARAMA AYYAR, JJ.)

DHAKESWARI COTTON MILLS LTD. ... Appellant;

Versus

COMMISSIONER OF INCOME TAX, WEST BENGAL ... Respondent.

Civil Appeal No. 217 of 1953^{*}, decided on October 29, 1954

Advocates who appeared in this case :

N.C. Chatterjee and Veda Vyas, Senior Advocates, for the Appellant;

C.K. Daphtary, Solicitor-General of India (G.N. Joshi, Advocate, with him) instructed by R.H. Dhebar, for the Respondent;

The Judgment of the Court was delivered by

MEHR CHAND MAHAJAN, C.J.— The appellant is a public limited joint stock company incorporated under the Indian Companies Act, 1915, with its registered office at Calcutta. It carries on the business of manufacture and sale of cotton yarn and piece-goods. On the 28th of July, 1944, the Income Tax Officer issued a notice to it under Section 22(2) of the Indian Income Tax Act calling upon it to file the return of its income for Assessment Year 1944-45 (account year being 1943-44). Before the expiry of the due date for filing the return the account books of the appellant company together with the documents relevant to the accounts, were taken into custody by the Sub-Divisional Officer, Narayanganj and it is alleged that these remained in the custody of the Court of the Sub-Divisional Magistrate till January 1950, when they were handed back to the appellant. In this situation the assessee pleaded for extension of time to furnish the return. This request was refused, and a show cause notice was issued under Section 28(3) of the Act calling upon the appellant company why penalty should not be imposed upon it for its failure to file the return. An officer of the company appeared before the Income Tax Officer and explained the cause for this default. In order to ascertain whether the explanation furnished by the assessee was genuine, the Income Tax Officer made inquiries from the court concerned about this matter. He also made a request to the court to allow him access to the books of account. The court, however, neither acceded to the demand that books of account be made available to the assessee nor did it permit the Income Tax Officer to have access to them. The Income Tax Officer having thus satisfied himself about the genuineness of the assessee's explanation, condoned the default in filing the return and dropped the proceedings taken against the company under Section 28(3) of the Act.

2. It seems that no further action in the matter was taken by the department till the year 1947. During that year the company requested the department to revive the proceedings. The proceedings having been revived the appellant company furnished the return of its income for Assessment Year 1944-45 on the 16th March, 1948. This return, however, was not a complete document as without the assistance of the books the profits could not be computed according to the provisions of law. On receipt of the return the Income Tax Officer issued a notice under Section 23(2) of the Act calling upon the company to supply further information on a number of points and to prepare certain statements indicated in the notice. This requisition had to be complied with by 19th March, 1948. On that date the Chief Accounts Officer of the company appeared before the Income Tax Officer and asked for further time till the middle of the following week for furnishing the requisite particulars. This request was, however,

refused and assessment was completed on the 20th March, 1948. The excess profits assessment was also made final on the 23rd March, 1948. The relevant part of the assessment order is in these terms:

"From the point of view of profits, 1943 was a very good year, if not the best, for all cotton mills. Expenses on cotton and fuel shows that production was undoubtedly higher whereas it is found that the gross profit disclosed by this company is low. I conclude that full amount of sales have not been accounted for. It is expected that actually the rate of gross profit should have been higher this year. In view of the higher costs of establishment, I take it that the rate of about 40% i.e. near about the rate disclosed in 1942 accounts should have been maintained. I add back the Rs 36 lakhs for unaccounted sales."

It may be mentioned that in the return the company had disclosed a gross profit of 28 per cent on sales amounting to Rs 1,78,96,122. The total amount of sales in the year 1942 was of the amount of Rs 1,15,69,582, disclosing a gross profit of 41 percent. The establishment expenses, however, during that year were in the sum of Rs 15,94,101, while during the accounting year relevant to the year under assessment these had gone up to Rs 34,74,735 on account of labour troubles. A number of other causes were mentioned by the assessee for the low rate of profit during the relevant period; but the Income Tax Officer took no notice of them. On appeal this order was upheld by the Appellate Assistant Commissioner. The assessee then appealed to the Tribunal against these decisions. What happened before the Tribunal may well be stated in terms of the Tribunal's order itself. This is what is mentioned in the judgment of the Tribunal:

"At the end of the hearing of this appeal on 25th of November, 1949 the Income Tax Appellate Tribunal requested the departmental representative to produce for the examination of the Income Tax Appellate Tribunal the gross profit rates shown or assessed in the cases of *other similar cotton mills*. The departmental representative wanted $\frac{3}{4}$ days' time to collect information on this point. On this the appellant also wanted to be allowed to produce information regarding the gross profit rates shown or assessed by other similar cotton mills, and he was also allowed to produce information on the point. On or about the 29th November the counsel for the appellant requested that he should be allowed time till Saturday the 3rd of December to file the above information and time for this purpose was allowed to him. On the 3rd December Mr Banerjee the appellant's counsel saw the Accountant Member in his chamber and wanted to produce written arguments and a trunk full of books and papers in support of his case. Mr Banerjee was told that the arguments in the case had finished on the 25th and he was allowed time only to supply to the court the gross profit rates shown or assessed in the cases of other similar cotton mills. He was told that it was not fair to the other side to take notice of any additional evidence or record at that stage and his trunk of books and papers was returned to him. During the discussion of Mr Banerjee with the Accountant Member Mr Banerjee produced a report showing that the gross profit rates of some mills in Bengal on the average amounted to 23 per cent. In the statement showing 23 per cent. gross profit rates there was another item called 'Pool profit' which was bigger than the gross profits rate. Mr Banerjee was asked to explain what this word 'Pool profit' meant but he had no information on this point.... For want of this information we are afraid it is not possible for us to attach a great deal of importance to the gross profit percentage of 23 per cent. mentioned in the books produced by Mr Banerjee.

Mr Banerjee during this discussion further produced a book showing the wastage expected. In that book certain quality of cotton had been mentioned and it was said that wastage of 34 per cent was normal. In the case of the assessee he has shown a wastage of 9 per cent in 1942, 26 per cent in 1943 and 19 per cent in 1944. The

figure of 34 per cent. shown in that book would therefore seem to refer to a particular quality of cotton very much inferior to the cotton generally used by the appellant. The department's main case on the question of wastage is based on the appellant's own books according to which his wastage in the year under review amounted to three times the wastage in the year previous. In the light of all this information it appears to us that the Income Tax Officer was justified in making a substantial addition to the gross profit shown by the appellant.

Coming to the question of what the amount of addition should be the departmental representative has on our request filed a number of cases of other cotton mills which show a gross profit rates varying between 49 per cent. and 22 per cent and in one case even 13 per cent. has been shown...

In the face of all the above facts it appears to us that the Income Tax Officer was justified in coming to the conclusion that all sales had not been brought into the books. We have, however, considered all facts relevant to this case and are of the opinion that the addition to the sales should be reduced from Rs 36 lakhs made by the Income Tax Officer to Rs 16 lakhs which would reduce the gross profit rate to about 35 per cent."

3. The sum and substance of these decisions is that the Income-tax Officer estimated the gross profit on sales at 40 per cent. by a pure guess, while the Tribunal reduced it to 35 per cent. by applying some other rule of thumb. It is not clear from either of these judgments on what material these estimates were based.

4. Dissatisfied with the decision of the Tribunal, the assessee wanted the Tribunal to state a case and refer to the High Court for its decision ten questions of law. It seems that Dr Pal who represented the assessee before the Tribunal had only argued one question namely, whether the estimate of profit made by the Income Tax Officer was excessive or whether it was justified on the material on the record. The other points raised in the memorandum of appeal regarding the validity or the correctness of the procedure of assessment had been abandoned. The questions which were submitted to the Tribunal and which it was asked to refer to the High Court concerned all the points including those abandoned before the Tribunal. The Tribunal came to the conclusion that no question of law arose on its order, and it, therefore, dismissed the application made by the assessee. It appears that the assessee then applied to the High Court under Section 66(2) of the Act for the issue of a mandamus to the Tribunal directing it to refer to the High Court the very same questions of law which it had refused to refer. This application was summarily rejected. The High Court also refused an application for leave to appeal to this Court. Having exhausted all the remedies that were available to him under the Income Tax Act, the assessee then made an application to this Court for special leave against the order of the Income Tax Tribunal under the provisions of Article 136 of the Constitution. Leave was allowed and this appeal is now before us by virtue of that leave.

5. Mr Chatterjee, the learned counsel for the appellant, contended inter alia that the assessment order made under Section 23(3) of the Income Tax Act had been made in violation of the principles of natural justice, inasmuch as it was not based on any material whatsoever and that the evidence tendered by the appellant had been improperly rejected. It was further said that the Tribunal acted without jurisdiction in relying on the data supplied by the Income Tax department behind the back of the appellant company, and without giving it an opportunity to rebut or explain the same. Reliance was placed on the decision of a Full Bench of the Lahore High Court in *Seth Gurmukh Singh v. CIT*¹ for the proposition that while proceeding under sub-section (3) of Section 23, the Income Tax Officer, though not bound to rely on evidence produced by the assessee as he considers to be false, yet if he proposes to make an estimate in disregard of that evidence, he should in fairness disclose to the assessee the material

on which he is going to found that estimate; and that in case he proposes to use against the assessee the result of any private inquiries made by him, he must communicate to the assessee the substance of the information so proposed to be utilized to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and that he should further give him ample opportunity to meet it. It was said that the Tribunal failed to disclose to the assessee the material that the departmental representative had given to it regarding the rates of gross profit of cotton mills varying between 49 per cent. and 13 per cent., and that if that disclosure had been made, the assessee would have satisfied the Tribunal that the mills which had shown gross profits at rates mentioned above had no similarity of any kind with the appellant company's mill or to other mills in Bengal and therefore those rates had no relevancy in the enquiry as to gross profits of the assessee company's mill. It was also argued that both the Income Tax Officer and the Tribunal acted arbitrarily and on suspicion in estimating the rate of gross profit. In conclusion the learned counsel urged that now that the books of account of the company were available, it was only just and fair that the Income Tax Officer and the Tribunal should examine these books in order to determine the correctness of the return furnished by the assessee.

6. The learned Solicitor-General who appeared for the Commissioner of Income Tax, West Bengal, combated the contentions raised by Mr Chatterjee on a twofold ground: (1) In the first instance, without questioning the jurisdiction of this Court to grant special leave against an order of an Income Tax Tribunal, he argued that such leave should not be granted when remedies provided by the Income-tax Act itself were available for correcting errors of the Tribunal, and had been taken but without success. It was said that the power conferred on this Court by Article 136 of the Constitution being an extraordinary power, its exercise should be limited to cases of patent and glaring errors of procedure, or where there has been a failure of justice because of the violation of the rules of natural justice or like causes but that this discretionary power should not be exercised for the purpose of reviewing findings of fact when the law dealing with the subject has declared those findings as final and conclusive. (2) That the finding given by the Income Tax Officer and affirmed by the Appellate Assistant Commissioner and the Tribunal was based on material and it could not be said that these bodies had acted arbitrarily in this matter. It was contended that the Income Tax Officer has very wide powers and is not fettered by technical rules of evidence and pleadings, and that the only restriction on his judgment is that he must act honestly on the material however inadequate before him, but not capriciously or arbitrarily. It was suggested that owing to the disparity of the rate of wastage the Income Tax Officer was entitled to reach the conclusion that the assessee had not disclosed the full sales made by him during the accounting year, and that on that basis he was entitled on his own information to make an estimate of the rate of gross profit.

7. As regards the first contention of the learned Solicitor-General, we are unable to accede to it. It is not possible to define with any precision the limitations on the exercise of the discretionary jurisdiction vested in this Court by the constitutional provision made in Article 136. The limitations, whatever they be, are implicit in the nature and character of the power itself. It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in special and extraordinary situations. Beyond that it is not possible to fetter the exercise of this power by any set formula or rule. All that can be said is that the Constitution having trusted the wisdom and good sense of the Judges of this Court in this matter, that itself is a sufficient safeguard and guarantee that the power will only be used to advance the cause of justice, and that its exercise will be governed by well established principles which govern the exercise of overriding constitutional powers. It is, however, plain that when the Court reaches the conclusion that a person has been

dealt with arbitrarily or that a court or tribunal within the territory of India has not given a fair deal to a litigant, then no technical hurdles of any kind like the finality of finding of facts or otherwise can stand in the way of the exercise of this power because the whole intent and purpose of this article is that it is the duty of this Court to see that injustice is not perpetuated or perpetrated by decisions of Courts and tribunals because certain laws have made the decisions of these Courts or tribunals final and conclusive. What we have said above sufficiently disposes of the first contention raised by the learned Solicitor-General.

8. As regards the second contention, we are in entire agreement with the learned Solicitor-General when he says that the Income Tax Officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law, but there the agreement ends; because it is equally clear that in making the assessment under sub-section (3) of Section 23 of the Act, the Income Tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under Section 23(3). The rule of law on this subject has, in our opinion, been fairly and rightly stated by the Lahore High Court in the case of *Seth Gurmukh Singh v. CIT*¹.

9. In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and, lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result is that the assessee had not had a fair hearing. The estimate of the gross rate of profit on sales, both by the Income Tax Officer and the Tribunal seems to be based on surmises, suspicions and conjectures. It is somewhat surprising that the Tribunal took from the representative of the department a statement of gross profit rates of other cotton mills without showing that statement to the assessee and without giving him an opportunity to show that statement had no relevancy whatsoever to the case of the mill in question. It is not known whether the mills which had disclosed these rates were situated in Bengal or elsewhere, and whether these mills were similarly situated and circumstanced. Not only did the Tribunal not show the information given by the representative of the department to the appellant, but it refused even to look at the trunk load of books and papers which Mr Banerjee produced before the Accountant-Member in his chamber. No harm would have been done if after notice to the department the trunk had been opened and some time devoted to see what it contained. The assessment in this case and in the connected appeal, we are told, was above the figure of Rs 55 lakhs and it was meet and proper when dealing with a matter of this magnitude not to employ unnecessary haste and show impatience, particularly when it was known to the department that the books of the assessee were in the custody of the Sub-Divisional Officer, Narayanganj. We think that both the Income Tax Officer and the Tribunal in estimating the gross profit rate on sales did not act on any material but acted on pure guess and suspicion. It is thus a fit case for the exercise of our power under Article 136.

10. In the result we allow this appeal, set aside the order of the Tribunal and remand the case to it with directions that in arriving at its estimate of gross profits and sales it should give full opportunity to the assessee to place any relevant material on the point that it has before the Tribunal, whether it is found in the books of account or elsewhere and it should also disclose to the assessee the material on which the Tribunal is going to found its estimate and then afford him full opportunity to meet the substance of any private inquiries made by the Income Tax Officer if it is intended to make the estimate on the foot of those enquiries. It will also be open to the

department to place any evidence or material on the record to support the estimate made by the Income Tax Officer or by the Tribunal in its judgment. The Tribunal if it thinks fit may remit the case to the Income Tax Officer for making a fresh assessment after taking such further evidence as is furnished by the assessee or by the department. The costs of these proceedings will abide the result.

(1955) 1 SCR 941 : AIR 1955 SC 154 : (1955) 27 ITR 126

DHAKESWARI COTTON MILLS LTD ... Appellant;

Versus

COMMISSIONER OF INCOME TAX, WEST BENGAL ... Respondent.

On Appeal by Special Leave from the Judgment and Order dated 16-1-1950 of the Income Tax Appellate Tribunal, Calcutta in ITA No. 4659 and 4660 of 1948-49 and EPTA Nos. 1138 and 1139 of 1948-49.

Civil Appeal No. 218 of 1953, decided on October 29, 1954

Present:

(BEFORE MEHR CHAND MAHAJAN, C.J. AND SUDHI RANJAN DAS, GHULAM HASAN, N.H. BHAGWATI, T.L. VENKATARAMA AYYAR, JJ.)

N.C. Chatterjee and Veda Vyas, Senior Advocates, for the Appellant;

C.K. Daphtary, Solicitor-General for India (G.N. Joshi, Advocate, with him), instructed by R.H. Dhebar, for the Respondent.

MEHR CHAND MAHAJAN, C.J.— This appeal concerns the same assessee as Appeal No. 217 of 1953 and relates to the assessment of its profits for the years 1945-46, and 1946-47, the account years being 1943-44 and 1944-45. The facts and circumstances relating to these assessments are the same as have been stated in our judgment in Appeal No. 217 of 1953, and it is unnecessary to re-state them here. The assessee duly furnished returns for these years within the time allowed to it but the profits returned regarding these years could not be computed according to the provisions of law as the relative books of account were in the Court of the Sub-Divisional Magistrate, Narayanganj and were not received back by the assessee till after the completion of the assessment. The Income Tax Officer did not accept the estimate disclosed of the gross profit and sales during the years and for reasons stated in the judgment relating to 1944-45 assessment he held that during these years also full amount of sales had not been accounted for. He therefore added back Rs 23,67,000 in the year 1944 and Rs 24,55,000 in the year 1945. The profit disclosed by the audited account in 1944 was Rs 8,06,830 and in 1945, Rs 8,77,800. The Income Tax Officer estimated these figures at Rs 31,73,830 and Rs 33,32,800 by estimating the rate of profit at 33 ½ per cent on sales, whereas the appellant has shown a gross profit at the rate of 20 per cent and 19 per cent respectively. On appeal, the Appellate Assistant Commissioner confirmed this order. On further appeal to the Tribunal, the estimate was reduced to 28 per cent mostly for the reasons given in the judgment of the Tribunal relating to the assessment for the year 1944-45. The relevant part of the judgment dealing with these assessments is in these terms:

"The appellant had shown a gross profit rate of 20 per cent in 1945-46 assessment and 19 per cent. in 1946-47 assessment. After the additions made by the Income Tax Officer are taken into consideration, the gross profit rate works out to 33 ½ per cent on the enhanced sales, for both these years. The lists of cases of other cotton mills filed with us by the Departmental representative show that profits during these two years were a little less than the profits during Assessment Year 1944-45. Considering all the facts of these cases, we are of opinion that the additions made during these two years be reduced to Rs 14,00,000 in 1945-46 and

Rs 14,10,000 in 1946-47. This would reduce the gross profits to about 28 per cent. on enhanced sales during both these years."

No separate arguments were addressed by the learned counsel for either side in this appeal, and for the reasons given by us in our judgment in Appeal No. 217 of 1953 this appeal is also allowed, the decision of the Tribunal set aside and the case remanded to the Tribunal with similar directions as given in Appeal No. 217 of 1953. Costs of this appeal will also abide the result.

— — — — —
* On Appeal from the Judgment and Order dated 16th day of January 1950 of the Income Tax Appellate Tribunal, Calcutta in Income Tax Appeal No. 4658 of 1948-49 and EPTA No. 1137 of 1948-49.

¹ 1944 ITR 393

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1963 Supp (1) SCR 676 : AIR 1963 SC 786

In the Supreme Court of India

(BEFORE S.J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J.B. MUDHOLKAR, JJ.)

UDIT NARAIN SINGH MALPAHARIA ... Appellant;

Versus

ADDITIONAL MEMBER BOARD OF REVENUE, BIHAR AND ANOTHER
... Respondents.

Civil Appeal No. 586 of 1962*, decided on October 19, 1962

Advocates who appeared in this case :

H.N. Sanyal, Additional Solicitor-General of India (Jagat Narain Prasad Sinha and D.P. Singh, Advocates with him), for the Appellant;

D.P. Singh, M.K. Ramamurthi, R.K. Garg and S.C. Aggarwala, Advocates of Ramamurthi and Co., for the Respondents.

The Judgment of the Court was delivered by

K. SUBBA RAO, J.— This appeal by special leave is directed against the order of the High Court of Judicature at Patna rejecting *in limine* an application for a writ of certiorari filed under Article 226 of the Constitution.

2. The facts giving rise to this appeal may be briefly stated. There is a country liquor shop in Dumka town. Originally one Hari Prasad Sah was the licensee of that shop, but his licence was cancelled by the Excise Authorities. Thereupon a notice was issued inviting applications for the settlement of the shop. One Jadu Manjhi, along with others, applied for the licence. On March 22, 1961, for the settlement of the shop a lots were drawn by the Deputy Commissioner, Santal Parganas, and the draw was in favour of Jadu Manjhi. But Hari Prasad Sah, that is the previous licensee filed an appeal against the order of the Deputy Commissioner, before the Commissioner of the Santal Parganas and as it was dismissed, he moved the Board of Revenue, Bihar, and obtained a stay of the settlement of the said shop. On July 13, 1961, the Board of Revenue dismissed the petition filed by Hari Prasad Sah. Meanwhile Jadu Manjhi died and when the fact was brought to the notice of the Deputy Commissioner, he decided to hold a fresh lot on June 19, 1961 and the lot was drawn in favour of the appellant. Hari Prasad Sah filed a petition in the revenue court and obtained a stay of the settlement of the shop in favour of the appellant. Meanwhile one Basantilal Bhagat filed an application under Article 226 of the Constitution in the High Court at Patna and obtained an interim stay; but he withdrew his application on September 8, 1961. The petition filed by Hari Prasad Sah was dismissed by the Board of Revenue on July 13, 1961. On 11-9-1961, the appellant furnished security and the shop was settled on him and a licence was issued in his name. After the expiry of the period of the said licence, it was renewed in his favour for 1962. On June 19, 1961, one Phudan Manjhi, son of Jadu Manjhi, filed a petition before the Deputy Commissioner for substituting his name in the place of his father on the basis of the lot drawn in favour of his father. The Deputy Commissioner rejected the application and Phudan Manjhi preferred an appeal against that order to the Commissioner of Excise; and the Commissioner remanded the case to the Deputy Commissioner to consider the fitness of Phudan Manjhi to get the licence and to consider whether the provisions of Rule 145 of the Excise Manual, Vol. 2, would apply to the facts of his case. One Bhagwan Rajak, who was not an applicant before the Deputy Commissioner, filed an application before the Commissioner alleging that there should have been a fresh advertisement for the settlement of the shop according to clause (13) of Rule 101 of the Excise Manual, Vol.

3; and on March 13, 1962, the Commissioner allowed his application and directed the Deputy Commissioner to take steps for afresh settlement of the shop in accordance with rules. Against the said orders the appellant filed petitions before the Board of Revenue and the said Board, by its order dated May 30, 1962, dismissed the petitions and directed that unless the Deputy Commissioner came to a definite conclusion that Phudan Manjhi was unfit to hold the licence, he should be selected as a licensee in accordance with Rule 145 of the Excise Manual, Vol. 2. The result of the said proceedings is that the appellant's licence was cancelled and the Deputy Commissioner was directed to hold a fresh settlement giving a preferential treatment to Phudan Manjhi. The appellant filed a petition under Article 226 of the Constitution in the High Court at Patna to quash the said orders. Neither Phudan Manjhi nor Bhagwan Rajak in whose favour the Board of Revenue decided the petition, was made a party. It is represented to us that pursuant to the orders of the Board of Revenue the Deputy Commissioner made an enquiry, came to the conclusion that Phudan Manjhi was not fit to be selected for the grant of a licence, and that he has not yet made a fresh settlement in view of the pendency of the present appeal.

3. Learned Additional Solicitor General, appearing for the appellant, contended that the Board of Revenue acted without jurisdiction in directing a fresh settlement, as neither Rule 101 nor Rule 145 of the Excise Manual would apply to the facts of the case: Rule 101 does not apply as in this case no licence was cancelled for malpractices, and Rule 145 is not attracted as Jadu Manjhi was not a licensee since no licence was issued in his favour.

4. Learned Counsel for the respondents raised a preliminary objection that, as Phudan Manjhi and Bhagwan Rajak, who were necessary parties to the writ petition, were not made parties, the High Court was fully justified in dismissing the petition *in limine*.

5. As we are accepting the preliminary objection raised on behalf of the respondents, we do not propose to express our view on the merits of the case. It may be mentioned that the order of the High Court does not disclose whether the petition was dismissed as the necessary parties were not before it, or on merits; but that does not preclude us from considering the question now raised as the respondents had obviously no opportunity to raise that question in the High Court, notice having not been issued to them.

6. The question is whether in a writ in the nature of certiorari filed under Article 226 of the Constitution the party or parties in whose favour a tribunal or authority had made an order, which is sought to be quashed, is or are necessary party or parties. While learned Additional Solicitor-General contends that in such a writ the said tribunal or authority is the only necessary party and the parties in whose favour the said tribunal or authority made an order or created rights are not necessary parties but may at best be only proper parties and that it is open to this Court, even at this very late stage, to direct the impleading of the said parties for a final adjudication of the controversy, learned Counsel for the respondents contends that whether or not the authority concerned is a necessary party, the said parties would certainly be necessary parties, for otherwise the High Court would be deciding a case behind the back of the parties that would be affected by its decision.

7. To answer the question raised it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding. The law on the subject is well settled: it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

8. The next question is, what is the nature of a writ of certiorari. What relief can a

petitioner in such a writ obtain from the Court. Certiorari. lies to remove for the purpose of quashing the proceedings of inferior courts of record or other persons or bodies exercising judicial or quasi-judicial functions. It is not necessary for the purpose of this appeal to notice the distinction between a writ of certiorari and a writ in the nature of certiorari: in either case the High Court directs an inferior tribunal or authority to transmit to itself the record of proceedings pending therein for scrutiny and, if necessary, for quashing the same. It is well settled law that a certiorari lies only in respect of a judicial or quasi-judicial act as distinguished from administrative act. The following classic test laid down by Lord Justice Atkin, as he then was, in *King v. Electricity Commissioners*¹ and followed by this Court in more than one decision clearly brings out the meaning of the concept of judicial act:

“Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.”

Lord Justice Slesser in *King v. London County Council*² dissected the concept of judicial act laid down by Atkin, L.J., into the following heads in his judgment: “Wherever any body of persons (1) having legal authority (2) to determine questions affecting rights of subjects and (3) having the duty to act judicially (4) act in excess of their legal authority — a writ of certiorari may issue”. It will be seen from the ingredients of judicial act that there must be a duty to act judicially. A tribunal, therefore, exercising a judicial or quasi-judicial act cannot decide against the rights of a party without giving him a hearing or an opportunity to represent his case in the manner known to law. If the provisions of a particular statute or rules made thereunder do not provide for it, principles of natural justice demand it. Any such order made without hearing the affected parties would be void. As a writ of certiorari will be granted to remove the record of proceedings of an inferior tribunal or authority exercising judicial or quasi-judicial acts, *ex hypothesi* it follows that the High Court in exercising its jurisdiction shall also act judicially in disposing of the proceedings before it. It is implicit in such a proceeding that a tribunal or authority which is directed to transmit the records must be a party in the writ proceedings, for, without giving notice to it, the record of proceedings cannot be brought to the High Court. It is said that in an appeal against the decree of a subordinate court, the court that passed the decree need not be made a party and on the same parity of reasoning it is contended that a tribunal need not also be made a party in a writ proceeding. But there is an essential distinction between an appeal against a decree of a subordinate court and a writ of certiorari to quash the order of a tribunal or authority: in the former, the proceedings are regulated by the Code of Civil Procedure and the court making the order is directly subordinate to the appellate court and ordinarily acts within its bounds, though sometimes wrongly or even illegally, but in the case of the latter, a writ of certiorari is issued to quash the order of a tribunal which is ordinarily outside the appellate or revisional jurisdiction of the court and the order is set aside on the ground that the tribunal or authority acted without or in excess of jurisdiction. If such a tribunal or authority is not made party to the writ, it can easily ignore the order of the High Court quashing its order, for, not being a party, it will not be liable to contempt. In these circumstances whoever else is a necessary party or not the authority or tribunal is certainly a necessary party to such a proceeding. In this case, the Board of Revenue and the Commissioner of Excise were rightly made parties in the writ petition.

9. The next question is whether the parties whose rights are directly affected are the necessary parties to a writ petition to quash the order of a tribunal. As we have seen, a tribunal or authority performs a judicial or quasi-judicial act after hearing parties. Its order affects the right or rights of one or the other of the parties before it.

In a writ of certiorari the defeated party seeks for the quashing of the order issued by the tribunal in favour of the successful party. How can the High Court vacate the said order without the successful party being before it. Without the presence of the successful party the High Court cannot issue a substantial order affecting his right. Any order that may be issued behind the back of such a party can be ignored by the said party, with the result that the tribunal's order would be quashed but the right vested in that party by the wrong order of the tribunal would continue to be effective. Such a party, therefore, is a necessary party and a petition filed for the issue of a writ of certiorari without making him a party or without impleading him subsequently, if allowed by the court, would certainly be incompetent. A party whose interests are directly affected is, therefore, a necessary party.

10. In addition, there may be parties who may be described as proper parties, that is parties whose presence is not necessary for making an effective order, but whose presence may facilitate the settling of all the questions that may be involved in the controversy. The question of making such a person as a party to a writ proceeding depends upon the judicial discretion of the High Court in the circumstances of each case. Either one of the parties to the proceeding may apply for the impleading of such a party or such a party may suo motu approach the court for being impleaded therein.

11. The long established English practice, which the High Courts in our country have adopted all along, accepts the said distinction between the necessary and the proper party in a writ of certiorari. The English practice is recorded in *Halsbury's Laws of England*, Vol. 11, 3rd Edn. (Lord Simonds') thus in para 136:

"The notice of motion or summons must be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any act in relation to the proceedings or to quash them or any order made therein, the notice of motion or summons must be served on the clerk or registrar of the court, the other parties to the proceedings, and (where any objection to the conduct of the judge is to be made) on the judge...".

In para 140 it is stated:

"On the hearing of the summons or motion for an order of mandamus prohibition or certiorari, counsel in support begins and has a right of reply. Any person who desires to be heard in opposition, and appears to the court or Judge to be a proper person to be heard, is to be heard notwithstanding that he has not been served with the notice or summons, and will be liable to costs in the discretion of the court or Judge if the order should be made ...".

So too, the Rules made by the Patna High Court require that a party against whom relief is sought should be named in the petition. The relevant Rules read thus:

Rule 3. Application under Article 226 of the Constitution shall be registered as Miscellaneous Judicial Cases or Criminal Miscellaneous Cases, as the case may be.

Rule 4. Every application shall, soon after it is registered, be posted for orders before a Division Bench as to issue of notice to the respondents. The Court may either direct notice to issue and pass such interim order as it may deem necessary or reject the application.

Rule 5. The notice of the application shall be served on all persons directly affected and on such other persons as the Court may direct.

Both the English rules and the rules framed by the Patna High Court lay down that persons who are directly affected or against whom relief is sought should be named in the petition, that is all necessary parties should be impleaded in the petition and notice served on them. In "*The Law of Extra-ordinary Legal Remedies*" by Ferris, the procedure in the matter of impleading parties is clearly described at p. 201 thus:

"Those parties whose action is to be reviewed and who are interested therein and affected thereby, and in whose possession the record of such action remains, are not only proper, but necessary parties. It is to such parties that notice to show cause against the issuance of the writ must be given, and they are the only parties who may make return, or who may demur. The omission to make parties those officers whose proceedings it is sought to direct and control, goes to the very right of the relief sought. But in order that the court may do ample and complete justice, and render a judgment which will be binding on all persons concerned, all persons who are parties to the record, or who are interested in maintaining the regularity of the proceedings of which a review is sought, should be made parties respondent."

This passage indicates that both the authority whose order is sought to be quashed and the persons who are interested in maintaining the regularity of the proceeding of which a review is sought should be added as parties in a writ proceeding. A Division Bench of the Bombay High Court in *Ahmedalli v. M.D. Lalkaka*³ laid down the procedure thus:

"I think we should lay down the rule of practice, that whenever a writ is sought challenging the order of a Tribunal, the Tribunal must always be a necessary party to the petition. It is difficult to understand how under any circumstances the Tribunal would not be a necessary party when the petitioner wants the order of the Tribunal to be quashed or to be called in question. It is equally clear that all parties affected by that order should also be necessary parties to the petition."

A Full Bench of the Nagpur High Court in *Kanglu Baula v. Chief Executive Officer*⁴ held that though the elections to various electoral divisions were void the petition would have to be dismissed on the short ground that persons who were declared elected from the various constituencies were not joined as parties to the petition and had not been given an opportunity to be heard before the order adverse to them was passed. The said decisions also support the view we have expressed.

12. To summarise: in a writ of certiorari not only the tribunal or authority whose order is sought to be quashed but also parties in whose favour the said order is issued are necessary parties. But it is in the discretion of the court to add or implead proper parties for completely settling all the questions that may be involved in the controversy either suo motu or on the application of a party to the writ or an application filed at the instance of such proper party.

13. In the present case Phudan Manjhi and Bhagwan Rajak were parties before the Commissioner as well as before the Board of Revenue. They succeeded in the said proceedings and the orders of the said tribunal were in their favour. It would be against all principles of natural justice to make an order adverse to them behind their back; and any order so made could not be an effective one. They were, therefore, necessary parties before the High Court. The record discloses that the appellant first impleaded them in his petition but struck them out at the time of the presentation of the petition. He did not file any application before the High Court for impleading them as respondents. In the circumstances, the petition filed by him was incompetent and was rightly rejected.

14. That order was made on July 3, 1962; and the special leave petition was filed on July 18, 1962. Even in the special leave petition the said two parties were not impleaded. Learned counsel for the appellant suggests that this Court may at this very late stage direct them to be made parties and remand the matter to the High Court for disposal. This request is belated and cannot, therefore, be granted. In this view it is not necessary to express our opinion on the other questions raised.

15. The appeal fails and is dismissed with costs.

* Appeal by Special Leave from the Order dated 3rd July, 1962 of the Patna High Court in Misc. Judicial Case No.

460 of 1962.

¹ (1924) 1 KB 171

² (1931) 2 KB 215, 243

³ AIR 1954 Bom 33, 34.

⁴ AIR 1955 Nag. 49

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(1978) 1 Supreme Court Cases 405**In the Supreme Court of India**

(BEFORE M.H. BEG, C.J. AND P.N. BHAGWATI, V.R. KRISHNA IYER, P.K. GOSWAMI AND P.N. SHINGHAL, JJ.)

MOHINDHR SINGH GILL AND ANOTHER . . Appellants;

Versus

CHIEF ELECTION COMMISSIONER, NEW DELHI AND OTHERS . .

Respondents.

Civil Appeal No. 1297 of 1977[±], decided on December 2, 1977.

Constitution of India — Articles 329(b) & 226 — Scope and applicability — Held, Article 329(b) operates as a complete bar to challenges to steps in election including that by a writ petition under Article 226 — Covers only proceedings “calling in question” the election — Meaning of — Section 100 RPA 1951, held, is otherwise broad enough to cover every kind of objection, constitutional, legal or factual and affords complete relief to the petitioner — Sections 98 & 100 RPA, 1951

Constitution of India — Article 324 — Scope of Election Commission's powers under — Held, to be construed widely and the power operates in areas left unoccupied by legislation — Limitations on the power pointed out — Election Commission, however, not only to act bona fide but subject to rules of natural justice — Hence rules of natural justice as far as practicable to be followed before cancelling a poll and ordering a repoll — Sections 58 and 64 -A, RPA, 1951 do not then prevent a re-poll

Administrative Law — Natural justice — Expanding area of application indicated — Distinction between administrative and quasi-judicial functions, held, no longer relevant — English cases considered

(Paras 43 to 63)

Administrative Law — Natural justice — Hearing — Flexibility in the requirements of in different fact situations — Hearing after the passing of the order may, on facts, satisfy the requirements of natural justice

(Paras 62 and 63)

Administrative Law — Administrative action as much subject to natural justice as judicial and quasi-judicial ones — Natural justice — Applicability of

(Paras 44, 51 and 53)

Administrative Law — Judicial review — Action to be judged by the reasons stated while making the order and supplementary reasons in the shape of affidavits to be excluded — AIR 1952 SC 16, relied on

(Para 8)

Article 324(1) vests in the Election Commission the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of all elections to Parliament and to the legislature of every State and the elections to the offices of the President and the Vice-President held under the Constitution. Article 329(b) provides that notwithstanding anything in the Constitution, no election to either House of Parliament or to the House or either of the Houses of the legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature. Section 100(1)(d)(iv) of



the Representation of the People Act, 1951, provides that subject to the provisions of sub-section (2) if the High Court is of opinion that the result of the election insofar as it concerns a returned

candidate has been materially affected by any non-compliance with the provisions of the Constitution or of that Act or of any Rules or Orders made under it, the High Court shall declare the election of the returned candidate to be void. Section 98 of the same Act provides that, at the conclusion of the trial of an election petition the High Court shall make an order (a) dismissing the election petition, or (b) declaring the election of all or any of the returned candidates to be void, or (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected.

In the 1976 elections to Parliament held from the 13-Ferozepore constituency in Punjab which consisted of 9 assembly segments, the appellant and the third respondent were the principal contestants. According to the scheme for the conduct of elections the postal ballots are to arrive at the Returning Officer's headquarters where they are to be counted. An official tally is made when the ballot boxes and the returns from the various segment headquarters duly reached the headquarters. Voting and counting in all the segments took place but the completion of the counting at the constituency headquarters was aborted by mob violence at the final hour when the postal ballots were being counted. Ballot boxes from one of the segments was also done away with en route and the Returning Officer had to postpone the declaration of the result. An observer who had been sent earlier by the Election Commission was present at the time of counting and he and the Returning Officer reported the happenings to the Election Commission. The appellant, who was having a substantial lead over the respondent before the disturbance took place met the Chief Election Commissioner on the next day i.e. March 22 with a request that he should direct the Returning Officer to declare the result of the election but the Commission issued an order cancelling the whole poll, and a few days later, the Commission gave a direction to have a fresh poll for the whole constituency. The Commission declined to reconsider its decision and thereupon the appellant filed a writ petition under Article 226 in the High Court. The Election Commission filed a counter-affidavit wherein it stated that after taking into account the circumstances and the information including the oral representation of the appellant he passed the order cancelling the poll in the said parliamentary constituency. Holding that it had no jurisdiction to entertain the writ petition, the High Court dismissed the petition but made observations on the merits. Meanwhile, pursuant to the Commission's direction a re-poll was held and the third respondent was declared elected and the appellant had filed an election petition before the High Court. In appeal to the Supreme Court against the decision of the High Court dismissing the writ petition, the following points were raised:

"(1) Is Article 329(b) a blanket ban on all manner of questions which may have impact on the ultimate result of the election, arising between two temporal termini viz. the notification by the President calling for the election and the declaration of the result by the returning officer? Is Article 226 also covered by this embargo and, if so, is Section 100 RPA, 1951, broad enough to accommodate every kind of objection, constitutional, legal or factual, which may have the result of invalidation of an election and the declaration of the petitioner as the returned candidate and direct the organisation of any steps necessary to give full relief?

(2) Can the Election Commission, clothed with the comprehensive functions under Article 324 of the Constitution, cancel the whole poll of a constituency after it has been held, but before the formal declaration of the result has been made, and direct a fresh poll without reference to the guidelines under Sections 58 and 64(a) of the Act, or other legal prescription or legislative backing. If such plenary powers exist, is it exercisable on the basis of his inscrutable "subjective satisfaction" or only on a reviewable objective assessment



reached on the basis of circumstances vitiating a free and fair election and warranting the stoppage of declaration of the result and the direction of a fresh poll not merely of particular polling stations but of the total constituency?

(3) Assuming a constitutionally vested capacity under Article 324 to direct re-poll, is it exercisable only in conformity with natural justice and geared to the sole goal of a free, popular verdict if frustrated on the first occasion? Or, is the Election Commission immune to the observance of the doctrine of natural justice on account of any recognised exceptions to the application of the said principle and unaccountable for his action even before the Election Court?"

Dismissing the appeal the Supreme Court

Held :

Per Beg, C J., Bhagwati and Krishna Iyer, JJ.

1. (a) Election has a very wide connotation commencing from the presidential notification calling upon the electorate to elect a candidate culminating in the final declaration of the returned candidate.

(Para 92)

Every step from start to finish of the total process constitutes "election" not merely the conclusion or culmination. The rainbow of operations covered by the compendious expression "election" commences from the initial notification and culminates in the declaration of the returned candidate.

(Paras 22 and 27)

Indira Nehru Gandhi v. Raj Narain, (1976) 2 SCR 347 : 1975 Supp SCC 1 ; *N.P. Ponnuswami v. Returning Officer*, (1952 SCR 218 : AIR 1952 SC 64 : 1 ELR 133 ; *Hari Vishnu Kamath v. Syed Ahmed Ishaque*, (1955) 1 SCR 1104 : AIR 1955 SC 233 : 10 ELR 216 and *Dr N.B. Khare v. Election Commission of India*, AIR 1958 SC 139 : 1958 SCR 648 and *Durga Shankar Mehta v. Thakur Raghuraj Singh*, (1955) 1 SCR 267 ; AIR 1954 SC 520 : 9 ELR 494, followed

(b) Article 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result. The conspectus of provisions bearing on the subject of elections in the Constitution and the Representation of the People Act clearly expresses the rule that there is a remedy for every wrong done during the election in progress although it is postponed to the post-election stage and procedure as predicated in Article 329(b) and the 1951-Act. The Election Court has, under various provisions of the Act, large enough powers to give relief to the injured candidate if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll to bring up the ballots or do other things necessary for the fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law.

(Para 92)

Under Article 329(b) the sole remedy for an aggrieved party, if he wants to challenge any election, is an election petition and this exclusion of all other remedies includes constitutional remedies like Article 226 because of the nonobstante clause. If what is impugned is an election the ban operates provided the proceeding "calls it in question" or puts it in issue, not otherwise. The paramount policy of the Constitution-makers in declaring that no election shall be called in question except the way it is provided for in Article 329(b) and the Representation of the People Act, 1951, shows that the Constitution and the Act should be read as an integrated scheme. The reason for postponement of election litigation to the post-election stage is that elections shall not unduly be protracted or obstructed. The speed and promptitude in getting due representation for the electors in the legislative bodies is the real reason. It is not every decision sought and rendered that will amount to "calling in question" an election. There are two types of decisions and two types of challenges. The first relates to proceedings which



interfere with the process of election and the second accelerates the completion of the election and acts in furtherance of an election. Anything done towards the completion of the election proceedings, such as a decision by a Returning Officer on objections made to any nomination, can by no stretch of reasoning be described as questioning the election. The plenary bar of Article 329(b) rests on two principles: (i) the peremptory urgency and prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion; and (ii) the provision of the special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes the other forms, the right and remedy being creatures of the statute and controlled by the Constitution. The conclusion is, therefore, irresistible that jurisdiction under Article 226 cannot consider the correctness, legality or otherwise of the direction for cancellation integrated with the re-poll because the prima facie purpose of such a re-poll was to restore a detailed poll process and to complete it through the salvatory effect of a re-poll. Whether in fact or in law the order is validly made by the Election Commission or is violative can be examined later by the High Court as the Election Tribunal. If the regular poll, for some reason, has failed to reach the goal of choosing the returned candidate and to achieve this object a

fresh poll (not a new election) is needed, it may still be a step in the election. Hence, the writ application, challenging the cancellation coupled with re-poll, amounts to calling in question a step in election and is, therefore, barred by Article 329(b). (If no re-poll had been ordered here the legal perspective would have been different.)

(Paras 21, 26 to 32)

This conclusion is fortified by reading Section 100 of the 1951-Act so as to give a substantial assurance of justice and as covering the whole basket of grievances of candidates. Knowing the supreme significance of speedy elections, the framers of the Constitution have, by implication, postponed all election disputes to election petitions and tribunals. In harmony with this scheme Section 100 of the Act has been designedly drafted to embrace all conceivable infirmities which may be urged. The Section is exhaustive of all grievances regarding an election. An election ripens into the electors' choice only when processed, screened and sanctified, every step up to the formalised finish being unified in purpose, forward in movement, fair and free in its temper. Article 329(b) halts judicial intervention during this period provided the act possesses the prerequisites of "election" in its semantic sweep. Under Section 98 of the Act, the High Court has three options by way of conclusive determinations. If the second poll here is set aside as invalid by the High Court in the election petition for any good reason then it falls and the third respondent too with it. The question of the soundness of cancellation of the entire poll is within the court's power under Section 98. Everything necessary to resurrect, reconstruct and lead on to a consummation of the original process and to give effective relief by way of completion of the proper election are within the court's power.

(Paras 33 to 35, 86 and 88)

Matajog Dubey v. H.C. Bhari, (1955) 2 SCR 925 : AIR 1956 SC 44 : (1955) 28 ITR 941 : 1956 Cri LJ 140 and *Commissioner of Commercial Taxes v. R.S. Jhaver*, (1968) 1 SCR 148 : AIR 1968 SC 59 : 20 STC 453 : 66 ITR 664, referred to

2. The Constitution contemplates a free and fair election and vests comprehensive responsibility of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances. It is true that Article 324 has to be read in the light of the Constitutional scheme and the Representation of the People Acts of 1950 and 1951. The article, however, operates in areas left unoccupied by legislation and the words "superintendence, direction and control" as well as "conduct of all elections" are in the broadest terms. But the Commission cannot defy the law armed by Article 324 nor act arbitrarily. Its orders are subject to review. So ordering a re-poll for the whole constituency under compulsion of circumstances may be



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a direction for the conduct of elections and can be saved by Article 324 provided it is bona fide necessary for the vindication of the free verdict of the electorate and the abandonment of the previous poll because it failed to achieve the goal. The article is wide enough to supplement the powers under the Acts. It is true that there may be some guidelines in Sections 58 and 64-A of the 1951 Act and they may be applicable to an order for constituency-wide re-poll. But though it may be wholesome to be guided it is not illegal not to do so provided homage to natural justice is otherwise paid.

(Paras 96, 38 to 41 and 78)

3. Two limitations at least are laid on the plenary character of the power of the Election Commissioner in the exercise thereof. First, when Parliament or any State Legislature has made a valid law relating to or in connection with the elections, the Commission shall act in conformity with and not in violation of such provisions. But where such law is silent, Article 324 is a reservoir of power to act for the avowed purpose of not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, to act bona fide and be amenable to the norms of natural justice insofar as conformance to such canons can reasonably and realistically be required of it, as fairplay-in-action in a most important area of the constitutional order, namely, elections. Fairness does import an obligation to see that no wrongdoer candidate benefits by his own wrong. Natural justice enlivens and applies to the specific case of total re-poll although not in full panoply but in flexible practicability. Whether it has been complied with is

left open for the Tribunal's adjudication. Article 324 is geared to the accomplishment of free and fair elections expeditiously. If it is misused certainly the court has power to strike down the particular action.

(Paras 92 and 39)

Vigrendra v. State of Punjab, 1958 SCR 308 : AIR 1957 SC 896 ; *Harishankar Bagla v. State of M.P.*, (1955) 1 SCR 380 : AIR 1954 SC 465 : 1954 Cri LJ 1322 ; *A.K. Kraipak v. Union of India*, (1970) 1 SCR 457 : (1969) 2 SCC 262, *followed*

In re H.K. (an infant), (1967) 2 QB 617 : (1967) 1 All ER 226 applied.

Ridge v. Baldwin, (1964) AC 40 : (1963) 2 All ER 66, *referred to*

Article 324, on the face of it, vests vast functions which may be powers or duties essentially administrative and marginally even adjudicative or legislative.

(Para 50)

All Party Hill Leaders' Conference v. Capt. W.A. Sangma, (1977) 4 SCC 161, *referred to*

But assuming that the cancellation of the poll were only an administrative act, even then it does not repel the application of the natural justice principle. Good administration demands fairplay in action and this simple desideratum is the fount of natural justice. Classification of functions as "judicial" or "administrative" is a stultifying shibboleth discarded in India as well as in England. When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned therein and cannot be supplemented by fresh reasons in the shape of affidavits or otherwise.

(Paras 51, 53 and 8)

Commissioner of Police v. Gordhandas Bhanji, AIR 1952 SC 16 : 1952 SCR 16 : 1951 SCJ 803, *followed*

(a) The fact that the Election Commission is a high constitutional functionary charged with conducting elections with celerity to bring the new House into being, does not imply that the process of notice and hearing would thwart this imperative and delay the process. It is true that once the process of election has started it should not be interrupted since the temporary slowdown may halt the early constitution of an elected Parliament. Discretion is vested in the Election Commissioner and he will ordinarily use it wisely and not rashly. Yet wide discretion is fraught with tyrannical potential even in high personages. Natural justice is one kind of check on wide power.

(Paras 58, 61 to 63)

Wiseman v. Borneman, (1967) 3 All ER 1945 ; *Howard v. Borneman*, (1974) 3 WLR 660 and *Selvarajan*, (1966) 1 All ER 12, *applied*



Russel v. Duke of Norfolk, (1949) 1 All ER 109 and *Durayappah v. Fernando*, (1967) 2 AC 337 : (1967) 2 All ER 152 (PC), *referred to*

(b) Merely because there was no final determination to the prejudice of any party by directing a re-poll and since the High Court as Election Tribunal is the last word on every objectionable order, it does not mean that the Election Commission is not bound by rules of natural justice. The Election Court can exercise only a limited power of review and must give regard to the Commission's discretion. The trouble and cost of instituting such proceedings would deter all but the most determined of parties aggrieved and even the latter could derive no help from legal principles in predicting whether at the end of the day the court would not condone their summary treatment on a subjective appraisal of the demerits of the case they had been denied the opportunity to present. The public interest would be ill-served by judicially fostered uncertainty as to the value to be set upon procedural fairplay as a canon of good administration.

(Para 72)

Pearlberg v. Varty, (1971) 1 WLR 728 and *Malloch v. Aberdeen Corpn.*, (1971) 1 WLR 1578 :

(1971) 2 All ER 1278, *applied*

(c) It is not correct to say that no candidate could claim anything more than expectation and hence has no crystallised right till official declaration of the result and, therefore, he cannot complain of civil consequences. Every candidate has an interest or right to fair and free and legally run election. A vested interest in the prescribed process is a processual right actionable if breached, the Constitution permitting. The appellant has a right to have the election conducted not according to humour or hubris but according to law and justice. It is true the Election Commissioner in this case was met by the appellant but the hearing was a vacuous one where nothing was disclosed and the appellant was summarily told off.

(Para 66)

Ram Gopal Chaturvedi v. State of M.P. (1970) 1 SCR 472 : (1969) 2 SCC 240 and *Union of India v. Col. J.N. Sinha*, (1971) 1 SCR 791 : (1970) 2 SCC 458, *explained*

State of Orissa v. Dr Binapani Dei, (1967) 2 SCR 625 : AIR 1967 SC 1269 : (1967) 2 LLJ 266, *referred to*

(d) The application of the rule of natural justice would not end in a far flung futility on the ground that hearing will have to be given to every member of the constituency. The candidates have set themselves up as nominated candidates, organised the campaign and galvanised the electorate for the crowning event of polling and counting. Their interest and claim are not indifferent but immediate, not weak but vital. They are more than members of the public. In this sense they stand on a better footing and cannot be denied the right to be heard or noticed and it is not necessary that notice should be given to all the members of the public. In electoral situations if the Election Commission cancels a poll because it is satisfied that the procedure adopted has gone awry on a wholesale basis in such a case no doubt notice need not be given to any member of the constituency. It all depends on the circumstances and the matter is incapable of generalisations. In a situation like the present it is a far cry from natural justice to argue that the whole constituency may have to be given a hearing. It is sufficient if notice is given to the parties to the electoral dispute.

(Para 70)

Board of High School & Intermediate Education, U.P., Allahabad v. Ghanshyam Das Gupta, (1962) Supp 3 SCR 36 : AIR 1962 SC 1110, *referred to*

Bihar School Examination Board v. Subhash Chander Sinha, (1970) 3 SCR 963 : (1970) 1 SCC 618, *distinguished*

It cannot be argued that since hearing is provided for in certain matters, that Parliament when it intended that hearing should be given said so in the Act and the Rules and inferentially where it has not so specified it is not necessary to give any hearing. The silence of a statute has no exclusionary effect except where it flows from necessary implication. Article 324 vests a wide power and where



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some direct consequences on candidates emanate from its exercise, this functional obligation of following the rule of natural justice must be read into it.

(Para 77)

(Any observations made by the Delhi High Court in dismissing the writ petition or by the Supreme Court in disposing of the present matter in appeal from that decision, on merits of the case, would not bind the High Court as an Election Tribunal in disposing of the election petition.)

(Para 9)

Per Goswami and Shinghal, JJ. (concurring)

(1) Article 329(b) rules out the maintainability of the writ application. An election can be challenged only under the provisions of the Representation of the People Act, 1951. Indeed, Section 80 of that Act provides that no election shall be called in question except by an election petition presented in accordance with the provisions of Part IV of the Act. All the substantial reliefs which the appellant seeks in the writ application including the declaration of the election to be void and a declaration of appellant to be duly elected, can be claimed in the election petition. It will be within the power of the High Court as an election court to give all appropriate reliefs and to do complete justice

between the parties. In doing so, it will be open to the High Court to pass any ancillary or consequential order to enable it to grant the necessary relief provided under the Act. One of the prayers of the appellant is for a declaration of the result on the basis of poll which has been cancelled. This is nothing short of seeking to establish the validity of a very important stage in the election process, namely, the poll which has taken place and which is countermanded by the impugned order. If the appellant succeeds the result may be declared if possible on the basis of that poll or some other suitable orders may be passed. If he fails, a fresh poll will take place and the election will be declared on the basis of the fresh poll. This is, in fact, a vital issue which relates to the questioning of the election since the election will be complete only after the fresh poll on the basis of which the declaration of the result will be made. That is, there are no two elections and there is only one continuous process of election. If, therefore during the process of election at an intermediate or final stage, the entire poll has been wrongly cancelled and a fresh poll has been wrongly ordered, that is a matter which may be agitated after declaration of the result on the basis of the fresh poll, by questioning the election in the appropriate forum by means of an election petition in accordance with law. The appellant is thus not without a remedy to question every step in the electoral process and every order that has been passed in the process of the election including the countermanding of the earlier poll. The election court will be able to entertain his objection with regard to the order of the Election Commissioner countermanding the earlier poll and the whole matter will be at large. There is, therefore, no foundation for the grievance that the appellant will be without remedy if the writ application is dismissed. The High Court was, therefore, right in dismissing the writ petition

(Paras 126 and 123)

(2) Article 324(1) is couched in wide terms. When appropriate laws are made under Article 327 by Parliament or under Article 328 by the State Legislatures the Election Commission has to act in conformity with those laws and the other legal provisions made thereunder. Even so, both the Articles — Articles 327 and 328 are subject to the provisions of the Constitution which include Articles 324 and 329. The framers of the Constitution took care to leave scope for the exercise of the residuary power by the Commission in its own right as a creature of the Constitution in the infinite variety of situations that may emerge from time to time in our large democracy. The Commission may be required to cope with some situations which may not have been provided for in the enacted laws and rules. The Election Commission is a high-powered and independent body and its objective cannot be achieved unless it has an amplitude of powers in the conduct of elections — of course in accordance with the existing laws. But where they are absent, and yet a situation has to be tackled, the Election Commissioner has the power to deal with the situation. The Election Commissioner must lawfully exercise his power independently in all matters relating to the conduct of elections



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and see that the election process is completed. The express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence, of limitation, the authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty. The Chief Election Commissioner has thus to pass appropriate orders on receipt of reports from the Returning Officer with regard to any situation arising in the course of an election, and power cannot be denied to him to pass such appropriate orders. Moreover, such power has to be exercised with promptitude. Whether an order passed is wrong, arbitrary or otherwise invalid, relates to the mode of exercising the power under Article 324.

(Paras 113 and 114)

Sections 58 and 64(A) envisage the necessity for the cancellation of poll and ordering of re-poll in particular polling stations where the situation may warrant such a course. When provision is made in the Act it cannot be said that if a general situation arises whereby numerous polling stations may witness serious mal-practices the power should be denied to the Election Commission to take an appropriate decision. The fact that a particular Chief Election Commissioner may take certain decisions unlawfully or arbitrarily is not the test in such a case. Under both the sections poll that was taken at a particular situation can be voided and a fresh poll can be ordered by the Commission. These provisions cannot, therefore, be said to rule out the making of an order to deal with a similar situation in a substantially large area or the whole constituency.

(Paras 117 and 118)

The contention that the President can revoke, alter or amend the notification under Section 14 of the Act or that he promulgates an Ordinance in an appropriate case does not touch the question of the power of the Election Commissioner. That question will have to be decided on the scope of Article 324(1). It is true that in exercising the powers under the article the Election Commission cannot do something impinging upon the power of the President; but after the notification has been issued by the President, the entire electoral process is in the charge of the Election Commission, and the Commission is exclusively responsible for the conduct of the election without reference to any outside agency. When a poll that has already taken place has been cancelled and a fresh poll has been ordered, the order with the amended date is passed as an integral part of the electoral process. It, therefore, necessarily follows that if there is any illegality in the exercise of the power under Article 324 or under any provisions of the Act, there is no reason why Section 100(1)(d)(iv) of the Act should not be attracted to it.

(Paras 120, 122 and 125)

Durga Shanker Mehta v. Thakur Raghuraj Singh, (1955) 1 SCR 267 : AIR 1954 SC 520 : 9 ELR 444, followed

(3) In view of the conclusion that the High Court had no jurisdiction to entertain the writ petition under Article 226 it would not be correct for the Supreme Court in an appeal against the order of the High Court to enter into any other controversy on the merits either on law or on facts and to pronounce finally on the same. Any view expressed by the High Court or the Supreme Court would not bind the High Court as an Election Tribunal in disposing of the election petition. Being not altogether certain of all the facts that may be made available in the appropriate forum it may be a premature exercise by the Supreme Court even to lay down guidelines when there is no hide-bound formula or rule of natural justice to operate in all cases and at all times when a decision has to be made. Justice and fair-play have often to be harmonised to the exigencies of the situation in the light of accumulated totality of circumstances in a given case having regard to the question of prejudice, not to the mere combatants in the electoral contest, but the real and larger issue of the completion of a free and fair election with rigorous promptitude. This Court will not, therefore, make the task of the election court difficult and embarrassing by suggesting guidelines in a rather twilight zone.

(Paras 127 and 130)

S-M/3762/C



The Judgment of the Court was delivered by

V.R. KRISHNA IYER, J. (*for himself, Beg, C.J. and Bhagwati, J.*)— What troubles us in this appeal, coming before a Bench of 5 Judges on a reference under Article 145(3) of the Constitution, is not the profusion of controversial facts nor the thorny bunch of lesser law, but the possible confusion about a few constitutional fundamentals, finer administrative normae and jurisdictional limitations bearing upon elections. What are those fundamentals and limitations? We will state them, after mentioning briefly what the writ petition, from which this appeal, by special leave, has arisen, is about.

THE BASICS

2. Every significant case has an unwritten legend and indelible lesson. This appeal is no exception, whatever its formal result. The message, as we will see at the end of the decision, relates to the pervasive philosophy of democratic elections which Sir Winston Churchill vivified in matchless, words:

“At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper — no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point.”

If we may add, the little, large Indian shall not be hijacked from the course of free and

fair elections by mob muscle methods, or subtle perversion of discretion by men "dressed in little, brief authority". For "be you ever so high, the law is above you".

3. The moral may be stated with telling terseness in the words of William Pitt: "Where laws end, tyranny begins". Embracing both these mandates and emphasising their combined effect is the elemental law and politics of power best expressed by Benjamin Disraeli¹:

"I repeat ... that all power is a trust — that we, are accountable for its exercise — that, from the people and for the people, all springs, and all must exist."

Aside from these is yet another, bearing on the play of natural justice, its nuances, non-applications, contours, colour and content. Natural justice is no mystic testament of Judge-made juristics but the pragmatic, yet principled, requirement of fairplay in action as the norm of a civilised justice-system and minimum of good government — crystallised clearly in our jurisprudence by a catena of cases here and elsewhere.

THE CONSPECTUS OF FACTS

4. The historic elections to Parliament, recently held across the country, included a constituency in Punjab called 13-Ferozepore parliamentary constituency. It consisted of nine assembly segments and the polling took place on March 16, 1977. According to the calendar notified by the Election Commission. The counting took place in respect of five assembly segments on March 20, 1977 and the remaining four on the next day. The appellant and the third respondent were the principal contestants. It is stated by the appellant that when counting in all the assembly segments was completed at the respective segment headquarters, copies of the results



were given to the candidates and the local tally telephonically communicated to the Returning Officer (Respondent 2). According to the scheme the postal ballots are to arrive at the returning officer's headquarters at Ferozepore where they are to be counted. The final tally is made when the ballot boxes and the returns duly reach the Ferozepore headquarters from the various segment headquarters. The poll proceeded as ordained, almost to the very last stages, but the completion of the counting at the constituency headquarters in Ferozepore was aborted at the final hour as the postal ballots were being counted — thanks to mob violence allegedly mobilised at the instance of the third respondent. The appellant's version is that he had all but won on the total count by a margin of nearly 2000 votes when the panicked opposite party havoced and halted the consummation by muscle tactics. The postal ballot papers were destroyed. The ballot boxes from the Fazilka segment were also done away with en route, and the Returning Officer was terrified into postponing the declaration of the result. On account of an earlier complaint that the Returning Officer was a relation of the appellant, the Election Commission (hereinafter referred to as "Commission") had deputed an officer of the Commission — Shri IKK Menon — as observer of the poll process in the constituency. He was present as the Returning Officer started the last stage operations on March 21, from 3 p.m. onwards. Thus the Returning Officer had the company of the observer with him during the crucial stages and controversial eruptions in the afternoon of March 21. Shortly after sunset, presumably, the Returning Officer who under compulsion had postponed the concluding part of the election, reported the happenings by wireless message to the Election Commission. The observer also reached Delhi and gave a written account and perhaps an oral narration of the untoward events which marred what would otherwise have been a smooth finish to the election.

5. Disturbed by the disruption of the declaratory part of the election, the appellant, along with a former Minister of the State, met the Chief Election Commissioner (i.e. the Commission) at about 10.30 a.m. on March 22, with the request that he should direct the Returning Officer to declare the result of the election. Later in the day, the Commission issued an order which has been characterised by the appellant as a lawless and precedentless cancellation of the whole poll, acting by hasty hunch and without rational appraisal of facts. By March 22, when the Election Commission made the impugned order, the bulk of the electoral results in the country had beamed in. The gravamen of the grievance of the appellant is that while he had, in all probability, won the poll, he had been deprived of this valuable and hard-won victory by the arbitrary action of the Commission going contrary to fairplay and in negation of the basic canons of natural justice. Of course, the Commission did not stop with the cancellation but followed it up a few days later with a direction to hold a fresh poll for the whole constituency, involving all the nine segments. although there were no complaints about the polling in any of the constituencies and the ballot papers of eight constituencies were available intact with the Returning Officer and only Fazilka segment ballot papers were destroyed or damaged on the way, (plus the postal ballots) It must



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also be mentioned here that a demand was made, according to the version of the third respondent, for recount in one segment which was, unreasonably, turned down. The observer, in his report to the Election Commission, also mentioned that in two polling stations divergent practices were adopted in regard to testing valid and invalid votes. To be more precise, Shri IKK Menon mentioned in his report that at Polling Station 8, the presiding officer's seal on the tag as well as the paper seal of one box was broken. But the ballot papers contained in that box were below 300 and would not have affected the result in the normal course. In another case in Jalalabad assembly segment, the Assistant Returning Officer had rejected a number of ballot papers of a polling station on the score that they were not signed by the presiding officer. In yet another case it was reported that the ballot papers were neither signed nor stamped but were accepted by the assistant Returning Officer as valid, although the factum was not verified by Shri Menon with the assistant returning officer. Shri Menon, in his report, seems to have broadly authenticated the story of the mob creating a tense situation leading to the military being summoned. According to him only the ballot papers of Fazilka assembly segment were destroyed, not of the other segments. Even regarding Fazilka, the result sheet had arrived. So far as Zira assembly segment was concerned, some documents (not the ballot papers) had been snatched away by hooligans. The observer had asked the Returning Officer to send a detailed report over and above the wireless message. That report, dated March 21, reached the Commission on March 23, but, without waiting for the report — we need not probe the reasons for the hurry — the Commission issued the order cancelling the poll. The Chief Election Commissioner has filed a laconic affidavit leaving to the Secretary of the Commission to go into the details of the facts, although the Chief Election Commissioner must himself have had them within his personal ken. This aspect also need not be examined by us and indeed cannot be, for reasons which we will presently set out.

6. Be that as it may, the Chief Election Commissioner admitted in his affidavit that the appellant met him in his office on the morning of March 22, 1977 with the request that the Returning Officer be directed to declare the result. He agreed to consider and

told him off, and eventually passed an order as mentioned above. The then Chief Election Commissioner has mentioned in his affidavit that the observer Shri Menon had apprised him of "the various incidents and developments regarding the counting of votes in the constituency" and also had submitted a written report. He has also admitted the receipt of the wireless message of the returning officer. He concludes his affidavit: "that after taking all these circumstances and information including the oral representation of the first petitioner into account on March 22, 1977 itself I passed the order cancelling the poll in the said parliamentary constituency. In my view this was the only proper course to adopt in the circumstances of the case and with a view to ensuring fair and free elections, particularly when even a recount had been rendered impossible by reason of the destruction of ballot papers". The order of the Election Commission, resulting in the demolition of the poll already held, may be read at this



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stage:

ELECTION COMMISSION OF INDIA

New Delhi Dated March 22, 1977 Chaitra 1, 1889 (Saka)

NOTIFICATION

S.O. Whereas the Election Commission has received reports from the Returning Officer of 13-Ferozepore parliamentary constituency that the counting on March 21, 1977 was seriously disturbed by violence; that the ballot papers of some of the assembly segments of the parliamentary constituency have been destroyed by violence; that as a consequence it is not possible to complete the counting of the votes in the constituency and the declaration of the result cannot be made with any degree of certainty;

And whereas the Commission is satisfied that taking all circumstances into account, the poll in the constituency has been vitiated to such an extent as to affect the result of the election;

Now, therefore, the Commission in exercise of the powers vested in it under Article 324 of the Constitution, Section 153 of the Representation of the People Act, 1951 and all other powers enabling it so to do, cancels the poll already taken in the constituency and extends the time for the completion of the election up to April 30, 1977 by amending its Notification 464/77 dated February 25, 1977 in respect of the above election as follows:

In clause (d) of Item (i) of the said notification relating to the completion of election—

(a) in the existing item (i), after the words 'State of Jammu and Kashmir', the words and 13-Ferozepore parliamentary constituency in the State of Punjab" shall be inserted; and

(b) the existing item (ii) shall be renumbered as item (iii), and before the item (iii) as so renumbered, the following item shall be inserted, namely:

(iii) April 30, 1977 (Saturday) as the date before which the election shall be completed in 13-Ferozepore parliamentary constituency in the State of Punjab. (464/77) By order

sd/-

A.N. Sen, Secretary.

The Commission declined to reconsider his decision when the appellant pleaded for it. Shocked by the liquidation of the entire poll, the latter moved the High Court under

Article 226 and sought to void the order as without jurisdiction and otherwise arbitrary and violative of any vestige of fairness. He was met by the objection, successfully urged by Respondents 1 and 3, that the High Court had no jurisdiction in view of Article 329(b) of the Constitution and the Commission had acted within its wide power under Article 324 and fairly. Holding that it had no jurisdiction to entertain the writ petition, the High Court nevertheless proceeded to enter verdicts on the merits of all the issues virtually exercising even the entire jurisdiction which exclusively belonged to the Election Tribunal. The doubly damnified appellant has come up to this Court in appeal by special leave.



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7. Meanwhile, pursuant to the Commission's direction, a re-poll was held. Although the appellant's name lingered on the ballot he did not participate in the re-poll and Respondent 3 won by an easy plurality although numerically those who voted were less than half of the previous poll. Of course, if the Commission's order for re-poll fails in law, the second electoral exercise has to be dismissed as a stultifying futility. Two things fall to be mentioned at this stage, but, in passing, it may be stated that the third respondent had complained to the Chief Election Commissioner that the assistant Returning Officer Fazilka segment had declined the request for recount unreasonably and that an order for re-poll of the Fazilka assembly part should be made "after giving personal hearing". Meanwhile, runs the request of the third respondent: "direct the Returning Officer to withhold declaration of result of 13-Ferozepore parliament constituency". We do not stop to make inference from this document but refer to it as a material factor which may be considered by the tribunal which, eventually, has to decide the factual controversy.

8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji*²:

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older.

A CAVEAT

9. We must, in limine, state that — anticipating our decision on the blanket ban on litigative interference during the process of the election, clamped down by Article 329 (b) of the Constitution — we do not propose to enquire into or pronounce upon the factual complex or the lesser legal tangles, but only narrate the necessary circumstances of the case to get a hang of the major issues which we intend adjudicating. Moreover, the scope of any factual investigation in the event of controversion in any petition under Article 226 is ordinarily limited and we have before us an appeal from the High Court dismissing a petition under Article 226 on the score

that such a proceeding is constitutionally out of bounds for any court, having regard to the mandatory embargo in Article 329(b). We should not, except in exceptional circumstances, breach the recognised, though not inflexible, boundaries of Article 226 sitting in appeal, even assuming the maintainability of such a petition. Indeed, we should have expected the High Court to have considered the basic jurisdictional issue



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first, and not last as it did, and avoided sallying forth into a discussion and decision on the merits, self-contradicting its own holding that it had no jurisdiction even to entertain the petition. The learned Judges observed:

“It is true that the submission at Serial No. 3 above in fact relates to the preliminary objection urged on behalf of Respondents 1 and 3 and should normally have been dealt with first but since the contentions of the parties on submission 1 are intermixed with the interpretation of Article 329(b) of the Constitution, we thought it proper to deal with them in the order in which they have been made.”

This is hardly convincing alibi for the extensive *per incuriam* examination of facts and law gratuitously made by the Division Bench of the High Court, thereby generating apprehensions in the appellant's mind that not only is his petition not maintainable but he has been damned by damaging findings on the merits. We make it unmistakably plain that the election court hearing the dispute on the same subject under Section 98 of the RP Act, 1951 (for short, the Act) shall not be moved by expressions of opinion on the merits made by the Delhi High Court while dismissing the writ petition. An obiter binds none, not even the author, and obliteration of findings rendered in supererogation must allay the appellant's apprehensions. This Court is in a better position than the High Court, being competent, under certain circumstances, to declare the law by virtue of its position under Article 141. But, absent such authority or duty, the High Court should have abstained from its generosity. Lest there should be any confusion about possible slants inferred from our synoptic statements, we clarify that nothing projected in this judgment is intended to be an expression of our opinion, even indirectly. The facts have been set out only to serve as a peg to hang three primary constitutional issues which we will formulate a little later.

OPERATION ELECTION

10. Before we proceed further, we had better have a full glimpse of the constitutional scheme of elections in our system and the legislative follow-up regulating the process of election. Shri Justice Mathew in *Indira Nehru Gandhi*³ summarised, skeletal fashion, this scheme following the pattern adopted by Fazl Ali, J. in *Ponnuswami*⁴. He explained: (SCC p. 120, paras 268 & 269)

“The concept of democracy as visualized by the Constitution presupposes the representation of the people in Parliament and State Legislatures by the method of election. And, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Articles 327 and 328 deal with the first of these requisites. Article 324 with the second and Article 329 with the third requisite (see *N.P. Ponnuswami v. Returning Officer, Namakkal*

Constituency).

Article 329(b) envisages the challenge to an election by a petition to be presented to such authority as the Parliament may, by law, prescribe. A law



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relating to election should contain the requisite qualifications for candidates, the method of voting, definition of corrupt practices by the candidates and their election agents, the forum for adjudication of election disputes and other cognate matters. It is on the basis of this law that the question whether there has been a valid election has to be determined by the authority to which the petition is presented. And, when a dispute is raised as regards the validity of the election of a particular candidate, the authority entrusted with the task of resolving the dispute must necessarily exercise a judicial function, for, the process consists of ascertaining the facts relating to the election and applying the law to the facts so ascertained."

11. A short description of the legislative project in some more detail may be pertinent, especially touching on the polling process in the booths and the transmission of ballot boxes from the polling stations to the returning officer's ultimate counting station and the crucial prescriptions regarding announcements and recounts and declarations. We do not pronounce upon the issues regarding the stage for and right of recount, the validity of votes or other factual or legal disputes since they fall for decision by the Election Court where the appellant has filed an election petition by way of abundant caution.

12. A free and fair election based on universal adult franchise is the basic; the regulatory procedures vis-a-vis the repositories of functions and the distribution of legislative, executive and judicative roles in the total scheme, directed towards the holding of free elections, are the specifics. Part XV of the Constitution plus the Representation of the People Act, 1950 (for short, "the 1950 Act") and the Representation of the People Act, 1951 (for short, "the Act"), Rules framed thereunder, instructions issued and exercises prescribed, constitute the package of electoral law governing the parliamentary and assembly elections in the country. The super-authority is the Election Commission, the kingpin is the returning officer, the minions are the presiding officers in the polling stations and the electoral engineering is in conformity with the elaborate legislative provisions.

13. The scheme is this. The President of India (under Section 14) ignites the general elections across the nation by calling upon the people, divided into several constituencies and registered in the electoral rolls, to choose their representatives to the Lok Sabha. The constitutionally appointed authority, the Election Commission, takes over the whole conduct and supervision of the mammoth enterprise involving a plethora of details and variety of activities, and starts off with the notification of the time-table for the several stages of the election (Section 30). The assembly line operations then begin. An administrative machinery and technology to execute these enormous and diverse jobs is fabricated by the Act, creating officers, powers and duties, delegation of functions and location of polling stations. The precise exercises following upon the calendar for the poll commencing from presentation of nomination papers, polling drill and felling of votes, culminating in the declaration and report of results are covered by specific prescriptions in the Act and the Rules. The secrecy of the ballot, the authenticity of the voting paper and its later identifiability with reference to particular polling stations, have been thoughtfully provided for. Myriad other matters necessary for smooth elections have been taken care of by several provisions of the Act.



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14. The wide canvas so spread need not engage us sensitively, since such diffusion may weaken concentration on the few essential points concerned in this case. One such aspect relates to re-poll. Adjournment of the poll at any polling station in certain emergencies is sanctioned by Section 57 and fresh poll in specified vitiating contingencies is authorised by Section 58. The Rules run into more particulars. After the votes are cast comes their counting. Since the simple plurality of votes clinches the verdict, as the critical moment approaches, the situation is apt to hot up, disturbances erupt and destruction of ballots disrupt. If disturbance or destruction demolishes the prospect of counting the total votes, the number secured by each candidate and the ascertainment of the will of the majority, a re-poll confined to disrupted polling stations is provided for. Section 64-A chalks out the conditions for and course of such re-poll, spells out the power and repository thereof and provides for kindred matters. At this stage we may make a closer study of the provisions regarding re-poll systematically and stagewise arranged in the Act. It is not the case of either side that a total re-poll of an *entire constituency* is specified in the sections or the Rules. Reliance is placed for this wider power upon Article 324 of the Constitution — by the Commission in its order, by the first respondent in his affidavit, by the learned Addl. Solicitor-General in his argument and by the third respondent through his counsel. We may therefore have to study the scheme of Article 324 and the provisions of the Act together since they are integral to each other. Indeed, if we may mix metaphors for emphasis, the legislation made pursuant to Article 327 and that part of the Constitution specially devoted to elections must be viewed as one whole picture, must be heard as an orchestrated piece and must be interpreted as one package of provisions regulating perhaps the most stressful and strategic aspect of democracy-in-action so dear to the nation and so essential for its survival.

THE LIS AND THE ISSUES

15. Two prefatory points need to be mentioned as some reference was made to them at the Bar. Firstly, an election dispute is not like an ordinary lis between private parties. The entire electorate is vicariously, not inertly, before the Court. (See *Inamati Mallappa Basappa v. Desai Besavaraj Ayyappa*⁵). We may, perhaps, call this species of cases *collective litigation* where judicial activism assures justice to the constituency, guardians the purity of the system and decides the rights of the candidates. In this class of cases, where the common law tradition is partly departed from, the danger that the active Judge may become, to some extent, the prisoner of his own prejudices exists; and so, notwithstanding his powers of initiative, the parties' role in the formulation of the issues and in the presentation of evidence and argument should be substantially maintained and care has to be taken that the circle does not become a vicious one, as pointed out by J.A. Jolowicz in "*Public Interest Parties and the Active Role of the Judge in Civil Litigation*" (see p. 276). Therefore, it is essential that courts, adjudicating upon election controversies, must play a warily active role, conscious all the time that every decision rendered



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by the Judge transcends private rights and defends the constituency and the

democracy of the country.

16. Secondly, the pregnant problem of power and its responsible exercise is one of the perennial riddles of many a modern constitutional order. Similarly, the periodical process of free and fair elections, uninfluenced by the caprice, cowardice or partisanship of hierarchical authority holding it and unintimidated by the trust, tantrum or vandalism of strongarm tactics, exacts the embarrassing price of vigilant monitoring. Democracy digs its grave where passions, tensions and violence, on an overpowering spree, upset results of peaceful polls, and the law of elections is guilty of sharp practice if it hastens to legitimate the fruits of lawlessness. The judicial branch has a sensitive responsibility here to call to order lawless behaviour. Forensic non-action may boomerang, for the court and the law are functionally the bodyguards of the people against bumptious power, official or other.

17. We now enter the constitutional zone relating to the controversy in this case. Although both sides have formulated the plural problems with some divergence, we may compress them into three cardinal questions:

“(1) Is Article 329(b) a blanket ban on all manner of questions which may have impact on the ultimate result of the election, arising between two temporal termini viz. the notification by the President calling for the election and the declaration of the result by the returning officer? Is Article 226 also covered by this embargo and, if so, is Section 100 broad enough to accommodate every kind of objection, constitutional, legal or factual, which may have the result of invalidation of an election and the declaration of the petitioner as the returned candidate and direct the organisation of any steps necessary to give full relief?

(2) Can the Election Commission, clothed with the comprehensive functions under Article 324 of the Constitution, cancel the whole poll of a constituency after it has been held, but before the formal declaration of the result has been made, and direct a fresh poll without reference to the guidelines under Sections 58 and 64(A) of the Act, or other legal prescription or legislative backing? If such plenary power exists, is it exercisable on the basis of his inscrutable “subjective satisfaction” or only on a reviewable objective assessment reached on the basis of circumstances vitiating a free and fair election and warranting the stoppage of declaration of the result and directions of a fresh poll not merely of particular polling stations but of the total constituency?

(3) Assuming a constitutionally vested capacity under Article 324 to direct re-poll, is it exercisable only in conformity with natural justice and geared to the sole goal of a free, popular verdict if frustrated on the first occasion? Or, is the Election Commission immune to the observance of the doctrine of natural justice on account of any recognised exceptions to the application of the said



principle and unaccountable for his action even before the Election Court?”

18. The juridical aspect of these triple questions alone can attract judicial jurisdiction. However, even if we confine ourselves to legal problematics, eschewing the political overtones, the words of Justice Holmes will haunt the Court: “We are quiet here, but it is the quiet of a storm centre.” The judicature must, however, be illumined in its approach by a legal — sociological guideline and a principled-pragmatic insight in resolving with jural tools and techniques, “the various crises of human affairs” as they reach the forensic stage and seek dispute-resolution in terms of the rule of law. Justice Cardozo felicitously set the perspective:

“The great generalities of the Constitution have a content and significance that vary from age to age.”

Chief Justice Hidayatullah perceptively articulated the insight:

“One must, of course, take note of the synthesized authoritative content or the moral meaning of the underlying principle of the prescriptions of law, but not ignore the historic evolution of the law itself or how it was connected in its changing moods with social requirements of a particular age.”

19. The old articles of the *supreme lex* meet new challenges of life, the old legal pillars suffer new stresses. So we have to adopt the law and develop its latent capabilities if novel situations, as here, are encountered. That is why in the reasoning we have adopted and the perspective we have projected, not literal nor lexical but liberal and visional is our interpretation of the articles of the Constitution and the provisions of the Act. Lord Denning's words are instructive:

“Law does not stand still. It moves continually. Once this is recognised, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect — thinking of the structure as a whole building for society a system of law which is strong, durable and just. It is on his work that civilised society itself depends.”

THE INVULNERABLE BARRIER OF ARTICLE 329(b)

20. Right at the forefront stands in the way of the appellant's progress the broad-spectrum ban of Article 329(b) which, it is claimed for the respondents, is imperative and goal-oriented. Is this Great Wall of China, set up as a preliminary bar, so impregnable that it cannot be bypassed even by Article 226? That, in a sense, is the key question that governs the fate of this appeal. Shri P.P. Rao for the appellant contended that, however, wide Article 329(b) may be it does not debar proceedings challenging, not the steps promoting, election but dismantling it, taken by the Commission without the backing of legality. He also urged that his client, who had been nearly successful in the poll and had been deprived of it by an illegal cancellation by the Commission, would be left in the cold without any remedy since the challenge to cancellation of the completed poll in the entire constituency was not covered by Section 100 of the Act. Many subsidiary pleas also were put forward but we will



focus on the two interrelated submissions bearing on Article 329(b) and Section 100 and search for a solution. The problem may seem prickly but an imaginative application of principles and liberal interpretation of the Constitution and the Act will avoid anomalies and assure justice. If we may anticipate our view which will presently be explained, Section 100(1)(d)(iv) of the Act will take care of the situation present here, being broad enough, as a residual provision, to accommodate, in the expression “non-compliance”, every excess, transgression, breach or omission. And the span of the ban under Article 329(b) is measured by the sweep of Section 100 of the Act.

21. We have to proceed heuristically now. Article 329(b) reads:

“Notwithstanding anything in this Constitution—

(b) no election to either House of Parliament or to the House or either House of the legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature.”

Let us break down the prohibitory provision into its components. The sole remedy for an aggrieved party, if he wants to challenge any election, is an election petition. And this exclusion of all other remedies includes constitutional remedies like Article 226 because of the non obstante clause. If what is impugned is an election the ban operates provided the proceeding "calls it in question" or puts it in issue; not otherwise. What is the high policy animating this inhibition? Is there any interpretative alternative which will obviate irreparable injury and permit legal contests in between? How does Section 100(1)(d)(iv) of the Act integrate into the scheme? Let us read Section 100 here:

"Subject to the provisions of sub-section (2) if (the High Court) is of opinion—

* * *

(d) that the result of the election, insofar as it concerns a returned candidate, has been materially affected—

* * *

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any Rules or orders made under this Act.

the High Court shall declare the election of the returned candidate to be void.

The companion provision viz. Section 98 also may be extracted at this stage:

"At the conclusion of the trial of an election petition (the High Court) shall make an order—

(a) dismissing the election petition; or

(b) declaring the election of all or any of the returned candidates to be void;

or

(c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected."

Now arises the need to sketch the scheme of Section 100 in the setting of Article 329 (b). The troublesome word "non-compliance" holds in its fold a teleologic signification which resolves the riddle of this case in a way.



So we will address ourselves to the meaning of meanings, the values within the words and the project unfolded. This will be taken up one after the other.

22. At the first blush we get the comprehensive impression that every calling in question of an election save, at the end, by an election petition, is forbidden. What, then, is an election? What is "calling in question"? Every step from start to finish of the total process constitutes "election", not merely the conclusion or culmination. Can the cancellation of the entire poll be called a step in the process and for the progress of an election, or is it a reverse step of undoing what has been done in the progress of the election, a non-step or anti-step setting at nought the process and, therefore, not a step towards the goal and hence liberated from the coils of Article 329(b)? And, if this act or step were to be shielded by the constitutional provision, what is an aggrieved party to do? This takes us to the enquiry about the ambit of Section 100 of the Act and the object of Article 329(b) read with Article 324. Such is the outline of the complex issue projected before us.

THE ELECTION PHILOSOPHY AND THE PRINCIPLE IN PONNUSWAMI

23. Democracy is government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude,

marking his vote at the poll does a social audit of his Parliament plus political choice of this proxy. Although the full flower of participative Government rarely blossoms, the minimum credential of popular Government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions. "The right of election is the very essence of the constitution" (Junius). It needs little argument to hold that the heart of the Parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more.

24. *Ponnuswami* is a landmark case in election laws and deals with the scope, amplitude, rationale and limitations of Article 329(b). Its ratio has been consistently followed by this Court in several rulings through *Durga Shankar Mehta v. Thakur Raghuraj Singh*⁷ and *Hari Vishnu Kamath*⁸ and *Khare*⁹ down to *Indira Gandhi*¹⁰. The factual setting in that case may throw some light on the decision itself. The appellant's nomination for election to the Madras Legislative Assembly was rejected by the Returning Officer and so he hurried to the High Court praying for a writ of certiorari to quash the order of rejection, without waiting for the entire elective process to run its full course and, at the end of it, when the results also were declared, to move the Election Tribunal for setting aside the result of the election conducted without his participation. He



thought that if the election proceeded without him irreparable damage would have been caused and therefore sought to intercept the progress of the election by filing a writ petition. The High Court dismissed it as unsustainable, thanks to Article 329(b) and this Court in appeal, affirmed that holding. Fazl Ali, J. virtually spoke for the Court and explained the principle underlying Article 329(b). The ambit and spirit of the bar imposed by the article was elucidated with reference to the principle that "it does not require much argument to show that in a country with a democratic Constitution in which the legislatures have to play a very important role, it will lead to serious consequences if the elections are unduly protracted or obstructed". In the view of the learned Judge, immediate individual relief at an intermediate stage when the process of election is underway has to be sacrificed for the paramount public good of promoting the completion of elections. Fazl Ali, J. ratiocinated on the ineptness of interlocutory legal holdups. He posed the issue and answered it thus:

"The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to describe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question, could be urged. I think it follows by

necessary implication from the language of this provision that *those grounds cannot be urged in any other manner, at any other stage and before any other court*. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any are rectified, there will be no meaning in enacting a provision like Article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the Election Tribunal, which is to be an independent body, at the stage when the matter is brought before it."

25. Having thus explaining the *raison d'etre* of the provision, the Court proceeded to interpret the concept of election in the scheme of Part XV of the Constitution and the Representation of the People Act, 1951. Articles 327 and 328 take care of the set of laws and Rules making provisions with respect to all matters relating to or in connection with elections. Election disputes were also to be provided for by laws made under Article 327. The Court emphasised that Part XV of the Constitution was really a code in itself, providing the entire groundwork for enacting the appropriate laws and setting up suitable machinery for the conduct of elections. The scheme of the Act enacted by Parliament was also set out by Fazl Ali, J.:



"Part VI deals with disputes regarding elections and provides for the manner of presentation of election petitions, the constitution of Election Tribunals and the trial of election petitions. Part VII outlines the various corrupt and illegal practices which may affect the elections, and electoral offences. Obviously, the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the Rules made thereunder. The provisions of the Act which are material to the present discussion are Sections 80, 100, 105 and 170, and the provisions of Chapter II of Part IV dealing with the form of election petitions, their contents and the reliefs which may be sought in them. Section 80 which is drafted in almost the same language as Article 329(b) provides that 'no election shall be called in question except by an election petition presented in accordance with the provisions of this Part'. Section 100, as we have already seen, provides for the grounds on which an election may be called in question, one of which is the improper rejection of a nomination paper. Section 105 says that 'every order of the Tribunal made under this Act shall be final and conclusive'. Section 170 provides that 'no civil court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or by any other person appointed under this Act in connection with an election'."

There have been amendments to these provisions but the profile remains substantially the same. After pointing out that the Act, in Section 80, and the Constitution, in Article 329(b), speak substantially the same language and inhibit other remedies for election grievances except through the election tribunal, the Court observed:

"That being so, I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage."

There is a non obstante clause in Article 329 and, therefore, Article 226 stands pushed out where the dispute takes the form of calling in question an election, except in special situations pointed at but left unexplored in *Ponnuswami*

26. The heart of the matter is contained in the conclusions summarised by the Court thus:

“(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the ‘election’; and, if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the ‘election’ and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress.”

After elaborately setting out the history in England and in India of election legislation vis-a-vis dispute-resolution, Fazl Ali, J. stated:

“If the language used in Article 329(b) is considered against this historical background, it should not be difficult to see why the framers of the Constitution framed that provision in its present form and chose the language which had been



consistently used in certain earlier legislative provisions and which had stood the test of time.”

Likewise the Court discussed the connotation of the expression “election” in Article 329 and observed:

“That word has by long usage in connection with the process of selection or proper representatives in domestic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote *the entire process culminating in a candidate being declared elected* it seems to me that the word ‘election’ has been used in Part XV of the Constitution in the wide sense, that is to say, *to connote the entire procedure to be gone through to return a candidate to the legislature* That the word “election” bears this wide meaning whenever we talk of elections in a democratic country, is borne out by the fact that in most of the books on the subject and in several cases dealing with the matter, one of the questions mooted is, when the election begins?”

The rainbow of operations, covered by the compendious expression “election”, thus commences from the initial notification and culminates in the declaration of the return of a candidate. The paramount policy of the Constitution-framers in declaring that no election shall be called in question except the way it is provided for in Article 329(b) and the Representation of the People Act, 1951, compels us to read, as Fazl Ali, J. did in *Ponnuswami* the Constitution and the Act together as an integral scheme. The

reason for postponement of election litigation to the post-election stage is that elections shall not unduly be protracted or obstructed. The speed and promptitude in getting due representation for the electors in the legislative bodies is the real reason suggested in the course of judgment.

27. Thus far everything is clear. No litigative enterprise in the High Court or other court should be allowed to hold up the on-going electoral process because the parliamentary representative for the constituency should be chosen promptly. Article 329 therefore covers "electoral matters". One interesting argument, urged without success in *Ponnuswami* elicited a reasoning from the Court which has some bearing on the question in the present appeal. That argument was that if nomination was part of election a dispute as to the validity of the nomination was a dispute relating to election and could be called in question, only after the whole election was over, before the Election Tribunal. This meant that the Returning Officer could have no jurisdiction to decide the validity of a nomination, although Section 36 of the Act conferred on him that jurisdiction. The learned Judge dismissed this argument as without merit, despite the great dialectical ingenuity in the submission. In this connection the learned Judge observed:

"Under Section 36 of the Representation of the People Act, 1951, it is the duty of the Returning Officer to scrutinize the nomination papers to ensure that they comply with the requirements of the Act and decide all objections which may be made to any nomination. It is clear that unless this duty is discharged properly, any number of candidates may stand for election without complying with the provisions of the Act and a great deal of confusion may ensue. In discharging the statutory duty imposed on him, the Returning Officer does not call in question



any election. Scrutiny of nomination papers is only a stage, though an important stage, in the election process. It is one of the essential duties to be performed before the election can be completed, and anything done towards the completion of the election proceeding can by no stretch of reasoning be described as questioning the election. The fallacy of the argument lies in treating a single step taken in furtherance of an election as equivalent to election. The decision of this appeal however turns not on the construction of the single word 'election', but on the construction of the compendious expression — 'no election shall be called in question' in its context and setting, with due regard to the scheme of Part XV of the Constitution and the Representation of the People Act, 1951. Evidently, the argument has no bearing on this method of approach to the question posed in this appeal, which appears to me to be the only correct method."

28. What emerges from this perspicacious reasoning, if we may say so with great respect, is that any decision sought and rendered will not amount to "calling in question" an election if it subserves the progress of the election and facilitates the completion of the election. We should not slur over the quite essential observation "Anything done *towards the completion of the election proceeding* can by no stretch of reasoning be described as questioning the election." Likewise, it is fallacious to treat "a single step taken in *furtherance* of an election" as equivalent to election.

29. Thus, there are two types of decisions, two types of challenges. The first relates to proceedings which interfere with the progress of the election. The second accelerates the completion of the election and acts in furtherance of an election. So, the short question before us, in the light of the illumination derived from *Ponnuswami* is as to whether the order for re-poll of the Chief Election Commissioner is "anything

done towards the completion of the election proceeding” and whether the proceedings before the High Court facilitated the election process or halted its progress. The question immediately arises as to whether the relief sought in the writ petition by the present appellant amounted to calling in question the election. This, in turn, revolves round the point as to whether the cancellation of the poll and the reordering of fresh poll is “part of election” and challenging it is “calling it in question”.

30. The plenary bar of Article 329(b) rests on two principles: (1) The peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion. (2) The provision of a special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form, the right and remedy being creatures of statutes and controlled by the Constitution. *Durga Shankar Mehta* has affirmed this position and supplemented it by holding that, once the Election Tribunal has decided, the prohibition is extinguished and the Supreme Court's overall power to interfere under Article 136 springs into action. In *Hari Vishnu* this Court upheld the rule in *Ponnuswami* excluding any proceeding, including one under Article 226, during the on-going process of election, understood in the comprehensive sense of notification down to declaration. Beyond the declaration comes the election petition, but beyond the decision of the Tribunal the ban of Article 329(b) does not bind.



31. If “election” bears the larger connotation, if “calling in question” possesses a semantic sweep in plain English, if policy and principle are tool for interpretation of statutes, language permitting, the conclusion is irresistible, even though the argument contra may have emotional impact and ingenious appeal, that the catch-all jurisdiction under Article 226 cannot consider the correctness, legality or otherwise of the direction for cancellation integrated with re-poll. For, the prima facie purpose of such a re-poll was to restore a detailed poll process and to complete it through the salvatory effort of a re-poll. Whether, in fact or law, the order is validly made within his powers or violative of natural justice can be examined later by the appointed instrumentality viz. the Election Tribunal. That aspect will be explained presently. We proceed on the footing that re-poll in one polling station or in many polling stations, for good reasons, is lawful. This shows that re-poll in many or all segments, all pervasive or isolated, can be lawful. We are not considering whether the act was bad for other reasons. We are concerned only to say that if the regular poll, for some reasons, has failed to reach the goal of choosing by plurality the returned candidate and to achieve this object a fresh poll (not a new election) is needed, it may still be a step in the election. The deliverance of *Dunkirk* is part of the strategy of counter-attack. Wise or valid, is another matter.

32. On the assumption, but *leaving the question of the validity of the direction for re-poll open* for determination by the Election Tribunal, we hold that a writ petition challenging the cancellation coupled with re-poll amounts to calling in question a step in “election” and is therefore barred by Article 329(b). If no re-poll had been directed the legal perspective would have been very different. The mere cancellation would have then thwarted the course of the election and different considerations would have come into play. We need not chase a hypothetical case.

33. Our conclusion is not a matter of textual interpretation only but a substantial

assurance of justice by reading Section 100 of the Act as covering the whole basket of grievances of the candidates. Sri P.P. Rao contended that the Court should not deny relief to a party in the area of elections which are the lifebreaths of the democracy and people's power. We agree.

34. This dilemma does not arise in the wider view we take of Section 100(1)(d)(iv) of the Act. Sri Rao's attack on the order impugned is in substance based on alleged non-compliance with a provision of the Constitution viz. Article 324 but is neatly covered by the widely-worded, residual catch-all clause of Section 100. Knowing the supreme significance of speedy elections in our system the framers of the Constitution have, by implication postponed all election disputes to election petitions and tribunals. In harmony with this scheme Section 100 of the Act has been designedly drafted to embrace all conceivable infirmities which may be urged. To make the project fool-proof Section 100(1)(d)(iv) has been added to absolve everything left over. The Court has in earlier rulings pointed out that Section 100 is exhaustive of all grievances regarding an election. But what is banned is not anything whatsoever done or directed



by the Commissioner but everything he does or directs in furtherance of the election, not contrarywise. For example, after the President notifies the nation on the holding of elections under Section 15 and the Commissioner publishes the calendar for the poll under Section 30, if the latter orders Returning Officers to accept only one nomination or only those which come from one party as distinguished from other parties or independents, is that order immune from immediate attack. We think not. Because the Commissioner is *preventing* an election, not promoting it and the Court's review of that order will facilitate the flow, not stop the stream. Election, wide or narrow be its connotation, means choice from a possible plurality, monolithic politics not being our genius or reality, and if that concept is crippled by the Commissioner's act, he holds no election at all.

35. A poll is part — a vital part — of the election but with the end of the poll the whole election is not over. Ballots have to be assembled, scrutinised, counted, recount claims considered and result declared. The declaration determines the election. The conduct of the election thus ripens into the elector's choice only when processed, screened and sanctified, every escalatory step up to the formalized finish being unified in purpose, forward in movement, fair and free in its temper, Article 329(b) halts judicial intervention during this period, provided the act possesses the pre requisites of "election" in its semantic sweep. That is to say, immunity is conferred only if the Act impeached is done for the apparent object of furthering a free and fair election and the protective armour drops down if the act challenged is either unrelated to or thwarts or taints the course of the election.

36. Having held against the maintainability of the writ petition, we should have parted with the case finally. But counsel for both the candidates and, more particularly, the learned Addl. Solicitor-General, appearing for the Election Commission, submitted that the breadth, amplitude and implications, the direction and depth of Article 324 and, equally important, the question of natural justice raised under Article 324 are of such public importance and largely fallow field, going by prior pronouncements, and so strategic for our democracy and its power process that this Court must decide the issue here and now. Article 141 empowers and obligates this Court to declare the law for the country when the occasion asks for it. Counsel, otherwise opposing one another, insistently concurred in their request that, for the working of the electoral machinery and understanding of the powers and duties vested

in the functionaries constituting the infrastructure it is essential to sketch the ambit and import of Article 324. This point undoubtedly arises before us even in considering the prohibition under Article 329 and has been argued fully. In any view, the Election Tribunal will be faced with this issue and the law must be laid down so that there may be no future error while disposing of the election petition or when the Commission is called upon to act on later occasion. This is the particular reason for our proceeding to decide what the content and parameters of Article 324 are, contextually limited to situations analogous to the present.

37. We decide two questions under the relevant article, not *arguendo*



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but as substantive pronouncements on the subject. They are:

“(a) What, in its comprehensive connotation, does the ‘conduct’ of elections mean or, for that matter, the ‘superintendence, direction and control’ of elections?”

(b) Since the text of the provision is silent about hearing before acting, is it permissible to import into Article 324(1) an obligation to act in accord with natural justice?”

38. Article 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State elections and, therefore, the necessary powers to discharge that function. It is true that Article 324 has to be read in the light of the constitutional scheme and the 1950 Act and the 1951 Act. Sri Rao is right to the extent he insists that if competent legislation is enacted as visualised in Article 327 the Commission cannot shake itself free from the enacted prescriptions. After all, as Mathew, J. has observed in *Indira Gandhi* (p. 523) (see p. 136, paras 335-6):

“In the opinion of some of the Judges constituting the majority in *Bharati's case*¹¹ rule of law is a basic structure of the Constitution apart from democracy.

The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of Government in the sense of excluding arbitrary official action in any sphere.”

And the supremacy of valid law over the Commission argues itself. No one is an *imperium in imperio* in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Article 324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system.

39. Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, not arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words “superintendence, direction and control, as well as ‘conduct of all elections’, are the broadest terms”. Myriad maybes, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the system into elected despotism — instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bluff,

quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the man as much as on the Great National Parchment. Secondly, when a high functionary like the Commissioner



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is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in *Virendra*¹² and *Harishankar*¹³ discretion vested in a high functionary may be reasonably trusted to be used properly, not perversely. If it is misused, certainly the Court has power to strike down the act. This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud, J.:

“But the electorate lives in the hope that a sacred power will not so flagrantly be abused—and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power.”^{13a}”

40. The learned Addl. Solicitor-General brought to our notice rulings of this Court and of the High Courts which have held that Article 324 was a plenary power which enabled the Commission to act even in the absence of specific legislation though not contrary to valid legislation. Ordering a re-poll for a whole constituency under compulsion of circumstances may be directed for the conduct of elections and can be saved by Article 324 — provided it is bona fide necessary for the vindication of the free verdict of the electorate and the abandonment of the previous poll was because it failed to achieve that goal. While we repel Sri Rao's broadside attack on Article 324 as confined to what the Act has conferred, we concede that even Article 324 does not exalt the Commission into a law unto itself. Broad authority does not bar scrutiny into specific validity of the particular order.

41. Our conclusion on this limb of the contention is that Article 324 is wide enough to supplement the powers under the Act, as here, but subject to the several conditions on its exercise we have set out.

42. Now we move on to a closeup of the last submission bearing on the Commission's duty to function within the leading strings of natural justice.

43. Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has, many colours and shades, many forms and shapes and, save where valid law excludes it, applies when people are affected by acts of authority. It is the hone of healthy government, recognised from earliest times and not a mystic testament of Judge-made law. Indeed, from the legendary days of Adam — and of Kautilya's *Arthashastra* — the rule of law has had this stamp of natural justice which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case-law or other extant principle, not the hoary chords



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of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.

44. The dichotomy between administrative and quasi-judicial functions vis-a-vis the doctrine of natural justice is presumably obsolescent after *Kraipak*¹⁴ in India and *Schmidt*¹⁵ in England.

45. *Kraipak* marks the watershed, if we may say so, in the application of natural justice to administrative proceedings. Hegde, J., speaking for a Bench of five Judges observed, quoting for support Lord Parker in *In re H.K. (an infant)*¹⁶:

"It is not necessary to examine these decisions as there is a great deal of fresh thinking on the subject. The horizon of natural justice is constantly expanding. (p. 467) (SCC p. 271, para 17)

* * *

The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. (p. 468) (SCC p. 272. para 20)

* * *"

The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative inquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George v. University of Kerala*¹⁷ the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case." (p. 469) (SCC pp. 272-3, para 20)

46. It is an interesting sidelight that in America it has been held to be but fundamental fairness that the right to an administrative hearing is given.¹⁸ Natural justice is being given access to the United Nations.¹⁹ It is notable that Mathew, J. observed in *Indira Gandhi* (p. 513, see p. 128, para 303):

"If the amending body really exercised judicial power, that power was exercised in violation of the principles of natural justice of *audi alteram partem*. Even if a power is given to a body without specifying that the rules of natural justice should be observed in exercising it, the nature of the power would call for its observance."



Lord Morris of Borth-y-Gest in his address before the Bentham club concluded²⁰:

"We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying those principles which we broadly classify under the designation of natural justice. Many testing problems as to their application yet remain to be solved. But I affirm that

the area of administrative action is but one area in which the principles are to be deployed. Nor are they to be invoked only when procedural failures are shown. Does natural justice qualify to be described as a 'majestic' conception? I believe it does. Is it just a rhetorical but vague phrase which can be employed, when needed, to give a gloss of assurance? I believe that it is very much more. If it can be summarised as being fairplay in action — who could wish that it would ever be out of action? It denotes that the law is not only to be guided by reason and by logic but that its purpose will not be fulfilled if it lacks more exalted inspiration."

47. It is fair to hold that subject to certain necessary limitations natural justice is now a brooding omnipresence although varying in its play.

48. Once we understand the soul of the rule as fairplay in action — and it is so — we must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation: nothing more — but nothing less. The "exceptions" to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case. Text-book excerpts and ratios from rulings can be heaped, but they all converge to the same point that *audi alteram partem* is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation.

49. Let us look at the jurisprudential aspects of natural justice, limited to the needs of the present case, as the doctrine has developed in the Indo-Anglican systems. We may state that the question of nullity does not arise here because we are on the construction of a constitutional clause. Even otherwise, the rule of natural justice bears upon construction where a statute is silent save in that category where a legislation is charged with the vice of unreasonableness and consequential voidness.

50. Article 324, on the face of it, vests vast functions which may be powers or duties, essentially administrative and marginally even judicative or legislative. (See *All Party Hill Leaders' Conference, Shillong v. Capt. W.A. Sangma*²¹.) We are not fascinated by the logomachic exercise suggested by Sri P.P. Rao, reading "functions" in contradistinction



to "powers" nor by the trichotomy of diversion of powers, fundamentally sound but flawsome in several situations if rigidly applied. These submissions merely serve to draw the red-herring across the trial. We will now zero in on the crucial issue of natural justice vis-a-vis Article 324 where the function is so exercised that a candidate is substantially prejudiced even if he has not acquired a legal right nor suffered "civil consequences", whatever that may mean.

51. We proceed on the assumption that even if the cancellation of the poll in this case were an administrative act, that per se does not repel the application of the natural justice principle. *Kraipak* nails the contrary argument. Nor did the learned Addl. Solicitor-General contend that way, taking his stand all through, not on technicalities, easy victories or pleas for reconsiderations of the good and progressive

rules gained through this Court's rulings in administrative law but on the foundational thesis that any construction that we may adopt must promote and be geared to the great goal of expeditious, unobstructed, despatch of free and fair elections and leaving grievances to be fully sorted out and solved later before the Election Tribunal set out by the Act. To use a telling word familiar in officialese: "Election Immediate".

52. So now we are face to face with the naked issue of natural justice and its pro tem exclusion on grounds of necessity and non-stultification of the on-going election. The Commission claims that a direction for re-poll is an "emergency" exception. The rules of natural justice are rooted in all legal systems, not any "new theology" and are manifested in the twin principles of *nemo iudex in causa sua* and *audi alteram partem*. We are not concerned here with the former since no case of bias has been urged. The grievance ventilated is that of being condemned unheard. Sporadic applications or catalogue of instances cannot make for a scientific statement of the law and so we have to weave consistent criteria of application and principles for carving out exceptions. If the rule is sound and not negated by statute, we should not devalue it nor hesitate to hold every functionary who affects others' right to it. The *audi alteram partem* rule has a few facets two of which are (a) notice of the case to be met; and (b) opportunity to explain. Let us study how far the situation on hand can coexist with canons of natural justice. While natural justice is universally respected, the standards vary with situations contracting into a brief, even post-decisional opportunity, or expanding into trial-type trappings.

53. *Ridge v. Baldwin*²² is a leading case which restored light to an area "benighted by the narrow conceptualism of the previous decade", to borrow Professor Clark's expression.²³ Good administration demands fairplay in action and this simple desideratum is the fount of natural justice. We have already said that the classification of functions as "judicial" or "administrative" is a stultifying shibboleth, discarded in India as in England. Today, in our jurisprudence, the advances made by natural



justice far exceed old frontiers and if judicial creativity belights penumbral areas it is only for improving the quality of government by injecting fairplay into its wheels.

54. The learned Addl. Solicitor-General welcomed the dramatic pace of enlargement in the application of natural justice. But he argued for inhibiting its spread into forbidden spaces lest the basic values of Article 329 be nullified. In short, his point is that where utmost promptitude is needed — and that is the *raison d'etre* of exclusion of intermediate legal proceedings in election matters — natural justice may be impractical and may paralyze, thus balking the object of expeditious completion. He drew further inspiration from another factor to validate the exclusion of natural justice from the Commission's actions, except where specifically stipulated by statute. He pointed out what we have earlier mentioned — that an election litigation is one in which the whole constituency of several lakhs of people is involved and, if the Election Commission were under an obligation to hear affected parties it may, logically, have to give notice to lakhs of people and not merely to candidates. This will make an ass of the law and, therefore, that is not the law. This *reductio ad absurdum* also has to be examined.

55. Law cannot be divorced from life and so it is that the life of the law is not logic but experience. If, by the experiential test, importing the right to be heard will paralyze the process, law will exclude it. It has been said that no army can be commanded by a debating society, but it is also true that the House of Commons did debate, during the days of debacle and disaster, agony and crisis of the Second World

War, the life-and-death aspects of the supreme command by the then British Prime Minister "to the distress of all our friends and to the delight of all our foes" — too historic to be lost on jurisprudence. Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity. Such is the sensible perspective we should adopt if ad hoc or haphazard solutions should be eschewed.

56. Normally, natural justice involves the irritating inconvenience for men in authority, of having to hear both sides since notice and opportunity are its very marrow. And this principle is so integral to good government, the onus is on him who urges exclusion to make out why. Lord Denning expressed the paramount policy consideration behind this rule of public law (while dealing with the *nemo iudex* aspect) with expressiveness: "Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking "the Judge was biased'." We may adapt it to the *audi alteram* situation by the altered statement: "Justice must be felt to be just by the community if democratic legality is to animate the rule of law. And if the invisible audience sees a man's case disposed of unheard, a chorus of 'no-confidence' will be heard to say, 'that man had no chance to defend his stance'." That is why Tucker, LJ in *Russel v. Duke of Norfolk*²⁴ emphasised that "whatever standard of



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natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case". What is reasonable in given circumstances is in the domain of practicability; not formalised rigidity. Lord Upjohn in *Fernando*²⁵ observed that "while great urgency may rightly limit such opportunity timerously, perhaps severely, there can never be a denial of that opportunity if the principles of natural justice are applicable". It is untenable heresy, in our view, to lock-jaw the victim or act behind his back by tempting invocation of urgency, unless the clearest case of public injury flowing from the least delay is self-evident. Even in such cases a remedial hearing as soon as urgent action has been taken is the next best. Our objection is not to circumscription dictated by circumstances, but to annihilation as an easy escape from a benignant, albeit inconvenient obligation. The procedural precondition of fair hearing, however minimal, even post-decisional, has relevance to administrative and judicial gentlemanliness. The Election Commission is an institution of central importance and enjoy far-reaching powers and the greater the power to affect others right' or liabilities the more necessary the need to hear.

57. We may not be taken to say that situational modifications to notice and hearing are altogether impermissible. They are, as the learned Addl. Solicitor-General rightly stressed. The glory of the law is not that sweeping rules are laid down but that it tailors principles to practical needs, doctors remedies to suit the patient, promotes, not freezes, life's processes, if we may mix metaphors. Tucker, LJ drove home this point when he observed in the *Duke of Norfolk case*:

"There are no words which are of universal application to every kind of inquiry The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

This circumstantial flexibility of fair hearing has been underscored in *Wiseman v. Borneman*²⁶ by Lord Reid when he said he would be "sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules". Lord Denning, with

lovely realism and principled pragmatism, set out the rule in *Selvaraiyan*²⁷:

“The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigation body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.”

Courts must be tempered by the thought while compromise on principle is unprincipled, applied administrative law in modern complexities of



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government must be realistic, not academic. The myriad maybes and the diverse urgencies are live factors. Natural justice should not destroy administrative order by insisting on the impossible.

58. This general discussion takes us to four specific submissions made by the learned Addl. Solicitor-General. He argued that the Election Commission, a high constitutional functionary, was charged with conducting elections with celerity to bring the new House into being and the tardy process of notice and hearing would thwart this imperative. So no natural justice. Secondly, he submitted that there was no *final* determination to the prejudice of any party by directing a re-poll since the Election Court had the last word on every objectionable order and so the Commission's order was more or less provisional. So no natural justice. Thirdly, he took up the position that no candidate could claim anything more than an expectation or *spes* and no right having crystallised till official declaration of the result, there was no room for complaint of civil consequences. What was condemned was the poll, not any candidate. So no natural justice. Finally, he reminded us of the far-flung futility of giving a hearing to a numerous constituency which too was interested in proper elections like the candidates. So no natural justice.

59. De Smith was relied on and *Wiseman*²⁸ as well as *Pearlberg*²⁹ were cited in support of these propositions. We may add to these weighty rulings the decision of the House of Lords in *Pearlberg*. The decision of this Court in the ruling in *Bihar School Examination Board v. Subhas Chandra Sinha*³⁰ where a whole University examination was cancelled without hearing any of the candidates but was upheld against the alleged vice of non-hearing, was relied on.

60. We must admit that the law, in certain amber areas of natural justice, has been unclear. Vagueness haunts this zone but that is no argument to shut down. If it is twilight, we must delight. So we will lay down the guidelines but guard ourselves against any decision on the facts of this case. That is left for the Election Court in the light of the law applicable.

61. Nobody will deny that the Election Commissioner in our democratic scheme is a central figure and a high functionary. Discretion vested in him will ordinarily be used wisely, not rashly, although to echo Lord Camden, wide discretion is fraught with tyrannical potential even in high personages, absent legal norms and institutional

checks, and relaxation of legal canalisation on generous 'VIP' assumptions may boomerang. Natural justice is one such check on exercise of power. But the chemistry of natural justice is confused in certain aspects, especially in relation to the fourfold exceptions put forward by the respondents.

62. So let us examine them each. Speed in action versus soundness of judgment is the first dilemma. *Punnuswami* has emphasised what is implicit in Article 329(b) that once the process of elec



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tion has started, it should not be interrupted since the tempo may slow down and the early constitution of an elected parliament may be halted. Therefore, think twice before obligating a hearing at a critical stage when a quick re-poll is the call. The point is well taken. A fair hearing with full notice to both or others may surely protract; and notice does mean communication of materials since no one can meet an unknown ground. Otherwise hearing becomes hollow, the right becomes a ritual. Should the cardinal principle of "hearing" as condition for decision-making be martyred for the cause of administrative immediacy? We think not. The full panoply may not be there but a manageable minimum may make-do.

63. In *Wiseman v. Borneman*^{30a} there was a hint of the competitive claims of hurry and hearing. Lord Reid said: "Even where the decision has to be reached by a body acting judicially, there must be a *balance between the need for expedition and the need to give full opportunity* to the defendant to see material against him" (emphasis added). We agree that the elaborate and sophisticated methodology of a formalised hearing may be injurious to promptitude so essential in an election under way. Even so, natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances. To burke it altogether may not be a stroke of fairness except in very exceptional circumstances. Even in *Wiseman* where all that was sought to be done was to see if there was a prima facie case to proceed with a tax case where, inevitably, a fuller hearing would be extended at a later stage of the proceedings, Lord Reid, Lord Morris of Borth-y-Gest and Lord Wilberforce suggested "that there might be exceptional cases where to decide upon it ex parte would be unfair, and it would be the duty of the tribunal to take appropriate steps to eliminate unfairness" (Lord Denning, M.R., in *Howard v. Borneman*³¹ summarised the observations of the Law Lords in this form). No doctrinaire approach is desirable but the court must be anxious to salvage the cardinal rule to the extent permissible in a given case. After all, it is not obligatory that counsel should be allowed to appear nor is it compulsory that oral evidence should be adduced. Indeed, it is not even imperative that written statements should be called for. Disclosure of the prominent circumstances and asking for an immediate explanation orally or otherwise may, in many cases, be sufficient compliance. It is even conceivable that an urgent meeting with the concerned parties summoned at an hour's notice, or in a crisis, even a telephone call, may suffice. If all that is not possible as in the case of a fleeing person whose passport has to be impounded lest he should evade the course of justice or a dangerous nuisance needs immediate abatement, the action may be taken followed immediately by a hearing for the purpose of sustaining or setting aside the action to the extent feasible. It is quite on the cards that the Election Commission if pressed by circumstances, may give a short hearing. In any view, it is not easy to appreciate whether before further steps got under way he could not have afforded an opportunity of hearing the parties, and revoke the earlier directions. We do not wish to disclose our mind on what, in the critical circumstances, should have been done for a fairplay of

fair hearing.



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This is a matter pre-eminently for the Election Tribunal to judge, having before him the vivified totality of all the factors. All that we need emphasize is that the content of natural justice is a dependent variable, not an easy casualty.

64. The learned Addl. Solicitor-General urged that even assuming that under ordinary circumstances a hearing should be granted, in the scheme of Article 324 and in the situation of urgency confronting the Election Commission it was not necessary.

65. Here we must demur. Reasons follow.

66. It was argued, based on rulings relating to natural justice, that unless civil consequences ensued, hearing was not necessary. A civil right being adversely affected is a sine qua non for the invocation of the *audi alteram partem* rule. This submission was supported by observations in *Ram Gopal*³², *Col. Sinha*³³. Of course, we agree that if only spiritual censure is the penalty, temporal laws may not take cognizance of such consequences since human law operates in the material field although its vitality vicariously depends on its morality. But what is a civil consequence, let us ask ourselves, bypassing verbal booby-traps? 'Civil consequences' undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence. "Civil" is defined by Black (*Law Dictionary*, 4th Edn.) at p. 311:

"Ordinarily, pertaining or appropriate to a member of a *civitas* of free political community; natural or proper to a citizen. Also, relating to the community, or to the policy and government of the citizens and subjects of a state.

The word is derived from the Latin *civilis*, a citizen In law, it has various significations.

* * *

'Civil Rights' are such as belong to every citizen of the State or country, or, in a wider sense, to all its inhabitants, and are not connected with the organisation or administration of Government. They include the rights of property, marriage, protection by the laws, freedom of contract, trial by jury etc.... Or, as otherwise defined, civil rights are rights appertaining to a person in virtue of his citizenship in a State or community. Rights capable of being enforced or redressed in a civil action. Also a term applied to certain rights secured to citizens of the United States by the thirteenth and fourteenth amendments to the Constitution, and by various acts of Congress made in pursuance thereof.

(p. 1487, *Black's Legal Dictionary*)

The interest of a candidate at an election to Parliament regulated by the Constitution and the laws comes within this gravitational orbit. The most valuable right in a democratic polity is the "little man's" little pencil-marking, assenting or dissenting, called his vote. A democratic right, if denied, inflicts civil consequences. Likewise, the little man's right, in a representative system of Government, to rise to Prime Ministership or Presidentship by use of the right to be candidate, cannot be wished away



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by calling it of no civil moment. It civics mean anything to a self-governing citizenry, if participatory democracy is not to be scuttled by the law, we shall not be captivated by catchwords. The straight forward conclusion is that every Indian has a right to elect and be elected and this is a constitutional as distinguished from a common law right and is entitled to cognizance by courts subject to statutory regulation. We may also notice the further refinement urged that a right accrues to a candidate only when he is declared returned and until then it is incipient, inchoate and intangible for legal assertion — in the twilight zone of expectancy, as it were. This too, in our view, is logicid sophistry. Our system of "ordered" rights cannot disclaim cognizance of orderly processes as the right means to a right end. Our jurisprudence is not so jejune as to ignore the concern with means as with the end, with the journey as with the destination. Every candidate, to put it cryptically, has an interest or right to fair and free and legally run election. To draw lots and decide who wins, if announced as the electoral methodology, affects his right, apart from his luckless rejection at the end. A vested interest in the prescribed process is a processual right, actionable if breached, the Constitution permitting. What is inchoate, viewed from the end, may be complete, viewed midstream. It is a subtle fallacy to confuse between the two. Victory is still an expectation; *qua mado* is a right to the statutory procedure. The appellant has a right to have the election conducted not according to humour or hubris but according to law and justice. And so natural justice cannot be stumped out on this score. In the region of public law *locus standi* and person aggrieved, right and interest have a broader import. But, in the present case, the Election Commission contends that a hearing has been given although the appellant retorts that a vacuous meeting where nothing was disclosed and he was summarily told off would be strange electoral justice. We express no opinion on the factum or adequacy of the hearing but hold that where a candidate has reached the end of the battle and the whole poll is upset, he has a right to notice and to be heard, the quantum and quality being conditioned by the concatenation of circumstances.

67. The rulings cited, bearing on the touchstone of civil consequences, do not contradict the view we have propounded. *Col. Sinha* merely holds — and we respectfully agree — that the lowering of retirement age does not deprive a government servant's rights, it being clear that every servant has to quit on the prescribed age being attained. Even *Binapani* concedes that the State has the authority to retire a servant on superannuation. The situation here is different. We are not in the province of substantive rights but procedural rights statutorily regulated. Sometimes processual protections are too precious to be negotiable, temporised with or whittled down.

68. *Ram Gopal* for the same reason, is inapplicable. A temporary servant has only a temporary tenure terminable legally without injury Even he, if punished, has procedural rights in the zone of natural justice, but not when the contract of employment is legally extinguished. Interest and right are generous conceptions in this jurisdiction, not narrow orthodoxies as in traditional systems



69. We move on to a consideration of the argument prolix plurality making hearing impracticable and therefore expendable. Attractively ingenious and seemingly precedented, but, *argumentum ab inconvenienti* has its limitations and cannot override established procedure. May be, *argumentum ab impossibili* has greater force.

But here neither applies for it is a misconception to equate candidates who fought to the bitter finish with the hundreds of thousands of voters who are interested in electoral proprieties. In law and life, degree of difference may, at a substantial stage, spell difference in kind or dimensions. Is there an impossible plurality which frustrates the feasibility of notice and hearing if candidates alone need be notified?

70. In *Subhash Chandra Sinha* Hidayatullah, C.J. speaking for the Court repelled the plea of natural justice when a whole examination was cancelled by the concerned university authorities. The reasons given are instructive. The learned Judge said that "the mention of fairplay does not come very well from the respondents who were grossly guilty of breach of fairplay themselves at the examinations". The Court examined the grounds for cancellation of examinations and satisfied itself that there was undoubted abundance of evidence that students generally had outside assistance in answering questions. The learned Judge went on further to say:

"This is not a case of any particular individual who is being charged with adoption of unfair means but of the conduct of all the examinees or at least a vast majority of them at a particular centre. If it is not a question of charging anyone individually with unfair means but to condemn the examination as ineffective for the purpose it was held, must the Board give an opportunity to all the candidates to represent their cases? We think not. It was not necessary for the Board to give an opportunity to the candidates if the examinations as a whole were being cancelled. The Board had not charged any one with unfair means so that he could claim to defend himself. The examination was vitiated by adoption of unfair means on a mass scale. In these circumstances it would be wrong to insist that the Board must hold a detailed inquiry into the matter and examine each individual case to satisfy itself which of the candidates had not adopted unfair means. The examination as a whole had to go. (pp. 967-68) (SCC p. 652, para 13)

* * *

If at a centre the whole body of students receive assistance and manage to secure success in the neighbourhood of 100 per cent when others at other centres are successful only at an average of 50%, it is obvious that the university or the Board must do something in the matter. It cannot hold a detailed quasi-judicial inquiry with a right to its alumni to plead and lead evidence etc. before the results are withheld or the examinations cancelled. If there is sufficient material on which it can be demonstrated that the university was right in its conclusion that the examinations ought to be cancelled then academic standards require that the university's appreciation of the problem must be respected. It would not do for the Court to say that he should have examined all the candidates or even their representatives with a view to ascertaining whether they had received assistance or not. To do this would encourage indiscipline if not also perjury." (pp. 968-69) (SCC pp. 652-53, para 14)

These propositions are relied on by the learned Addl. Solicitor-General who seeks to approximate the present situation of cancellation of the poll to the cancellation of an examination. His argument is that one has to launch on



a public enquiry allowing a large number of people to participate in the hearing if the cancellation of the poll itself is to be subjected to natural justice. He further said that no candidate was condemned but the poll process was condemned. He continued to find a parallel by stating that like the university being responsible for the good conduct of examinations, the Election Commission was responsible for the proper

holding of the poll. We do not consider the ratio in *Subhash Chandra* as applicable. In fact, the candidates concerned stand on a different footing from the electorate in general. They have acquired a very vital stake in polling going on properly to a prompt conclusion. And when that is upset there may be a vicarious concern for the constituency, why, for that matter, for the entire country, since the success of democracy depends on countrywide elections being held periodically and properly. Such interest is too remote and recondite, too feeble and attenuated, to be taken note of in a cancellation proceeding. What really marks the difference is the diffusion and dilution. The candidates, on the other hand, are the spearheads, the combatants, the claimants to victory. They have set themselves up as nominated candidates, organised the campaign and galvanised the electorate for the crowning event of polling and counting. Their interest and claim are not indifferent but immediate, not weak but vital. They are more than the members of the public. They are parties to the electoral dispute. In this sense, they stand on a better footing and cannot be denied the right to be heard or noticed. Even in the case of university examinations it is not a universal rule that notice need not be given. *Ghanshyam Das Gupta case*³⁴ illustrates this aspect. Even there, when an examination result of three candidates was cancelled the Court imported natural justice. It was said that even if the enquiry involved a large number of persons, the committee should frame proper regulations for the conduct of such enquiries but not deny the opportunity. That case was distinguished in *Subhash Chanda*. the differentia being that in one case the right exercised was of the examining body to cancel its own examinations since it was satisfied that the examination was not properly conducted. It may be a parallel in electoral situations if the Election Commission cancels a poll because it is satisfied that the procedure adopted has gone awry on a wholesale basis. Supposing wrong ballot papers in large numbers have been supplied or it has come to the notice of the Commission that in the constituency counterfeit ballots had been copiously current and used on a large scale, then without reference to who among the candidates was more prejudiced, the poll might have been set aside. It all depends on the circumstances and is incapable of generalisation. In a situation like the present it is a far cry from natural justice to argue that the whole constituency must be given a hearing. That is an ineffectual over-kill.

71. Lastly, it was contended by the learned Addl. Solicitor-General, taking his cue from *Wiseman* that the Election Commission's direction for a re-poll has only a provisional consequence since the Election Court was the ultimate matter of the destiny of the poll, having power to review the decision of the Commission. It is true that *Wisemen* deals with the assess



ment of the evidence at a preliminary stage merely to ascertain whether there is a prima facie case. The proceeding had still later stages where the affected party would enjoy a full opportunity. Lord Reid said plainly that there was a difference:

"It is very unusual for there to be a judicial determination of the question whether there is a prima facie case . . . there is nothing inherently unjust in reaching such a decision (i.e., a prima facie decision) in the absence of the other party."

Lord Wilberforce however took the view that there was 'a residual duty of fairness'. Lord Denning in *Pearlberg v. Varty*³⁵ added in parenthesis:

"Although the tribunal, in determining whether there is a prima facie case, is

itself the custodian of fairness, nevertheless its discretion is open to review. Buckley, J. made this point about natural justice and administrative action (P. 747)"

I do not forget the fact that it has been said that the rules of natural justice may apply to cases where the act in question is more properly described as administrative than judicial or quasi-judicial: See *Ridge v. Baldwin* and *Schmidt v. Secretary of State for Home Affairs*^{35a}.

72. The Indian parallel would be an argument for notice and hearing from a police officer when he investigated and proceeded to lay a chargesheet because he thought that a case to be tried by the court had been made out. The present case stands on a totally different footing. What the Election Commission does is not to ascertain whether a prima facie case exists or an ex parte order, subject to modification by him is to be made. If that were so *Pearlberg* would have been an effective answer. For, Lord Denning luminously illustrates the effect:

"I would go so far with him as to say that in reaching a prima facie decision, there is a duty on any tribunal to act fairly; but fairness depends on the task in hand. Take an application to a court by statute, or by the rules, or, as a matter of practice, is made ex parte. The court itself is a custodian of fairness. If the matter is so urgent that an order should be made forthwith, before hearing the other side, as in the case of an interim injunction or a stay of execution, the court will make the order straightaway. We do it every day. We are always ready, of course, to hear the other side if they apply to discharge the order. But still the order is made ex parte without hearing them. It is a prima facie decision. I agree that before some other tribunal a prima facie decision may be a little different. The party affected by it may not be able to apply to set it aside. The case must go forward to a final decision. Here, again, I think the tribunal itself is under what Lord Wilberforce described as a residual duty of fairness." (1971 AC 297, 320)

When *Pearlberg* reached the House of Lords^{35b} the Law Lords considered the question again. Lord Hailsham of St. Marylebone, L.C. observed:

"The third factor which affects mind is the consideration that the decision once made, does not make any final determination of the rights of the taxpayer. It simply enables the inspector to raise an assessment, by satisfying the Commissioner that there are reasonable grounds for suspecting loss of tax resulting from neglect, fraud, or wilful default, that is that there is a prima facie probability that there has been neglect etc. and that the Crown may have lost by it. When the assessment is made, the taxpayer can appeal against it, and, on the appeal, may raise



any question (inter alia) which would have been relevant on the application for leave except that the leave given should be discharged (p. 539)

* * *

The doctrine of natural justice has come in for increasing consideration in recent years and the courts generally, and Your Lordships' House in particular, have, I think rightly, advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases, (p. 540)

Viscount Dilhorne observed in that case:

I agree with Lord Donovan's view (*Wiseman v. Borneman*³⁶) that it cannot be said that the rules of natural justice do not apply to a judicial determination of the

question whether there is a prima facie case, but I do not think they apply with the same force or as much force as they do to decide decisions which determine the rights of persons. (p. 546)

Lord Pearson's comment ran thus:

"A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles in performing those functions unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required, although, as 'Parliament' is not to be presumed to act unfairly, the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness, however, does not necessarily require a plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards, nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too readily sacrificed. The disadvantage of a plurality of hearings even in the judicial sphere was cogently pointed out in the majority judgments in *Cozens v. North Devon Hospital Management Committee*³⁷", (p. 547)

Lord Salmon put the matter pithily:

"No one suggests that it is unfair to launch a criminal prosecution without first hearing the accused." (p. 550)

Indeed, in *Mallock*³⁸ Lord Wilberforce observed³⁹:

"A limited right of appeal on the merits affords no argument against the existence of a right to a precedent hearing, and, if that is denied, to have the decision declared void."

After all the Election Court can exercise only a limited power of review and must give regard to the Commission's discretion. And the trouble and cost of instituting such proceedings would deter all but the most determined of parties aggrieved, and even the latter could derive no help from legal principle in predicting whether at the end of the day the Court would not condone their summary treatment on a subjective appraisal of the demerits of the case they had been denied the opportunity to present. The public interest would be ill-served by judicially fostered uncertainty as to the value to be set upon procedural fairplay as a canon of good administration. And further the *Wiseman* Law Lords regarded the cutting out of "hearing" as quite unpalatable but in the circumstances harmless since most of the assesseees knew the grounds and their declaration was one mode of explanation.



73. We consider it a valid point to insist on observance of natural justice in the area of administrative decision-making so as to avoid devaluation of this principle by "administrators already alarmingly insensitive to the rationale of *audi alteram partem*":

"In his lecture on 'The Mission of the Law' Professor H.W.R. Wade takes the principle that no man should suffer without being given a hearing as a cardinal example of a principle 'recognised as being indispensable to justice, but which (has) not yet won complete recognition in the world of administration The goal of administrative sporadic and ex post facto judicial review. The essential mission of the law in this field is to win acceptance by administrators of the principle that to hear a man before he is penalised is an integral part of the decision-making process. A measure of the importance of resisting the incipient abnegation by the

courts of the firm rule that breach of *audi alteram partem* invalidates, is that if it gains ground the mission of the law is doomed to fail to the detriment of all."⁴⁰

74. Our constitutional order pays more than lip-service to the rule of reasonable administrative process. Our people are not yet conscious of their rights; our administrative apparatus has a hard-of-hearing heritage. Therefore a creative play of fairplay, irksome to some but good in the long run, must be accepted as part of our administrative law. Lord Hailsham. L.C. in *Pearlberg* presaged⁴¹:

"The doctrine of natural justice has come in for increasing consideration in recent years, and the courts generally, (and the House of Lords in particular), have ... advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticate view of what is required in individual cases."

And in India this case is neither the inaugural nor the valedictory of natural justice.

75. Moreover Sri Rao's plea that when the Commission cancels viz. declares the poll void it is performing more than an administrative function merits attention, although we do not pause to decide it. We consider that in the vital area of elections where the people's faith in the democratic process is hyper-sensitive it is republican realism to keep alive *audi alteram* even in emergencies, "even amidst the clash of arms". Its protean shades apart we recognise that "hearing" need not be an elaborate ritual and may, in situations of quick despatch, be minimal, even formal, nevertheless real. In this light, the Election Court will approach the problem. To scuttle the ship is not to save the cargo; to jettison may be.

76. Fair hearing is thus a postulate of decision-making cancelling a poll, although fair abridgement of that process is permissible. It can be fair without the rules of evidence or form of trial. It cannot be fair if apprising the affected and appraising the representations is absent. The philosophy behind natural justice is, in one sense, participatory justice in the process of democratic rule of law.

77. We have been told that wherever the Parliament has intended a hearing it has said so in the Act and the Rules and inferentially where it has not specified it is otiose. There is no such sequitur. The silence



of a statute has no exclusionary effect except where it flows from necessary implication. Article 324 vests a wide power and where some direct consequence on candidates emanates from its exercise we must read this functional obligation.

78. There was much argument about the guidelines in Sections 58 and 64-A being applicable to an order for constituency-wide re-poll. It may be wholesome to be guided; but it is not illegal not to do so, provided homage to natural justice is otherwise paid. Likewise, Sri P.P. Rao pressed that the Chief Election Commissioner was arbitrary in ordering a re-poll beyond Fazilka segment or postal ballots. Even the third respondent had not asked for it; nor was there any material to warrant it since all the ballots of all the other segments were still available to be sorted out and recounted. A whole re-poll is not a joke. It is almost an irreparable punishment to the constituency and the candidates. The sound and fury, the mammoth campaigns and rallies, the whistle-stop speeches and frenzy of slogans, the white-heat of tantrums, the expansiveness of the human resources and a hundred other traumatic consequences must be remembered before an easy re-poll is directed, urges Shri Rao. We note the point but leave its impact open for the Election Court to assess when judging whether the impugned order was scary, arbitrary, whimsical or arrived at by omitting material considerations. Independently of natural justice, judicial review

extends to an examination of the order as to its being perverse, irrational, bereft of application of the mind or without any evidentiary backing. If two views are possible, the court cannot interpose its view. If no view is possible the court must strike down.

79. We have projected the panorama of administrative law at this length so that the area may not be befogged at the trial before the Election Court and for action in future by the Election Commission. We have held that Article 329(b) is a bar for intermediate legal proceedings calling in question the steps in the election outside the machinery for deciding election disputes. We have further held that Article 226 also suffers such eclipse. Before the notification under Section 14 and beyond the declaration under Rule 64 of Conduct of Election Rules, 1961, are not forbidden ground. In between *is*, provided, the step challenged is taken in furtherance of, not to halt or hamper the progress of the election.

80. We have clarified that what may seem to be counter to the march of the election process may in fact be one to clear the way to a free and fair verdict of the electorate. It depends. Taking the Election Commission at his word (the Election Court has the power to examine the validity of his word), we proceed on the *prima facie* view that writ petition is not sustainable. If it turned out that the Election Commission acted in a bizarre fashion or in indiscreet haste, it forebodes ill for the Republic. For if the salt lose their savour, wherewith shall they be salted? Alan Barth in his *Prophets with Honor*, quotes Justice Felix Frankfurter regarding the standard for a judicial decision thus⁴²:

Mr Dooley's the Supreme Court fellows th' illiction returns', expressed the wit of



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cynicism, not the demand of principle. A court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will. Courts can fulfil their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable."

The above observation would equally apply to the Election Commission.

81. Many incidental points were debated but we have ignored those micro-questions and confined ourselves to macro-determinations. It is for the Election Court, not for us, to rule on those variegated matters. Certain obvious questions will claim the Election Court's attention. Did the Commission violate the election rules or canons of fairness? Was the play, in short, according to the script or did the *dramatis personae* act definitely, contrary to the text? After all, democratic elections may be likened to a drama, with a solemn script and responsible actors, officials and popular, each playing his part, with roles for heroes but not for villains, save where the text is travestied and unscheduled anti-heroes intervene turning the promising project for the smooth registration of the collective will of the people into a tragic plot against it. Every corrupt practice, partisan official action, basic breach of rules or deviance from the fundamental of electoral fairplay is a danger signal for the nation's democratic destiny. We view this case with the seriousness of John Adams' warning⁴³:

" 'Remember', said John Adams, 'remember', democracy never lasts long. It soon wastes, exhausts and murders itself. There never was a democracy that did not commit suicide."

82. Only one issue remains. Is the provision in Section 100 read with Section 98 sufficient to afford full relief to the appellant if the finding is in violation or malexercise of powers under Article 324? Sri Rao says "NO" while the opposition says "YES".

83. Let us follow the appellant's apprehension for a while to test its tenability. He says that the Commissioner has no power to cancel the election to a whole constituency. Therefore, the impugned order is beyond his authority and in excess of his functions under Article 324. Moreover, even if such power exists it has been exercised illegally, arbitrarily and in violation of the implied obligation of *audi alteram partem*. In substance, his complaint is that under guise of Article 324 the Commissioner has acted beyond its boundaries, in breach of its content and oblivious of its underlying duties. Such a malexercise clearly tantamounts to non-adherence to the norms and limitations of Article 324 and, if true, is a non-compliance with that provision of the Constitution. It falls within Section 100(1)(d)(iv). A generous, purpose-oriented, literally informed statutory interpretation spreads the wings of "non-compliance" wide enough to bring in all contraventions, excesses, breaches and subversions.

84. We derive support for this approach from *Durga Mehta*.



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The Court there considered the same words, in the same sections, in the same statute. Section 100(2)(c) interpreted in that case reincarnates as Section 100(d)(iv) later. Everything is identical. And Mukherjea, J. explained:

"It is argued on behalf of the respondent that the expression 'non-compliance' as used in sub-section (2)(c) would suggest the idea of not acting according to any rule or command and that the expression is not quite appropriate in describing a mere lack of qualification. This, we think, would be a narrow way of looking at the thing. When a person is incapable of being chosen as a member of a State Assembly under the provisions of the Constitution itself but has nevertheless been returned as such at an election, it can be said without impropriety that there has been non-compliance with the provisions of the Constitution materially affecting the result of the election. There is no material difference between 'non-compliance' and 'non-observance' or 'breach' and this item in clause (c) of sub-section (2) may be taken as a residuary provision contemplating cases where there has been infraction of the provisions of the Constitution or of the Act but which have not been specifically enumerated in the other portions of the clause."

Lexical significations are not the last word in statutory construction. We hold that it is perfectly permissible for the Election Court to decide the question as one tailing under Section 100(1)(d)(iv). A presumatic view of the Act and Article 324 helps discern "an organic synthesis". Law sustains, not fails.

85. A kindred matter viz. the scope of Section 100 and Section 98 has to be examined, parties having expressed anxious difference on the implied powers of the Election Court. Indeed, it is a necessary part of our decision but we may deal with it even here. Sri Rao's consternation is that if his writ petition is dismissed as not maintainable and his election petition is dismissed on the ground that the Election Court had no power to examine the cancellation of poll, now that a fresh poll has taken place, he will be in the unhappy position of having to forfeit a near-victory because a gross illegality triumphs irremediably. If this were true the hopes of the rule of law turn into dupes of the people. We have given careful thought to this tragic possibility and are convinced — indeed, the learned Addl. Solicitor-General has argued for upholding, not subverting the rule of law and agrees — that the Election Court has all the powers necessary to grant all or any of the reliefs set out in Section 98 and to direct the Commissioner to take such ancillary steps as will render complete justice to the appellant.

86. Section 98, which we have read earlier, contemplates three possibilities when an election petition is tried. Part VI of the Act deals with the complex of provisions calculated to resolve election disputes. A march past this part discloses the need to file an election petition (Section 80); the jurisdiction to try which is vested in the High Court (Section 80-A) Regulatory of the further processes on presentation of a petition are Sections 81 to 96. If a candidate whose return is challenged has a case invalidating the challenger's election he may set it up subject to the provision in Section 97. Then comes the finale in Section 98. The High Court has three options by way of conclusive determinations. It may (a) dismiss the petition; (b) declare the election void; and (c) go further to declare the petitioner duly elected. Side-stepping certain species



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of orders that may be passed under Section 99 we have to explore the gamut of implied powers when the grant of power is wide and needs incidental exercises to execute the substantive power.

87. A few more sections exist which we may omit as being not germane to the present controversy.

88. What is that controversy? Let us project it with special reference to the present case. Here the poll proceeded peacefully, the counting was almost complete, the ballots of most stations are available and postal votes plus the votes of one or two polling stations may alone be missing. Sri P.P. Rao asks and whenever counsel in court or speaker on a podium asks rhetorical questions be sure he is ready with an answer in his favour: If the court holds that the cancellation by the Commissioner of the whole poll is illegal what relief can it give me since a fresh election based on that demolition has been already held? If the court holds that since most of the ballots are intact, re-poll at one or two places is enough how can even the court hold such limited re-poll? If the court wants to grant the appellant the relief that he is duly elected how can the intervening processes lying within the competence of the Commissioner be commanded by the court? The solution to this disturbing string of interrogations is simple, given a creative reading of implied powers writ invisibly, yet viably, into the larger jurisdiction under Section 98. Law transcends legalism when life is baffled by surprise situations. In this larger view and in accordance with the well-established doctrine of implied powers we think the court *can* — and if justified, *shall* — do by its command, all that is necessary to repair the injury and make the remedy realisable. Courts are not luminous angels beating their golden wings in the void but operational authority sanctioning everything to fulfil the trust of the rule of law. That the less is the inarticulate part of the larger is the jurisprudence of power. Both Sri Sorabjee and Sri Phadke agree to this proposition and Sri Rao, in the light of the election petition filed and pending, cannot but assent to it. By way of abundant caution or otherwise, the appellant has challenged, in his election petition, the declaration of the third respondent as the returned candidate. He has also prayed for his being declared the duly elected candidate. There is no dispute — there cannot be — that the cornerstone of the second constituency-wide poll is the cancellation of the first. If that is set aside as invalid by the High Court for any good reason then the second poll falls and the third respondent too with it. This question of the soundness of the cancellation of the entire poll is within the court's power under Section 98 of the Act. All are agreed on this. In that eventuality, what are the follow-up steps? Everything necessary to resurrect, reconstruct and lead on to a consummation of the original process. Maybe, to give effective relief by way of completion of the broken election the Commissioner

may have to be directed to hold fresh poll and report back together with the ballots. A recount of all or some may perhaps be required. Other steps suggested by other developments may be desired. If anything integrally linked up with and necessitated by the obligation to grant full relief has to be undertaken or ordered to be done by the election machinery, all that is within the orbit of the Election Court's power.



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89. *Black's Law Dictionary* explains the proposition thus⁴⁴:

"Implied powers are such as are necessary to make available and carry into effect those powers which are expressly granted or conferred, and which must therefore be presumed to have been within the intention of the constitutional or legislative grant."

90. This understanding accords with justice and reason and has the support of Sutherland. The learned Addl. Solicitor-General also cited the cases in *Matajog Dobe v. H.C. Bhari*⁴⁵ and *Commissioner of Commercial Taxes v. R.S. Jhaver*⁴⁶ to substantiate his thesis that the doctrine of implied powers clothes the Commissioner with vast incidental powers. He illustrated his point by quoting from Sutherland (Frank E. Horack Jr., Vol. 3):

"*Necessary implications.*—Where a statute confers powers or duties in general terms, all powers and duties incidental and necessary to make such legislation effective are included by implication. Thus it has been stated, 'An express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty That which is clearly implied is as much a part of a law as that which is expressed.' 'The reason behind the rule is to be found in the fact that legislation is enacted to establish broad or general standards. Matters of minor detail are frequently omitted from legislative enactments, and 'if these could not be supplied by implication the drafting of legislation would be an interminable process and the true intent of the legislature likely to be defeated.'

The rule whereby a statute, is by necessary implication extended has been most frequently applied in the construction of laws delegating powers to public officers and administrative agencies. The powers thus granted involve a multitude of functions that are discoverable only through practical experience.

* * *

A municipality, empowered, by statute to construct sewers for the preservation of the public health, interest and convenience, was permitted to construct a protecting wall and pumping plant which were necessary for the proper working of the sewer, but were essential to public health. A country school superintendent, who was by statute given general supervisory power over a special election, was permitted to issue absentee ballots. The power to arrest has been held to include the power to take fingerprints, and take into custody non-residents who were exempted from the provisions of a licensing statute."

91. Having regard to statutory setting and comprehensive jurisdiction of the Election Court we are satisfied that it is within its powers to direct a re-poll of particular polling stations to be conducted by the specialised agency under the Election Commission and report the results and ballots to the court. Even a re-poll of postal ballots, since those names are known, can be ordered taking care to preserve

the secrecy of the vote. The court may, if necessary, after setting aside the election of Respondent 3 (if there are good grounds therefor) keep the case pending, issue directions for getting available votes, order recount and/or parital re-poll, keep the election petition pending and pass final orders holding the appellant elected if — only if — valid grounds are established. Such



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being the wide ranging scope of implied powers we are in agreement with the learned Addl. Solicitor-General that all the reliefs the appellant claims are within the Court's power to grant and Sri Rao's alarm is unfounded.

92. Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet that we synopsize the formulations. Of course, the condensed statement we make is for convenience, not for exclusion of the relevance or attenuation of the binding impact of the detailed argumentation. For this limited purpose, we set down our holdings:

“(1)(a) Article 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result.

(b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.

(2)(a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.

(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice insofar as conformance to such canons can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order viz. elections. Fairness does import an obligation to see that no wrongdoer candidate benefits by his own wrong. To put the matter beyond doubt, natural justice enlivens and applies to the specific case of order for total re-poll, although not in full panoply but in flexible practicability. Whether it has been complied with is left open for the Tribunal's adjudication.

(3) The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a remedy for every wrong done during the election in progress



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although it is postponed to the post-election stage and procedure as predicated in Article 329(b) and the 1951 Act. The Election Tribunal has, under the various provisions of the Act, large enough powers to give relief to an injured candidate if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do other thing necessary for fulfilment of the jurisdiction to undo illegality and

injustice and do complete justice within the parameters set by the existing law.”

93. In sum, a pragmatic *modus vivendi* between the Commission's paramount constitutional responsibility vis-a-vis elections and the rule of law vibrant with fair acting by every authority and remedy for every right breached, is reached.

94. We conclude stating that the bar of Article 329(b) is as wide as the door of Section 100 read with Section 98. The writ petition is dismissible but every relief (given factual proof) now prayed for in the pending election petition is within reach. On this view of the law *ubi jus ibi remedium* is vindicated, election injustice is avoided, and the constituency is allowed to speak effectively. In the light of and conditioned by the law we have laid down, we dismiss the appeal. Where the dispute which spirals to this Court is calculated to get a clarification of the legal calculus in an area of national moment, the parties are the occasion but the people are the beneficiaries, and so costs must not be visited on a particular person. Each party will bear his own costs.

95. A word of need for counsel. Shri Soli Sorabjee did, with imaginative, yet emphatic, clarity and pragmatic, yet persuasive, advocacy, belight the twilit, yet sensitive, zones of the electoral law; Shri P.P. Rao did, with feeling for justice and wrestling with law, drive home the calamities of our system if right did not speak to remedy; and Shri Phadke did, without overlapping argument, but with unsparing vigour, bring put the legal dynamics of quick elections and comprehensive corrections. We record our appreciation to the Bar whose help goes a long way for the Bench to do justice.

P.K. GOSWAMI, J. (for himself and Shinghal, J.) (concurring).— This appeal by special leave is directed against the judgment of the Delhi High Court dismissing the writ application of the appellant under Article 226 of the Constitution.

97. By a notification of February 10, 1977, made under Section 14 of the Representation of the People Act, 1951, (briefly “the Act”), the President called upon the Parliamentary Constituencies to elect members to the House of the People in accordance with the provisions of the Act and the Rules and orders made thereunder. Simultaneously, a notification was issued by the Chief Election Commissioner with a calendar of dates for different parliamentary constituencies in the country. In this appeal



we are concerned with 13-Ferozepore Parliamentary Constituency in the State of Punjab where the poll was scheduled to be held on March 15, 1977, and March 23 was fixed as the date before which the election shall be completed. Counting, according to the schedule, was to commence on March 20, 1977 and it actually continued on March 21, 1977. This parliamentary constituency consisted of nine assembly constituencies including the Fazilka and Zira Assembly segments.

98. We may now briefly state the appellants' case so far as it is material:

98-A. The poll in the entire Parliamentary Constituency was peacefully over on March 16, 1977. Counting in five assembly segments was completed on March 20, 1977, and in the remaining four it was completed on March 21. The Assistant Returning Officers made entries in the result sheets in Form 20 and announced the number of votes received by each candidate in the Assembly segments. No recounting was asked for by any candidate or his polling agent in any segment. Copies of the result sheets in Form 20 were handed over to the candidates or to their polling agents.

The ballot papers and the result sheets of all the nine Assembly segments were transmitted by the Assistant Returning Officers concerned to the Returning Officer at the Headquarters. According to the result sheets the appellant, who was the Congress candidate, secured 1,96,016 votes, excluding postal ballots, as against his nearest rival candidate, Respondent 3, belonging to the Akali Party, who secured 1,94,095 votes, excluding postal ballots. The margin of votes between the appellant and Respondent 3 at that stage was 1921. There were 769 postal ballots. As per programme, counting of postal ballot papers was started by the Returning Officer (Respondent 2) at 3.00 p.m. on March 21. 248 ballot papers out of 769 were rejected in the counting. At this stage, it is said, Respondent 3 and his son incited an unruly mob of his supporters to raid the office of the Returning Officer as a result of which a grave situation was created in which many officers received injuries. The Returning Officer was abused and was threatened that his son and other members of his family would be murdered. All the postal ballot papers, except those which had been rejected, were destroyed by the mob. Some ballot papers of Fazilka Assembly segment are also said to have been destroyed by the mob in the course of their transit to the office of the Returning Officer. The Assistant Returning Officer of the Zira Assembly segment, on his way to the office of the Returning Officer, was attacked by the mob and some of the envelopes containing ballot papers, paper seal accounts and Presiding Officers' diaries were snatched away from him. However the result sheets in Form 20 of all the Assembly segments in which the counting had been completed by March 21, 1977, could be preserved and were deposited in government treasury, Ferozepore. In view of the violent situation created in the office of the Returning Officer, he was prevented from ascertaining the result of the postal ballot papers and declaring the result of the election. He was made to sign a written report about the happenings to the Chief Election Commissioner (Respondent 1). The above, briefly, is the version of the appellant.



99. Deputy Commissioners are usually appointed as Returning Officers and originally Shri G.B.S. Gosal, who was the Deputy Commissioner, was nominated as the Returning Officer of the aforesaid constituency, as per notification dated January 29, 1977. It appears on February 8, 1977, Shri Gosal was transferred and Shri Gurbachan Singh, a close relation of the appellant, was appointed as the Deputy Commissioner in place of Shri Gosal. Shri Gurbachan Singh (Respondent 2) thus became the Returning Officer. There were complaints and allegations against him and after being apprised of the same the Chief Election Commissioner (Respondent 1) appointed Shri I.K.K. Menon, Under Secretary, Election Commission, as an Observer to be present at Ferozepore from March 16 till March 21 on which date the result was expected to be declared.

100. On March 22, 1977, the Chief Election Commissioner received a wireless message from the Returning Officer which may be quoted:

"Mob about sixteen thousand by overpowering the police attacked the counting hall where postal ballot papers were being counted. Police could not control the mob being outnumbered. Part of postal ballot papers excepting partly rejected ballot papers and other election material destroyed by the mob. Lot of damage to property done. The undersigned was forced under duress to give in writing the following: 'The counting of 13 Parliamentary Ferozepore Constituency has been adjourned due to certain circumstances which have been mentioned in the application presented

by Shri Mohinder Singh Sayanwala regarding re-poll of the constituency and on the polling station in which the ballot boxes have been reported to be tampered with. This will be finally decided on receipt of instructions from the Election Commission and the result will be announced thereafter.' Counting adjourned and result postponed till receipt of further instructions from Election Commission. Incident happened in the presence of Observer at Ferozepore. Mob also destroyed the ballot papers and other election material and steel trunks of Fazilka Assembly segment at Ferozepore after the counting part of election material of Zira Assembly segment was also snatched and destroyed by the mob at Ferozepore."

On the same day the Chief Election Commissioner received a written report from the Observer. The Observer also "orally apprised the Chief Election Commissioner of the various incidents at the time of poll and counting in various Assembly segments". No other report from the Returning Officer was, however, received on that day.

101. On the materials mentioned above which he could gather on March 22, 1977, the Chief Election Commissioner passed the impugned order on the same day. It may even be appropriate to quote the same:

"Election Commission of India
New Delhi
Dated March 22, 1977.
Chaitra 1, 1899 (SAKA)

NOTIFICATION

S.O. Whereas the Election Commission has received reports from the Returning Officer of 13-Ferozepur Parliamentary Constituency that the counting on March 21, 1977 was seriously disturbed by violence; that the ballot papers of some of the assembly segments of the parliamentary constituency have been destroyed by violence; that as a consequence it is not possible to complete the



counting of the votes in the constituency and the declaration of the result cannot be made with any degree of certainty;

And whereas the Commission is satisfied that taking all circumstances into account, the poll in the constituency has been vitiated to such an extent as to affect the result of the election;

Now, therefore, the Commission, in exercise of the powers vested in it under Article 324 of the Constitution, Section 153 of the Representation of the People Act, 1951 and all other powers enabling it so to do, cancels the poll already taken in the constituency and extends the time for the completion of the election up to April 30, 1977 . . .

* * *

102. The appellant approached the Chief Election Commissioner to revoke the impugned order and to declare the result of the election, but without success. That led to the writ application in the High Court with prayer to issue—

- "(1) a writ of certiorari calling forth the records for the purpose of quashing the impugned order; and
- (2) a writ of mandamus directing the Chief Election Commissioner and the Returning Officer to declare the result of the election;
- (3) alternatively, a writ of mandamus directing the Chief Election Commissioner to act strictly in accordance with the provisions of Section 64-A(2) thus confining

its directions in regard to postal ballot papers only.”

103. The appellant made three contentions before the High Court. Firstly, that the Election Commission had no jurisdiction to order re-poll of the entire parliamentary constituency. Secondly, the impugned order was violative of the principles of natural justice as no opportunity of a hearing was afforded to the appellant before passing the order. Thirdly, that the High Court under Article 226 of the Constitution was competent to go into the matter notwithstanding the provisions of Article 329(b) of the Constitution.

104. The application was resisted by the Chief Election Commissioner (Respondent 1) and Respondent 3, the rival candidate.

105. A preliminary objection was raised by Respondents 1 to 3 with regard to the maintainability of the writ application on the ground that Article 329(b) of the Constitution was a bar to the High Court's entertaining it. Another objection was taken that the writ petition was not maintainable in view of the amended provisions of Article 226 of the Constitution. The High Court dismissed the writ application. The High Court held that Article 324 confers “plenary executive powers” on the Election Commission and there were no limitations on the functions contemplated in Article 324. The High Court observed that the law framed under Article 327 or Article 328 was in aid of the plenary powers already conferred on the Election Commission under Article 324, and where the law so made under Article 327 or Article 328 omitted to provide for a contingency or a situation, the said plenary executive power relating to conduct of elections conferred upon the Election Commission by Article



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324(1) of the Constitution would become available to it and the Election Commission would be entitled to pass necessary orders in the interest of free and fair elections. The High Court also held that the Returning Officer could not deprive the candidates of the rights of recount available to them under Rule 63 of the Conduct of Election Rules, 1961, and after going into the facts observed that “it became impossible for the Returning Officer to comply with the provisions of Rule 63(2) to 63(6)”. Repelling the contention of the appellant that the Commission could not travel beyond the Act and the Rules by simply relying on its powers under the Constitution, the High Court observed “that calling upon of the parliamentary constituencies to elect members has to be in accordance with the provisions of the Act and the Rules but it does not mean that the conduct of elections by the Commission has to be held only under the Act or the Rules. The Election Commission who is vested with the power of conducting the elections has still to hold the elections in accordance with the Act and the Rules as well as under the Constitution”. The High Court further held that the principles of natural justice were not specifically provided for in Article 324 but were “totally excluded while passing the impugned order”. The High Court further observed that even if the principles of natural justice were impliedly to be observed before passing the impugned order the appellant was “heard not only before the issue of the notification but in any case after the notification”. The High Court also held that it had no jurisdiction to entertain the writ petition in view of the bar contained in Article 329 (b) of the Constitution.

106. This appeal has come up for hearing before this Constitution Bench on a reference by a two-Judge Bench as substantial questions of law have arisen as to the interpretation of the Constitution, in particular Article 324 and Article 329(b) of the Constitution. We should, therefore, immediately address ourselves to that aspect of the matter.

107. What is the scope and ambit of Article 324 of the Constitution? The Constitution of our country ushered in a democratic republic for the free people of India. The founders of the Constitution took solemn care to devote a special chapter to elections niched safely in Part XV of the Constitution. Originally there were only six articles in this Part opening with Article 324. The penultimate article in the chapter, as it stands, is Article 329 which puts a ban on interference by courts in electoral matters. We are not concerned in this appeal with the newly added Article 329-A which is the last article to close the chapter.

108. Elections supply the visa viva to a democracy. It was, therefore, deliberately and advisedly thought to be of paramount importance that the high and independent office of the Election Commission should be created under the Constitution to be in complete charge of the entire electoral process commencing with the issue of the notification by the President to the final declaration of the result. We are not concerned with the other duties of the Election Commission in this appeal.

109. Article 324 came to the notice of this Court for the first time



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in *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*⁴⁷. This Court observed:

“Broadly speaking, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Articles 327 and 328 deal with the first of these requisites. Article 324 with the second and Article 329 with the third requisite.”

Further below this Court observed as follows:

“Obviously, the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the Rules made thereunder.”

Lower down this Court further observed:

“It is now well-recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.

* * *

. . . it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage.”

110. *Ponnuswami case* had to deal with a matter arising out of rejection of a nomination paper which was the subject-matter of a writ application under Article 226 of the Constitution which the High Court had dismissed.

111. With regard to the construction of Article 329(b) it was held that “the more reasonable view seems to be that Article 229 covers all “electoral matters’ “. This Court put forth its conclusions in that decision as follows:

“(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the ‘election’; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the ‘election’ and enable, the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress.”

This Court also explained the connotation of the word “election” in very wide terms as follows:

“It seems to me that the word ‘election’ has been used in Part XV of the



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Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. The use of the expression ‘conduct of elections’ in Article 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other provisions which occur in Part XV including Article 329(b).”

This Court further observed that —

“. . . it (is) clear that the word ‘election’ can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process.

* * *

If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the Election Tribunal, which is to be an independent body, at the stage when the matter is brought up before it.”

The above decision is *locus-classicus* on the subject and the parties before us seek to derive support from it for their contentions.

112. The important question that arises for consideration is as to the amplitude of powers and the width of the functions which the Election Commission may exercise under Article 324 of the Constitution. According to Mr Rao, appearing on behalf of the appellants, there is no question of exercising any powers under Article 324 of the Constitution which, in terms, refers to “functions” under sub-article (6). We are, however, unable to accept this submission since functions include powers as well as duties (see *Stroud's Judicial Dictionary*, p. 1196). It is incomprehensible that a person or body can discharge any functions without exercising powers. Powers and duties are integrated with function.

113. Article 324(1) vests in the Election Commission the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the legislature of every State and of elections to the offices of the President and Vice-President held under the Constitution. Article 324(1) is thus couched in wide terms. Power in any democratic set-up, as is the pattern of our polity, is to be exercised in accordance with law. That is why Articles 327 and 328 provide for making of provisions with respect to all matters relating to or in connection with elections for the Union Legislatures and for the State Legislatures respectively. When appropriate laws are made under Article 327 by Parliament as well as under Article 328 by the State Legislatures, the Commission has to act in conformity with those laws and the other legal provisions made thereunder. Even so, both Articles 327 and 328 are "subject to the provisions" of the Constitution which include Article 324 and Article 329. Since the conduct of all elections to the various legislative bodies and to the offices of the President and the Vice-President is vested under Article 324(1) in the Election Commission, the framers of the Constitution took care to leaving scope for exercise of residuary power by the Commission, in its own right, as a creature of the



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Constitution, in the infinite variety of situations that may emerge from time to time in such a large democracy as ours. Every contingency could not be foreseen, or anticipated with precision. That is why there is no hedging in Article 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules. That seems to be the *raison d'être* for the opening clause in Articles 327 and 328 which leaves the exercise of powers under Article 324 operative and effective when it is reasonably called for in a vacuous area. There is, however, no doubt whatsoever that the Election Commission will have to conform to the existing laws and rules in exercising its powers and performing its manifold duties for the conduct of free and fair elections. The Election Commission is a high-powered and independent body which is irremovable from office except in accordance with the provisions of the Constitution relating to the removal of Judges of the Supreme Court and is intended by the framers of the Constitution to be kept completely free from any pulls and pressures that may be brought through political influence in a democracy run on party system. Once the appointment is made by the President, the Election Commission remains insulated from extraneous influences, and that cannot be achieved unless it has an amplitude of powers in the conduct of elections — of course in accordance with the existing laws. But where these are absent, and yet a situation has to be tackled, the Chief Election Commissioner has not to fold his hands and pray to God for divine inspiration to enable him to exercise his functions and to perform his duties or to look to any external authority for the grant of powers to deal with the situation. He must lawfully exercise his power independently, in all matters relating to the conduct of elections, and see that the election process is completed properly, in a free and fair manner. "An express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty That which is clearly implied is as much a part of a law as that which is expressed."⁴⁸

114. The Chief Election Commissioner has thus to pass appropriate orders on receipt of reports from the Returning Officer with regard to any situation arising in the course of an election and power cannot be denied to him to pass appropriate orders. Moreover, the power has to be exercised with promptitude. Whether an order passed is

wrong, arbitrary or is otherwise invalid, relates to the mode of exercising the power and does not touch upon the existence of the power in him if it is there either under the Act or the Rules made in that behalf, or under Article 324(1).

115. Apart from the several functions envisaged by the two Acts and the Rules made thereunder, where the Election Commission is required to make necessary orders or directions, are there any other functions of the Commission? Even if the answer to the question may be found elsewhere, reference may be made to Section 19 -A of the Act which, in terms,



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refers to functions not only under the Representation of the People Act, 1950 and the Representation of the People Act, 1951, or under the Rules made thereunder, but also under the Constitution. The Commission is, therefore, entitled to exercise certain powers under Article 324 itself, on its own right, in an area not covered by the Acts and the Rules. Whether the power is exercised in an arbitrary or capricious manner is a completely different question.

116. Mr Rao submits, referring to Sections 58 and 64-A of the Act, that the Chief Election Commissioner has no power to cancel the poll in the entire constituency. He submits that this is a case of complete lack of power and not merely illegal or irregular exercise of power. He points out that there is a clear provision under Section 63 of the Act for reordering of poll at a polling station. Similarly under Section 64-A there is provision for declaring the poll at a polling station void when the Election Commission is satisfied that there is destruction or loss etc. of ballot papers before counting. Counsel submits that while law has provided for situations specified in Section 58 with regard to loss or destruction of ballot boxes and under Section 64-A with regard to loss and destruction of ballot papers before counting of votes, no provision has been made for such an unusual exercise of power as the cancellation of the poll in the entire constituency after it has already been completed peacefully. It is, therefore, argued that, this is a case of complete lack of power of the Commission to pass the impugned order.

117. It is clear even from Section 58 and Section 64-A that the legislature envisaged the necessity for the cancellation of poll and ordering of re-poll in particular polling stations where situation may warrant such a course. When provision is made in the Act to deal with situations arising in a particular polling station, it cannot be said that if a general situation arises whereby numerous polling stations may witness serious malpractices affecting the purity of the electoral process, that power can be denied to the Election Commission to take an appropriate decision. The fact that a particular Chief Election Commissioner may take certain decisions unlawfully, arbitrarily or with ulterior motive or in mala fide exercise of power, is not the test in such a case. The question always relates to the existence of power and not the mode of exercise of power. Although Section 58 and Section 64-A mention "a polling station" or "a place fixed for the poll" it may, where necessary, embrace multiple polling stations.

118. Both under Section 58 and under Section 64-A the poll that was taken at a particular polling station can be voided and fresh poll can be ordered by the Commission. These two sections naturally envisage a particular situation in a polling station or a place fixed for the poll and cannot be said to be exhaustive. The provisions in Sections 58 and 64-A cannot therefore be said to rule out the making of an order to deal with a similar situation if it arises in several polling stations or even sometimes as a general feature in a substantially large area. It is, therefore, not possible to accept

the contention that the Election Commission



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has no power to make the impugned order for a re-poll in the entire constituency.

119. Mr Rao submits that once the Presidential notification has been made, it is left to the President alone to amend or alter the notification and power, in an appropriate case, may be exercised by the President in which case the action of the President will be on the advice of the Cabinet which will be responsible to the legislature. He submits that it was not the intention of the Constitution-makers in the entire scheme of the electoral provisions to entrust such an extraordinary power to the Election Commission. He further submits that in an appropriate case the President may also promulgate an ordinance under Article 123(1) of the Constitution cancelling the poll in the entire constituency.

120. The contention that the President can revoke, alter or amend the notification under Section 14 of the Act or that he can promulgate an ordinance in an appropriate case does not however answer the question. The question will have to be decided on the scope and ambit of power under Article 324(1) of the Constitution which vests the conduct of elections in the Election Commission. It is true that in exercise of powers under Article 324(1) the Election Commission cannot do something impinging upon the power of the President in making the notification under Section 14 of the Act. But after the notification has been issued by the President, the entire electoral process is in the charge of the Election Commission and the Commission is exclusively responsible for the conduct of the election without reference to any outside agency. We do not find any limitation in Article 324(1) from which it can be held that where the law made under Article 327 or the relevant Rules made thereunder do not provide for the mechanism of dealing with a certain extraordinary situation, the hands of the Election Commission are tied and it cannot independently decide for itself what to do in a matter relating to an election. We are clearly of opinion that the Election Commission is competent in an appropriate case to order re-poll of an entire constituency where necessary. It will be an exercise of power within the ambit of its functions under Article 324. The submission that there is complete lack of power to make the impugned order under Article 324 is devoid of substance.

121. The ancillary question which arises for consideration is that when the Election Commission amended its notification and extended the time for completion of the election by ordering a fresh poll, is it an order during the course of the process of "election" as that term is understood?

122. As already pointed out, it is well-settled that election covers the entire process from the issue of the notification under Section 14 to the declaration of the result under Section 66 of the Act. When a poll that has already taken place has been cancelled and a fresh poll has been ordered, the order therefor, with the amended date, is passed as an integral part of the electoral process. We are not concerned with the question whether the impugned order is right or wrong or invalid on any account. Even if it is a wrong order it does not cease to be an order passed by a



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competent authority charged with the conduct of elections with the aim and object of completing the elections. Although that is not always decisive, the impugned order

itself shows that it has been passed in the exercise of power under Article 324(1) and Section 153 of the Act. That is also the correct position. Such an order, relating, as it does, to election within the width of the expression as interpreted by this Court, cannot be questioned except by an election petition under the Act.

123. What do the appellants seek in the writ application? One of their prayers is for declaration of the result on the basis of the poll which has been cancelled. This is nothing short of seeking to establish the validity of a very important stage in the election process, namely, the poll which has taken place and which was countermanded by the impugned order. If the appellants succeed, the result may, if possible, be declared on the basis of that poll, or some other suitable orders may be passed. If they fail, a fresh poll will take place and the election will be declared on the basis of the fresh poll. This is, in effect, a vital issue which relates to questioning of the election since the election will be complete only after the fresh poll on the basis of which the declaration of the result will be made. In other words, there are no two elections as there is only one continuing process of election. If, therefore, during the process of election, at an intermediate or final stage, the entire poll has been wrongly cancelled and a fresh poll has been wrongly ordered, that is a matter which may be agitated after declaration of the result on the basis of the fresh poll, by questioning the election in the appropriate forum by means of an election petition in accordance with law. The appellants, then, will not be without a remedy to question every step in the electoral process and every order that has been passed in the process of the election including the countermanding of the earlier poll. In other words, when the appellants question the election after declaration of the result on the basis of the fresh poll, the Election Court will be able to entertain their objection with regard to the order of the Election Commission countermanding the earlier poll, and the whole matter will be at large. If for example, the Election Court comes to the conclusion that the earlier poll has been wrongly cancelled, or the impugned order of the Election Commission is otherwise invalid, it will be entitled to set aside the election on the basis of the fresh poll and will have power to breathe life into the countermanded poll and to make appropriate directions and orders in accordance with law. There is, therefore, no foundation for a grievance that the appellants will be without any remedy if their writ application is dismissed. It has in fact been fairly conceded by counsel for the other side that the Election court will be able to grant all appropriate reliefs and that the dismissal of the writ petition will not prejudice the appellants.

124. Indeed it has been brought to our notice that an election petition has been filed by the appellants, *ex abundanti cautela*, in the High Court of Punjab and Haryana, challenging the election which has since been completed on the basis of a fresh poll ordered by the Election Commission. The High Court of Punjab and Haryana will therefore be free to decide that petition in accordance with law.



125. It is submitted by Mr Rao that in *Ponnuswami* the question was of improper rejection of nomination paper which is clearly covered by Section 100(1)(c) of the Act. Counsel submits that the only ground which can be said to be raised in the election petition, in the present case, is Section 100(1)(d)(iv), namely, non-compliance with the provisions of the Constitution or of the Representation of the People Act, 1951, or of any Rules or orders made under that Act. According to counsel, there is no non-compliance with Article 324 of the Constitution as the Election Commission has no

power whatsoever to pass the impugned order under Article 324 of the Constitution. That, according to him, is not "non-compliance with the provisions of the Constitution" within the meaning of Section 100(1)(d)(iv). We are unable to accept this submission for the reasons already given. The Election Commission has passed the order professedly under Article 324 and Section 153 of the Act. We have already held that the order is within the scope and ambit of Article 324 of the Constitution. It, therefore, necessarily follows that if there is any illegality in the exercise of the power under Article 324 or under any provision of the Act, there is no reason why Section 100(1)(d)(iv) should not be attracted to it. If exercise of a power is competent either under the provisions of the Constitution or under any other provision of law, any infirmity in the exercise of that power is, in truth and substance, on account of non-compliance with the provisions of law, since law demands of exercise of power by its repository, as in a faithful trust, in a proper, regular, fair and reasonable manner. (See also *Durga Shanker Mehta v. Thakur Raghuraj Singh*⁴⁹)

126. The above being the legal position, Article 329(b) rules out the maintainability of the writ application. Article 329(b) provides that "notwithstanding anything in this Constitution ... no election to either House of Parliament . . . shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature". It is undisputed that an election can be challenged only under the provisions of the Act. Indeed Section 80 of the Act provides that "no election shall be called in question except by an Election petition presented in accordance with the provisions of" Part VI of the Act. We find that all the substantial reliefs which the appellants seek in the writ application, including the declaration of the election to be void and the declaration of Appellant 1 to be duly elected, can be claimed in the election petition. It will be within the power of the High Court, as the election Court, to give all appropriate reliefs to do complete justice between the parties. In doing so it will be open to the High Court to pass any ancillary or consequential order to enable it to grant the necessary relief provided under the Act. The writ application is therefore barred under Article 329(b) of the Constitution and the High Court rightly dismissed it on that ground.

127. In view of our conclusion that the High Court had no jurisdiction to entertain the writ application under Article 226 of the Constitution,



it will not be correct for us, in an appeal against the order of the High Court in that proceeding, to enter into any other controversy, on the merits, either on law or on facts, and to pronounce finally on the same. The pre-eminent position conferred by the Constitution on this Court under Article 141 of the Constitution does not envisage that this Court should lay down the law, in an appeal like this, on any matter which is required to be decided by the Election Court on a full trial of the election petition, without the benefit of the opinion of the Punjab and Haryana High Court which has the exclusive jurisdiction under Section 80-A of the Act to try the election petition. Moreover, a statutory right to appeal to this Court has been provided under Section 116-A, on any question, whether of law or fact, from every order made by the High Court in the dispute.

128. So, in view of the scheme of Part VI of the Act, the Delhi High Court could not have embarked upon an enquiry on any part of the merits of the dispute. Thus it could not have examined the question whether the impugned order was made by the Election Commission in breach of a rule of natural justice. That is a matter relating to the merits of the controversy and it is appropriately for the Election Court to try and

decide it after recording any evidence that may be led at the trial. It may be that if we pronounce on the question of the applicability of the rule of natural justice, the High Court will be relieved of its duty to that extent. But it has to be remembered that even for the purpose of deciding that question, the parties may choose to produce evidence, oral or documentary, in the trial court. We therefore refrain from expressing any opinion in this appeal on the question of the violation of any rule of natural justice by the Election Commission in passing the impugned order.

129. At the same time we would like to make it quite clear that any observation, on a question of law or fact, made in the impugned judgment of the Delhi High Court, bearing on the trial of the election petition pending in the Punjab and Haryana High Court, will stand vacated and will not come in the way of that trial. That High Court will thus be free to decide the petition according to the law. We would also like to make it quite clear, with all respect to the learned Judges who have delivered a separate judgment, that we may not be taken to have agreed with the views expressed therein about the applicability of *audi alteram partem* or on the applicability of the guidelines in Sections 58 and 64-A to the facts and circumstances of this case, or the desirability of ordering a re-poll in the whole constituency, or the ordering of a re-poll of postal ballots etc. Election is a long elaborate and complicated process and, as far as we can see, the rule of *audi alteram partem*, which is in itself a fluid rule, cannot be placed in a strait-jacket for purposes of the instant case. It has also to be remembered that the impugned order of the Election Commission could not be said to be a final pronouncement on the rights of the parties as it was in the nature of an order covering an unforeseen eventuality which had arisen at one stage of the election. The aggrieved party had all along a statutory right to call the entire election in question, including the Commission's order, by an election



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petition under Section 80 of the Act, for the trial of which an elaborate procedure has been laid down in the Act. Then, as has been stated, there is also a right of appeal under Section 116-A. These and perhaps other relevant points may enter the scales in considering at the trial of the election petition whether there may not be sufficient justification to negative the existence of any implied duty on the part of the Commission, at that stage, to hear any party before taking its decision to order or not to order a re-poll. We do not therefore think it necessary or desirable to foreclose a controversy like this by any general observations and will leave any issue that may arise from it for trial and adjudication by the Election Court.

130. Being not altogether certain of all the facts and circumstances that may be made available, in the appropriate forum, it may be a premature exercise by this Court even to lay down guidelines when there is no hide-bound formula of rules of natural justice to operate in all cases and at all times when a decision has to be made. Justice and fairplay have often to be harmonised with exigencies of situations in the light of accumulated totality of circumstances in a given case having regard to the question of prejudice not to the mere combatants in an electoral contest but to the real and larger issue of completion of free and fair election with rigorous promptitude. Not being adequately informed of all the facts and circumstances, this Court will not make the task of the Election Court difficult and embarrassing by suggesting guidelines in a rather twilight zone.

131. As we find no merit in this appeal, it is dismissed but, in the circumstances of the case, there will be no order as to the costs in this Court.

† Appeal by Special Leave from the Judgment and Order dated 25-4-1977 of the Delhi High Court in Civil Writ Petition 245 of 1977

¹ Vivian Grey, BK VI Ch 7

² *Commr. of Police, Bombay v. Gordhandas Bhanji*, AIR 1952 SC 16

³ *Indira Nehru Gandhi v. Raj Narain*, (1976) 2 SCR 347, 504-505 : 1975 Supp SCC 1, 120

⁴ *N.P. Ponnuswami v. Returning Officer*, (1952) SCR 218 : AIR 1952 SC 64 : 1 ELR 133

⁵ AIR 1958 SC 698 : 1959 SCR 611, 616, 622 : 14 ELR 296

⁶ Judicial Methods, B.N. Rau Memorial Lecture

⁷ AIR 1954 SC 520 : (1955) 1 SCR 267 : 9 ELR 494

⁸ *Hari Vishu Kamath v. Syed Ahmed Ishaque*, AIR 1955 SC 233 : (1955) 1 SCR 1104 : 10 ELR 216

⁹ *Dr N.B. Khare v. Election Commissioner of India*, AIR 1958 SC 139 : 1958 SCR 648

¹⁰ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1 : (1976) 2 SCR 347

¹¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

¹² *Virendra v. State of Punjab*, AIR 1957 SC 896 : 1958 SCR 308

¹³ *Harishankar Bagla v. State of M.P.*, AIR 1954 SC 465 : 1954 Cri LJ 1322 : (1955) 1 SCR 380

^{13a} *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1, 251 (para 661) : (1976) 2 SCR 347, 657

¹⁴ *A.K. Kripak v. Union of India*, (1969) 2 SCC 262 : (1970) 1 SCR 457

¹⁵ *Schmidt v. Secretary of State for Home Affairs*, (1969) 2 Ch 149

¹⁶ (1967) 2 QB 617, 630 : (1967) 1 All ER 226

¹⁷ AIR 1969 SC 198 : (1969) 1 SCR 317

¹⁸ Boson University Law Review, Vol. 53, p. 899

¹⁹ American Journal of International Law, Vol. 67, p. 479

²⁰ Current Legal Problems, 1973 Vol. 26, p. 16

²¹ (1977) 4 SCC 161

²² (1964) AC 40 : (1963) 2 All ER 66

²³ Natural Justice : Substance and Shadow 'Public Law' Journal — Spring 1975

²⁴ (1949) 1 All ER 109, 118 : 65 ILR 225

²⁵ *Durayappah v. Fernando*, (1967) 2 AC 337 : (1967) 2 All ER 152 (PC)

²⁶ 1971 AC 297 : (1969) 3 All ER 275

²⁷ (1976) 1 All ER 12, 19

²⁸ (1967) 3 All ER 1945

²⁹ *Pearlberg v. Varty*, (1971) 1 WLR 728

³⁰ (1970) 1 SCC 648 : (1970) 3 SCR 963

^{30a} (1967) 3 All ER 1945

³¹ (1974) 3 WLR 660

³² *Ram Gopal Chaturvedi v. State of M.P.*, (1969) 2 SCC 240 : (1970) 1 SCR 472

³³ *Union of India v. Col. J.N. Sinha*, (1970) 2 SCC 458 : (1971) 1 SCR 791

³⁴ *Board of High School and Intermediate Education, U.P., Allahabad v. Ghanshyam Das Gupta*, AIR 1962 SC 1110 : 1962 Supp 3 SCR 36

³⁵ (1971) 1 WLR 728, 737-38

^{35a} (1969) 2 Ch 149 : (1969) 1 All ER 904

^{35b} (1972) 1 WLR 534 (HL) : (1972) 2 All ER 6

³⁶ 1971 SC 297, 316

³⁷ (1966) 2 QB 330, 343, 346-47

³⁸ *Mallock v. Aberdeen Corpn.*, (1971) 1 WLR 1578, 1598 : (1971) 2 All ER 1278

³⁹ D.H. Clark : Natural Justice : Substance and Shadow, Public Law : Spring 1975, p. 50, f.n. 30

⁴⁰ Id. p. 60

⁴¹ Id. 63

⁴² Quotation from *American Federation of Labour v. American Suth and Door Co.*, 335 US 538 (1949) — p. 15 of Alan Barth's book published by Light & Life Publishers, New Delhi

⁴³ Quoted from M. Hidayatullah in "Democracy in India and the Judicial Process", Lajpat Rai at Memorial Lecture, p. 16

⁴⁴ Black's Legal Dictionary, 4th Edn., p. 1334

⁴⁵ AIR 1956 SC 44 : (1955) 2 SCR 925, 937 : (1955) 28 ITR 941 : 1956 Cri LJ 140

⁴⁶ AIR 1968 SC 59 : (1968) 1 SCR 148, 154-5 : 20 STC 453 : 66 ITR 664

⁴⁷ AIR 1952 SC 64 : 1952 SCR 218 : 1 ELR 133

⁴⁸ Sutherland Statutory Construction, Third Edn., p. 20

⁴⁹ AIR 1954 SC 520 : (1955) 1 SCR 267 : 9 ELR 494

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(BEFORE A.P. SEN AND S. NATARAJAN, JJ.)

STATE OF KERALA AND OTHERS . . Appellants;

Versus

K.G. MADHAVAN PILLAI AND OTHERS . . Respondents.

Civil Appeals Nos. 1407-15 of 1988[±] decided on September 19, 1988**I. RIGHT ACQUIRED BY APPLICANT UNDER CHAPTER V RULE 2-A(5) OF KERALA EDUCATION RULES AND ITS ENFORCEMENT UNDER ARTICLE 226****Education — Kerala Education Rules, 1959 — Chapter V Rules 2-A(5). 9 and 11 — Sanction under Rule 2-A(5) to educational agencies would confer on them a right to seek continuance of statutory procedural actions in order to have their applications considered under Rule 9 and dealt with under Rule 11**

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Held :

Though by the mere grant of an approval under Rule 2-A(5), an applicant will not acquire a right to open a new school or to upgrade an existing school, but once the Government approves an application for opening a new unaided school or a higher class in an existing unaided school and passes an order under Rule 2-A(5), the successful applicant acquires a right of legitimate expectation to have his application further considered under Rules 9 and 11 for the issue of a sanction order under Rule 11 for opening a new school or upgrading an existing school.

(Paras 18 and 27)

Education — Kerala Education Act, 1958 — Section 3(5) — Establishment of new schools or upgrading of existing schools prematurely even before publication of final list of approved areas under Chapter V Rule 2(4) of Kerala Education Rules — Effect — Held, that would not result in forfeiture of right of the affected educational agencies to question Government order of cancellation of its earlier order of sanction under Rule 2-A(5) — Kerala Education Rules, 1959, Chapter V, Rules 2(4) and 2-A(5)*Held :*

Section 3(5) of the Act does not totally ban the establishment of a new school or the opening of a higher class. It will not, therefore, be per se a contravention of the Act and the Rules if an educational agency started a new school or opened a higher class without following the provisions of the Act and the Rules and the only disqualification it would suffer is its disentitlement to Government's recognition. That apart in the present case the order of cancellation is not challenged by the respondent-educational agencies on the ground that they have already established new schools or opened higher classes in existing schools but on the ground that the earlier order of sanction had been cancelled without justifiable reason and without the respondents being heard. Therefore, the respondents cannot be non-suited merely on the ground that they had opened new schools or higher standards even before the Government published its final list of approved areas under Rule 2(4).

(Para 15)

Re Kerala Education Bill, 1957, 1959 SCR 995 : AIR 1958 SC 956, *referred to***Education — Kerala Education Rules, 1959 — Chapter V Rule 2-A(5) — Sanction granted under — Subsequent cancellation of, without affording opportunity of hearing to applicants — Results in deprivation of the rights of the applicants to get their applications further processed under Rules 9 and 11 — Accordingly, the applicants acquire locus standi to challenge the cancellation order before High Court — Constitution of India, Article 226**

Held :

The sanction orders passed in favour of the respondent-educational agencies under Rule 2-A(5) carried rights with them even before their



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acceptance under Rule 11. Therefore, after having granted sanction to the respondents under Rule 2-A(5) to open/upgrade schools, subject to satisfying the conditions under Rule 9 and obtaining clearance under Rule 11, the Government could not go back on the matter and cancel the sanction order and that too without giving the respondents any hearing at all. The Government having done so by passing the cancellation orders, the respondent-applicants acquired "legitimate expectation rights" and the requisite locus to challenge the cancellation orders.

(Paras 19 to 21)

Mani Subrat Jain v. State of Haryana, (1977) 1 SCC 486 : 1977 SCC (L&S) 166; *McInnes v. Onslow Fane*, (1978) 3 All ER 211; *Ebrahim Aboobakar v. Custodian General of Evacuee Property*, 1952 SCR 696 : AIR 1952 SC 319 and *S.P. Gupta v. Union of India*, 1981 Supp SCC 87, referred to

Education — Kerala Education Rules, 1959 — Chapter V Rule 2-A(5) — Sanction order under — Cancellation of — Writ petition under Article 226 challenging the cancellation order maintainable — High Court justified in issuing writs quashing the cancellation order and directing the Government to proceed further with the approval procedures — Constitution of India, Article 226

Held :

If an application is approved and sanction is granted under Rule 2-A(5), the applicant acquires a justiciable right to have his application considered at the next level of determination under Rule 9 and Rule 11. That right having been denied the High Court was justified in issuing writs under Article 226 for quashing the cancellation order and issuing a mandamus to the Government to proceed with the 'approval exercise' and consider the eligibility of the respondents for being granted permission under Rule 11. Insofar as many of the respondents not possessing the required extent of land or the type of building or the amount of finance etc. for opening a new school are concerned, it was always open to the Government when scrutinising the applications in the context of Rule 9 to refuse grant of permission to those applicants and reject their applications. By the judgment of the High Court the right of the State Government to pass appropriate orders under Rules 9 and 11 had not been taken away.

(Paras 28 and 29)

II. CANCELLATION OF SANCTION UNDER CHAPTER V RULE 2-A(5) OF KERALA EDUCATION RULES

A. Government's Right, if any

Education — Kerala Education Rules, 1959 — Rule 2-A(5) — Sanction order under — Cancellation or revocation of — Government cannot claim right under Section 20 of Kerala Interpretation and General Clauses Act in view of special provisions under the Kerala Education Act and Rules

General Clauses Act, 1897 — Section 21 — Kerala Interpretation



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and General Clauses Act, 1125 (7 of 1125) — Section 20 — Government's general power to rescind its own order — Should be understood in the context of special statutory provisions, if any

Held :

The general power of rescindment available to the State Government under Section 20 of the Kerala General Clauses Act has to be determined in the light of the "subject matter, context and the effect of the relevant provisions of the statute", viz the Kerala Education Act and Kerala Education Rules.

(Para 27)

State of M.P. v. V.P. Sharma, (1966) 3 SCR 557 : AIR 1966 SC 1593 and *Lt. Governor v. Avinash Sharma*, (1970) 2 SCC 149 : (1971) 1 SCR 413, referred to

B. Compliance with Natural Justice

Education – Kerala Education Rules, 1959 – Chapter V, Rule 2-A(5) – Sanction order under – Cancellation of – Compliance with principles of natural justice is condition precedent – Administrative Law – Natural justice

Held :

The applicants have to necessarily make arrangements for purchasing or taking on lease the required extent of land as well as making arrangements for the building and equipment that would be needed, for obtaining sanction from the Government even at the stage of making an application under Rule 2-A(2). Therefore, prejudice would occur to the respondent-applicants by reason of the cancellation order and as such principles of natural justice would be violated if the Government unilaterally revokes an order of sanction granted under Rule 2-A(5) to the respondents for opening new schools or for upgrading existing schools.

(Para 25)

C. Extraneous Considerations

Education – Kerala Education Rules, 1959 – Rule 2-A(5) – Sanction order under – Cancellation of, on ground that sanction order passed at the end of the academic year – Writ issued by High Court quashing the cancellation order justified when application under Rule 2-A(1) was made in time but passing of the sanction order was delayed due to interim orders passed by court

(Para 29)

Education – Kerala Education Rules, 1959 – Chapter V, Rules 2-A(5) and 11 – Publication of sanction order under Rule 2-A(5) for opening new unaided schools or upgrading existing unaided schools – Cancellation of, cannot be justified on ground that Government cannot be compelled to incur additional financial burden, the schools being unaided schools – Moreover, the sanction order required the applicants to give undertaking as provided under Rule 11(v)

(Para 24)



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Education – Kerala Education Rules, 1959 – Rules 2-A(5) and 11 – Sanction order under Rule 2-A(5) – Cancellation of, on ground that opening of new unaided schools or upgradation of existing unaided schools would result in financial burden on State – Held, cancellation order based on extraneous consideration – Hence writ petition under Article 226 quashing the cancellation order justified

(Para 29)

III. MISCELLANEOUS

Education – Kerala Education Rules, 1959 – Chapter V, Rule 2(4) – Publication of list of areas where new schools are to be opened or existing schools upgraded – Binding on Government

Held :

The publication of the final list under Rule 2(4) has not only binding force on the Government but it also entails consequential obligations on the Government. Rule 2 prescribes an elaborate procedure and the due application of mind by several agencies before the final list of approved areas is published under Rule 2(4). The selection of approved areas becomes final once the list is published under Rule 2(4), with or without modification and the finality is not contingent upon further approval under Rule 9.

(Paras 17 and 18)

Chingleput Bottlers v. Majestic Bottling Co., (1984) 3 SCC 258 : (1984) 3 SCR 190 : AIR 1984 SC 1030 and *State of Kerala v. A. Laxmikutty*, (1986) 4 SCC 632 : (1986) 1 ATC 735, referred to

Education — Kerala Education Rules, 1959 — Chapter V, Rule 2(5) proviso — Scope of power of modification under

The proviso to Rule 2(5) grants only limited power of modification to the Government viz. to alter the list here and there and not to scrap it outright. Even the power of modification can be exercised only after giving the affected parties an opportunity to make representations against the proposed modification.

(Para 17)

Education — Kerala Education Rules, 1959 — Chapter V, Rule 9 — Scheme of

What Rule 9 provides for is the grant of permission to applicants approved under Rule 2-A(5) to open new schools depending upon the applicant subjectively satisfying the Government about the factors mentioned therein. Rule 9 speaks of fulfilment of conditions only for opening new schools and not for the upgrading of existing schools. Rule 9 lays down subjective tests while Rule 2 prescribes objective as well as subjective standards in the matter of selecting areas which are in need of new schools or upgraded schools.

(Para 17)

Education — Kerala Education Rules, 1959 — Rule 11 — Government can fix date from which school should start functioning and exercise regulatory control in such matters

(Para 29)



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Education — Kerala Education Rules, 1959 — Chapter V — Rules 2(4), 2-A(1), (5), 9, 11, 14, 16-A and 17 — Opening of new schools or upgrading of existing schools and obtaining recognition from Government — Stages to be passed through by educational agency for

(Para 13)

Education — Kerala Education Rules — Rules 16-A and 17 — Government recognition to new schools or upgradation of schools — Importance of, explained

(Para 12)

R-M/9057/C

Advocates who appeared in this case:

P.S. Poti, Senior Advocate (K. Sudhakaran and K.R. Nambiar, Advocates, with him) for the Appellants;

T.S. Krishnamurthy Iyer, K.K. Venugopal and Dr Y.S. Chitale, Senior Advocates (E.M.S. Anam and Mrs Baby Krishnan, Advocates, with them) for the Respondents.

The Judgment of the Court was delivered by

S. NATARAJAN, J.— These appeals by special leave arise out of a common judgment rendered by the High Court of Kerala in a batch of writ appeals filed by the respondents herein against the dismissal of their petitions under Article 226 of the Constitution of India for the issue of writs of certiorari, mandamus, prohibition etc. by a learned Single Judge. Though the appeals were allowed and the order of learned Single Judge was reversed, the Division Bench has granted only limited reliefs to the respondents in that it has quashed the impugned order of the Government under Ex. P -7 dated 19-5-1987 and issued a mandamus to the State Government to consider the applications of the respondents on their merits on the basis of the earlier order passed in their favour under Ex. P-4 dated 4-2-1987. The State of Kerala, feeling aggrieved with the judgment of the Division Bench, has preferred these appeals.

2. Pursuant to the State Government publishing in the gazette a final list of areas where new unaided recognised high schools/upper primary schools/lower primary schools are to be opened or existing unaided lower primary schools/upper primary schools are to be upgraded in the year 1986-87, the respondent educational agencies submitted applications for grant of sanction to open new unaided recognised schools

or for upgrading the schools already run by them. On 4-2-1987, the State Government issued an order under Ex. P-4 granting sanction to the respondents to open new unaided schools or to upgrade their existing schools subject to the conditions set out therein. However, by an order under Ex. P-5 dated 20-2-1987, the Government directed the earlier order under Ex. P-4 to be kept in abeyance. The respondents challenged the order of the



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Government by means of petitions under Article 226 of the Constitution. During the pendency of the writ petitions, the general elections were held in Kerala State and a new ministry came to assume office. The Government under the new ministry passed an order dated 19-5-1987 under Ex. P-7 cancelling in toto the order under Ex. P-4 granting sanction to the respondents to open new schools or to upgrade the existing schools. This led to the respondents amending the writ petitions suitably so as to direct their challenge to the validity of the cancellation order passed under Ex. P-7. The respondents failed before the Single Judge but on appeal the Division Bench has granted them limited reliefs as set out above.

3. Before advertent to factual matters, it is necessary to refer to some of the relevant provisions of the Kerala Education Act (for short "the Act") and the Kerala Education Rules (for short "the Rules"). After the Kerala Education Bill, 1957, had been passed by the Kerala Legislative Assembly and was reserved by the Governor for the consideration of the President, the President made a reference to the Supreme Court under Article 143 (1) of the Constitution for obtaining the opinion of the court upon certain questions relating to the constitutional validity of some of the provisions of the Bill and the Supreme Court gave its opinion as reported in *re Kerala Education Bill, 1957*¹. The Preamble to the Act states that the Act is being enacted "to provide for the better organisation and development of educational institutions in the State providing a varied and comprehensive educational service throughout the State". Section 2 is the definition section and for our purpose it is enough if we look at the definitions of 'educational agency', 'private school', and 'recognised school' because we are concerned in these appeals only with private recognised schools and not with Government or departmental schools or aided schools. Section 2(2), 2(7) and 2(8) read as under:

"2.(2) 'Educational agency' means any person or body of persons permitted to establish and maintain any private school under this Act;

* * *

(7) 'Private school' means an aided or recognised school;

(8) 'Recognised school', means a private school recognised by the Government under this Act."

Section 3(1) empowers the Government to regulate primary and other stages of education and courses of instruction in government and private schools. It is apposite to mention here that recognised schools do not receive any financial aid from the Government though they are bound to impart instruction only according to the prescribed curriculum



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of studies and they can have recognised standards or divisions of classes only in

accordance with the Act and the Rules. Section 3(3) sets out that the Government may provide educational facilities by (a) establishing and maintaining schools or (b) permitting any person or body of persons to establish and maintain aided schools or (c) recognising any school established and maintained by any person or body of persons. Section 3(4) confers deemed recognition to all the schools which were in existence when the Act came into force. Section 3(5) stipulates that after the commencement of the Act, the establishment of a new school or the opening of a higher class in any private school shall be subject to the provisions of the Act and the Rules made thereunder and that if any school or higher class is established or opened otherwise than in accordance with the provisions of the Act and the Rules, they will not be entitled to be recognised by the Government. Section 9 provides that the Government shall pay the salary of all teachers in aided schools direct or through the Headmaster of the school. Section 13 lays down that if there is any retrenchment of teachers in any aided school on account of orders of Government, then the retrenched teachers can be absorbed in any Government school or aided school. Section 36 confers power on Government to make Rules, either prospectively or retrospectively for the purpose of carrying into effect the provisions of the Act. Section 37 provides that all Rules made under the Act shall be laid before the Legislative Assembly for its approval.

4. In exercise of its powers under Section 36, the Government have framed Rules and they have been approved by the legislature. Though the Rules contain several chapters, we need look only into Chapter V and the relevant rules therein. Rule 2 provides for the Director of Public Instructions (hereinafter the Director) preparing once in two years "a report indicating the locality where new schools or class or grades are to be opened and existing lower primary schools or upper primary schools or both are to be upgraded". In preparing such a report, the Director is enjoined to take into consideration several factors. The list so prepared by the Director should be published in the gazette before the end of January of the year of publication, inviting objections or representations against such list. Every objection filed by an objector has to be accompanied by a challan for Rs 10. On receipt of the objection, the educational authorities have to conduct enquiries, hear the parties, visit the areas and submit their reports, together with their views on the objections raised, to the Director within a period of two months. The Director, if he finds it necessary, may also hear the parties and thereafter he has to finalise the list and send his recommendations with the final list to Government within a period of two months. The Government has thereafter to scrutinise the records and approve the list with or without



modifications and cause the approved list to be published by the Director. As against the final list published by the Director, there is no right of appeal or revision for anyone but the Government is empowered to review the list. As Rules 2(4) and 2(5) are relevant for consideration, they are extracted hereunder:

"2. (4) Government after scrutinising all the records may approve the list, with or without modification and forward it to the Director within a month from the last date of the receipt of the recommendation of the Director. The list shall be finalised before the end of July by the Government and shall be published by the Director.

(5) No appeal or revision shall lie against the final list published by the Director:

Provided that the Government may, either suo motu or on application by any person objecting to the list published by the Director under sub-rule (4) made

before the expiry of thirty days from the date of such publication, review their order finalising such list and make such modifications in that list as they deem fit by way of additions or omissions, if they are satisfied that any relevant ground has not been taken into consideration or any irrelevant ground has been taken into account while finalising the said list:

Provided further that no modification shall be made under the preceding proviso without giving any person likely to be affected thereby an opportunity to make representations against such modification."

Then comes Rule 2-A which is an important provision and requires close scrutiny. Rule 2-A(1) provides that after the publication of the final list under Rule 2(4) the Director shall, by notification in the gazette in the month of October, call for applications for opening of new schools and for upgradation of existing schools in the areas specified in the final list. Rule 2-A (2) lays down that only applications made in response to the notification published by the Director will merit consideration and not applications made otherwise. Rule 2-A (3) lays down that on receipt of such applications for permission to open new schools or for upgrading of existing schools, the District Educational Officer should make appropriate enquiries regarding the correctness of the particulars contained in the application and other relevant matters and then forward the applications with his report thereon to the Director. Rule 2-A(4) obligates the Director to peruse the applications and the reports of the District Educational Officers and forward all the papers to the Government with his own report: Rule 2-A(5) enjoins the Government to consider the applications and the reports



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accompanying them and take a final decision and publish the same in the gazette. As this sub-rule is of importance it requires extraction:

"2-A (5) The Government shall consider the applications in the light of the report of the District Educational Officer and the Director and other relevant matters which the Government think necessary to be considered in this connection and shall take a final decision and publish their decision in the gazette with the list containing necessary particulars."

Rule 2-A(7) sets out the time schedule in which the applications are to be made and the orders of Government are to be issued. It is worthy of note that as against the list of applications approved by the Government and published in the gazette under Rule 2-A(5), there is no provision for the Government reviewing the list to the detriment of the applicants whose applications have been approved and the provision made under Rule 12 is only for unsuccessful applicants to present revision petitions to complain on their non-selection. The next rule which requires notice is Rule 9 which sets out the conditions for grant of permission to open new schools. Rule 10 which was originally in the Rules and which prescribes the preparation of a Development Plan by the Director came to be deleted when the Rules were amended. Rule 11 pertains to grant of permission to open new schools. The rule provides that if the Government are satisfied that permission to open the schools included in the development plan may be granted, the Government may issue orders to that effect through the Director specifying (i) the educational agency to whom permission is granted, (ii) the grade of the school, (iii) the standard or standards to be opened, (iv) the location of the school, (v) the date from which the school should start functioning and (vi) the conditions to be fulfilled by the educational agency in respect of the site, area, buildings, equipments, staff, financial guarantee etc. Rule 14 provides that when a new school is opened with permission granted under Rule 11, the District Educational Officer and the Director

should be informed of the date of opening of the school, the location, the standards opened, the name and qualifications of the staff etc. etc. The District Educational Officer should then visit the school and report to the Director about the conditions stipulated for opening the school being complied with. Rule 15 provides for withdrawal of permission if the conditions stipulated have not been fulfilled. Rule 16(a) deals with applications for recognition of schools or of additional standards. The rule states that within three months from the date of opening of schools or of additional standards, applications should be made to the educational authorities for grant of recognition or continuance of temporary recognition. Rule 17 sets out that if all the conditions prescribed have been satisfied, then the school shall be granted recognition.



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5. Now turning to factual matters, the Director published on 6-3-1986 a list indicating the areas where new unrecognised schools are to be opened and existing lower/upper primary schools are to be upgraded and inviting objections or representations against the list from interested parties. Thereafter, the educational authorities conducted the necessary enquiries, considered the objections/representations received and submitted their reports to the Director. Thereupon the Director bestowed his consideration to the matter and finalised the list and sent his recommendations to the Government. The Government approved the list with some modifications and then caused the approved list to be published by the Director on 24-6-1986 in the gazette. The list published by the Government set out 122 areas where new schools are to be opened or existing schools are to be upgraded in order to fulfil the educational needs of the notified areas. The gazette publication was under the caption: "The final list of areas where new unaided recognised high schools/upper primary schools/lower primary schools are to be opened or existing unaided lower primary schools/upper primary schools are to be upgraded in the year 1986-87."

6. The task of identifying and approving the areas where new unaided schools are to be opened or existing schools are to be upgraded having been accomplished, the Director took the next step of issuing a notification under Rule 2-A(1) calling for applications from intending applicants for opening new schools or for upgrading of existing schools in the selected areas. The respondents submitted their applications in response to the notification made by the Director. These applications were duly enquired into and considered by the District Educational Officer and thereafter by the Director as laid down in Rules 2-A(3) and (4) and thereafter the Government considered the applications in accordance with Rule 2-A(5) and took a final decision and caused their decision to be published in the gazette on 4-2-1987. As per the gazette notification, the Government granted sanction for the opening/upgrading of 36 lower primary schools, 36 upper primary schools and 19 high schools, totalling in all 91 schools in the list of areas selected. This gazette notification has been marked as Ex. P-4. The names of all the respondents found a place in the notification and they were granted permission to open/upgrade unaided schools. The order reads as under:

"Government are pleased to accord sanction to open/upgrade unaided recognised schools as detailed in Annexure to the Government order subject to the following conditions:

1. The schools will be permitted to be opened during the academic year 1986-87.

...



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2. For L.P. Schools and U.P. Schools without L.P. Section, the educational agencies must provide one acre of land; for U.P. School with L.P. School 1.5 acres of land; and for High Schools with or without primary section 3 acres of land. Recognition will be given only to the educational agency who produce evidence before the concerned controlling authority having provided the required site.

3. The applicants for opening of the schools or upgradation of the schools shall give an undertaking as provided under Note (v) to Rule 11 Chapter V of K.E. Rs."

7. It so happened that on 4-2-1987, itself an announcement was made regarding the holding of general elections in Kerala State but no dates were announced for the election. Presumably, to avoid criticism about the timing of the publication of the sanction order, the Chief Minister passed orders for keeping in abeyance the sanction accorded to the successful applicants under Ex. P-4 and a gazette notification to that effect was published on 23-2-1987. Thereupon, the respondents moved the High Court through petitions under Article 226 of the Constitution challenging the action of the Government. During the pendency of the writ petitions, the general elections came to be held and a new ministry assumed power in Kerala State. The new ministry decided to revoke the order of sanction passed under Ex. P-4 and caused a gazette notification Ex. P-7 to be made in that behalf. The notification was as under:

"In the GO read as first paper above sanction was accorded to open/upgrade 91 unaided recognised schools of various categories during the academic year 1986-87. As per GO read as second paper above the orders issued in the said GO were kept in abeyance until further orders.

2. Government have reconsidered the matter. At present there are more than 16,000 schools in the State. Thousands of protected teachers will have to be absorbed from these schools. Every time a recognised school is started in an area, there is an immediate impact on the neighbouring aided and Government schools leading to fall in strength and divisions, creating more protected teachers and thereby leading to wasteful expenditure. The 91 schools sanctioned were at the fag end of the academic year 1986-87 and it was not possible to start the schools during the same year. Many schools do not fulfil the conditions for starting the schools. In several cases exemption will have to be given to fulfil the conditions year after year. As such Government strongly feel that instead of starting new schools the existing schools should be strengthened in all respects, i.e. site, building, equipment etc.



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3. In the circumstances the orders issued in the GO read as first paper will stand cancelled. No recognised schools will be upgraded or sanctioned during 1987-88 also."

The learned Single Judge who heard the writ petitions filed by the respondents took the view that while it was obligatory for the Government to follow the procedure prescribed in Rules 2 and 2-A of Chapter V of the Rules, if it was to permit the opening

of new unaided recognised schools or the sanctioning of upgradation of existing schools, the converse result would not follow i.e. wherever the Government had gone through the exercise of the procedure laid down in Rules 2 and 2-A, the Government could not retrace its steps and was bound to proceed further in the matter of the opening of new schools or upgrading of existing schools and that the Government had no option to reverse its decision. Insofar as the Government's power to revoke an order of sanction made under Rule 2-A(5) is concerned, the learned Judge held that the Government's power to sanction new schools also carried with it an inherent right of cancellation of an order passed under Rule 2-A(5). The learned Judge saw justification for the cancellation order being passed by the Government on another ground also viz. that the sanction for opening of new schools or upgrading of schools was given only at the fag end of the academic year 1986-87 and, as such, the order of sanction was not capable of implementation. Besides these grounds, the Single Judge found merit in the reasons given by the Government in the impugned order Ex. P-7 for revoking the sanction viz. that the opening of new unaided schools or upgrading of existing unaided schools invariably resulted in fall of pupil strength and / or division strength in the Government-run as well as aided schools and this led to the ousting of teachers from aided schools whom the State had to treat as "protected teachers" and take care of them and provide appointments for them in Government as well as aided schools. The last reason which weighed with the Single Judge was that the Government's experience in the past showed that many of the schools proposed to be started or seeking upgradation were not able to fulfil the minimum requirements and resorted to seeking Government's indulgence for granting them exemption from complying with the prescribed conditions and requirements. In accordance with these views, the learned Single Judge dismissed the writ petitions.

8. The Division Bench which heard the writ appeals viewed the matter in a wholly different manner and allowed the appeals. The Division Bench held that firstly the writ petitioners had adequate locus standi to challenge the cancellation order of the Government and that the Government did not have power or jurisdiction to revoke the sanction order: secondly the order of cancellation violated the principles of natural justice: thirdly there was no application of mind and



fourthly the order of cancellation was passed on the basis of irrelevant grounds.

9. In presenting the case of the State before us in these appeals Mr Subramania Poti, learned Senior Advocate appearing for the State assailed every one of the findings and reasons given by the Division Bench and argued that the notifications made under Exs. P-4 and P-7 were only announcements of the policy decisions taken by the Government and the Government could revise its decision at any time and even if they are to be viewed as administrative orders passed by the Government, it was always open to the Government, in exercise of its powers under Section 20 of the Kerala General Clauses Act (corresponding to Section 21 of the General Clauses Act 10 of 1897) to add, amend, vary, or rescind the notifications. The learned counsel further stated that the respondents would get the status of 'aggrieved persons' and acquire locus standi to question any order of revocation passed by the Government only if they had been granted permission under Rule 11 to open new schools and not before as they would acquire "legitimate expectation rights" only after satisfying the requirements of Rule 11. Proceeding on the same lines, the learned counsel stated that the Government had not indulged in any adjudicative process nor had the Government violated any provisions of the Act or Rules or even the principles of

natural justice and, as such, the writ petitions did not present any justiciable issue for consideration by the court. The last submission made was that the cancellation order did not suffer either from the vice of non-application of mind or the permeation of irrelevant grounds.

10. Controverting the arguments of the appellant's counsel, Dr Chitale, Mr Krishnamurthy Iyer and Mr K.K. Venugopal, learned senior advocates appearing for the respondents contended that the decision rendered by the Division Bench is fully in accordance with law and needs no interference by this Court. They pointed out that the Division Bench has done nothing more than to place the parties in their status quo ante position by quashing Ex. P-7 and directing the Government to proceed further with the applications in order to see whether permission could be granted under Rule 11 of Chapter V.

11. In the light of these conflicting arguments what falls for consideration in these appeals may broadly be enunciated under the following heads:

“(1) Whether any rights accrued to the respondents pursuant to the sanction granted to them under Ex. P-4 for opening new schools or upgrading existing schools; so as to challenge the cancellation order under Ex. P-7 or whether the right of challenge would accrue to them only after further approval was granted under Rule 11.



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(2) Whether it was open to the Government under the Act and Rules or under Section 20 of the Kerala General Clauses Act to cancel in toto the sanction given to 91 approved applicants for opening new schools or upgrading existing schools.

(3) Even if the Government had powers of cancellation, whether the order under Ex. P-7 is vitiated by reason of (a) non-observance of the principles of natural justice (b) non-application of mind and (c) influence of irrelevant grounds.”

12. Before taking up for consideration these questions, we may set out the various stages contemplated by the Rules which have to be passed through by an educational agency in order to open a new school or upgrade an existing school and obtain recognition from the Government. It is relevant at this juncture to mention that the Act and the Rules do not prohibit the starting and running of private unaided schools by any agency and the only restriction is that it will not be entitled to secure recognition for the said school from the Government unless the conditions imposed by the Rules are satisfied and complied with. The importance of securing recognition lies in the fact that without recognition the students studying in the unaided schools will neither be permitted to appear as candidates in the examinations conducted by the State nor be eligible to avail of the opportunities for higher education or to enter public service examination. The obtainment of recognition from the Government is therefore a vital factor for the educational agencies starting new schools or newly upgrading their existing schools.

13. Coming now to the stages which should be gone through, there are five stages as set out by the Division Bench and which enunciation is accepted by the learned counsel for the appellants as the correct position. The first stage consists of the Government going through the exercise under Rule 2 culminating in the Government publishing under Rule 2(4) the localities where new schools are to be opened or existing schools are to be upgraded. The second stage consists of the Government calling for applications under Rule 2-A(1) from intending applicants for opening new

schools or for upgrading the existing schools in the areas specified and taking a final decision and publishing the list of approved applicants in the gazette under Rule 2-A (5). Then comes the third stage when the applications are subjected to more detailed scrutiny under Rule 11 regarding the fulfilment of conditions set out in Rule 9 and the drawing up of the order setting out the name of the educational agency, the grade of the school, the standards to be opened, the location and the date of opening of the school etc. The fourth stage is envisaged under Rule 14 and it consists of the educational agency permitted under Rule 11 to report to the educational authorities the factum of the opening of



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the school and the fulfilment of the conditions set out in the order and the names and qualifications of the staff etc. so that the educational officer can visit the school and submit a report to the Director regarding the fulfilment of all the conditions by the school authority. The fifth and the last stage is set out in Rules 16 and 17 and it pertains to the school authority applying for recognition under Rule 16-A and the Director granting sanction under Rule 17 after being satisfied that the school authority has satisfied all the requisite conditions for grant of recognition.

14. A fourfold argument was advanced by Mr Poti to assail the judgment of the Division Bench. The contentions were formulated as under:

“(1) The respondents are not entitled to the issue of a writ of mandamus because firstly they had unauthorisedly opened new schools in contravention of Section 3(5) without obtaining the Government's permission under Rule 11 Chapter V and secondly the proceedings under Chapter V had reached only the second stage of passing of an order under Rule 2-A(5) and had not reached the third stage of permission being granted under Rule 11 whereafter only the respondents would acquire 'legitimate expectation rights' cognisable in law.

(2) There was no violation of any rule or the principles of natural justice when the Government dropped the proposal of permitting new schools to be opened or existing schools to be upgraded in the 91 localities mentioned in Ex. P-4 notification because it was an administrative decision based on Government's policy and no adjudicative process was involved in the passing of the cancellation order.

(3) In any event the Government had inherent powers of revocation under Section 20 of the Kerala General Clauses Act corresponding to Section 21 of the Central Act and the exercise of such powers is not open to challenge.

(4) In any view of the matter, this was not a case where the High Court should have exercised its powers under Section 226 to restore the sanction order under Ex. P-4 because the court cannot impose an economic burden on the State's resources by issuance of a writ.”

15. Taking up for consideration the first limb of the first contention of the learned counsel, it is true the respondents have opened new schools or upgraded their existing schools at the approved localities on 2-6-1986 itself i.e. even before the final list of approved areas under Rule 2(4) was published on 24-6-1986 and the sanction order under Ex. P-4 was published on 4-2-1987. The



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question however will be whether by reason of the opening of the schools prematurely,

the respondents stand forfeited of their right to question the cancellation order under Ex. P-7. We think not. This is because Section 3(5) of the Act does not totally ban the establishment of a new school or the opening of a higher class but only states that if any school or higher class is opened without following the procedure, then such new school or higher class will not be entitled to recognition by the Government. It will not therefore, be per se a contravention of the Act and the Rules if an educational agency started a new school or opened a higher class without following the provisions of the Act and the Rules and the only disqualification it would suffer is its disentitlement to Government's recognition. That apart the order of cancellation is not challenged by the respondents on the ground they have already established new schools or opened higher classes in existing schools but on the ground the earlier order of sanction under Ex. P-4 had been cancelled without justifiable reason and without the respondents being heard. Therefore, the respondents cannot be non-suited merely on the ground they had opened new schools or higher standards even before the Government published its final list of approved areas under Rule 2(4). Hence, the first limb of the first argument of Mr Poti cannot be countenanced.

16. Insofar as the second limb of the first contention is concerned, it was urged by Mr Poti that the publication of the final list under Rule 2(4) was only a preliminary exercise and not a final one because the initial selection of localities under Rule 2(4) for opening new schools or upgrading existing schools requires further scrutiny and approval under Rule 9 and consequently any order of sanction granted under Rule 2-A (5) would leave the grantee only in the position of an applicant and not confer on him legitimate expectation rights. In support of his contention Mr Poti placed reliance on certain passages in *Chingleput Bottlers v. Majestic Bottling Co.*², *State of Kerala v. A. Laxmikutty*³ and certain passages in *Wade on Administrative Law* pp. 464, 465, 624 and 625.

17. Looking at Rule 2 and the procedure enunciated therein for determining the areas where new schools are to be opened or existing schools are to be upgraded, we are unable to accept the contention of Mr Poti that the selection of areas where additional educational facilities are to be provided is only an informal and inconsequential exercise and as such the final list published by the Government carried no force with it till such time the further selection process under Rule 9 is gone through. The reason for our saying so is because



Rule 2 prescribes an elaborate procedure and the due application of mind by several agencies before the final list of approved areas is published under Rule 2(4). Rule 2(1) enjoins the Director to prepare a list of localities where new schools or upgraded schools are to be opened after taking into consideration all the relevant factors viz. the existing schools in and around the locality, the strength of the several standards and the accommodation position in the existing schools, distance factors and the educational needs of the locality with reference to the habitation and backwardness of the area etc. Besides publishing the tentative list, the Director has to call for representations and objections from interested parties and they have to be duly considered by the Educational Officers of the locality and then by the Director himself and eventually the Government itself has to apply its mind to the selection of areas and then cause the final list to be published. The proviso to Rule 2(5) grants only limited powers of modification to the Government viz. to alter the list here and there and not to scrap it outright. Even the power of modification can be exercised only after giving the affected parties an opportunity to make representations against the

proposed modification. The selection of approved areas becomes final once the list is published under Rule 2(4), with or without modification and the finality is not contingent upon further approval under Rule 9. What Rule 9 itself provides for is the grant of permission to applicants approved under Rule 2-A(5) to open new schools depending upon the applicant subjectively satisfying the Government about his ownership or right to possession of the site, buildings and other needs of the school, his financial guarantee, his not being convicted of any offence involving moral turpitude and about the locality being in need of the new school and the accessibility of the new school to the members of the public. It is significant to point out that Rule 9 speaks of fulfilment of conditions only for opening new schools and not for the upgrading of existing schools. Thus it may be seen that Rule 9 lays down subjective tests while Rule 2 prescribes objective as well as subjective standards in the matter of selecting areas which are in need of new schools or upgraded schools. It was also pleaded that the final list published under Rule 2(4) was vulnerable to cancellation at any time before new schools were actually opened in the selected areas in accordance with the Rules because of change of conditions in the selected areas or because of the selected area losing their place of priority. This is too fragile a statement to merit acceptance because the need of a selected area, given recognition after an elaborate process of selection, cannot disappear overnight unless the need is fulfilled by the Government itself opening a new school or by the residents of the locality migrating on a large scale to another place.

18. That the publication of the final list under Rule 2(4) has



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not only binding force on the Government but it also entails consequential obligations on the Government could be seen from the fact that Rule 2-A(1) makes it imperative for the Director to call for applications from interested parties for opening new schools or upgrading existing schools in the selected areas. Mr Poti argued that it was only to prevent a deluge of applications for opening new schools all over the State, the selection of areas under Rule 2 is gone through so that the number of applications could be restricted. It is difficult for us to accept this statement because it runs counter to the scheme of Rule 2 regarding the selection of areas on objective factors and subjective considerations. Be that as it may, the mandate contained in Rule 2-A(1) goes to show that the identification and selection of inadequately served areas under Rule 2(4) is not an idle or meaningless exercise. Such being the case the applications made under Rule 2-A(1) cannot be treated as applications made by mere speculators or adventurers. On the contrary the applications carry with them a certain amount of legitimacy in that they pertain to opening of schools in the inadequately served areas notified by the Government and are made in response to the Director's notification calling for applications. In fact Rule 12 confers a right of revision on those applicants whose applications for the opening new/upgraded schools are not included in the list of approved applicants published by the Government under Rule 2-A(5). Thus when even an unsuccessful applicant is conferred a right to represent to Government against the non-approval of his application, can it be said that an approved applicant has no right whatever to complain when the sanction granted to him is revoked all of a sudden without he being given any opportunity to show cause against such cancellation. It is significant to note that the Rules do not provide for the revocation or cancellation of a final list published under Rule 2-A(5) and that the right of cancellation is given to the Government only if the approved applicant fails to satisfy the condition so laid down in Rule 9 and thereby becomes disentitled to obtain

sanction under Rule 11. The scheme of the Rules is such that after sanction is accorded to an applicant under Rule 2-A(5) to open a new/upgraded school, then the applicant acquires a right to have his application considered further under Rule 9 as regards his ownership or possession of land, buildings etc. his declaration of financial guarantee, the suitability of the place offered by him for location of the school and about he being free of any conviction by any criminal court so as to entitle him to the issue of an order under Rule 11. The further scrutiny of the application of the approved applicant under Rule 9 and the confirmation of approval under Rule 11 would not, however, mean that the earlier sanction granted under Rule 2-A(5) does not create "legitimate expectation rights" in the approved applicant.

19. Mr Poti contended that an applicant obtaining sanction under



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Rule 2-A(5) would only remain in the position of an applicant and it is only after further permission is granted under Rule 11, the applicant can be said to acquire 'legitimate expectation rights' and the requisite locus to challenge any order of cancellation passed by the Government. In support of his argument Mr Poti relied upon (1) *State of Kerala v. A. Laxmikutty*³ where the court after referring to the ruling in *Mani Subrat Jain v. State of Haryana*⁴ that a person whose name had been recommended for appointment as a District Judge by the High Court under Article 233 (1) had no legal right to the post, held that unless there was a judicially enforceable right no writ of mandamus for enforcement of a right would lie; (2) *Chingleput Bottlers v. Majestic Bottling*² where the distinction drawn by Megarry V.C. in *McInnes v. Onslow Fane*⁵ between initial applications for grant of licence and the revocation, suspension or refusal to renew licence already granted was referred to and the court observed that "the principle that there was a duty to observe the audi alteram partem" rule may not apply to cases which relate not to rights or legal expectations but to mere privilege or licence: (3) Wade on *Administrative Law*, 5th Edn. where difference between rights, liberties and expectations have been set out as under: (pp. 464-65)

"In many cases legal rights are affected, as where property is taken by compulsory purchase or someone is dismissed from a public office. But in other cases the person affected may have no more than an interest, a liberty or an expectation. An applicant for a licence, though devoid of any legal right to it, is as a general rule entitled to a fair hearing and to an opportunity to deal with any allegations against him. The holder of a licence who applies for its renewal is likewise entitled to be fairly heard before renewal can be refused. So also is a racegoer before he can be put under a statutory ban against entering a public racecourse.

In none of these situations is there legal right, but they may involve what the courts sometimes call 'legitimate expectation'. This expression furnishes judges with a flexible criterion whereby they can reject unmeritorious or unsuitable claims. It was introduced in a case where alien students of 'scientology' were refused extension of their entry permits as an act of policy by the Home Secretary. The Court of Appeal held that they had no legitimate expectation of extension beyond the permitted time and so no right to a hearing, though revocation of their permits within that time would have been contrary to legitimate



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expectation. Likewise where car-hire drivers had habitually offended against airport bye-laws, with many convictions and unpaid fines, it was held that they had no legitimate expectation of being heard before being banned by the airport authority. There is some ambiguity in the dicta about legitimate expectation, which may apparently mean either expectation of a fair hearing or expectation of the licence or other benefit which is being sought. But the result is the same in either case: absence of legitimate expectation will absolve the public authority from affording a hearing.

For the purposes of natural justice the question which matters is not whether the claimant has some legal right by whether legal power is being exercised over him to his disadvantage. It is not a matter of property or of vested interests, but simply of the exercise of Governmental power in a manner which is fair and considerate."

20. The argument, therefore, was that the respondents had no locus standi to move the court to seek the quashing of Ex. P-7 order and mandamus for their applications being approved and granted sanction under Rule 17. Refuting this contention Dr Chitale argued that the respondents were "persons aggrieved" and they had locus standi in the full sense of the term to move the court since their right to open a school, though not claimed as a constitutional right was a natural right and their suitability to open a school in the selected area having been accepted and their names included in the list published under Rule 2-A(5), the Government could not cancel the list. Dr Chitale relied upon the decisions of this Court in *Ebrahim Aboobakar v. Custodian General of Evacuee Property*⁶ and *S.P. Gupta v. Union of India*⁷. Arguments were also advanced by the appellant's counsel to contend that any permission given under the rule to run a school would only be a privilege while the respondent's counsel would say that it was a right within the meaning of Article 19(1)(g) of the Constitution. We do not think it necessary to go into this aspect of the matter because of the controversy narrowing down to the question whether after having granted sanction to the respondents under Rule 2-A(5) to open/upgrade schools, subject to satisfying the conditions under Rule 9 and obtaining clearance under Rule 11, the Government could go back on the matter and cancel the sanction order and that too without giving the respondents any hearing at all.

21. In the course of the arguments Mr Poti laid stress upon the fact that while Rule 9 lays down several conditions for being fulfilled



before permission can be granted under Rule 11 to an educational agency to start a new school or upgrade a school, the order made under Rule 2-A(5) makes mention of only one of the several conditions being noticed by the Government viz. the provision of land for the proposed school and as such the order, despite the use of the word "sanction" can by no stretch of imagination be considered as an order which conferred rights upon the respondents and therefore it was futile for the respondents to say that legally enforceable recognition had been given to them to open schools in the selected areas. Going a step further Mr Poti said that in many cases even the solitary factor noticed by the Government viz. the provision of land for the proposed school had not been adequately satisfied and this shortcoming has been referred to in the alleged sanction order passed under Rule 2-A(5). Going to the other end, Mr Iyer, and Dr Chitale tried to take up the stand that the sanction order passed under Rule 2-A(5) was virtually one under Rule 11 because the respondents had furnished information pertaining to all the conditions enunciated in Rule 9 and therefore what remained for the Government was only to see whether the schools opened or upgraded by the

respondents were entitled to grant of recognition under Rule 17 or not. We are unable to find merit in the last contention of the respondents in this behalf because the Division Bench has clearly stated in para 52 of the judgment that the stage of the Government giving directions for fulfilment of various conditions has not been reached and therefore it was directing "the State to proceed to take the further steps commencing from Rule 11, Chapter V of the K.E.R." In view of this categorical finding and since it is the admitted position that the Government have not subjectively scrutinised the application of each of the respondents with reference to the conditions enunciated in Rule 9, there is no scope for the respondents to say that the sanction order made under Ex. P-4 was for all practical purposes an order made under Rule 11. Even so, we cannot accept the contention of the State that the applications submitted by the respondents, despite their approval by the District Educational Officer, the Director and the Government and the publication of the sanction order under Rule 2-A (5) remained only at the threshold and it was therefore open to the Government to revise its policy of opening new schools or upgrading existing schools and throw overboard all the approved applications. We do not therefore feel persuaded to accept the first contention of the appellant's counsel that the sanction order passed in favour of the respondents under Rule 2-A(5) carried no rights with them and that they would remain still-born orders till they passed through the third stage and were given acceptance under Rule 11.

22. The second major contention of the appellant's counsel, it



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may be recalled, was that the Government had not violated any statutory provision or the principles of natural justice when it passed the cancellation order Ex. P-7 revoking the earlier order Ex. P-4. To a large extent the arguments on this aspect of the matter overlapped the arguments advanced with reference to the first ground of attack already dealt with. It was once again argued that the identification and selection of poorly served areas in the matter of educational facilities under Rule 2 was only an administrative exercise in order to restrict the number of applications for opening new schools within manageable limits and that the real test of selection of the areas began only when the applications were processed under Rule 9. It was likewise urged that though the Government was bound to implement the Directive Principles contained in Article 41 of the Constitution in the matter of providing educational facilities, the obligation was subject to the limits of the economic capacity of the Government and as such the Government cannot be compelled by any educational agency or even by the court to open new schools unmindful of the financial burden that would be cast on the State by the opening of such schools. The last submission made in this behalf was that the revocation order passed under Ex. P-7 was not in pursuance of any adjudication of the rights of the applicants but to make known the revised policy of the Government which was taken after considering several relevant factors such as the inadequate resources of the applicants in providing lands, buildings, equipment, financial guarantee etc. for opening the proposed schools, the backlash on Government's finances due to the resultant surplusage of teachers that would occur in aided and Government schools due to opening of more unaided schools etc. and therefore the respondents could neither complain of violation of the statute or the principles of natural justice when the Government passed the impugned order under Ex. P-7. It was pointed out by Mr Poti that the Secretary to Government, Education Department had pointed out in January 1983 about the inadvisability of opening new schools and about many of the applicants failing to satisfy most of the required conditions for

opening new schools but in spite of it the Education Minister had acted in a cavalier manner in passing the order of sanction under Ex. P-4 and therefore the Government was well within its rights in withholding the order in the first instance and revoking it in toto subsequently.

23. We are unable to see persuasive force in these contentions because they do not take notice of the realities of the situation. As we have already pointed out, the identification of inadequately served local areas in the matter of educational facilities and their selection process under Rule 2 cannot be construed as a meaningless and idle exercise. That apart, the final list of selected areas published under



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Rule 2(4) has not been revoked or cancelled by the Government. Though a fresh list of areas has to be prepared once in two years, that would not mean that the list can be rendered irrelevant due to non-implementation. Such being the case the sanction order granted to the 91 applicants from among the total number of 122 applications has the support of the earlier Government order made under Rule 2(4). It must, therefore, logically follow that the approved applicants are entitled to have their applications taken to the next stage for consideration on more subjective factors so as to obtain permission under Rule 11 if they satisfied the requirements laid down by Rule 9. We have already pointed out that the Rules do not provide for the Government reviewing suo motu any order of sanction passed under Rule 2-A(5) in favour of any applicant for opening of a new school or upgrading an existing school and its power of revision under Rule 12 is confined to the reconsideration of the case of any applicant whose name did not find a place in the final list of approved applications published by the Government.

24. Insofar as the argument that the Government cannot be compelled by any educational agency or by the court to incur additional financial burden by opening new schools, or new classes is concerned, we have to point out that the argument in the present context has no force because all the applications that were approved pertained to the opening of unaided schools. Therefore, there is no question of the Government being put to additional financial burden due to the opening of new schools in the selected areas. Moreover, the sanction order under Ex. P-4 specifically provided that "the applicants for opening of the schools or upgradation of the schools shall give an undertaking as provided under note (v) to Rule 11 Chapter V of the K.E.R." The undertaking referred to above is for ensuring that the approved applicant "shall not move the Government at any time for the conversion of the school into an aided school" and clause (b) of Rule 11 further provides that "if any application is made for conversion into an aided school, the permission granted for opening of the school shall automatically lapse". Hence the argument that the Government will be saddled with additional financial burden by the opening of new unaided schools is a misconceived one.

25. It cannot be disputed that the applicants have to necessarily make arrangements for purchasing or taking on lease the required extent of land as well as making arrangements for the building and equipment that would be needed, for obtaining sanction from the Government even at the stage of making an application under Rule 2-A(2). The Government cannot, therefore, be heard to say that no prejudice would occur to the respondents by reason of the cancellation order and that no principles of natural justice would be



violated if the Government unilaterally revokes an order of sanction granted under Rule 2-A(5) to the respondents for opening new schools or for upgrading existing schools. For all these reasons, we are unable to accept the second contention of the appellant's counsel.

26. We now pass on to the third contention that even if there is no provision in the Rules for the Government cancelling the sanction order passed under Ex. P-4, the Government is always possessed of inherent powers of revocation under Section 20 of the Kerala General Clauses Act and hence the Division Bench was wrong in holding that the Government had no jurisdiction to pass the impugned order Ex. P-7. In support of this argument, Mr Poti referred to the decisions in *State of M.P. v. V.P. Sharma*⁸ and *Lt. Governor v. Avinash Sharma*⁹. Both the cases arose under the Land Acquisition Act and what was in issue before the court was whether the Government could exercise powers only under Section 48 of the Land Acquisition Act to withdraw a notification for acquisition made under Section 4(1) of the Act. In the first case, after the issue of a notification under Section 4(1), the Government issued successive notifications under Section 6 of the Act covering different portions of the land notified for acquisition under Section 4(1). The validity of the last of the notifications under Section 6 was challenged on the ground that a notification under Section 4(1) could be followed only by one notification under Section 6 and that successive notifications with respect to different parts of the land comprised in one notification under Section 4(1) cannot be made. The contention was upheld by the High Court and also by this Court after overruling the plea that once a notification was made under Section 4(1), the Government could issue successive notifications under Section 6 as long as the notification under Section 4(1) was not withdrawn by the Government in exercise of its powers under Section 48. In repelling this contention, the court incidentally observed that the argument "that the only way in which the notification under Section 4(1) can come to an end is by withdrawal under Section 48(1)" is not correct because "under Section 21 of the General Clauses Act the power to issue a notification includes the power to rescind it and therefore it is always open to the Government to rescind a notification under Section 4 or under Section 6 and a withdrawal under Section 48(1) is not the only way in which a notification under Section 4 or Section 6 can be brought to an end".

27. In *Lt. Governor v. Avinash Sharma*⁹ the Government caused a notification under Section 4 of the Land Acquisition Act to be made



on 31-3-1964 and followed the same by a composite notification on 16-5-1964 under Sections 6, 17(1) and (4). Then the Collector served notices under Section 9 in June 1964. Subsequently on 5-10-1965 the State Government published an order cancelling the earlier notifications dated 31-3-1964 and 16-5-1964. The owner of the land challenged the cancellation order and sought a mandamus to direct the Government to proceed with the acquisition in accordance with law and determine the compensation payable to him for compulsory and urgent acquisition. It was contended on behalf of the State that under Section 21 of the General Clauses Act the State had the power to cancel the notification at any time and that Section 48 of the Land Acquisition Act did not trench upon that power. The contention was rejected and the writ petition filed by the owner of the land was allowed. In the course of the judgment

it was observed as follows: (SCC p. 151, para 6)

“Power to cancel a notification for compulsory acquisition is, it is true, not affected by Section 48 of the Act; by a notification under Section 21 of the General Clauses Act, the Government may cancel or rescind the notification issued under Sections 4 and 6 of the Land Acquisition Act.”

The Court, however pointed out that (SCC p. 151, para 6)

“The power under Section 21 of the General Clauses Act cannot be exercised after the land statutorily vests in the State Government.”

In another portion of the judgment it was observed that (SCC p. 152, para 8)

“after possession has been taken pursuant to a notification under Section 17(1) the land is vested in the Government, and the notification cannot be cancelled under Section 21 of the General Clauses Act, nor can the notification be withdrawn in exercise of the powers under Section 48”

and that (SCC p. 152, para 8)

“any other view would enable the State Government to circumvent the specific provision by relying upon a general power”.

Mr Poti's contention was that till the permission was granted under Rule 11 for opening new schools or upgrading schools, the power of the Government under Section 20 of the Kerala General Clauses Act remained unaffected. We are unable to accept this argument because as pointed out by the Division Bench, the Act and the Rules do not provide for revocation of an order of sanction granted under Rule 2-A(5) before taking the application to the third stage and



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evaluating it on subjective considerations as to whether permission should be granted under Rule 11 or not. In other words once the Government approves an application for opening a new unaided school or a higher class in an existing unaided school and passes an order under Rule 2-A(5), then the successful applicant acquires a right of legitimate expectation to have his application further considered under Rules 9 and 11 for the issue of a sanction order under Rule 11 for opening a new school or upgrading an existing school. It is no doubt true, as pointed out by the Division Bench, that by the mere grant of an approval under Rule 2-A(5), an applicant will not acquire a right to open a new school or to upgrade an existing school but he certainly acquires a right enforceable in law to have his application taken to the next stage of consideration under Rule 11. The Division Bench was therefore, right in taking the view that the general power of rescindment available to the State Government under Section 20 of the Kerala General Clauses Act has to be determined in the light of the “subject matter, context and the effect of the relevant provisions of the statute”. For the aforesaid reasons the fourth contention of Mr Poti has also to fail.

28. The last contention of Mr Poti was that the Division Bench of the High Court ought not to have issued writs under Article 226 of the Constitution for quashing the order under Ex. P-7 and issuing a mandamus to the Government to proceed with the ‘approval exercise’ and consider the eligibility of the respondents for being granted permission under Rule 11 for opening new schools or upgrading existing schools in the selected areas. Various factors were adverted to in support of this plea. It was first of all stated that the respondents have no enforceable right under law to open a school or to insist upon Government according them sanction. Secondly, it was stated that many of the respondents were not possessed of adequate land or suitable buildings or necessary equipment or financial resources etc. to open the schools. Thirdly, it was

urged that the academic year 1986-87 had almost come to a close when the order under Ex. P-4 was issued and hence the order had practically become inoperative. Fourthly, it was stated that though there would be no direct expenditure for the State in the opening of unaided schools, the consequential results would affect the finances of the State. It was said that as a result of the opening of new unaided schools or upgraded schools, the pupil strength and the division strength in the existing Government and aided schools inevitably get reduced and this led to reduction in the teaching staff strength of those schools and the teachers thrown out of employment have to be given protection by the State by treating them as protected teachers and absorbing them in other Government and aided schools as and when vacancies arose and it was in this



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manner the State's finances came to be affected. By this devious reasoning it was contended that the State cannot be compelled to incur additional expenditure in order to oblige the respondents opening new schools etc.

29. We have given our careful consideration to these submissions and find that they have no merit or substance. We have already set out that though the respondents do not claim a fundamental right, since none of them base their claim under Article 30 (1), to open new schools, they do acquire a legal right under the Act and the Rules, after the Government finalises the list of approved applicants for opening new schools or upgrading existing schools in the selected areas. The Rules enjoin the Government to scrutinise the applications at various levels and then cause a list of the approved applications to be published. Any applicant whose name is not included in the approved list can file a revision to Government under Rule 12 and seek redressal of his grievance. Therefore it follows that if an application is approved and sanction is granted under Rule 2-A(5), the applicant acquires a justiciable right to have his application considered at the next level of determination under Rule 9 and Rule 11. To take any other view of the matter would run counter to the Rules in Chapter V and the legislative intent underlying them. Insofar as many of the respondents not possessing the required extent of land or the type of building or the amount of finance etc. for opening a new school, it is always open to the Government when scrutinising the applications in the context of Rule 9, to refuse grant of permission to those applicants and reject their applications. By the judgment of the Division Bench, the right of the State Government to pass appropriate orders under Rules 9 and 11 have not been taken away. As regards the contention that the sanction granted under Ex. P-4 on 4-2-1987 was almost at the close of the academic year and as such the order could not have been effectively implemented by the respondents even if the order had not been revoked, we have only to point out that the applications were made well in time but at the instance of some parties who moved the High Court, the Government was restrained from passing sanction orders and it was on account of that there was some delay. Even otherwise Rule 11 provides for the Government prescribing the date from which the school should start functioning. It is always therefore open to the Government to fix the date from which the school should start functioning and the Government is not left without power to exercise regulatory control in such matters. The last of the reasons given viz. that by the opening of new aided schools, the teachers in the Government and aided schools will be rendered surplus due to fall in the pupil strength or the division strength in the existing schools, it speaks rather poorly of the standards



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of education in Government and aided schools. Be that as it may, this cannot be a reason which can be advanced by the Government after it had gone half the way through the exercise of opening new schools in areas and localities where educational facilities are not adequate. It was urged that there are 16,000 schools in Kerala State and they themselves cast a heavy burden on the finances of the State and as such the State cannot afford to have more teachers thrown out of employment in Government and aided schools due to opening of new schools and pay them their salary till such time they are absorbed in regular vacancies in the existing schools. The argument fails to take note of the fact that all these factors were not new developments but were in existence even when the Government took steps under Rule 2 to identify the poorly served areas and then called for applications from interested parties for grant of permission to open new schools or to upgrade existing schools. If really the opening of new aided schools would result in an adverse effect upon the finances of the State, then the Government should find remedy for the situation by amending the Rules suitably so as to severely limit the scope for opening new unaided schools by putting more stringent conditions. In fact, the Government have already proceeded in that direction and even now Rule 11 stipulates that any unaided school granted recognition should not seek conversion into an aided institution and that if such conversion is sought for, then the recognition granted earlier will automatically lapse. Over and above all these things, it is inconceivable that by the opening of 91 unaided schools, new or upgraded, even assuming all of them are granted permission under Rule 11, the impact on the pupil strength or division strength in the existing Government and aided schools will be so great as to cause a large number of teachers being rendered surplus and the Government being forced to incur heavy expenditure by treating them as protected teachers and paying them their salary. We are therefore, in complete agreement with the Division Bench that these factors are undoubtedly extraneous ones and do not afford justification for the passing of the impugned order Ex. P-7 for revoking the earlier sanction order Ex. P-4. Hence the last contention also fails.

30. In the light of our reasoning and conclusions, our answers for the three questions formulated by us are as under:

“(1) Though the sanction granted to the respondents under Ex. P-4 would not by itself entitle them to open new schools or upgrade the existing schools, it did confer on them a right to seek the continuance of the statutory procedural stream in order to have their applications considered under Rule 9 and dealt with under Rule 11.

(2) It was not open to the Government, either under the Act



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or Rules or under Section 20 of the Kerala General Clauses Act to cancel in toto the approval granted to the respondents under Rule 2-A(5), for opening new schools or upgrading existing schools in the selected areas on the basis of a revised policy.

(3) The impugned order under Ex. P-7, irrespective of the question whether the Government had the requisite power of cancellation or not, is vitiated by reason of non-observance of the principles of natural justice and the vice of extraneous factors.”

31. In the result, all the appeals fail and are accordingly dismissed. There will be no order as to costs. However, even as the Division Bench has done, we make it clear that

we are not making any pronouncement about the suitability or otherwise of the respondents to be granted permission under Rule 11 to open new schools or upgrade existing schools. All that we hold is that the respondents are entitled, on the basis of the earlier order passed in their favour under Ex. P-4, to seek continuance of the statutory procedure in order to have their applications considered under Rule 9 and for appropriate orders being passed under Rule 11 in accordance with law.

— — —

[†] From the Judgment and Order dated 29-9-1987 of the Kerala High Court in WA Nos. 601, 602, 604, 605, 610, 655, 664, 680 and 735 of 1987

¹ AIR 1958 SC 956 : 1959 SCR 995

² (1984) 3 SCC 258 : (1984) 3 SCR 190, 211-13 : AIR 1984 SC 1030

³ (1986) 4 SCC 632, 654 : (1986) 1 ATC 735

⁴ (1977) 1 SCC 486: 1977 SCC (L&S) 166

⁵ (1978) 3 All ER 211

⁶ AIR 1952 SC 319 : 1952 SCR 696

⁷ 1981 Supp SCC 87

⁸ AIR 1966 SC 1593 : (1966) 3 SCR 557, 570

⁹ (1970) 2 SCC 149 : (1971) 1 SCR 413, 416

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D.K. Yadav v. J.M.A. Industries Ltd., (1993) 3 SCC 259

D.K. YADAV V. J.M.A. INDUSTRIES LTD., (1993) 3 SCC 259

by

Manisha More^{*} and Arun K. Thiruvengadam^{*}

The law regarding voluntary abandonment of service has finally been settled; a domestic enquiry is required to be held. Principles of natural justice have been extended to apply to all acts which give rise to civil consequences, in the instant case, industrial relations and misconduct in employment. A fall-out of this decision is the extension of the principles underlying Articles 14 and 21 to employment in private firms, companies and organisations, beyond the confines of Article 12.

Introduction

A three-judge Bench of the Supreme Court comprising of Kuldip Singh, V. Ramaswami and K. Ramaswamy JJ. has, in the case of *D.K. Yadav v. J.M.A. Industries Ltd.*¹ delivered a judgement of considerable importance which extends the application of principles of natural justice beyond the realm of quasi-judicial and administrative action to hitherto neglected areas in the field of industrial disputes and labour relations.

The Background of the Case

The respondent, a private industrial concern, informed the appellant, a worker on the rolls of the concern, that he had wilfully absented himself from duty for more than eight days without leave or prior information or permission from the management and therefore was deemed to have left the service of the company of his own account and lost his lien on his appointment.

This action of the management was based on clause 13(2)(iv) of the Certified Standing Orders of the Industrial Concern which stipulates that if a workman remains absent without sanction of leave or beyond the period of leave originally granted or subsequently extended, the employee loses his lien on employment unless he returns to duty within eight calendar days of the commencement of the absence or the expiry of leave.

At this stage it would be pertinent to examine the legal status of these Certificate Standing Orders. A statutory mandate has been imposed on the owners of industrial establishments employing 100 or more workmen to formulate standing orders in compliance with the Industrial Employment (Standing Orders) Act, 1946. This law was enacted with the objective of



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introducing a certainty in the service conditions of workmen by placing a responsibility on the employer to stipulate the terms and conditions of employment in the form of Standing Orders.

The impugned action of the management was therefore, in conformity with Clause 13(2)(iv) of the Certified Standing Orders.

The Main Issue and the Reasoning Employed by the Court.

The principal issue considered by the Court was whether the impugned action was

violative of the principles of natural justice.

The Court, speaking through K. Ramaswamy J., then proceeded to examine all the leading cases on the issue and stated that the basic principles of natural justice are that in every case the person concerned should have a reasonable opportunity of presenting his case and the authority should act in a fair, just and impartial manner. The Court stated that principles of natural justice apply unless a particular statute or statutory rules or orders having statutory flavour exclude the application of natural justice expressly or by necessary implication.

The Court also stated that the duty to give a reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. ²

"Punitive or damaging action" which, necessitates observances of principles of natural justice has been liberally construed by the judiciary so as to include any action bearing civil consequences.³ The term "civil consequences" has been given a beneficial interpretation and has been held by a Constitution Bench to cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages.⁴ Reiterating these principles, the Supreme Court proceeded to hold that since the principles of natural justice are inherent in the guarantee of equality of Art. 14 any procedure prescribed by a Statute, or Statutory orders affecting the civil rights or resulting in civil consequences will have to comply with Art. 14.

The Court then proceeded to examine the validity of the impugned action in the light of Art. 21 and observed that the right to life guaranteed by Art. 21 includes, the right to livelihood.⁵ The order of termination of service of an employee or workman visits with civil consequences of jeopardising not only



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his livelihood but also that of his dependants. Thus the Court categorically held that before taking any action putting an end to the tenure of an employee fair-play requires that a reasonable opportunity to put forth his case be given and a domestic enquiry conducted in compliance with the principles of natural justice.

In this manner the Court stipulated that principles of natural justice would have to be read into Clause 13(2)(iv) of the Standing Orders in order to fulfil the requirement of just and fair procedure prescribed by Arts. 14 and 21.

Incidental observations that are of tremendous significance

The appellant raised an alternative argument to the effect that the definition of retrenchment in sec. 2(oo) of the Industrial Disputes Act, 1947 is a comprehensive one intended to cover any action of the management to terminate the employment of an employee. To support this contention, the decision in *Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court*⁶ was cited where it was held that the definition of retrenchment in sec. 2(oo) means the termination by the employer of the service of a workman for any reason whatsoever except those expressly excluded in the section. Such an interpretation would benefit the workers because in every case of termination of employment the benefit under sec. 25F would accrue to them and it would not be open to the management to deny the workers the benefits of the said section on the ground that certain forms of termination of employment do not amount to retrenchment.

The Court examined this proposition in some detail and also referred to a number of decisions delivered by the Supreme Court on previous occasions with respect to this issue and in conclusion stated that there was considerable force in the argument.

However, the Court decided not to rest its conclusion on this aspect as in its considered view, it could be decided on the issue of violation of natural justice. Nevertheless, the observation is of tremendous significance as the Court has *sub-silentio* conceded that, in the event that such a contention is raised before it in future, it would be inclined favourably towards it and such an interpretation would go a long way in strengthening the case of the workers in their unequal struggle with the management.

The relief granted by the Court

The Court turned its attention to this aspect after dealing with all the above mentioned legal principles. It noted that the management did not conduct any domestic enquiry nor gave the appellant any opportunity to put forth his case. The Court then stated that the appellant was equally to blame for the impugned action and under these circumstances, the Court held that 50 per cent of the back wages would meet the ends of justice.



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It is submitted that this is a line of reasoning that defies logic-the appellant had contested the basic facts as alleged by the management; it was his case that he had been prevented from being allowed to work. The Court has itself observed that there was no domestic enquiry. In the light of this fact, it becomes difficult to understand how the Court arrived at the conclusion that "the appellant was equally to blame for the impugned action".

It is submitted that the Court should have, in the proper course of things, ordered that a domestic inquiry be held to ascertain the facts and pending such an inquiry, it should have awarded reinstatement in service and 100% back wages to the appellant. Repercussions of this ruling

Extension of the principles of natural justice to all authorities widening the application of fundamental rights beyond "other authorities" in Art. 12.

This case has, because of the liberal outlook employed by the judges deciding it, the potential to bring about far reaching consequences. This is because it seeks to extend the application of principles of natural justice far beyond the confines of quasi-judicial and administrative actions.

To establish that the principles of natural justice have been violated, all that a person has to prove, as per this ruling, is that the order which affected his rights under Art. 14 gave rise to civil consequences and his case can be further strengthened if he can establish that his right to means of livelihood under Art. 21 is also affected. Since virtually every aspect of civil life is covered by these broad guidelines it would be safe to declare that the principles of natural justice must be complied with in every walk of civil life and that *every authority* which by its orders affects the rights of citizens *must* follow principles of natural justice while conducting its proceedings.

* IV Year B.A; LL.B (H). NLSIU.

¹ (1993) 3 SCC 259.

² In *A.K. Kraipak v. Union of India*, (1969) 2 SCC 262. a Constitution Bench held that there was no distinction between a quasi-judicial and an administrative function for the purposes of observance of natural justice.

³ In *State of Orissa v. Dr. Binapani Dei*, (1967) 2 SCR 625. the Supreme Court held that even an administrative

order which involves civil consequences must be made consistently with rules of natural justice.

⁴ *Mohinder Singh Gill v. Chief Election Commissioner*, (1978) 1 SCC 405.

⁵ In *DTC v. Mazdoor Congress*, 1991 Supp (1) SCC 600, the Supreme Court held that the right to public employment and its concomitant right to livelihood were protected by Arts. 14 and 21.

⁶ (1990) 3 SCC 682.

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(BEFORE B. SUDERSHAN REDDY AND S.S. NIJJAR, JJ.)

Civil Appeal No. 8601 of 2010[±]

NATWAR SINGH . . Appellant;

Versus

DIRECTOR OF ENFORCEMENT AND ANOTHER . . Respondents.

*With*Civil Appeal No. 8602 of 2010[±]

JAGAT SINGH . . Appellant;

Versus

DIRECTOR OF ENFORCEMENT AND ANOTHER . . Respondents.

Civil Appeals No. 8601 of 2010 with No. 8602 of 2010, decided on October 5, 2010

A. Debt, Financial and Monetary Laws — Foreign Exchange Management Act, 1999 — Ss. 16 and 13 — Documents required to be supplied at stage of issuance of notice under R. 4(1), 2000 Rules — Formation of opinion as to initiation of inquiry under R. 4(1) stage distinguished from inquiry proper under R. 4(6) stage for imposition of penalty — Existence of structured procedure under FEMA and 2000 Rules and its implications



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— Appellant noticee without general or special permission of RBI dealing in, acquiring, making payment and transferring foreign exchange from/to persons specified in complaint — FEMA prohibiting such transactions and providing penalty therefor — With obvious and sole objective to obstruct proceedings, appellant noticee at stage of R. 4(1) notice, making vague and indefinite requests on irrelevant grounds for supply of all documents in possession of Authority which also included some 83,000 documents procured from USA — Proceeding initiated as early as 2006 still held up due to such demands

— Held, as per a fair reading of 2000 Rules and FEMA, at R. 4(1) notice stage adjudicating authority is required to furnish copies of only those documents upon which reliance has been placed by it to issue show-cause notice — A noticee is always entitled to satisfy the adjudicating authority that those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry — This does not amount to supplanting procedure laid down therein and would in no manner frustrate apparent purpose of 2000 Rules and FEMA — However, at stage of formation of opinion as to initiation of inquiry under R. 4(1), noticee is not entitled to supply of documents on which no reliance has been placed by appellate authority to set law into motion — R. 4(6) procedure of summoning witnesses and production of documents involving serious consequences of imposition of penalty, on the other hand, requires production of reports and evidence in possession of deciding authority — Adjudicating authority appointed by Central Government under S. 16(1) therefore directed to expeditiously deal with complaint as required under S. 16(6) — Appeal dismissed with costs — Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 — Rr. 4(1) and (6)

(Paras 30 to 36, 45 to 48, 50 to 56, 4 to 7, 15, 16 and 21 to 23)

B. Administrative Law — Natural Justice — Audi alteram partem — Right to hearing — Adverse material, awareness/supply of — Doctrine of disclosure and theory of prejudice, explained — Held, if relevant materials are not disclosed to noticee, there is prima facie

unfairness irrespective of whether material in question arose before, during or after the hearing – A noticee has a right to know evidence to be used against him and is entitled to prepare his defence if prejudicial allegations are made – However, there must have been caused some real prejudice to complainant – There is no such thing as a merely technical infringement of natural justice

C. Administrative Law – Natural Justice – Audi alteram partem – Right to hearing – Adverse material, awareness/supply of – Duty of disclosure – Exceptions, special provisions and considerations, explained and flexible approach, prescribed – Proper mode of disclosure, whether only inspection or supply of documents – Held, while applying doctrine of fair play there must be real flexibility – Concept of fairness is not a one-way street – It cannot operate as roadblocks to statutory inquiries – No court can compel statutory authority to altogether deviate from prescribed procedure – There must have been caused some real prejudice to



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complainant – There is no such thing as a merely technical infringement of natural justice – Duty of adequate disclosure is only an additional procedural safeguard in order to ensure attainment of fairness and it has its own limitations – However, disclosure may not necessarily involve supply of material – A person can be allowed to inspect file and take notes – Evidence Act, 1872 – Ss. 123 to 125

D. Administrative Law – Natural Justice – Effect of violation of natural justice: void or voidable – Need to show real prejudice – Held, there must have been caused some real prejudice to complainant – There is no such thing as a merely technical infringement of natural justice

E. Administrative Law – Natural Justice – Audi alteram partem – Right to hearing – Adverse material, awareness/supply of – Disclosure, when may be avoided – Evidence Act, 1872, Ss. 123 to 125

F. Administrative Law – Natural Justice – Audi alteram partem – Right to hearing – Generally – Meaning, nature, scope and applicability – Extent to which court may supplement statutory procedure(s) – Held, in order to ensure a fair hearing, courts can insist and require additional steps as long as such steps would not frustrate apparent purpose of the legislation – Principles of natural justice are not intended to operate as roadblocks to obstruct statutory inquiries – Constitution of India – Arts. 14 and 21

Held :

The extent of applicability of principles of natural justice and concept of fairness depends upon the circumstances of the case, the statutory framework, the subject-matter to be dealt with, the nature of inquiry, the consequences that may visit a person after such inquiry from out of the decision pursuant to such inquiry and so forth. While applying the doctrine of fair play there must be real flexibility. The concept of fairness is not a one-way street. The principles of natural justice are not intended to operate as roadblocks to obstruct statutory inquiries. There must also have been caused some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice.

(Paras 26, 29 and 48)

R. v. Gaming Board for Great Britain, ex p Benaim and Khaida, (1970) 2 QB 417 : (1970) 2 WLR 1009 : (1970) 2 All ER 528 (CA); *Lloyd v. McMahon*, 1987 AC 625 : (1987) 2 WLR 821 : (1987) 1 All ER 1118 (HL); *Wiseman v. Borneman*, 1971 AC 297 : (1969) 3 WLR 706 : (1969) 3 All ER 275 (HL); *A.K. Kraipak v. Union of India*, (1969) 2 SCC 262; *Mohinder Singh Gill v. Chief Election Commr.*, (1978) 1 SCC 405, *relied on*

State (Inspector of Police) v. Surya Sankaram Karri, (2006) 7 SCC 172 : (2006) 3 SCC (Cri) 225; *Union of India v. Ranu Bhandari*, (2008) 17 SCC 348 : (2010) 4 SCC (Cri) 543; *Dwarka Prasad Agarwal v. B.D. Agarwal*, (2003) 6 SCC 230; *Tribhuvandas Bhimji Zaveri v. CCE*, (1997) 11 SCC 276; *State of M.P. v. Chintaman Sadashiva Vaishampayan*, AIR 1961 SC 1623; *R. v. H*, (2004) 2 AC 134 : (2004) 2 WLR 335 : (2004) 1 All ER 1269 : 2004 UKHL 3 (HL); *R. v. C*, (2006) 1 WLR 2994 : (2006) 3 All ER 689 (CA), *distinguished*

Lord Denning, M.R. in *Administrative Law* by Wade & Forsyth, 8th Edn. at p. 491, Line 4 from the bottom, referred to

In order to ensure a fair hearing, courts can insist upon and require additional steps as long as such steps would not frustrate the apparent purpose of



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the legislation. No court can compel the authority to deviate from the statute and exercise the power in altogether a different manner than the prescribed one. Duty of adequate disclosure is only an additional procedural safeguard in order to ensure the attainment of the fairness and it has its own limitations.

(Paras 26, 33 and 48)

As per the fundamental rules of natural justice, doctrine of fairness, doctrine of disclosure, theory of prejudice and a fair reading of the 2000 Rules and FEMA, an adjudicating authority is required to furnish copies of those documents upon which reliance has been placed by it to issue show-cause notice requiring the noticee to explain as to why an inquiry under Section 16 of the Act should not be initiated. To this extent, the principles of natural justice and concept of fairness are required to be read into Rule 4(1) of the Rules. Fair procedure and the principles of natural justice are in-built into the Rules. Such a fair reading of the provision would not amount to supplanting the procedure laid down and would in no manner frustrate the apparent purpose of the statute. As per such general rule if relevant material is not disclosed to a party/noticee, there is prima facie unfairness irrespective of whether the material in question arose before, during or after the hearing. A noticee is always entitled to satisfy the adjudicating authority that those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry. The right to fair hearing is a guaranteed right. Every person before an authority exercising the adjudicatory powers has a right to know the evidence to be used against him. Disclosure does not necessarily involves supply of the material. A person may be allowed to inspect the file and take notes. Whatever mode is used, the fundamental principle remains that nothing should be used against the person which has not been brought to his notice. If prejudicial allegations are to be made against a person, he must be given particulars of that before hearing so that he can prepare his defence. A proper hearing always include, no doubt, a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view. Disclosure of such things assist the accused in the timely preparation and presentation of their case and assist the case to focus on all the relevant issues in the trial.

(Paras 31, 30, 34, 46 and 45)

Dhakeswari Cotton Mills Ltd. v. CIT, AIR 1955 SC 65 : (1955) 1 SCR 941; *R. v. Secy. of State for Home Deptt., ex p H*, 1995 QB 43 : (1994) 3 WLR 1110 : (1995) 1 All ER 479 (CA); *Kanda v. Govt. of Malaya*, 1962 AC 322 : (1962) 2 WLR 1153 (PC), relied on

Criminal Procedure and Investigations Act, 1996 (UK), recently amended by the *Criminal Justice Act, 2003*, referred to

Such a fair reading of FEMA and the 2000 Rules would not amount to supplanting the procedure laid down and would in no manner frustrate the apparent purpose of the statute. All such documents relied on by the authority are required to be furnished to the noticee enabling him to show a proper cause as to why an inquiry should not be held against him though the Rules do not provide for the same. To this extent, the general principles of natural justice and concept of fairness are required to be read into Rule 4(1).

(Para 31)

Kanda v. Govt. of Malaya, 1962 AC 322 : (1962) 2 WLR 1153 (PC), relied on

However, there are various exceptions to this general rule where disclosure of evidential material might inflict serious harm on the person directly concerned



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or other persons or where disclosure would be breach of confidence or might be injurious to the public interest because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, might make it impossible to obtain certain clauses of essential information at all in the future.

(Para 30)

G. Precedents – Interpretation of judgments – Contextual interpretation, prescribed – Constitution of India, Art. 141

Reiterated :

Observations of the courts are not to be read as Euclid's theorems nor as provisions of the statute. The observations must be read in the context in which they appear. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision to impute a different meaning to the observations.

(Para 44)

Haryana Financial Corpn. v. Jagdamba Oil Mills, (2002) 3 SCC 496, relied on

State (Inspector of Police) v. Surya Sankaram Karri, (2006) 7 SCC 172 : (2006) 3 SCC (Cri) 225; Union of India v. Ranu Bhandari, (2008) 17 SCC 348 : (2010) 4 SCC (Cri) 543; Dwarka Prasad Agarwal v. B.D. Agarwal, (2003) 6 SCC 230; Tribhuvandas Bhimji Zaveri v. CCE, (1997) 11 SCC 276; State of M.P. v. Chintaman Sadashiva Vaishampayan, AIR 1961 SC 1623; R. v. H, (2004) 2 AC 134 : (2004) 2 WLR 335 : (2004) 1 All ER 1269 : 2004 UKHL 3 (HL); R. v. C, (2006) 1 WLR 2994 : (2006) 3 All ER 689 (CA), referred to

H. Debt, Financial and Monetary Laws – Foreign Exchange Management Act, 1999 – Ss. 16 and 28 – Jurisdiction and scope of exercise of power of Adjudicating Authority, clarified – Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000, R. 4

Held :

While holding inquiry into allegations of contravention, every adjudicating authority shall have the powers of a civil court under CPC in respect of the matters, namely, (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring discovery and production of documents; (c) receiving evidence on affidavits; (d) requisitioning any public record, document or copy of such record or document from any office; (e) issuing commissions for examination of witnesses or documents, etc. That all proceedings before the adjudicating authority shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 IPC; shall be deemed to be a civil court for the purposes of Sections 345 and 346 CrPC.

(Para 24)

I. Constitution of India – Art. 136 – Citing case law – Proper mode for – Citations included in compilations without leave of Court, held, would not be considered – Practice and Procedure – Case law – Advocates – Advocates-on-Record

Held :

The recent practice and procedure of including list of authorities in the compilation without the leave of the Court, must be deprecated. In many a case, even the Senior Counsel may not be aware of inclusion of such authorities in the compilation. Such decisions which are not cited at the Bar cannot be included in the compilation. In the present case, number of judgments are included in the compilation which were not cited at the Bar by any of the counsel. They have not been dealt with as they are not required to be dealt with. At any rate, these



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judgments deal with the procedural aspects and concern the interpretation for various provisions of CrPC. They are totally irrelevant for the purposes of deciding the issue in the present case.

(Para 53)

Appeals dismissed with costs

SS-D/46865/S

Advocates who appeared in this case:

Uday U. Lalit, Senior Advocate (Samrat Nigam and Gaurav Agrawal, Advocates) for the Appellant;

Gopal Subramaniam, Solicitor General, H.P. Raval, Additional Solicitor General (Rajshekhar Rao, Arijit Prasad and B.V. Balaram Das, Advocates) for the Respondents.

Chronological list of cases cited	on page(s)
1. (2008) 17 SCC 348 : (2010) 4 SCC (Cri) 543, <i>Union of India v. Ranu Bhandari</i>	271f, 271h
2. (2006) 7 SCC 172 : (2006) 3 SCC (Cri) 225, <i>State (Inspector of Police) v. Surya Sankaram Karri</i>	271c
3. (2006) 1 WLR 2994 : (2006) 3 All ER 689 (CA), <i>R. v. C</i>	273f-g
4. (2004) 2 AC 134 : (2004) 2 WLR 335 : (2004) 1 All ER 1269 : 2004 UKHL 3 (HL), <i>R. v. H</i>	273f-g
5. (2003) 6 SCC 230, <i>Dwarka Prasad Agarwal v. B.D. Agarwal</i>	272b-c
6. (2002) 3 SCC 496, <i>Haryana Financial Corpn. v. Jagdamba Oil Mills</i>	273f
7. (1997) 11 SCC 276, <i>Tribhuvandas Bhimji Zaveri v. CCE</i>	272e
8. 1995 QB 43 : (1994) 3 WLR 1110 : (1995) 1 All ER 479 (CA), <i>R. v. Secy. of State for Home Deptt., ex p H</i>	269e
9. 1987 AC 625 : (1987) 2 WLR 821 : (1987) 1 All ER 1118 (HL), <i>Lloyd v. McMahon</i>	268e
10. (1978) 1 SCC 405, <i>Mohinder Singh Gill v. Chief Election Commr.</i>	275d
11. 1971 AC 297 : (1969) 3 WLR 706 : (1969) 3 All ER 275 (HL), <i>Wiseman v. Borneman</i>	268g-h
12. (1970) 2 QB 417 : (1970) 2 WLR 1009 : (1970) 2 All ER 528 (CA), <i>R. v. Gaming Board for Great Britain, ex p Benaim and Khaida</i>	268b-c
13. (1969) 2 SCC 262, <i>A.K. Kraipak v. Union of India</i>	275d

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14. 1962 AC 322 : (1962) 2 WLR 1153 (PC), *Kanda v. Govt. of Malaya* 270g
15. AIR 1961 SC 1623, *State of M.P. v. Chintaman Sadashiva Vaishampayan* 273b
16. AIR 1955 SC 65 : (1955) 1 SCR 941, *Dhakeswari Cotton Mills Ltd. v. CIT* 269b-c

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J.— The central question of law arising in the appeal before this Court is whether a noticee served with show-cause notice under Rule 4(1) of the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 (hereinafter referred to as “the Rules”) is entitled to demand to furnish all the documents in possession of the adjudicating authority including those documents upon which no reliance has been placed to issue a notice requiring him to show cause why an inquiry should not be held against him?

2. The adjudicating authority's refusal to supply all the documents as demanded by the appellants led to filing of the writ petitions by the appellants in the Delhi High Court which were heard and dismissed.

3. In order to consider and decide the issue that arises for our consideration, it is just and necessary to briefly notice the relevant facts.



Part I: Background facts

4. A complaint in writing has been filed by an officer authorised against the appellants under sub-section (3) of Section 16 of the Foreign Exchange Management Act, 1999 (hereinafter referred to as “FEMA” or “the Act”) in which certain serious allegations have been levelled against the appellants which we are not required to notice in detail. The gravamen of the complaint is that the appellants along with others, jointly and severally, without general or special permission of Reserve Bank of India dealt in and acquired foreign exchange totalling US \$898,027.79 in respect of two oil contracts with SOMO of Iraq. Out of the said amount, the appellants and others jointly and severally, without the required permission of Reserve Bank of India made payment and transferred foreign exchange of US \$748,550 to the credit of specified account with Jordan National Bank, Jordan i.e. to persons resident outside India, in fulfilment of precondition imposed by SOMO for allocation of oil under aforesaid two contracts, in contravention of the provisions of FEMA.

5. It is further alleged that the appellants and others, jointly and severally, without the required permission of Reserve Bank of India transferred foreign exchange of US \$146,247.23 being the commission amount in respect of two oil contracts with SOMO to the account with Barclays Bank, London in contravention of the provisions of the Act. The appellants together with others jointly and severally failed to take all reasonable steps to repatriate the aforesaid foreign exchange within the stipulated period and in the prescribed manner, in contravention of the provisions of FEMA read with the Regulations, 2000. In addition to the above, some other allegations were also

levelled against Appellant 2.

6. The adjudicating authority having received the said complaint, set the law in motion and accordingly issued a notice to the appellants under the provisions of FEMA read with the Rules, requiring them to show cause why an inquiry should not be held against them.

7. The appellants having received the show-cause notice, instead of submitting their reply, required the adjudicating authority to furnish "copies of all the documents in ... possession in respect of the instant case, including the 83,000 documents allegedly procured by one Virender Dayal from USA in connection with the instant case..." This seemingly innocuous request ultimately turned out to be the origin of this avoidable litigation. The fact remains that the copies of all such documents as relied upon by the adjudicating authority were furnished. The authority, however, declined to furnish copies of other documents and decided to hold an inquiry in accordance with the provisions of FEMA and the Rules.

8. Aggrieved by the communications so sent by the authority, Appellant 1 filed writ petition in the Delhi High Court which was disposed of with direction extending time to file reply to the show-cause notice. As regards the prayer for supply of copies of the documents, the Court gave liberty to



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demand such copies but left the issue regarding the entitlement of Appellant 1 to such documents open.

9. Thereafter, a preliminary/short reply to the show-cause notice was submitted by the appellants but once again insisting with the demand that the copies of the documents not otherwise relied upon by the adjudicating authority also be supplied before taking any further steps in the matter.

10. The adjudicating authority, by the impugned proceedings, made it clear that the provisions of FEMA and the Rules provide for supply of the grounds, nature of contravention and copies of relied upon documents only in order to enable the noticee to make effective representation and the said requirement has been met. The adjudicating authority also made it clear that it is bound to conduct proceedings in accordance with the statute and the Rules and the noticees in any case are not entitled to ask the authority to deviate from the said procedure laid down in FEMA and the Rules. The authority clearly put the appellants on notice that it shall proceed with the inquiry in accordance with the provisions of the Act and the Rules.

11. The appellants promptly challenged the impugned order of the adjudicating authority in petitions filed under Article 226 of the Constitution of India resulting in the impugned judgment of the Delhi High Court. Hence these appeals.

12. Leave granted. We have heard Shri U.U. Lalit, learned Senior Counsel for the appellants and Shri Gopal Subramaniam, learned Solicitor General of India for the respondents.

Part II: Legal submissions

13. The learned Senior Counsel for the appellants strenuously contended that there is a duty cast on the adjudicating authority to disclose and supply copies of all the documents that may be available with it enabling the noticee to effectively defend and rebut the allegations mentioned in the show-cause notice. The submission was that the noticee is not only entitled to the documents referred to and relied upon to set the law in motion but all such other documents that may be in possession of the adjudicating authority. The learned Senior Counsel submitted that the principles of

natural justice and concept of fairness require supply to the noticee all such documents whether relied on or not by the adjudicating authority.

14. The learned Solicitor General of India, on the other hand, submitted that Rule 4 of the Rules is a comprehensive self-contained code and that the adjudicating authority is to follow and proceed step by step in accordance with the said Rules. The learned Solicitor General submitted that it is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner, then the said authority has to exercise it only in the manner provided in the statute itself. Hence the adjudicating authority cannot deviate from the mandate of the statute and the Rules to do something which is not provided for either in the statute or in the Rules. The submission was that the Rules do not provide for furnishing all the documents that may be in possession of the adjudicating authority as



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prayed for by the appellants. It was alternatively contended that the principles of natural justice are complied with in the instant case since copies of relied on documents were supplied to the appellants.

Part III: Relevant statute and the Rules

15. As part of the ongoing economic liberalisation relating to foreign investments and foreign trade, a review of the Foreign Exchange Regulation Act, 1973 was made in the year 1993 and several amendments were enacted subsequently. The Government of India felt that Foreign Exchange Regulation Act, 1973 must be repealed and to be replaced by a comprehensive legislation and for that purpose, a Task Force was constituted to have overall look on the subject and suggest the required changes. The Task Force submitted its Report in 1994. On the recommendations of the Task Force and keeping in view the significant developments that had taken place since 1993, the Foreign Exchange Management Bill was introduced in Parliament.

16. The Statement of Objects and Reasons reveals that the provisions of the Bill aim at consolidating and amending the law relating to foreign exchange with the objective of facilitating external trade and payments and *for promoting the orderly development and maintenance of foreign exchange markets in India*. The Foreign Exchange Management Bill having been passed by both the Houses of Parliament, received the assent of the President on 29-12-1999 and it came into force on the first day of June, 2000 as the Foreign Exchange Management Act, 1999 (42 of 1999).

17. Chapter II of FEMA deals with "Regulation and Management of Foreign Exchange". Chapter III thereof deals with "Authorised Person". Chapter IV deals with "Contravention and Penalties". Section 13 of FEMA which is relevant for our present purposes reads as under:

"13. *Penalties.*—(1) If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

(2) Any adjudicating authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such

contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.



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Explanation.—For the purposes of this sub-section, ‘property’ in respect of which contravention has taken place, shall include,—

- (a) deposits in a bank, where the said property is converted into such deposits;
- (b) Indian currency, where the said property is converted into that currency; and
- (c) any other property which has resulted out of the conversion of that property.”

18. Chapter V deals with “Adjudication and Appeal”. Section 16 is relevant which is reproduced hereinbelow:

“16. *Appointment of adjudicating authority.*—(1) For the purpose of adjudication under Section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the adjudicating authorities for holding an inquiry *in the manner prescribed* after giving the person alleged to have committed contravention under Section 13, against whom a complaint has been made under sub-section (2) (hereinafter in this section referred to as the said person) *a reasonable opportunity of being heard* for the purpose of imposing any penalty:

Provided that where the adjudicating authority is of opinion that the said person is likely to abscond or is likely to evade in any manner, the payment of penalty, if levied, it may direct the said person to furnish a bond or guarantee for such amount and subject to such conditions as it may deem fit.

(2) The Central Government shall, while appointing the adjudicating authorities under sub-section (1), also specify in the order published in the Official Gazette, their respective jurisdictions.

(3) No adjudicating authority shall hold an enquiry under sub-section (1) except upon a complaint in writing made by any officer authorised by a general or special order by the Central Government.

(4) The said person may appear either in person or take the assistance of a legal practitioner or a chartered accountant of his choice for presenting his case before the adjudicating authority.

(5) Every adjudicating authority shall have the same powers of a civil court which are conferred on the Appellate Tribunal under sub-section (2) of Section 28 and—

- (a) all proceedings before it shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Penal Code, 1860;
 - (b) shall be deemed to be a civil court for the purposes of Sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).
- (6) Every adjudicating authority shall deal with the complainant under sub-section

(2) as expeditiously as possible and endeavour shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint:

Provided that where the complaint cannot be disposed of within the said period, the adjudicating authority shall record periodically the reasons in writing for not disposing of the complaint within the said period."

(emphasis supplied)



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19. In exercise of the powers conferred by Section 4 read with sub-section (1) of Section 16, sub-section (3) of Section 17 and sub-section (2) of Section 19 of the Act, the Central Government made the rules for holding inquiry for the purpose of imposing penalty and appeals under Chapter V of the said Act. The rules are called the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000.

20. Rule 4 of the said Rules which prescribes the procedure for holding of inquiry which is material for our present purposes is as under:

"4. *Holding of inquiry.*—(1) For the purpose of adjudicating under Section 13 of the Act whether any person has committed any contravention as specified in that section of the Act, *the adjudicating authority shall, issue a notice to such person requiring him to show cause* within such period as may be specified in the notice (being not less than ten days from the date of service thereof) why an inquiry should not be held against him.

(2) Every notice under sub-rule (1) to any such person shall indicate the nature of contravention alleged to have been committed by him.

(3) After considering the cause, if any, shown by such person, the adjudicating authority is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of that person either personally or through his legal practitioner or a chartered accountant duly authorised by him.

(4) On the date fixed, the adjudicating authority shall explain to the person proceeded against or his legal practitioner or the chartered accountant, as the case may be, the contravention, alleged to have been committed by such person indicating the provisions of the Act or of rules, regulations, notifications, direction or orders or any condition subject to which an authorisation is issued by the Reserve Bank of India in respect of which contravention is alleged to have taken place.

(5) The adjudicating authority shall, then, given an opportunity to such person to produce such documents or evidence as he may consider relevant to the inquiry and if necessary, the hearing may be adjourned to future date and in taking such evidence the adjudicating authority shall not be bound to observe the provisions of the Indian Evidence Act, 1872 (1 of 1872).

(6) While holding an inquiry under this rule the adjudicating authority shall have the power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating authority may be useful for or relevant to the subject-matter of the inquiry.

(7) If any person fails, neglects or refuses to appear as required by sub-rule (3) before the adjudicating authority, the adjudicating authority may proceed with the adjudication proceedings in the absence of such person after recording the reasons for doing so.

(8) If, upon consideration of the evidence produced before the adjudicating authority, the adjudicating authority is satisfied that the person has committed the contravention, he may, by order in writing, impose such



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penalty as he thinks fit, in accordance with provisions of Section 13 of the Act.

(9) Every order made under sub-rule (8) of Rule 4 shall specify the provisions of the Act or of the rules, regulations, notifications, direction or orders or any condition subject to which an authorisation is issued by the Reserve Bank of India in respect of which contravention has taken place and shall contain brief reasons for such decisions.

(10) Every order made under sub-rule (8) shall be dated and signed by the adjudicating authority.

(11) A copy of the order made under sub-rule (8) of Rule 4 shall be supplied free of charge to the person against whom the order is made and all other copies of proceedings shall be supplied to him on payment of copying fee @ Rs. 2 per page.

(12) The copying fee referred to in sub-rule (11) shall be paid in cash or in the form of demand draft in favour of the adjudicating authority."

(emphasis supplied)

Part IV: Discussion

Analysis of relevant provisions of FEMA and the Rules

21. The issue that arises for our consideration is to be resolved in the background of this statutory setting. FEMA is a self-contained and special legislation dealing with the foreign exchange management. It essentially deals with regulation and management of the foreign exchange. The provisions of the Act mandate that save as otherwise provided in the Act, rules or regulations made thereunder or with the general or special permission of Reserve Bank, no person shall deal in or transfer any foreign exchange or foreign security to any person not being an authorised person; make any payment to or for the credit of any person resident outside India in any manner; receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner; enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India in any manner. It is further provided that no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India. That if any person contravenes any provision of the Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under the Act, or contravenes any condition subject to which an authorisation is issued, he shall, upon adjudication, be liable to a penalty. For the purpose of adjudication, the Central Government may, by an order, appoint officers of the Central Government as the adjudicating authorities for holding inquiry in the manner prescribed after giving the person alleged to have committed contravention against whom a complaint has been made, a reasonable opportunity of being heard for the purpose of imposing any penalty.



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22. That a bare reading of the relevant provisions of the Act and the Rules makes it abundantly clear that the manner, method and procedure of adjudication are completely structured by the statute and the Rules. The authority is bound to follow the prescribed procedure under the statute and the Rules and is not free and entitled to devise its own procedure for making inquiry while adjudicating under Section 13 of the Act since it is under legislative mandate to undertake adjudication and hold inquiry in the prescribed manner after giving the person alleged to have committed contravention against whom a complaint has been made, a reasonable opportunity of being heard for the purpose of imposing any penalty. The discretion of the authority is so well structured by the statute and the Rules.

23. The Rules do not provide and empower the adjudicating authority to straightaway make any inquiry into allegations of contravention against any person against whom a complaint has been received by it. Rule 4 of the Rules mandates that for the purpose of adjudication whether any person has committed any contravention, the adjudicating authority shall issue a notice to such person requiring him to show cause as to why an *inquiry* should not be held against him. It is clear from a bare reading of the rule that show-cause notice to be so issued is not for the purposes of making any adjudication into alleged contravention but only for the purpose of deciding whether an inquiry should be held against him or not. Every such notice is required to indicate the nature of contravention alleged to have been committed by the person concerned. That after taking the cause, if any, shown by such person, the adjudicating authority is required to form an opinion as to whether an inquiry is required to be held into the allegations of contravention. It is only then the real and substantial inquiry into allegations of contravention begins.

24. While holding inquiry into allegations of contravention, every adjudicating authority shall have the powers of a civil court under the Code of Civil Procedure in respect of the matters, namely, (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring discovery and production of documents; (c) receiving evidence on affidavits; (d) requisitioning any public record, document or copy of such record or document from any office; (e) issuing commissions for examination of witnesses or documents, etc. That all proceedings before the adjudicating authority shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Penal Code; shall be deemed to be a civil court for the purposes of Sections 345 and 346 of the Code of Criminal Procedure, 1973.

Principles of natural justice: statutory requirement and fair hearing

25. It is true that Rule 4 does not require the adjudicating authority to supply copies of any documents along with the show-cause notice. The Rule does not require the adjudicating authority even to furnish any list of



documents upon which reliance has been placed by it to set the law in motion. Does it mean that the adjudicating authority is not required to furnish the list of documents and copies thereof upon which reliance has been placed by it to issue notice of show cause to a person against whom a complaint has been made by the authorised officer? Whether the principles of natural justice and doctrine of fairness require supply of documents upon which reliance has been placed at the stage of show-cause notice?

“It is not possible to lay down rigid rules as to when the principles of natural

justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter:" [see *R. v. Gaming Board for Great Britain, ex p Benaim and Khaida*¹ at QB p. 430 C], observed Lord Denning, M.R.

"... Their application, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case."*

26.** Even in the application of the doctrine of fair play there must be real flexibility. There must also have been caused some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with and so forth. Can the courts supplement the statutory procedures with requirements over and above those specified? In order to ensure a fair hearing, courts can insist and require additional steps as long as such steps would not frustrate the apparent purpose of the legislation.

27. In *Lloyd v. McMahon*², Lord Bridge observed: (AC pp. 702 H-703 B)

"My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

28. As Lord Reid said in *Wiseman v. Borneman*³: (AC p. 308 C)



"... For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose."

29. It is thus clear that the extent of applicability of the principles of natural justice depends upon the nature of inquiry, the consequences that may visit a person after such inquiry from out of the decision pursuant to such inquiry.

30. The right to fair hearing is a guaranteed right. Every person before an authority exercising the adjudicatory powers has a right to know the evidence to be used against him. This principle is firmly established and recognised by this Court in *Dhakeswari Cotton Mills Ltd. v. CIT*⁴. However, disclosure not necessarily involves supply of the material. A person may be allowed to inspect the file and take notes. Whatever mode is used, the fundamental principle remains that nothing should be used against the person which has not been brought to his notice. If relevant material is not disclosed to a party, there is prima facie unfairness irrespective of whether the material in question arose before, during or after the hearing. The law is fairly well settled if prejudicial allegations are to be made against a person, he must be given particulars of that before hearing so that he can prepare his defence. However, there are various exceptions to this general rule where disclosure of evidential material

might inflict serious harm on the person directly concerned or other persons or where disclosure would be breach of confidence or might be injurious to the public interest because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, might make it impossible to obtain certain clauses of essential information at all in the future (see *R. v. Secy. of State for Home Deptt., ex p H⁵*).

31. The concept of fairness may require the adjudicating authority to furnish copies of those documents upon which reliance has been placed by him to issue show-cause notice requiring the noticee to explain as to why an inquiry under Section 16 of the Act should not be initiated. To this extent, the principles of natural justice and concept of fairness are required to be read into Rule 4(1) of the Rules. Fair procedure and the principles of natural justice are in-built into the Rules. A noticee is always entitled to satisfy the adjudicating authority that those very documents upon which reliance has been placed do not make out even a prima facie case requiring any further inquiry. In such view of the matter, we hold that all such documents relied on by the authority are required to be furnished to the noticee enabling him to show a proper cause as to why an inquiry should not be held against him though the Rules do not provide for the same. Such a fair reading of the provision would not amount to supplanting the procedure laid down and would in no manner frustrate the apparent purpose of the statute.



Part V: Duty of Adequate Disclosure

32. The real question that arises for consideration is whether the adjudicating authority even at the preliminary stage is required to furnish copies of all the documents in its possession to a noticee even for the purposes of forming an opinion as to whether any inquiry at all is required to be held.

33. In this regard, the learned Senior Counsel for the appellant pressed into service the doctrine of duty of adequate disclosure which according to him is an essential part of the principles of natural justice and doctrine of fairness. A bare reading of the provisions of the Act and the Rules do not support the plea taken by the appellants in this regard. Even the principles of natural justice do not require supply of documents upon which no reliance has been placed by the authority to set the law into motion. Supply of relied on documents based on which the law has been set into motion would meet the requirements of the principles of natural justice. No court can compel the authority to deviate from the statute and exercise the power in altogether a different manner than the prescribed one.

34. As noticed, a reasonable opportunity of being heard is to be provided by the adjudicating authority in the manner prescribed for the purpose of imposing any penalty as provided for in the Act and not at the stage where the adjudicating authority is required merely to decide as to whether an inquiry at all be held into the matter. Imposing of penalty after the adjudication is fraught with grave and serious consequences and therefore, the requirement of providing a reasonable opportunity of being heard before imposition of any such penalty is to be met. In contradistinction, the opinion formed by the adjudicating authority whether an inquiry should be held into the allegations made in the complaint are not fraught with such grave consequences and therefore the minimum requirement of a show-cause notice and consideration of cause shown would meet the ends of justice. A proper hearing always

include, no doubt, a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view.

35. Lord Denning has added: (AC p. 337)

“If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.” (See *Kanda v. Govt. of Malaya*⁶.)

36. In the present case, the inquiry against the noticee is yet to commence. The evidence as may be available upon which the adjudicating authority may place reliance, undoubtedly, is required to be furnished to the person proceeded against at the second stage of inquiry into allegations of contravention. It is at that stage, the adjudicating authority is not only



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required to give an opportunity to such person to produce such documents as evidence as he may consider relevant to the inquiry, but also enforce attendance of any person acquainted with the facts of the case to give evidence or to produce any document which in its opinion may be useful for or relevant to the subject-matter of the inquiry. It is no doubt true that natural justice often requires the disclosure of the reports and evidence in the possession of the deciding authority and such reports and evidence relevant to the subject-matter of the inquiry may have to be furnished unless the scheme of the Act specifically prohibits such disclosure.

37. However, the learned Senior Counsel for the appellants in support of his contention that there is a duty cast on the adjudicating authority to disclose and supply copies of all the documents that may be available with it to the noticee, placed reliance on *State (Inspector of Police) v. Surya Sankaram Karri*⁷ which is not an authority for the proposition canvassed. It was a case where the Court found that investigation into an offence punishable under Section 13(1)(e) of the Prevention of Corruption Act was undertaken without the required authorisation of the Superintendent of Police. In that context, this Court observed that (SCC p. 178, para 19) the manner in which

“the investigation was conducted, is condemnable. The least that a court of law would expect from the prosecution is that the investigation would be a fair one. It would not only be carried out from the stand of the prosecution, but also the defence, particularly, in view of the fact that the onus of proof may shift to the accused at a later stage.”

38. Shri Lalit, strongly relied upon the observations so made by this Court which in our considered opinion, are not relevant for our purpose. One cannot pick a sentence from here and there in the judgment and characterise it to be the ratio of the case. The observations made in that case were in the context of criminal investigation which was found to be unfair and illegal.

39. In *Union of India v. Ranu Bhandari*⁸ this Court found that some of the vital documents which have a direct bearing on the detention order, had not been placed before the detaining authority and the detenu was entitled to question such omission. It was the case of the detenu that if his representation and the writ petition had been placed before the detaining authority, which according to him contained his entire defence to the allegations made against him, the same may have weighed with the detaining authority as to the necessity of issuing the order of detention at all. It is under those circumstances, this Court expressed its view that on account of non-

supply of those documents, the detenu was prevented from making an effective representation against his detention. In fact, the said decision is an authority for the proposition that: (*Ranu Bhandari case*⁸, SCC p. 349 c-d)



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“When a detention order is passed, copies of all the documents, both against the detenu and in his favour, which had been relied upon by the detaining authority for reaching the satisfaction that in the interest of the State and its citizens the preventive detention of the detenu is necessary, must be supplied to the detenu to enable him to make an effective representation against the detention order in compliance with Article 22(5) of the Constitution, irrespective of whether he had knowledge of the same or not.”

40. The learned Senior Counsel further relied upon the following observations made by this Court in *Dwarka Prasad Agarwal v. B.D. Agarwal*⁹: (SCC pp. 245-46, para 38)

“38. ... The very basis upon which a judicial process can be resorted to is reasonableness and fairness in a trial. Under our Constitution as also the international treaties and conventions, the right to get a fair trial is a basic fundamental/human right. Any procedure which comes in the way of a party in getting a fair trial would be violative of Article 14 of the Constitution of India. Right to a fair trial by an independent and impartial tribunal is part of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950...”

41. We fail to appreciate as to how the above observations are of any relevance to resolve the issue that arises for our consideration in the present case. It is not the case of the appellants that the procedure prescribed under Rule 4 of the Rules comes in their way in getting a fair trial and therefore the said provision is violative of Article 14 of the Constitution of India. It is not the case that the adjudicating authority constituted under the present Act is not an independent and impartial tribunal.

42. In *Tribhuvandas Bhimji Zaveri v. CCE*¹⁰ the officers of the Income Tax Department raided the business premises of the appellant and prepared an inventory of the stock of gold and gold ornaments found in the premises. This was followed by a show-cause notice as to why penal action should not be taken against the appellants. The appellants by their letter had requested the authorities to furnish a certified copy of the checklist prepared at the time of raid with a view to enabling them to check and verify the particulars. In reply thereto, the Income Tax Officer expressed his inability to provide the required documents on the ground that they were not readily available with the officer. It is under those circumstances, this Court observed that the failure to supply important piece of information to the appellants has prejudiced the appellants and to this extent the principles of natural justice would stand violated. From the facts in that case, it is clear that particular documents containing important piece of information which would have enabled the noticee therein to offer a proper explanation were required to be made available. The nature of the document, its relevancy being a document



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prepared at the time of raid and its mention in the show-cause notice were taken into

consideration. It was a basic document based on which the law was set into motion against the appellants therein. It is for that reason this Court was of the view that such an important document could not have been withheld from the appellants therein.

43. In support of his submissions the learned Senior Counsel has also referred us to the decision of this Court in *State of M.P. v. Chintaman Sadashiva Vaishampayan*¹¹. In that case, the charged police officer wanted the documents which were relevant and would have been of invaluable assistance to him in making his defence and cross-examining the witness who gave evidence against him in the departmental enquiry. It is in that context this Court observed that: (AIR p. 1629, para 10)

"10. ... it is difficult and inexpedient to lay down any general rules; whether or not the officer in question has had a reasonable opportunity must always depend on the facts in each case. The only general statement that can be safely made in this connection is that the departmental enquiries should observe rules of natural justice and that if they are fairly and properly conducted the decisions reached by the enquiry officers on the merits are not open to be challenged on the ground that the procedure followed was not exactly in accordance with that which is observed in courts of law."

There is no dispute with this proposition.

44. In our opinion, these decisions do not assist the appellants' case in any manner whatsoever because the documents which the appellants wanted in the present case are the documents upon which no reliance was placed by the authority for setting the law into motion. Observations of the courts are not to be read as Euclid's theorems nor as provisions of the statute. The observations must be read in the context in which they appear. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision to impute a different meaning to the observations (see *Haryana Financial Corpn. v. Jagdamba Oil Mills*¹².)

45. One more decision upon which heavy reliance has been placed by the learned Senior Counsel is *R. v. H*¹³/*R. v. C*¹⁴. We fail to appreciate as to how the said judgment would render any assistance and support the case set up by the appellants in the present proceedings. In that case, the defendants were charged with criminal conspiracy to supply a Class A drug. The prosecution case was based on police surveillance evidence. In pre-trial proceedings the defendants made far-reaching requests for disclosure, including all material relating to any covert human intelligence sources involved in the investigation. At a preliminary hearing, it appeared that a public interest



immunity inquiry would be necessary as the prosecution wished to withhold documents from disclosure to the defence on that ground. The Judge ruled, without having looked in detail at the documents provided by the prosecution, that unless independent counsel were appointed, so as to introduce an adversarial element into the public interest immunity inquiry, there was a risk that the trial would be perceived to be unfair and therefore violate Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (as set out in Schedule 1 to the Human Rights Act, 1998) (the Convention), which provided for the right to a fair trial. The Judge, therefore, ordered that special counsel should be appointed. The Crown's appeal against the Judge's ruling was successful. The defendants appealed to the House of Lords contending inter alia that it was incompatible with Article 6 of the

Convention for a Judge to rule on a claim to public interest immunity in the absence of adversarial argument on behalf of the accused where the material which the prosecution was seeking to withhold was or might be relevant to a disputed issue of fact which the Judge had to decide in order to rule on an application which would effectively determine the outcome of the proceedings. The House of Lords held that there is a golden rule that full disclosure of any material held by the prosecution which weakened its case or strengthened that of the defendants should be disclosed to the defence. In circumstances where such material could not be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest, some derogation from the golden rule could be justified, but such derogation was always to be the minimum necessary to protect the public interest in question and had never to imperil the overall fairness of the trial.

46. This decision was followed by the Attorney General's guidelines and disclosure in which it is clearly explained that disclosure is one of the most important aspects in the *criminal justice system* and the application of proper and fair disclosure is a vital component of a fair criminal justice system. This amounts to no more and no less than a proper application of the Criminal Procedure and Investigations Act, 1996 (CPIA), recently amended by the Criminal Justice Act, 2003. The scheme set out in the Criminal Procedure and Investigations Act, 1996 is held to be designed to ensure that there is fair disclosure and material which may be relevant to an investigation and which does not form part of the prosecution case. The disclosure under the Act should assist the accused in the timely preparation and presentation of their case and assist the case to focus on all the relevant issues in the trial.

47. It appears that those Acts recognise rights of accused persons in a criminal case to a fair trial. It is clear that disclosure of unused material in criminal proceedings in the United Kingdom is regulated by the provisions of those Acts and applicable to criminal trials where the accused are charged with criminal offences. Duty of disclosure of unused material is not a definite concept to be applied in any and every case in this country. There is no such Act or law as in the United Kingdom, nor any procedure prescribed for



disclosure of unused material in criminal proceedings. In the present case, the appellants are not defendants in any criminal trial. The judgment has no application as to the fact situation and the law applicable in the United Kingdom is not applicable to either the adjudicatory proceedings or even criminal trials in this country.

48. On a fair reading of the statute and the Rules suggests that there is no duty of disclosure of all the documents in possession of the adjudicating authority before forming an opinion that an inquiry is required to be held into the alleged contraventions by a noticee. Even the principles of natural justice and concept of fairness do not require the statute and the Rules to be so read. Any other interpretation may result in defeat of the very object of the Act. Concept of fairness is not a one-way street. The principles of natural justice are not intended to operate as roadblocks to obstruct statutory inquiries. Duty of adequate disclosure is only an additional procedural safeguard in order to ensure the attainment of the fairness and it has its own limitations. The extent of its applicability depends upon the statutory framework.

49. Hegde, J. speaking for the Supreme Court propounded: "In other words, they (principles of natural justice) do not supplant the law of the land but supplement

it" (see *A.K. Kraipak v. Union of India*¹⁵). Its essence is good conscience in a given situation; nothing more but nothing less (see *Mohinder Singh Gill v. Chief Election Commr.*¹⁶).

Alternate submission

50. Yet another submission made by the learned Senior Counsel requiring our consideration relates to interpretation of sub-rule (6) of Rule 4. The learned Senior Counsel contended that the appellants' request to the adjudicating authority to furnish the copies of the documents could be treated as one made under sub-rule (6) of Rule 4 which enables the adjudicating authority to direct any person to produce any document which in its opinion may be useful for or relevant to the subject-matter of inquiry.

51. We find no merit in the submission. A plain reading of sub-rule (6) of Rule 4 makes it abundantly clear that such a power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which may be relevant to the subject-matter of inquiry is only available to the adjudicating authority while holding an inquiry into allegations of contravention, but not at the stage where the authority is merely required to form an opinion as to whether an inquiry should be held into allegations of contraventions. It is always open to a person facing an inquiry to invoke the jurisdiction of the adjudicating authority requiring any person to produce any document which may be useful for or relevant to the subject-matter of inquiry. Such request may have to be considered upon its own merits.



52. A fair reading of Rule 4 which is a complete compendium for holding of inquiry suggests that all the evidence and documents which the adjudicating authority may consider relevant for the purpose of inquiry may have to be furnished to a person facing the inquiry on the allegations of contravention of the provisions of the Act, etc., alleged to have been committed by him. In addition, the authority may require attendance of any person acquainted with the facts and circumstances of the case to give evidence and to produce any documents which in its opinion, may be useful for or relevant to the subject-matter of the inquiry. Only upon consideration of the entire evidence produced, if the adjudicating authority is satisfied that the person has committed the contravention, it may by order in writing accordingly impose such penalty as it thinks fit in accordance with the provisions of the Act which of course is not final as it is subject to appeal.

Practice of inclusion of list of judgments in compilations not cited at the Bar

53. Before parting with the judgment, we are constrained to observe with some reluctance about the recent practice and procedure of including list of authorities in the compilation without the leave of the Court. In many a case, even the Senior Counsel may not be aware of inclusion of such authorities in the compilation. In our considered opinion, this Court is not required to consider such decisions which are included in the compilation which were not cited at the Bar. In the present case, number of judgments are included in the compilation which were not cited at the Bar by any of the counsel. We have not dealt with them as we are not required to do so. At any rate, all those judgments deal with the procedural aspects and concern the interpretation for various provisions of the Code of Criminal Procedure applicable to a criminal trial and they are totally irrelevant for the purposes of deciding the issue that

had arisen for our consideration in the present case.

Conclusions

54. The appellants insisted for supply of all documents in possession of the authority and such demand is based on vague, indefinite and irrelevant grounds. The appellants are not sure as to whether they are asking for the copies of the documents in possession of the adjudicating authority or in possession of authorised officer who lodged the complaint. The only object in making such demand is obviously to obstruct the proceedings and the appellants, to some extent, have been able to achieve their object as is evident from the fact that the inquiry initiated as early as in the year 2006 still did not even commence.

55. We are constrained to take note of the fact that it is on account of continuous unreasonable requests on the part of the appellants, the adjudicating authority could not deal with the complaint expeditiously which is required to be disposed of within one year from the date of receipt of the complaint. We accordingly direct the adjudicating authority to deal with the



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complaint as expeditiously as possible and every endeavour shall be made to dispose of the complaint finally at the earliest. No unreasonable request for adjournment shall be entertained by the adjudicating authority.

56. However, we make it clear that the authority shall make inquiry into the allegations made in the complaint strictly in accordance with the law and uninfluenced by the observations, if any, made in this order. We have not expressed any opinion whatsoever on the merits of the case. The appellants are entitled to all the defence that may be available to them in law.

57. For all the aforesaid reasons, the appeals are dismissed with costs.

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[†] Arising out of SLP (C) No. 10553 of 2008. From the Judgment and Order dated 28-3-2008 of the High Court of Delhi at New Delhi in LPA No. 1072 of 2007

[‡] Arising out of SLP (C) No. 10554 of 2008

¹ (1970) 2 QB 417 : (1970) 2 WLR 1009 : (1970) 2 All ER 528 (CA)

* **Ed.:** See *Administrative Law* by Wade & Forsyth, 8th Edn. at p. 491, Line 4 from the bottom.

** **Ed.:** Para 26 corrected vide Official Corrigendum No. F.3/Ed.B.J./3/2011 dated 10-1-2011.

² 1987 AC 625 : (1987) 2 WLR 821 : (1987) 1 All ER 1118 (HL)

³ 1971 AC 297 : (1969) 3 WLR 706 : (1969) 3 All ER 275 (HL)

⁴ AIR 1955 SC 65 : (1955) 1 SCR 941

⁵ 1995 QB 43 : (1994) 3 WLR 1110 : (1995) 1 All ER 479 (CA)

⁶ 1962 AC 322 : (1962) 2 WLR 1153 (PC)

⁷ (2006) 7 SCC 172 : (2006) 3 SCC (Cri) 225

⁸ (2008) 17 SCC 348 : (2010) 4 SCC (Cri) 543

⁹ (2003) 6 SCC 230

¹⁰ (1997) 11 SCC 276

¹¹ AIR 1961 SC 1623

¹² (2002) 3 SCC 496

¹³ (2004) 2 AC 134 : (2004) 2 WLR 335 : (2004) 1 All ER 1269 : 2004 UKHL 3 (HL)

¹⁴ (2006) 1 WLR 2994 : (2006) 3 All ER 689 (CA)

¹⁵ (1969) 2 SCC 262

¹⁶ (1978) 1 SCC 405

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**BEFORE THE NATIONAL
GREEN TRIBUNAL
(SOUTHERN REGION)
AT CHENNAI**

Appeal No. 17 of 2017

M/s V.V. Mineral
...Appellant

Versus

The Member-Secretary
Tamil Nadu Coastal Zonal
Management Authority
... Respondent

TYPED SET

M/S SRINATH SRIDEVAN
TK. BHASKAR
K HARISHANKAR
BHAGAVATH KRISHNAN
COUNSELS FOR THE
APPELLANT