(2006) 10 Supreme Court Cases 337

(BEFORE ARIJIT PASAYAT AND C.K. THAKKER, JJ.)

EKTA SHAKTI FOUNDATION .. Petitioner;

Versus

GOVT. OF NCT OF DELHI .. Respondent.

Writ Petitions (C) No. 232 of 2006† with Nos. 233-34 of 2006,
decided on July 17, 2006

A. **Constitution of India — Arts. 21, 47 and 32 — PIL — Malnutrition — Right to freedom from — Integrated Child Development Service (ICDS) Programme — Directions in *PUCL case*, (2004) 12 SCC 104 for replacement of contractors for procurement for ICDS Programme — Implementation of — Delhi Govt. framing detailed scheme for — Involvement of Self-Help Groups (SHGs) — Eligibility requirement of registered non-profit organisations with at least three years' experience, for running of Anganwadi Centres (AWCs) — Validity of, upheld — Held, there is no irrationality much less something which is totally out of context to justify interference under Art. 32**

B. **Constitution of India — Arts. 32 and 226 — Interference in policy matters — When warranted — Held, in matter of policy decisions or exercise of discretion by Government, so long as infringement of fundamental rights is not shown, the courts will have no occasion to interfere and court will not and should not substitute its own judgment for that of executive in such matters — It is not enough that a second view is possible**

C. **Administrative Law — Judicial review — Policy matter — Correctness of reasons for adopting certain policy by the executive, held, is beyond judicial review, unless breach of fundamental rights is shown — That a different view is possible is no ground to interfere**

D. **Constitution of India — Art. 14 — Indulgence, error or illegality — Non-extension of benefit/relief conferred — Held, Art. 14 has no application or justification to legitimise illegal and illegitimate actions**

Pursuant to the Supreme Court's directions in *PUCL case*, (2004) 12 SCC 104, in respect of the replacement of contractors for procurement for the ICDS Programme, the Delhi Government framed a detailed scheme. The objective as appeared from the scheme was involvement of Self-Help Groups ("SHGs"). The scheme envisaged that within 27 months SHGs would completely take over the running of the Anganwadis from the NGOs. Keeping in view the observations made by the Supreme Court about the elimination of the contractors only it was stipulated that registered non-profit organisations with at least 3 years' experience were eligible to apply.

The writ petitioners questioned the rationale of the stipulation regarding three years' experience of working as a non-profit organisation or public trust registered under the Societies Registration Act, 1860.

† Under Article 32 of the Constitution of India

Dismissing the writ petitions, the Supreme Court

Held :

The correctness of the reasons which prompted the Government in decision-making taking one course of action instead of another is not a matter of concern in judicial review and the court is not the appropriate forum for such investigation. The policy decision must be left to the Government as it alone can decide which policy should be adopted after considering all the points from different angles. In the matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental rights is not shown, the courts will have no occasion to interfere and the court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the court cannot interfere even if a second view is possible from that of the Government. (Para 11)

Asif Hameed v. *State of J&K*, 1989 Supp (2) SCC 364 : AIR 1989 SC 1899; *Shri Sitaram Sugar Co. Ltd.* v. *Union of India*, (1990) 3 SCC 223 : AIR 1990 SC 1277; *Metropolis Theater Co.* v. *City of Chicago*, 57 L Ed 730 : 228 US 61 (1912); *State of Orissa* v. *Gopinath Dash*, (2005) 13 SCC 495, *followed*

It is not the case of the petitioners that the eligibility criteria has been stipulated with any oblique motive. On the contrary, after analysing the issues, a committee appointed by the respondent had suggested the norms and the schemes were accordingly prepared. There is no irrationality much less something which is totally out of context to justify interference. There is nothing illicit in the impugned criteria to warrant interference. (Paras 17 and 19)

It was submitted that in some other cases, a departure has been made. No definite material has been placed in that regard. In any event, Article 14 has no application or justification to legitimise illegal and illegitimate actions. So far as the allotment to non-eligible societies is concerned even if it is accepted, though specifically denied by the authority to be true, that does not confer any right on the appellants. (Paras 12 and 16)

Secy., Jaipur Development Authority v. *Daulat Mal Jain*, (1997) 1 SCC 35; *Coromandel Fertilizers Ltd.* v. *Union of India*, 1984 Supp SCC 457 : 1984 SCC (Tax) 225; *Chandigarh Admn.* v. *Jagjit Singh*, (1995) 1 SCC 745; *Gursharan Singh* v. *New Delhi Municipal Committee*, (1996) 2 SCC 459; *State of Haryana* v. *Ram Kumar Mann*, (1997) 3 SCC 321 : 1997 SCC (L&S) 801; *State of Bihar* v. *Kameshwar Prasad Singh*, (2000) 9 SCC 94 : 2000 SCC (L&S) 845; *Union of India* v. *International Trading Co.*, (2003) 5 SCC 437, *followed*

D-M/ATZ/34640/S

Advocates who appeared in this case :

Mandeep Singh Vinaik and Hardeep Singh Anand, Advocates, for the Petitioner;

Colin Gonsalves, Senior Advocate (S. Wasim A. Qadri, Anup Kr. Srivastava, Mohit Kumar and Ms Anil Katiyar, Advocates, with him) for the Respondent.

Chronological list of cases cited ***on page(s)***

1. (2005) 13 SCC 495, *State of Orissa* v. *Gopinath Dash* 342*f-g*
2. (2004) 12 SCC 104, *People's Union for Civil Liberties* v. *Union of India* 339*c-d*, 340*g*, 341*f-g*
3. (2003) 5 SCC 437, *Union of India* v. *International Trading Co.* 345*d*
4. (2000) 9 SCC 94 : 2000 SCC (L&S) 845, *State of Bihar* v. *Kameshwar Prasad Singh* 345*a*
5. (1997) 3 SCC 321 : 1997 SCC (L&S) 801, *State of Haryana* v. *Ram Kumar Mann* 344*d-e*

6. (1997) 1 SCC 35, *Secy., Jaipur Development Authority* v. *Daulat Mal Jain* 343*b*, 343*e*, 344*b-c*
7. (1996) 2 SCC 459, *Gursharan Singh* v. *New Delhi Municipal Committee* 343*f-g*
8. (1995) 1 SCC 745, *Chandigarh Admn.* v. *Jagjit Singh* 343*e*
9. (1990) 3 SCC 223 : AIR 1990 SC 1277, *Shri Sitaram Sugar Co. Ltd.* v. *Union of India* 342*a*
10. 1989 Supp (2) SCC 364 : AIR 1989 SC 1899, *Asif Hameed* v. *State of J&K* 342*a*
11. 1984 Supp SCC 457 : 1984 SCC (Tax) 225, *Coromandel Fertilizers Ltd.* v. *Union of India* 343*b*
12. 57 L Ed 730 : 228 US 61 (1912), *Metropolis Theater Co.* v. *City of Chicago* 342*e*

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J.— These three writ petitions filed under Article 32 of the Constitution of India question the legality of certain terms in inviting offers for implementation of the scheme called the "Detailed Scheme for Capacity Building of Self-Help Groups to Prepare and Supply Supplementary Nutrition under the Integrated Child Development Service (in short "ICDS") Programme".

2. By order dated 7-10-2004 in *People's Union for Civil Liberties* v. *Union of India*[1] this Court observed as under: (SCC pp. 104 & 106, paras 1 & 9)

> "We have gone through the 5th (August 2004) Report of the Commissioners....
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> * * *
>
> Further, the problem of using contractors for procurement has also been mentioned in the Report suggesting that it should be done by agencies and officers at the government level."

3. The following directions were issued: (SCC p. 107, para 10)

> "*10. 3.* Contractors shall not be used for supply of nutrition in Anganwadis and preferably ICDS funds shall be spent by making use of village communities, self-help groups and Mahila Mandals for buying of grains and preparation of meals."

4. ICDS is perhaps the largest of all the food and supplementation programmes in the world which was initiated in the year 1975 with various objectives as per the document prepared by the Planning Commission. It was also noted by this Court that there was a problem in using contractors for procurement and in the Report of the Commissioners it was suggested that it should be done by agencies and officers at the government level. In that context, it was noted by this Court as follows: (SCC pp. 106-07, para 9)

> "*9.* The Report also mentions that some of AWCS are operating from private houses including those of grain dealers which it is suggested is not a healthy way of working as it is likely to increase the chances of pilferage of the grain, etc. We are happy to note that as stated in the affidavit of the State of Uttar Pradesh, it has made efforts to shift AWCS to primary schools. It is a good example for other States to follow. The Report also mentions the attempt to centralise the procurements in some

1 (2004) 12 SCC 104

of the States which has many fallouts. It has been explained in one of the affidavits that the procurement is at district level and not at the State level. Further, the problem of using contractors for procurement has also been mentioned in the Report suggesting that it should be done by agencies and officers at the government level. These are only by way of illustrations as to facts and figures given in Section 1 of the Report relating to Integrated Child Development Services."

5. In accordance with this Court's order the Delhi Government framed a detailed scheme. The objective as appears from the scheme is involvement of Self-Help Groups (in short "SHGs"). The scheme envisaged that within 27 months SHGs would be framed and would completely take over the running of the Anganwadis from the NGOs. Keeping in view the observations made by this Court about the elimination of the contractors it was stipulated that registered non-profit organisations with at least 3 years' experience were eligible to apply. Accordingly an advertisement titled "ICDS — Expression of Interest" was placed in newspapers.

6. The writ petitioners question the rationale of the stipulation regarding three years' experience of working as a non-profit organisation or public trust registered under the Societies Registration Act, 1860 (in short "the Societies Act"/"the Public Trusts Act"). According to them, this condition does not in any way further the objectives and on the other hand keeps out genuine organisations. It is pointed out that though the writ petitioners were registered less than three years back, their functionaries have varied experience of long periods. Prayer is made for a declaration that the three years' period stipulated is irrational, contrary to the objects of the scheme and should be declared to be invalid. The eligibility criteria according to them should be on the basis of actual experience of the persons who are in charge of the legal entities and not the time period of three years as a registered entity. It is submitted that the three writ petitioners have taken on various projects and have wide experience and to keep them out would be giving premium to inexperience.

7. Per contra, learned counsel for the Government of NCT of Delhi submitted that the Government should set up a committee of experts consisting not only of senior government officials but also other experts such as a representative from the Nutrition Department of Lady Irwin College, a representative of Care India, one of the most reputed NGOs and a representative of the Commissioner who was appointed by this Court in *PUCL case*[1]. The Committee scrutinised the applications (117 in number) and shortlisted 60 entities and out of them 9 have been selected and out of them in the case of one enquiry is being conducted to verify the credentials. The Committee was of the view that the three writ petitioners have not been registered for a period of three years and, therefore, were ineligible. The writ petitioners have raised a grievance that even though they have not been registered for 3 years, the experience of such individuals connected with the organisation should be treated as experience of the organisation. The Committee examined this plea and noted as follows:

"It was pointed to the Committee that some NPOs were questioning their ineligibility on the grounds that they had more than three years' experience even if they were registered as society/trust for less than three years. The Committee confirming the criteria that no NPO which had been registered as a society for less than three years could be considered under the scheme since the experience which the said organisation could have had as an unregistered organisation could not be counted for the purpose of this scheme and that any relaxation on this account could lead to back-door entry of contractors who may have got themselves registered as NGO recently only to gain entry into such schemes without having social objectives of women empowerment as the actual perspective for their work."

8. It has been indicated in the counter-affidavit filed that the writ petitioners have not come with clean hands. They are catering contractors having their own commercial interest and are now trying to take up the project in the garb of NGO. Many erstwhile contractors who have now been barred by this Court's order from entering the ICDS Programme have registered themselves as NGO entities to overreach the order of this Court. The writ petitioners, it is to be noted, had approached the Delhi High Court. The writ petitions were dismissed as withdrawn in view of submissions made that this Court shall be approached.

9. The eligibility criteria which form the subject-matter of challenge read as follows:

"Must be a non-profit organisation or public trust registered under the Societies Registration Act, 1860/the Public Trusts Act.

At least 3 years' experience of working in a relevant field such as child development, nutrition, formation of SHGs, supplementary nutrition, home counselling, nutrition counselling, pre-school activities and women empowerment related works."

10. At this juncture we may take note of a submission by learned counsel for the writ petitioners. It was submitted that the writ petitioners were registered before this Court's order and therefore, it cannot be said that they had registered only to overreach this Court's order. It is pointed out by the learned counsel for the respondent that *PUCL case*[1] was being heard for a long time, and various details were being called for. The intention of this Court to keep contractors out of the picture was clearly evident. Ekta Shakti Foundation (Writ Petition No. 232 of 2006) was registered on 21-11-2003, Surya Society (Writ Petition No. 233 of 2006) was registered on 5-12-2003 and Jay Gee Society (Writ Petition No. 234 of 2006) was registered on 25-3-2004.

11. "*5.* While exercising the power of judicial review of administrative action, the court is not the Appellate Authority and

'[t]he Constitution does not permit the court to direct or advise the executive in [the matter] of policy or to sermonise qua any matter

which under the Constitution lies within the sphere of the legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory powers'. (See *Asif Hameed* v. *State of J&K*[2], SCC p. 374, para 19, *Shri Sitaram Sugar Co. Ltd.* v. *Union of India*[3].)

The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or [is violative of] the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the court, it cannot interfere.

6. The correctness of the reasons which prompted the Government in decision-making taking one course of action instead of another is not a matter of concern in judicial review and the court is not the appropriate forum for such investigation.

7. The policy decision must be left to the Government as it alone can adopt (*sic* decide) which policy should be adopted after considering all the points from different angles. In the matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental rights is not shown the courts will have no occasion to interfere and the court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the court cannot interfere even if a second view is possible from that of the Government.

8. The Court should constantly remind itself of what the Supreme Court of the United States said in *Metropolis Theater Co.* v. *City of Chicago*[4]: (L Ed p. 734)

'The problems of Government are practical ones and may justify, if they do not require, rough accommodations,—illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to our judicial review.' " (See *State of Orissa* v. *Gopinath Dash*[5], SCC p. 497, paras 5-8.)

12. It was submitted that in some other cases, a departure has been made. No definite material has been placed in that regard. In any event,

"Article 14 has no application or justification to legitimise an illegal and illegitimate action. Article 14 proceeds on the premise that a citizen has legal and valid right enforceable at law and persons having similar right and persons similarly circumstanced, cannot be denied of the benefit

2 1989 Supp (2) SCC 364 : AIR 1989 SC 1899
3 (1990) 3 SCC 223 : AIR 1990 SC 1277
4 57 L Ed 730 : 228 US 61 (1912)
5 (2005) 13 SCC 495

thereof. Such person cannot be discriminated to deny the [similar] benefit. The rational relationship and legal back-up are the foundations to invoke the doctrine of equality in case of persons similarly situated. If some persons derived benefit by illegality and had escaped from the clutches of law, similar persons cannot plead, nor the court can countenance that benefit had from infraction of law and must be allowed to be retained. Can one illegality be compounded by permitting similar illegal or illegitimate or ultra vires acts? Answer is obviously no."[6]

13. In *Coromandel Fertilizers Ltd.* v. *Union of India*[7] it was held in para 13 that wrong decision in favour of any party does not entitle any other party to claim the benefit on the basis of the wrong decision. In that case, one of the items was excluded from the schedule, by wrong decision, from its purview. It was contended that the authorities could not deny benefit to the appellant, since he stood on the same footing with excluded company. Article 14, therefore, was pressed into service. This Court had held that even if the grievance of the appellant was well founded, it did not entitle the appellant to claim the benefit of the notification. A wrong decision in favour of any particular party does not entitle another party to claim the benefit on the basis of the wrong decision. Therefore, the claim for exemption on the anvil of Article 14 was rejected.

14. "If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order [could not] be made the basis of issuing a writ compelling the respondent authority to repeat the illegality [to cause] another unwarranted order. The extraordinary and discretionary power of the High Court [under Article 226] cannot be exercised for such a purpose."[8] (emphasis in original) (See Secy., Jaipur Development Authority v. Daulat Mal Jain[6], SCC p. 51, para 27.)

15. "*30.* The concept of equality as envisaged under Article 14 of the Constitution is a positive concept which cannot be enforced in a negative manner. When any authority is shown to have committed any illegality or irregularity in favour of any individual or group of individuals, others cannot claim the same illegality or irregularity on the ground of denial thereof to them. Similarly wrong judgment passed in favour of one individual does not entitle others to claim similar benefits. In this regard this Court in *Gursharan Singh* v. *New Delhi Municipal Committee*[9] held that citizens have assumed wrong notions regarding the scope of Article 14 of the Constitution which guarantees equality before law to all citizens. Benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality as

6 *Secy., Jaipur Development Authority* v. *Daulat Mal Jain*, (1997) 1 SCC 35, p. 50, para 24.
7 1984 Supp SCC 457 : 1984 SCC (Tax) 225
8 *Chandigarh Admn.* v. *Jagjit Singh*, (1995) 1 SCC 745, p. 750, para 8.
9 (1996) 2 SCC 459

enshrined in Article14 of the Constitution by way of writ petition filed in the High Court. The Court observed: (SCC p. 465, para 9)

> 'Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination.'

Again in *Jaipur Development Authority case*[6] this Court considered the scope of Article 14 of the Constitution and reiterated its earlier position regarding the concept of equality holding: (SCC pp. 51-52, para 28)

> 'Suffice it to hold that the illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalised. In other words, judicial process cannot be abused to perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents.'

31. In *State of Haryana* v. *Ram Kumar Mann*[10] this Court observed: (SCC p. 322, para 3)

> 'The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them i.e. benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing misappropriation of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similarly circumstanced person claim equality under Section 14 for reinstatement? The answer is obviously 'No'. In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for enforcement of the same order. As stated earlier, his right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision by the Government does not

10 (1997) 3 SCC 321 : 1997 SCC (L&S) 801

give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right.' " (See *State of Bihar* v. *Kameshwar Prasad Singh*[11], SCC pp. 111-13, paras 30-31.)

16. So far as the allotment to non-eligible societies is concerned even if it is accepted, though specifically denied by the authority, to be true that does not confer any right on the appellants.

"[T]wo wrongs do not make one right. A party cannot claim that since something wrong has been done in another case, direction should be given for doing another wrong. It would not be setting a wrong right, but would be perpetuating another wrong. In such matters there is no discrimination involved. The concept of equal treatment on the logic of Article 14 of the Constitution cannot be pressed into service in such cases. What the concept of equal treatment presupposes is the existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs on a par. Even if hypothetically it is accepted that a wrong has been committed in some other cases by introducing a concept of negative equality the [appellant] cannot strengthen [its] case. [It has] to establish the strength of [its] case on some other basis and not by claiming negative equality." (See *Union of India* v. *International Trading Co.*[12], SCC pp. 444-45, para 13.)

17. It is not the case of the petitioners that the eligibility criteria has been stipulated with any oblique motive. On the contrary after analysing the issues, a committee appointed by the respondent had suggested the norms and the schemes were accordingly prepared. We do not find any irrationality much less something which is totally out of context to justify interference.

18. Clause 4 of the scheme (Broad Description of Proposed Arrangement) indicates that in order to implement this Court's order there was desirability to discourage contractors and involve SHGs through non-profit organisations. As the scheme itself provides, the intention is to make the SHGs fully equipped within a certain period after these NGOs go out of the picture and the State Government steps in.

19. In the aforesaid background we do not find anything illicit in the impugned criteria to warrant interference.

20. The writ petitions fail and are, therefore, dismissed. No costs.

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11 (2000) 9 SCC 94 : 2000 SCC (L&S) 845
12 (2003) 5 SCC 437