Beopar Sahayak (P) Ltd. & Ors vs Vishwa Nath & Ors on 15 July, 1987

Equivalent citations: 1987 AIR 2111, 1987 SCR (3) 496

Author: A.P. Sen

Bench: A.P. Sen

PETITIONER:
BEOPAR SAHAYAK (P) LTD. & ORS.

Vs.

RESPONDENT:
VISHWA NATH & ORS.

DATE OF JUDGMENT15/07/1987

BENCH:
NATRAJAN, S. (J)
BENCH:
NATRAJAN, S. (J)
SEN, A.P. (J)

CITATION:
1987 AIR 2111 1987 SCR (3) 496
1987 SCC (3) 693 JT 1987 (3) 76
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R 1988 SC 184 (13)
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ACT:
U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972: s. 3(e)--Prescribed Authority--Jurisdiction of to pass release order--Executive Magistrate of First Class with three years' experience in criminal trial--Whether competent.

Administrative Law--Subordinate legislation--Government notification published in official gazette--Whether could be superseded by administrative instruction--De facto doctrine--Applicability of to orders passed by person holding office under colour of lawful authority--Appointment of Authority----Whether could be challenged in a col-lateral proceeding.

HEADNOTE:

Clause (e) of s. 3 of the U.P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972 defined 'Prescribed Authority' to mean a Magistrate of the First Class having experience as such of not less than three years, authorised by the District Magistrate to exercise the powers of such authority. When the Code of Criminal Procedure, 1973 came into effect in 1974 this definition was amended to mean an officer having not less than three years experience as Munsif or as Magistrate of the First Class or as Executive Magistrate authorised by the State Government to exercise the power of the Prescribed Authority.

The respondents having their residence in the second floor of the premises and their business establishments in a portion of the ground floor, sought recovery of possession under s. 21 of the Act of the first floor and another portion of the ground floor leased out by their father to the predecessor concern of the appellant for residential and nonresidential purposes respectively. The Prescribed Authority passed an order of release holding that the requirement of the leased portions by the respondents for their residential and non-residential purposes was a bona fide one and that the comparative hardship factor was more in their favour than in favour of the appellant. These findings were confirmed by the Appellate Authority.

497

In the writ petition filed before the High Court it was contended for the first time that the order of the Prescribed Authority had been passed without jurisdiction and was, therefore, a nullity and its affirmation by the Appellate Authority could not validate it. That contention was repelled by the High Court holding that even if the order of the Prescribed Authority was a defective one, it had got merged with the order of the Appellate Authority when it was confirmed and that the question of jurisdictional competence of the Prescribed Authority to pass the order of release involved adjudication upon disputed questions of fact and such an enquiry was beyond the scope of proceedings under Article 226 of the Constitution.

The Government had in exercise of its powers under ss. 12 and 39(1), Cr. P.C., 1898 by a general notification dated 6.2.1968 conferred on all Tehsildars the powers of a First Class Magistrate, and on all Naib Tehsildars the powers of a Second Class Magistrate. The Deputy Secretary, Government of U.P. had, however, in his note forwarding the General Notification to all the District Magistrates stated that the conferment of powers was confined to the maintenance of law and order. By means of a notification dated 9.9.1974 the Government had designated the Additional City Magistrate II, Kanpur to be the Prescribed Authority under the Act for certain areas.

The Prescribed Authority, whose order is impugned had served as Tehsildar from 29.9.1962 to 6.11.1964 and again

from November, 1965 to 15.2.1974, when he was promoted to Deputy Collector and posted as Additional City Magistrate, Kanpur, which post he held when he dealt with the application in the instant case.

In the special leave petition it was contended that the powers of a First Class Magistrate under s. 39(1) Cr. P.C. 1898 cannot be deemed to have been conferred on the incumbent in the instant case in the absence of requisite proof under s. 39(2) of the Code, that even if the general notification dated 6.2.1968 empowered him to act as such, the conferment of power was only for ensuring the maintenance of law and order and not for trial of cases, and that s. 3(e) requires that an Executive Magistrate to be lawfully empowered to act as Prescribed Authority must have had not less than three years experience in the trial of cases as a First Class Magistrate.

Dismissing the appeal,

HELD: 1. The Prescribed Authority's experience as an Execu-
498
tive Magistrate in the instant case satisfied the requirements of s. 3(e) of the U.P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972. He was not, therefore, incompetent 10 act as such and pass the impugned order of release. [507]

2. The General Notification dated February 6, 1968, conferring the powers of a First Class Magistrate on all Tehsildars and the powers of a Second Class Magistrate on all Naib Tehsildars, which was published in the Official Gazette on February 17, 1968, had been communicated to-all the Tehsildars of the District by the District Magistrate. It must, therefore, be taken that the Government Notification should have been fully acted upon and all Tehsildars, including the official whose order is impugned, must have been conferred powers of a First Class Magistrate in the year 1968 when he was serving as Tehsildar. The requirement of s. 39(2) of the Code of Criminal Procedure, 1898 had thus been complied with.[504B-D,G; 505A]

3. There is nothing in the Government Notification dated February 6, 1968 or in the Gazette publication dated February 17, 1968 to indicate that the powers of a First Class Magistrate and a Second Class Magistrate conferred on Tehsildars and Naib Tehsildars respectively was only for the limited purpose of ensuring the maintenance of law and order and not for exercise of those powers in the trial of criminal cases. The note of the Deputy Secretary appears to be only an administrative instruction and not an order passed by the Government itself in exercise of its powers under ss. 12 and 39 of the Criminal Procedure Code, 1898. The administrative instruction cannot whitle down the Government Notification conferring higher magisterial powers on Tehsildars and Naib Tehsildars. [504E-F]

4. All that s. 3(e) of the Act says is that for being conferred the powers of a Prescribed Authority an Executive

Magistrate should have had experience as such magistrate for a period of not less than three years. Having regard to the terms of the stipulation, it would suffice if he had acquired experience in the trial of criminal cases, albeit cases triable by a Second Class Magistrate, for more than three years, while at the same time having the right to exercise the powers of a First Class Magistrate. This is because of the fact that as per Schedule III of the Code of Criminal Procedure, 1898 a Magistrate Of the First Class is also entitled to exercise all the powers of a Magistrate of the Second Class. A First Class Magistrate, therefore, can also gain experience by the trial of cases triable by a Second Class Magistrate. What is of relevance is the gaining of experience in trial of criminal cases for a period of three

499

years and more and at the same time.having the powers of a First Class Magistrate and not necessarily the experience of trying cases triable by a First Class Magistrate alone. It cannot, therefore, be said that the Prescribed Authority did not have requisite qualification in the instant case to be so appointed under el. (e) of s. 3 of the Act and hence the release order passed by him was a nullity. [505C-F]

5. The appointment of Prescribed Authority in the instant case was not made as persona designata. He exercised the powers of a Prescribed Authority by reason of his posting as Additional City Magistrate II, Kanpur, by virtue of an earlier Notification of the Government dated September 9, 1974 constituting the Additional City Magistrate II, Kanpur, as the Prescribed Authority, for certain specific areas in the city. The said Notification of the Government was a General Notification and therefore whoever came to be posted as Additional City Magistrate II, automatically became a Prescribed Authority for the areas indicated in the Government Notification. Therefore, as long as the Government Notification dated September 9, 1974 was not challenged, the exercise of powers by him as a Prescribed Authority could not also be challenged. The appellant was also not entitled to question the validity of the appointment of Prescribed Authority in a collateral proceedings. [505G-506A; 507G]

6. Even if the person appointed as Prescribed Authority was not fully qualified to act as such and pass the order of release, the validity and legality of the order of release passed by him cannot be impugned because of the de-facto doctrine in as much as he did not hold the office as an usurper but only under colour of lawful authority. [507E-F] G. Rangarajan v. Andhra Pradesh, [1981] 3 SCR, 474, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 265 of 1978.

From the Judgment and Order dated 12.9.1977 of the Allahabad High Court in C.M.W. No. 144 1 of 1976. S.N. Kacker and B.R. Agarwala for the Appellants. U.R. Lalit, R.B. Mehrotra and D.N. Misra for the Respond- ents.

Mr. Prithvi Raj and Mrs. Shobha Dikshit for the Respondents.

The Judgment of the Court was delivered by NATARAJAN, J. The only question for consideration in this appeal by special leave is whether the order of release passed by the Prescribed Authority under the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (for short the Act hereinafter) is a null and void order because the Prescribed Authority had no jurisdiction to pass the order as he did not possess the requisite quali- fication for being appointed as such Authority. Premises No. 58/3 Birhana Road, Kanpur is a three-sto- reyed building and in addition it has a mezzanine floor as well. As early as in 1947, when the respondents who are brothers were minors, a portion of the ground floor and the entire first floor was leased out to the predecessor concern of the appellant by the father of the respondents. While the first floor was leased out for residential purposes, a portion of the ground floor was leased out for non-residen- tial purposes. The respondents sought recovery of possession from the appellant of the leased portions for their residen- tial needs and business purposes. It may be mentioned here that the respondents were already having their residence in the second floor and their business establishments in anoth- er portion of the ground floor. As the appellant refused to comply, the respondents preferred an application under Section 21 of the Act for an order of release in their favour to recover possession of the leased portions. Various defences were raised by the appellant to oppose the applica- tion but all the objections were found untenable by the Prescribed Authority and he, therefore, passed an order of release on 19.8. 1975 holding that the requirement of the leased portions by the respondents for their residential and non-residential purposes was a bona fide one and furthermore the comparative hardship factor was more in their favour than in favour of the appellant. The findings of the Pre- scribed Authority were confirmed by the Appellate Authority (Additional District Judge, Kanpur) and thereafter the appellant filed a petition under Article 226 of the Consti- tution before the High Court. For the first time the appel- lant raised a contention, by means of an amendment petition, that the order of the Prescribed Authority had been passed without jurisdiction and was therefore a nullity and in such circumstances its affirmation by the Appellate Authority could not also validate it. The High Court, though it al- lowed the amendment petition and permitted the additional question to be raised, did not see any merit in it on ac- count of two factors. The first was that even if the order of the Prescribed Authority was a defective one, it had become merged with the order of the Appellate Authority when it was con-

firmed and as such there was no room for the appellant to assail the order on the question of jurisdictional incompe- tence of the Prescribed Authority. Besides, the High Court was of opinion that the question of jurisdictional compe- tence of the Prescribed Authority to pass the order of release involved adjudication upon disputed questions of fact and such an exercise was beyond the scope of proceed- ings under Article 226 of the Constitution. The High Court thereafter went into the correctness of the findings concur- rently rendered by the Prescribed Authority and the Appel-

late Authority and found the findings to be fully in accord- ance with law and facts. The High Court, therefore, dis- missed the writ petition filed by the appellant and hence the present appeal by special leave.

For a proper comprehension of the attack made on the competence of the Prescribed Authority to pass the impugned order of release, it is necessary to set out the terms of Clause (e) of Section 3 which defines the 'Prescribed Au- thority' under the Act as it stood before and after the amendment in 1974, and also the qualifications of Shri Senger who was the Prescribed Authority who had passed the order of release in this case.

Clause (e) of Section 3 of the Act was originally in the following terms:

> "Prescribed Authority" means a Magistrate of the First Class having experience as such of not less than three years, authorised by the District Magistrate to exercise, perform and discharge all or any of the powers, functions and duties of the prescribed authority under this Act, and different Magistrates may be so authorised in respect of different areas or cases or classes of cases, and the District Magistrate may recall any case from any such Magistrate and may either dispose of it himself or transfer it for disposal to any other such Magistrate."

The definition of a Prescribed Authority had, however, to be changed with the coming into effect of the Code of Criminal Procedure 1973 with effect from 1.4.1974 because the Executive Magistrates ceased to be Magistrates of the First Class under the Code. Hence by means of an Amendment Act viz. U.P. Act No. 19 of 1974, Section 3(e) came to be amended as under:-

> "(e) 'Prescribed Authority' means an officer having not less than 3 years experience as Munsif or as Magistrate of the First Class or as Executive Magistrate authorised by general or special order of the State Government to exercise, perform and discharge all or any of the powers. functions and duties of the Prescribed Authority under this Act, and different officers may be so authorised in respect of different areas or cases, or classes of cases."

Thus by reason of the amendment the State Government became the authority to authorise a person to act as a Prescribed Authority and three classes of officers viz. Munsifs, Magis- trates of the First Class and Executive Magistrates, each having not less than three years experience as such were designated the officers on whom the powers of a Prescribed Authority under the Act could be conferred.

Coming now to the qualifications of Shri Senger, the Prescribed Authority, he had served as Tehsildar from 29.9.2962 to 6.11.1964 and again from November 1965 to 15.2.1974 and he was promoted as Deputy Collector with effect from 16.2. 1974 and posted as Additional City Magis- trate II, Kanpur. He worked as Additional City Magistrate II, Kanpur from 16.2.1974 to 14.8.1974 and again from May 1975 to 26.8.1975. It was during this period i.e. on 19.8.1975 he had passed the impugned order of release. While Shri Senger was serving as a Tehsildar the Government in exercise

of its powers under Sections 12 and 39(1) of the Code of Criminal Procedure 1898, issued a general Notifica- tion dated 6.2.1968 conferring on all Tehsildars the powers of a First Class Magistrate and on all Naib Tehsildars the powers of a Second Class Magistrate. The Notification of the Government was duly published in the Gazette on 17.2. 1968. By means of a Notification dated 9.9.1974 the Government had designated the Additional City Magistrate II, Kanpur, to be the Prescribed Authority under the Act for certain areas including the limits of Collector Ganj Police Station where the leased property is situate. By reason of this notifica- tion when Shri Senger succeeded one Shri Jagdish Sharma as the Additional City Magistrate II, Kanpur, on May 19, 1975, he became the Prescribed Authority for those areas including the Collector Ganj area. It was in such circumstances Shri Senger dealt with the application filed under Section 21 of the Act by the respondents before his predecessor and passed the order of release on 19.8.1975.

Having set out these factual matters we will now refer to the grounds on which the competence of Shri Senger to have passed the order of release are questioned. They are as follows:-

> 1. There is no proof that the General Notification of the Government dated 6.2.68 was given effect to in the case of Shri Senger, and in the absence of such proof he cannot be deemed to have been conferred 'the powers of a First Class Magistrate because Clause (2) of Section 39 of the Criminal Procedure Code 1898 lays down that any conferment of magis-

terial powers on an officer under Section 39(1) "shall take effect from the date on which it is communicated to the person so empowered."

2. Even if there had been a communication to Shri Senger as envisaged under Section 39(2) of the Code, the conferment of powers was only for ensuring the maintenance of law and order and not for the trial of cases. This position has been set out by the Deputy Secretary, Government of U.P. in his note while forwarding a copy of the General Notification of the Government to all District Magistrates (vide page 260 of the Printed Paper Book). Therefore, Shri Senger cannot be treated as a Tehsildar on whom the powers of a First Class Magistrate had been conferred upon for trial of cases.

3. For an Executive Magistrate to be lawfully empowered to act as a Prescribed Authority under Section 3(e), he must have had not less than three years experience in the trial of cases as a First Class Magistrate. The terms of Section 3(e) are clear on this aspect and they have been reiterated by the Government through a communication sent by the Com- missioner and Secretary, Government of Uttar Pradesh to all District Magistrates on 9.9. 1974 (vide page 228 of Printed Paper Book). It has been stated therein that "in the case of Executive Magistrates, it shall be deemed sufficient if they have gained three years' experience of working as Magis- trates of First Class before the 1st April, 1974". These grounds were controverted by Mr. Lalit appearing for the respondents and he contended that Shri Senger had been conferred the powers of a First Class Magistrate in terms of the Government Notification and the Gazette publi- cation is proof thereof. that this position has been con- firmed by the District Magistrate in his reply to the Sixth Additional Judge, Kanpur (vide pages 224/225 of the Printed Paper Book), that Shri Senget was empowered to exercise all the powers of a

First Class Magistrate and that the note issued by the Deputy Secretary that the conferment of powers was confined to the maintenance of law and order and would not extend to the trial of cases is an administrative note which cannot override the Gazette Noti- fication and it must therefore be held that Shri Senger had been an Executive Magistrate exercising the powers of a First Class Magistrate from February 1968 itself and as such he fully satisfied the terms of Section 3(e) for being conferred the,powers of a Prescribed Authority under the Act. We will now examine the contentions of the counsel in greater detail.

It is not in dispute that the Government issued a Gener- al Notification on 6.2. 1968 conferring the powers of a First Class Magistrate on all Tehsildars and the powers of a Second Class Magistrate on all Naib Tehsildars and this Notification was duly published in the Official Gazette on 17.2.68. The argument of Mr. Kacker that in spite of the Government Notification there is no proof that Shri Senger had been individually communicated an order conferring upon him the powers of a First Class Magistrate cannot be accept- ed because the Additional District Magistrate has categori- cally stated in his reply to the letter of the Sixth Addi- tional Judge dated 3.5.76 that by virtue of the General Notification of the Government and the Gazette Notification, "all the Tehsildars had been appointed Magistrates, First Class" and by way of enclosure he had sent the relevant Gazette Notification as well. In the face of such materials, it must be taken that the Government Notification should have been fully acted upon and all Tehsildars including Shri Senger must have been conferred the powers of a First Class Magistrate in the year 1968 itself. In so far as the second criticism is concerned, there is nothing in the Government Notification dated 6.2.68 or in the Gazette publication dated 17.2.68 to indicate that the powers of a First Class Magistrate and a Second Class Magistrate conferred on Teh- sildars and Naib Tehsildars respectively was only for the limited purpose of ensuring the maintenance of law and order and not for exercise of those powers in the trial of crimi- nal cases. The note of the Deputy Secretary (page 260 of the Printed Paper Book) relied on by Mr. Kacker appears to be only an administrative instruction and not an order passed by the Government itself in exercise of its powers under Sections 12 and 39 of the Criminal Procedure Code 1898. In such circumstances, the instruction cannot whitle down the Government Notification conferring higher magisterial powers on Tehsildars and Naib Tehsildars. Incidentally, we may point out that the copy of the Government Notification dated 6.2.68 together with the administrative instruction of the Deputy Secretary had been communicated to all the Tehsildars of the District by the District Magistrate. The endorsement made by the Collector will, therefore, disprove the conten- tion of Mr. Kacker that there had been no individual commu- nica-

tion of the Government's Order to all the Tehsildars and hence the requirement of Section 39(2) of the Criminal Procedure Code 1898 had not been complied with. Even assuming for argument's sake that the conferment of the powers of a First Class Magistrate on all Tehsildars was for the limited purpose of enforcement of law and order and not for the trial of cases, the question will be whether the experience gained by Shri Senger as a Second Class Magis- trate while concurrently having the powers of a First Class Magistrate would not satisfy the requirements of Section 3(e) of the Act. All that the Section says is that for being conferred the powers of a Prescribed Authority an Executive Magistrate should have had experience as such Magistrate for a period of not less than three years. Having regard to the terms of the stipulation, it would suffice if Shri Senger had acquired experience in the trial of criminal cases, albeit cases triable by a Second Class Magistrate, for more than three

years, while at the same time having the right to exercise the powers of a First Class Magistrate. This is because of the fact that as per Schedule III of the Code of Criminal Procedure 1898 a Magistrate of the First Class is also entitled to exercise all the powers of a Magistrate of the Second Class. It would, therefore follow that a First Class Magistrate can also gain experience by the trial of cases triable by a Second Class Magistrate. What is of relevance is the gaining of experience in trial of criminal cases for a period of three years and more and at the same time having the powers of a First Class Magistrate and not necessarily the experience of trying cases triable by a First Class Magistrate alone.

In the light of the aforesaid reasons we do not see any merit in the contention of the appellant that Shri Senger did not have the requisite qualification to be appointed a Prescribed Authority under Clause (e) of Section 3 of the Act and hence the release order passed by him is a nullity. There is also another angle from which the matter needs to be considered. Shri Senget was not' appointed a Prescribed Authority as persona designata. On the other hand he exercised the powers of a Prescribed Authority by reason of his posting as Additional City Magistrate II, Kanpur, in the place of one Shri S.D. Sharma and by virtue of an earlier Notification of the Government dated 9.9.1974 constituting the Additional City Magistrate II, Kanpur, as the Prescribed Authority for certain areas in Kanpur city including the area falling within the limits of the Collector Ganj Police Station. The abovesaid Notification of the Government was a General Notification and, therefore, whoever came to be posted as Additional City Magistrate II, Kanpur, automatically became a Prescribed Authority for the areas indicated in the Gov- ernment Notification. Such being the case, as long as the Government Notification dated 9.9.1974 is not challenged, the exercise of powers by Shri Senger as a Prescribed Au- thority cannot also be challenged. This position would then call for the application of the 'de-facto doctrine' to the facts of the case. The principle of the 'de-facto doctrine' has been considered in several cases. This Court had occa- sion in G. Rangarajan v Andhra Pradesh, [1981] 3 S.C.R.474, to which one of us (Sen, J.) was a party to refer to those decisions and enunciate the law relating to the 'de-facto doctrine'. In that case a criminal appeal filed by one Gokaraju Rangaraju under Section 6(c) of the Essential Commodities Act was dismissed by Shri G. Anjappa, Additional Sessions Judge and a revision was preferred to the High Court. One Shri Raman Raj Saxena, another Additional Ses- sions Judge, had tried a Sessions case and awarded convic- tion to two of the accused persons and they had filed ap- peals to the High Court against their conviction and sentence. By the time the Criminal Revision and the Criminal Appeal filed by the accused came to be heard by the High Court, this Court had quashed the appointments of the above- said two Additional Sessions Judges and two others as Dis- trict Judges Grade II on the ground that their appointment was in violation of Article 233 of the Constitution. There- fore, the accused who had preferred the Criminal Revision and the Criminal Appeals respectively raised a contention before the High Court that the judgments rendered against them by the concerned Additional Sessions Judges were void and should therefore, be set aside. The High Court rejected the contention on the ground that the Additional Sessions Judges had held their offices under lawful authority and not as usurpers and therefore, the judgments rendered by them were valid and could not be questioned in collateral proceedings. Against the judgments of the High Court the ac- cused preferred appeals by special Leave to this Court and those appeals were dismissed by this Court on the ground the 'de-facto doctrine' was clearly attracted. After referring to severaL decisions rendered by the Courts in India and England, Chinnappa Reddy, J. speaking for the Bench enunci- ated the law relating to the 'de-facto

doctrine' as under:

> "A judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a Judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule also based on public policy. The defective appointment of a de facto judge may be questioned directly in a proceeding to which he be a party but it cannot be permitted to be questioned in a litigation between two private litigants, a litigation which is of no concern or consequence to the judge except as a judge. Two litigants litigating their private titles cannot be permitted to bring in issue and litigate upon the title of a judge to his office. Otherwise as soon as a judge pronounces a judgment a litigation may be commenced for a declaration that the judgment is void because the judge is no judge. A judge's title to his office cannot be brought into jeopardy in that fashion. Hence the rule against collateral attack on validity of judicial appointments. To question a judge's appointment in an appeal against the judgment is, of course, such a collateral attack."

The ensuing position therefore is that even if we are to countenance the argument of the appellant's counsel that Shri Senger had not gained experience as an Executive Magis- trate exercising First Class powers for a period of not less than three years and could not therefore be appointed as a Prescribed Authority under the Act, the validity and legali- ty of the order of release passed by him cannot be impugned because Shri Senger had not held the office as an usurper but only under colour of lawful authority. There is, there- fore, no escape for the appellant from being governed by the 'de-facto doctrine' and thereby being disentitled to impugn the validity of the release order on the ground of want of jurisdictional competence for Shri Senger to pass the order. Furthermore, the appellant is also not entitled to question the validity of the appointment of Shri Senger as a Pre- scribed Authority in a collateral proceeding. These addi- tional factors also militate against the contentions of the appellant.

In view of our conclusion that Shri Senger's experience as an Executive Magistrate satisfied the requirements of Section 3(e) of the Act and as such he was not incompetent to act as a Prescribed Authority and pass the impugned order of release, that secondly even if he was not fully qualified to act as a Prescribed Authority and pass the order of release the validity of the order cannot be impugned because of the 'de-facto doctrine' and thirdly, the appellant is not entitled to question the competence of Shri Senger to act as a Prescribed Authority in a collateral proceeding, it is really not necessary for us to examine the correctness of the view taken by the High Court that by reason of the merger of the order of Shri Senger with the order of the Appellate Authority, there is no room for the appellant to contend that the release order is a nullity because Shri Senger did not have jurisdiction to pass the order. Even so we may make a brief reference to the argu- ments of the counsel on that aspect of the matter and the case law cited by them to be fair to the counsel and to their arduous

preparation of the case. Mr. Kacker's argument was that the High Court was not right in its view because the rule of merger would not be attracted where there is a total lack of jurisdiction in the Tribunal or Court of first instance to pass an order. Mr. Kacker submitted that there is a clear distinction between the manner of exercise of jurisdiction and the existence of jurisdiction and whenever an order was passed without jurisdiction by a Tribunal or Court, the rule of merger will have no application. In support of his contention the learned counsel referred us to the following decisions. Hriday Nath Roy v. Ram Chandra Barna Sarma, (ILR 48 Calcutta 138); Collector of Customs v. A.H.A. Rahima, AIR 1957 Madras 496; The State of Uttar Pradesh v. Mohammad Noon, [1958] SCR 595; Kumaran v. Kothan- daraman, AIR 1963 Gujarat Page 6; Toronto Railway v. Toronto Corporation, [1904] Appeal Cases 809 and Barnard v. National Dock Labour Board, [1953] 1 All. E.R. 1113. Refuting the contentions of Mr. Kacker, Mr. Lalit argued that in several later judgments the view taken in Mohammad Noon's case (supra) has been explained as being confined to the peculiar facts of that case and that the rule of merger has not undergone any change and the consistent view that has been taken is that even an order passed by a Tribunal or Court without jurisdiction can be challenged before the Appellate Authority or Court, that in such an appeal the question of the initial Court's jurisdiction can also be gone into and that once the Appellate Authority or Court found jurisdic- tional competence in the Tribunal or Court of first instance and confirmed the order in appeal, then the rule of merger of the order of the original authority with the order of the Appellate Authority would be clearly attracted and thence- forth the order of the original authority cannot be assailed on the ground of jurisdictional error or incompetence. The learned counsel further submitted that besides the rule of merger the rule of finality of judgments would also be attracted and on that score too the order of the original authority will attain immunity from attack. Mr. Lalit cited several decisions in support of his arguments but we need refer only to the decisions of this Court. The decisions cited are:-

> U.J.S. Chopra v. State of Bombay, [1955] 2 SCR 94; Madan Gopal Rungta v. Secretary to the Govt. of Orissa, [1962] Suppl. 3 SCR 906 and Collector of Customs, Calcutta v. East India Commercial Co. Ltd., [1963] 2 SCR 563. As we have already indicated we do not find any necessi- ty to go into the merits of the contentions of the counsel regarding the applicability of the rule of merger and the rule of finality for rendering our decision in this appeal. We, therefore, leave the rival contentions to rest there. We have only to consider the grievance of the appellant that the respondents had committed a breach of their under- taking to the court and illegally dispossessed them from the leased portions in their occupation and, therefore, the respondents should be directed to restore possession to them in the interests of justice. It appears to us that the recovery of possession of the leased portions had taken place due to a misunderstanding about the period of force of the undertaking given by the respondents. From the records we see that the High Court preferred to act on the undertak- ing given by the respondents counsel not to disturb the possession of the appellant rather than pass an order of stay of the release order as the High Court was of the view that the appeal itself can be heard and disposed of expedi- tiously on merits. However, for one reason or other, the appeal could not be heard expeditiously. In the meanwhile since the undertaking had been given only for a limited period i.e. 25.10.76, the respondents seem to have been under the impression

that the undertaking had come to an end and hence they were entitled to recover possession. It is of relevance to note that the respondents had not taken posses- sion immediately after 25.10.76 but only on 23.12.76, i.e. nearly two months later. In such circumstances it is diffi- cult to sustain the charge levelled by the appellant that the respondents had committed a breach of their undertaking to the Court and had recovered possession illegally and should therefore be called upon to restore possession. In the light of our conclusion the appeal fails and will accordingly stand dismissed. We, however, direct the parties to bear their respective costs.

P.S.S. Appeal dis-
missed.