Lucknow Development Authority vs M.K. Gupta on 5 November, 1993

Equivalent citations: 1994 AIR 787, 1994 SCC (1) 243, AIR 1994 SUPREME COURT 787, 1994 (1) SCC 243, 1994 AIR SCW 97, 1994 BRLJ 95, (1993) 6 JT 307 (SC), 1993 (6) JT 307, (1994) 1 APLJ 57, (1994) 1 COMLJ 1, (1994) IJR 15 (SC), 1994 (1) ALL CJ 524, (1994) 1 MAD LJ 55, (1994) 1 ORISSA LR 258, (1994) 23 ALL LR 40, (1994) MAH LJ 611, (1994) MPLJ 461, (1994) 1 MAD LW 10, (1994) 13 CORLA 20, (1994) 1 CPR 569, (1994) 80 COMCAS 714, (1993) 3 CPJ 7, AIRONLINE 1993 SC 557

Author: R.M. Sahai

Bench: R.M. Sahai, Kuldip Singh

PETITIONER:
LUCKNOW DEVELOPMENT AUTHORITY

Vs.

RESPONDENT:
M.K. GUPTA

DATE OF JUDGMENT05/11/1993

BENCH:
SAHAI, R.M. (J)
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SAHAI, R.M. (J)
KULDIP SINGH (J)

CITATION:
1994 AIR 787 1994 SCC (1) 243
JT 1993 (6) 307 1993 SCALE (4)370

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by R.M. SAHAI, J.- The question of law that arises for consideration in these appeals, directed against orders passed by the National Consumer Disputes Redressal Commission (referred hereinafter as National Commission), New Delhi is if the statutory authorities such as Lucknow Development Authority or Delhi Development Authority or Bangalore Development Authority constituted under State Acts to carry on planned development of the cities in the State are amenable to Consumer Protection Act, 1986 (hereinafter referred to as 'the Act') for any act or omission relating to housing activity such as delay in delivery of possession of the houses to the allottees, non-completion of the flat within the stipulated time, or defective and faulty construction etc. Another aspect of this issue is if the housing activity carried on by the statutory authority or private builder or contractor came within the purview of the Act only after its amendment by the Ordinance No. 24 in 1993 or the Commission could entertain a complaint for such violations even before.

2. How the dispute arose in different appeals is not of any consequence except for two appeals which shall be adverted to later, for determining right and power of the Commission to award exemplary damages and accountability of the statutory authorities. We therefore come straight away to the legal issue involved in these appeals. But before doing so and examining the question of jurisdiction of the District Forum or State or National Commission to entertain a complaint under the Act, it appears appropriate to ascertain the purpose of the Act, the objective it seeks to achieve and the nature of social purpose it seeks to promote as it shall facilitate in comprehending the issue involved and assist in construing various provisions of the Act effectively. To begin with the preamble of the Act, which can afford useful assistance to ascertain the legislative intention, it was enacted, 'to provide for the protection of the interest of consumers'. Use of the word 'protection' furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a preamble cannot control otherwise plain meaning of a provision. In fact the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interest of the consumers have become a haven for unscrupulous ones as the enforcement machinery either does not move or it moves ineffectively, inefficiently and for reasons which are not necessary to be stated. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, 'a network of rackets' or a society in which, 'producers have secured power' to 'rob the rest' and the might of public bodies which are degenerating into storehouses of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked. The malady is becoming so rampant, widespread and deep that the society instead of bothering, complaining and fighting against it, is accepting it as part of life. The enactment in these unbelievable yet harsh realities appears to be a silver lining, which may in course of time succeed in checking the rot. A scrutiny of various definitions such as 'consumer', 'service', 'trader', 'unfair trade practice' indicates that legislature has attempted to widen the reach of the Act. Each of these definitions are in two parts, one, explanatory and the other expandatory. The explanatory or the main part itself uses expressions of wide amplitude indicating clearly its wide sweep, then its ambit is widened to such

things which otherwise would have been beyond its natural import. Manner of construing an inclusive clause and its widening effect has been explained in Dilworth v. Commissioner of Stamps' as under:

> " 'include' is very generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute, and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural, import, but also those things which the definition clause declares that they shall include."

It has been approved by this Court in Regional Director, Employees' State Insurance Corpn. v. High Land Coffee Works of P. F.X. Saldanha and Sons2; CIT v. Taj Mahal Hotel, Secunderabad3 and State of Bombay v. Hospital Mazdoor Sabha4. The provisions of the Act thus have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit oriented legislation. The primary duty of the court while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do violence to the language of the provisions and is not contrary to the attempted objective of the enactment.

3. Although the legislation is a milestone in the history of socioeconomic legislation and is directed towards achieving public benefit we shall first examine if on a plain reading of the provisions unaided by any external aid of interpretation it applies to building or construction activity carried on by the statutory authority or private builder or contractor and extends even to such bodies whose ancillary function is to allot a plot or construct a flat. In other words could the authorities constituted under the Act entertain a complaint by a consumer for any defect or deficiency in relation to construction activity against a private builder or statutory authority. That shall depend on ascertaining the jurisdiction of the Commission. How extensive it is? A National or a State Commission under Sections 21 and 16 and a Consumer Forum under Section 11 of the Act is entitled to entertain a complaint depending on valuation of goods or services and compensation claimed. The nature of 'complaint' which can be filed, according to clause (c) of Section 2 of the Act is for unfair trade practice or 1 1899 AC 99: 15 TLR 61 2 (1991) 3 SCC 617 3 (1971) 3 SCC 550 4 AIR 1960 SC 610: (1960) 2 SCR 866: (1960) 1 LLJ 251 restrictive trade practice adopted by any trader or for the defects suffered for the goods bought or agreed to be bought and for deficiency in the service hired or availed of or agreed to be hired or availed of, by a 'complainant' who under clause (b) of the definition clause means a consumer or any voluntary consumer association registered under the Companies Act, 1956 or under any law for the time being in force or the Central Government or any State Government or where there are one or more consumers having the same interest, then a complaint by such consumers. The right thus to approach the Commission or the Forum vests in consumer for unfair trade practice or defect in supply of goods or deficiency in service. The word 'consumer' is a comprehensive expression. It extends from a person who buys any commodity to consume either as eatable or otherwise from a shop, business house, corporation, store, fair price shop to use of private or public services. In Oxford Dictionary a consumer is defined as, "a purchaser of goods or services". In Black's Law Dictionary it is explained to mean, "one who consumes. Individuals who purchase, use, maintain, and dispose of products and services. A member of that broad class of people who are affected by pricing policies, financing practices, quality of goods and

services, credit reporting, debt collection, and other trade practices for which state and federal consumer protection laws are enacted." The Act opts for no less wider definition. It reads as under:

> consumer' means any person who,-
>
> (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
>
> (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person;

[Explanation.- For the purposes of sub-clause (i), 'commercial purpose' does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;]"

> It is in two parts. The first deals with goods and the other with services. Both arts first declare the meaning of goods and services by use of wide expressions. Their ambit is further enlarged by use of inclusive clause. For stance, it is not only purchaser of goods or hirer of services but even those who use the goods or who are beneficiaries of services with approval of the person who purchased the goods or who hired services are included in it. The legislature has taken precaution not only to define 'complaint', complainant', 'consumer' but even to mention in detail what would amount to unfair trade practice by giving an elaborate definition in clause (r) and even to define 'defect' and 'deficiency' by clauses (f) and (g) for which a consumer can approach the Commission. The Act thus aims to protect the economic interest of a consumer as understood in commercial sense as a purchaser of goods and in the larger sense of user of services. The common characteristics of goods and services are that they are supplied at a price to cover the costs and generate profit or income for the seller of goods or provider of services. But the defect in one and deficiency in other may have to be removed and compensated differently. The former is, normally, capable of being replaced and repaired whereas the other may be required to be compensated by award of the just equivalent of the value or damages for loss. 'Goods' have been defined by clause (i) and have been assigned the same meaning as in Sale of Goods Act, 1930 which reads as under:

> " goods' means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;"

It was therefore urged that the applicability of the Act having been confined to moveable goods only a complaint filed for any defect in relation to immoveable goods such as a house or building or allotment of site could not have been entertained by the Commission. The submission does not appear to be well founded. The respondents were aggrieved either by delay in delivery of possession of house or use of substandard material etc. and therefore they claimed deficiency in service rendered by the appellants. Whether they were justified in their complaint and if such act or omission could be held to be denial of service in the Act shall be examined presently but the jurisdiction of the Commission could not be ousted (sic merely) because even though it was service it related to immoveable property.

4. What is the meaning of the word 'service'? Does it extend to deficiency in the building of a house or flat? Can a complaint be filed under the Act against the statutory authority or a builder or contractor for any deficiency in respect of such property. The answer to all this shall depend on understanding of the word 'service". The term has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc. The concept of service thus is very wide. How it should be understood and what it means depends on the context in which it has been used in an enactment. Clause

(o) of the definition section defines it as under:

> " service' means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"

It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to any service made available to potential users. The words 'any' and 'potential' are significant. Both are of wide amplitude. The word 'any' dictionarily means 'one or some or all'. In Black's Law Dictionary it is explained thus, "word ,any' has a diversity of meaning and may be employed to indicate 'all' or ,every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject- matter of the statute". The use of the word 1 any' in the context it has been used in clause (o) indicates that it has been used in wider sense extending from one to all. The other word 'potential' is again very wide. In Oxford Dictionary it is defined as 'capable of coming into being, possibility'. In Black's Law Dictionary it is defined as "existing in possibility but not in act. Naturally and probably expected to come into existence at some future time, though not now existing; for example, the future product of grain or trees already planted, or the successive future installments or payments on a contract or engagement already

made." In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users. But the legislature did not stop there. It expanded the meaning of the word further in modem sense by extending it to even such facilities as are available to a consumer in connection with banking, financing etc. Each of these are wide-ranging activities in day to day life. They are discharged both by statutory and private bodies. In absence of any indication, express or implied there is no reason to hold that authorities created by the statute are beyond purview of the Act. When banks advance loan or accept deposit or provide facility of locker they undoubtedly render service. A State Bank or nationalised bank renders as much service as private bank. No distinction can be drawn in private and public transport or insurance companies. Even the supply of electricity or gas which throughout the country is being made, mainly, by statutory authorities is included in it. The legislative intention is thus clear to protect a consumer against services rendered even by statutory bodies. The test, therefore, is not if a person against whom complaint is made is a statutory body but whether the nature of the duty and function performed by it is service or even facility.

5. This takes us to the larger issue if the public authorities under different enactments are amenable to jurisdiction under the Act. It was vehemently argued that the local authorities or government bodies develop land and construct houses in discharge of their statutory function, therefore, they could not be subjected to the provisions of the Act. The learned counsel urged that if the ambit of the Act would be widened to include even such authorities it would vitally affect the functioning of official bodies. The learned counsel submitted that the entire objective of the Act is to protect a consumer against malpractices in business. The argument proceeded on complete misapprehension of the purpose of Act and even its explicit language. In fact the Act requires provider of service to be more objective and caretaking. It is still more so in public services. When private undertakings are taken over by the Government or corporations are created to discharge what is otherwise State's function, one of the inherent objectives of such social welfare measures is to provide better, efficient and cheaper services to the people. Any attempt, therefore, to exclude services offered by statutory or official bodies to the common man would be against the provisions of the Act and the spirit behind it. It is indeed unfortunate that since enforcement of the Act there is a demand and even political pressure is built up to exclude one or the other class from operation of the Act. How ironical it is that official or semi-official bodies which insist on numerous benefits, which are otherwise available in private sector, succeed in bargaining for it on threat of strike mainly because of larger income accruing due to rise in number of consumers and not due to better and efficient functioning claim exclusion when it comes to accountability from operation of the Act. The spirit of consumerism is so feeble and dormant that no association, public or private spirited, raises any finger on regular hike in prices not because it is necessary but either because it has not been done for sometime or because the operational cost has gone up irrespective of the efficiency without any regard to its impact on the common man. In our opinion, the entire argument found on being statutory bodies does not appear to have any substance. A government or semi-government body or a local authority is as much amenable to the Act as any other private body rendering similar service. Truly speaking it would be a service to the society if such bodies instead of claiming exclusion subject themselves to the Act and let their acts and omissions be scrutinised as public accountability is necessary for healthy growth of society.

6. What remains to be examined is if housing construction or building activity carried on by a private or statutory body was service within the meaning of clause (o) of Section 2 of the Act as it stood prior to inclusion of the expression 'housing construction' in the definition of "service" by Ordinance No. 24 of 1993. As pointed out earlier the entire purpose of widening the definition is to include in it not only day to day buying and selling activity undertaken by a common man but even such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on the consumer. Construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of a builder or contractor. The latter being for consideration is service as defined in the Act. Similarly when a statutory authority develops land or allots a site or constructs a house for the benefit of common man it is as much service as by a builder or contractor. The one is contractual service and other statutory service. If the service is defective or it is not what was represented then it would be unfair trade practice as defined in the Act. Any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such disputes or claims are not in respect of immoveable property as argued but deficiency in rendering of service of particular standard, quality or grade. Such deficiencies or omissions are defined in sub-clause (ii) of clause (r) of Section 2 as unfair trade practice. If a builder of a house uses substandard material in construction of a building or makes false or misleading representation about the condition of the house then it is denial of the facility or benefit of which a consumer is entitled to claim value under the Act. When the contractor or builder undertakes to erect a house or flat then it is inherent in it that he shall perform his obligation as agreed to. A flat with a leaking roof, or cracking wall or substandard floor is denial of service. Similarly when a statutory authority undertakes to develop land and frame housing scheme, it, while performing statutory duty renders service to the society in general and individual in particular. The entire approach of the learned counsel for the development authority in emphasising that power exercised under a statute could not be stretched to mean service proceeded on misconception. It is incorrect understanding of the statutory functions under a social legislation. A development authority while developing the land or framing a scheme for housing discharges statutory duty the purpose and objective of which is service to the citizens. As pointed out earlier the entire purpose of widening the definitions is to include in it not only day to day buying of goods by a common man but even such activities which are otherwise not commercial but professional or service-oriented in nature. The provisions in the Acts, namely, Lucknow Development Act, Delhi Development Act or Bangalore Development Act clearly provide for preparing plan, development of land, and framing of scheme etc. Therefore if such authority undertakes to construct building or allot houses or building sites to citizens of the State either as amenity or as benefit then it amounts to rendering of service and will be covered in the expression 'service made available to potential users'. A person who applies for allotment of a building site or for a flat constructed by the development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered in the expression 'service of any description'. It further indicates that the definition is not exhaustive. The inclusive clause succeeded in widening its scope but not exhausting the services which could be covered in earlier part. So any service except when it is free of charge or under a constraint of personal service is included in it. Since housing activity is a service it was covered in the clause as it stood before 1993.

7. In Civil Appeal No. 2954 filed by a builder it was urged that inclusion of 'housing construction' in clause (o) and 'avail' in clause (d) in 1993 would indicate that the Act as it stood prior to the amendment did not apply to hiring of services in respect of housing construction. Learned counsel submitted that in absence of any expression making the amendment retrospective it should be held to be prospective as it is settled that any law including amendments which materially affect the vested rights or duties or obligations in respect of past transactions should remain untouched. Reliance was placed on Jose Da Costa v. Bascora Sadasiva Sinai Narcornim5; State of M.P. v. Rameshwar Rathod6 and Pulborough School Board Election case, Re7. It was also argued that when definition of 'service' in Monopolies and Restrictive Trade Practices Act was amended in 1991 it was made retrospective. Therefore, in absence of use of similar expression in this Act it should be deemed to be prospective. True, the ordinance does not make the definition retrospective in operation. But it was not necessary. In fact it appears to have been added by way of abundant caution as housing construction being service was included even earlier. Apart from that what was the vested right of the contractor under the agreement to construct the defective house or to render deficient service? A legislation which is enacted to protect public interest from undesirable activities cannot be construed in such narrow manner as to frustrate its objective. Nor is there any merit in the submission that in absence of the word 'avail of' in the definition of consumer' such activity could not be included in service. A perusal of the definition of 'service' as it stood prior to 1993 would indicate that the word 'facility' was already there. Therefore the legislature while amending the law in 1993 added the word in clause (d) to dispel any doubt that consumer in the Act would mean a person who not only hires but avails of any facility for consideration. It in fact indicates that these words were added more to clarify than to add something new.

8. Having examined the wide reach of the Act and jurisdiction of the Commission to entertain a complaint not only against business or trading activity but even against service rendered by statutory and public authorities the stage is now set for determining if the Commission in exercise of its jurisdiction under the Act could award compensation and if such compensation could be for harassment and agony to a consumer. Both these aspects specially the latter are of vital significance in the present day context. Still more important issue is the liability of payment. That is, should the society or the tax payer be burdened for oppressive and capricious act of the public officers or it be paid by those responsible for it. The administrative law of accountability of public authorities for their arbitrary and even ultra vires actions has taken many strides. It is now accepted both by this Court and English Courts that the State is liable to compensate for loss or in' jury suffered by a citizen due to arbitrary actions of its employees. In State of Gujarat v. Memon Mahomed Haji Hasam8 the order of the High Court directing payment of compensation for disposal of seized vehicles without waiting for the outcome of decision in appeal was upheld both on principle of bailee's 'legal obligation to preserve the property intact and also the obligation to take reasonable care of it ... to return it in the same condition in 5 (1976) 2 SCC 917 6 (1990) 4 SCC 21 : 1990 SCC (Cri) 522: AIR 1990 SC 1849 7 Pulborough School Board Election v. Nutt, (1891-94) All ER 8 AIR 1967 SC 1885 : (1967) 3 SCR 938 which it was seized' and also because the Government was, 'bound to return the said property by reason of its statutory obligation or to pay its value if it had disabled itself from returning it either by its own act or by act of its agents and servants'. It was extended further even to bona fide action of the authorities if it was contrary to law in Lala Bishambar Nath v. Agra Nagar Mahapalika, Agra9. It was held that where the authorities could not have taken any

action against the dealer and their order was invalid, 'it is immaterial that the respondents had acted bona fide and in the interest of preservation of public health. Their motive may be good but their orders are illegal. They would accordingly be liable for any loss caused to the appellants by their action.' The theoretical concept that King can do no wrong has been abandoned in England itself and the State is now held responsible for tortuous act of its servants. The First Law Commission constituted after coming into force of the Constitution on liability of the State in tort, observed that the old distinction between sovereign and non- sovereign functions should no longer be invoked to determine liability of the State. Friedmann observed:

> "It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where the State, either directly or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and nongovernmental function, but the nature and form of the activity in question."

Even Kasturi Lal Ralia Ram Jain v. State of U.P.10 did not provide any immunity for tortuous acts of public servants committed in discharge of statutory function if it was not referable to sovereign power. Since house construction or for that matter any service hired by a consumer or facility availed by him is not a sovereign function of the State the ratio of Kasturi Lal10 could not stand in way of the Commission awarding compensation. We respectfully agree with Mathew, J. in Shyam Sunder v. State of Rajasthan11 that it is not necessary, 'to consider whether there is any rational dividing line between the so-called sovereign and proprietary or commercial functions for determining the liability of the State' (SCC p. 695, para 20). In any case the law has always maintained that the public authorities who are entrusted with statutory function cannot act negligently. As far back as 1878 the law was succinctly explained in Geddis v. Proprietors of Bann Reservoir12 thus:

> "I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does

9 (1973) 1 SCC 788 : AIR 1973 SC 1289 10 AIR 1965 SC 1039: (1965) 1 SCR 375 :(1966) 2 LLJ 583 11 (1974) 1 SCC 690 12 (1878) 3 AC 430 occasion damage to anyone; but an action does lie for doing what the Legislature has authorised, if it be done negligently."

Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law. Each hierarchy in the Act is empowered to entertain a complaint by the consumer for value of the goods or services and compensation. The word compensation' is again of very wide connotation. It has not been defined in the Act. According to dictionary it means,

'compensating or being compensated; thing given as recompense;'. In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss. Therefore, when the Commission has been vested with the jurisdiction to award value of goods or services and compensation it has to be construed widely enabling the Commission to determine compensation for any loss or damage suffered by a consumer which in law is otherwise included in wide meaning of compensation. The provision in our opinion enables a consumer to claim and empowers the Commission to redress any injustice done to him. Any other construction would defeat the very purpose of the Act. The Commission or the Forum in the Act is thus entitled to award not only value of the goods or services but also to compensate a consumer for injustice suffered by him.

9. Facts in Civil Appeal No. 6237 of 1990 may now be adverted to as it is the only appeal in which the National Commission while exercising its appellate power under the Act not only affirmed the finding of State Commission directing the appellant to pay the value of deficiency in service but even directed to pay compensation for harassment and agony to the respondent. The Lucknow Development Authority with a view to ease the acute housing problem in the city of Lucknow undertook development of land and formed plots of different categories/sizes and constructed dwelling units for people belonging to different income groups. After the construction was complete the authority invited applications from persons desirous of purchasing plots or dwelling houses. The respondent applied on the prescribed form for registration for allotment of a flat in the category of Middle Income Group (MIG) in Gomti Nagar Scheme in Lucknow on cash down basis. Since the number of applicants was more, the authority decided to draw lots in which flat No. 11/75 in Vinay Khand-II was allotted to the respondent on April 26, 1988. He deposited a sum of Rs 6132 on July 2, 1988 and a sum of Rs 1,09,975 on July 29, 1988. Since the entire payment was made in July 1988 the flat was registered on August 18, 1988. Thereafter the appellant by a letter dated August 23, 1988 directed its Executive Engineer-VII to hand over the possession of the flat to the respondent. This information was given to him on November 30, 1988, yet the flat was not delivered as the construction work was not complete. The respondent approached the authority but no steps were taken nor possession was handed over. Consequently he filed a complaint before the District Forum that even after payment of entire amount in respect of cash down scheme the appellant was not handing over possession nor they were completing the formalities and the work was still incomplete. The State Commission by its order dated February 15, 1990 directed the appellant to pay 12% annual simple interest upon the deposit made by the respondent for the period January 1, 1989 to February 15, 1990. The appellant was further directed to hand over possession of the flat without delay after completing construction work up to June 1990. The Commission further directed that if it was not possible for the appellant to complete the construction then it should hand over possession of the flat to the respondent by April 5, 1990 after determining the deficiencies and the estimated cost of such deficient construction shall be refunded to the respondent latest by April 20, 1990. The appellant instead of complying with the order approached the National Commission and raised the question of jurisdiction. It was overruled. And the appeal was dismissed. But the cross- appeal of the respondent was allowed and it was directed that since the architect of the appellant had estimated in October 1989 the cost of completing construction at Rs 44,615 the appellant shall pay the same to the respondent. The Commission further held that the action of the appellant amounted to harassment, mental torture and agony of the respondent, therefore, it directed the appellant to pay a

sum of Rs 10,000 as compensation.

10. Who should pay the amount determined by the Commission for harassment and agony, the statutory authority or should it be realised from those who were responsible for it? Compensation as explained includes both the just equivalent for loss of goods or services and also for sufferance of injustice. For instance in Civil Appeal No. ... of 1993 arising out of SLP (Civil) No. 659 of 1991 the Commission directed the Bangalore Development Authority to pay Rs 2446 to the consumer for the expenses incurred by him in getting the lease-cum-sale agreement registered as it was additional expenditure for alternative site allotted to him. No misfeasance was found. The moment the authority came to know of the mistake committed by it, it took immediate action by alloting alternative site to the respondent. It was compensation for exact loss suffered by the respondent. It arose in due discharge of duties. For such acts or omissions the loss suffered has to be made good by the authority itself. But when the sufferance is due to mala fide or oppressive or capricious acts etc. of a public servant, then the nature of liability changes. The Commission under the Act could determine such amount if in its opinion the consumer suffered injury due to what is called misfeasance of the officers by the English Courts. Even in England where award of exemplary or aggravated damages for insult etc. to a person has now been held to be punitive, exception has been carved out if the injury is due to, 'oppressive, arbitrary or unconstitutional action by servants of the Government' (Salmond and Heuston on the Law of Torts). Misfeasance in public office is explained by Wade in his book on Administrative Law thus:

> "Even where there is no ministerial duty as above, and even where no recognised tort such as trespass, nuisance, or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or injurious wrong-doing. There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury." (p. 777) The jurisdiction and power of the courts to indemnify a citizen for injury suffered due to abuse of power by public authorities is founded as observed by Lord Hailsham in Cassell & Co. Ltd. v. Broome13 on the principle that, an award of exemplary damages can serve a useful purpose in vindicating the strength of law'. An ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law. It acts as a check on arbitrary and capricious exercise of power. In Rookes v. Barnard14 it was observed by Lord Devlin, 'the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service'. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it. Compensation or damage as explained earlier may arise even when the officer discharges his duty honestly and bona fide. But when it arises due to arbitrary or capricious behaviour then it loses its individual character and assumes social significance. Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. Crime and corruption thrive and prosper in the

society due to lack of public resistance. Nothing is more damaging than the feeling of helplessness. An ordinary citizen instead of complaining and fighting succumbs to the pressure of undesirable functioning in offices instead of standing against it. Therefore the award of compensation for harassment by public authorities not only compensates the individual, satisfies him personally but helps in curing social evil. It may result in improving the work culture and help in changing the outlook. Wade in his book Administrative Law has observed that it is to the credit of public authorities that there are simply few reported English decisions on this form of malpractice, namely, misfeasance in public offices which includes malicious use of power, deliberate maladministration and perhaps also other unlawful acts causing injury. One of the reasons for this appears to be development of law which, apart, from other factors succeeded in keeping a salutary check on the functioning in the government 13 1972 AC 1027 (1972) 1 All ER 801 14 1964 AC 11 29 (1964) 1 All ER 367, 410 or semi-govemment offices by holding the officers personally responsible for their capricious or even ultra vires action resulting in injury or loss to a citizen by awarding damages against them. Various decisions rendered from time to time have been referred to by Wade on Misfeasance by Public Authorities. We shall refer to some of them to demonstrate how necessary it is for our society. In Ashby v. White15 the House of Lords invoked the principle of ubi jus ibi remedium in favour of an elector who was wrongfully prevented from voting and decreed the claim of damages. The ratio of this decision has been applied and extended by English Courts in various situations. In Roncarelli v. Duplessis16 the Supreme Court of Canada awarded damages against the Prime Minister of Quebec personally for directing the cancellation of a restaurant-owner's liquor licence solely because the licensee provided bail on many occasions for fellow members of the sect of Jehovah's Witnesses, which was then unpopular with the authorities. It was observed that, 'what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the Alcoholic Liquor Act? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.' In Smith v. East Elloe Rural District Council17 the House of Lords held that an action for damages might proceed against the clerk of a local authority personally on the ground that he had procured the compulsory purchase of the plaintiff's property wrongfully and in bad faith. In Farrington v. Thomson18 the Supreme Court of Victoria awarded damages for exercising a power the authorities knew they did not possess. A licensing inspector and a police officer ordered the plaintiff to close his hotel and cease supplying liquor. He obeyed and filed a suit for the resultant loss. The Court observed:

"Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer."

In Wood v. Blair 19 a dairy farmer's manageress contracted typhoid fever and the local authority served notices forbidding him to sell milk, except under certain conditions. These notices were void, and the farmer was awarded damages on the ground that the notices were invalid and that the plaintiff was entitled to damages for misfeasance. This was done even though the finding was that the officers had acted from the best motives.

11. Today the issue thus is not only of award of compensation but who should bear the brunt. The concept of authority and power exercised by 15 (1703) 2 Ld Raym 938 16 (1959) 16 DLR 2d 689 17 1956 AC 736: (1956) 1 All ER 855 18 1959 UR 286 19 The Times, July 3, 4, 5, 1957 (Hallet J and Court of Appeal) public functionaries has many dimensions. It has undergone tremendous change with passage of time and change in socioeconomic outlook. The authority empowered to function under a statute while exercising power discharges public duty. It has to act to subserve general welfare and common good. In discharging this duty honestly and bona fide, loss may accrue to any person. And he may claim compensation which may in circumstances be payable. But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility to pay the loss determined should be whose? In a modem society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority. But where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same. It was never more necessary than today when even social obligations are regulated by grant of statutory powers. The test of permissive form of grant is over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. When the court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries.

12. For these reasons all the appeals are dismissed. In Appeal No. 6237 of 1990 it is further directed that the Lucknow Development Authority shall fix the responsibility of the officers who were responsible for causing harassment and agony to the respondent within a period of six months from the date a copy of this order is produced or served on it. The amount of compensation of Rs 10,000

awarded by the Commission for mental harassment shall be recovered from such officers proportionately from their salary. Compliance of this order shall be reported to this Court within one month after expiry of the period granted for determining the responsibility. The Registrar General is directed to send a copy of this order to the Secretary, Lucknow Development Authority immediately.

13. In Civil Appeal Nos. 6237 of 1990, 5257 of 1990, 3963 of 1989 and 2954-59 of 1992 the appellant shall pay costs to the contesting respondents which are assessed at Rs 5,000 in each case. Since the respondents have not put in appearance in other appeals there shall be no order as to costs.

ORDER

1. On January 7, 1993 the President of India promulgated an Ordinance to provide for the acquisition of certain area at Ayodhya specified in the schedule to the Ordinance. By Section 3 of the Ordinance, on the commencement thereof, the right, title and interest in relation to the said area stood transferred to, and vested-in, the Central Government. Section 4(3) provided that on the commencement of the Ordinance, any suit, appeal or other proceeding in respect of the right, title and interest relating to any property vested in the Central Government under Section 3, if pending before any court, tribunal or other authority, shall abate. By Section 5 the Central Government came to be empowered to take possession of the area vested in it under Section 3. Section 8 contemplated the payment of compensation to the owner or owners of the acquired property.

2. Simultaneously on the same day, the President, in exercise of power conferred under Article 143(1) of the Constitution referred the following question to this Court for its opinion:

> "Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid (including the premises of the inner and other courtyards of such structure) in the area on which the structure stood?"

The Presidential reference sets out the nature of dispute, the location of its area and the adverse consequences thereof and then proceeds to state that with a view to maintenance of public order and communal harmony in the country in the area vested in the Central Government by virtue of the acquisition, it is necessary to seek this Court's opinion on the question referred under Article 143(1). The Ordinance has since become an Act.

3. On receipt of the Presidential reference this Court gave detailed directions by its order dated January 27, 1993. In that order this Court pointed out that in its opinion 'it would be desirable to hear the preliminary objections at the threshold' but realising the urgency of the matter we also gave directions inviting response on the merits of the reference. Thus by the said order we indicated that we will hear the preliminary objection regarding the maintainability, competence and desirability of answering the reference first in point of time.

4. After the issuance of the Ordinance it appears that in the pending suits renumbered o.b.s. Nos. 3 and 4 of 1989 the plaintiffs applied for amendment of the plaints challenging the legality and validity of the Ordinance by which the suits abated. The Full Bench of the High Court heard the said applications and passed an order on March 15, 1993. By the said order the High Court framed the question 'whether the suit has abated or survives' and since the said issue necessarily touched upon the validity of the Ordinance, the Court ordered notice to the Attorney General and listed the case for hearing of the issue on April 26, 1993. Although this order was passed in Suit O.O.S. No. 4 of 1989, it was also to govern the amendment application in Suit O.O.S. No. 3 of 1989. It also appears that in the meantime as many as five Writ Petition Nos. 552, 925, 1351, 1532 and 1809 of 1993 came to be filed in the High Court challenging the validity of the Ordinance, now the Act. Besides these proceedings in the High Court a Writ Petition No. 208 of 1993 also came to be filed in this Court under Article 32 of the Constitution challenging the legality and validity of the very same law.

5. The question of maintainability of the reference involves the question of the legal and constitutional validity of the impugned law as well. This is evident from the objections raised by the Communist Party of India in I.A. No. 2 of 1993. Therein it is contended that the said statute as well as the Presidential reference violate Articles 14, 15, 25 and 26 of the Constitution. It was also disclosed in the said application that the party would be filing a separate petition under Article 32 to challenge the validity of the Ordinance. It is, therefore, obvious that the constitutional validity of the said statute is one of the main issues which this Court will be required to consider when the preliminary issue regarding the maintainability of the Presidential reference is taken up for hearing. That question directly arises in the writ petition filed under Article 32 of the Constitution. The Union of India has, therefore, prayed under Article 139-A for a transfer of the proceedings or issue raised in the two suits pursuant to the grant of the amendment applications as well as the five writ petitions pending in the Lucknow Bench of the High Court.

6. On August 10, 1993 when the transfer petition came up for hearing before a Bench comprising the learned Chief Justice and Mohan, J. the first respondent, the petitioner of the Writ Petition No. 552 of 1993 Dr Ismail Farooqui stated that he had no objection to the transfer but others had. When the petition came up for hearing before this Bench on September 21, 1993 none of the other petitioners to the writ petitions pending in the High Court was present to object to the transfer. The only objection, if any, came from Mr Abdul Mannan, learned counsel representing the plaintiff in Suit No. 4 of 1989. His submissions were twofold, namely, (i) the suits had progressed for several years in the High Court and it would be unwise to abate them since the question of title will have to be gone into in any case for determining the owner/occupant entitled to compensation for the acquired land and (ii) the High Court is competent to decide the question of the constitutional validity of the impugned law and had done it on the earlier occasion when the State Government's acquisition was struck down. The question whether the Central Government's decision to abate the suits was wise or not is not germane at present and at any rate that is a policy matter on which we need not say anything at this stage. Ordinarily, we may have allowed the High Court to go ahead with the matter had the same issues not been raised in the Presidential reference and the writ petition before us. The same issue being the subject-matter in the other writ petitions in the High Court we think it would be advisable to withdraw them to this Court so that the petitioners of those petitions may also have an opportunity to participate in the hearing before this Court. As far as the second point is

concerned, there is no doubt that the Full Bench is fully competent to deal with the petitions but we are withdrawing them to this Court for a comprehensive adjudication of the challenge to the statute and the maintainability of the reference.

7. In the result, we allow this application by ordering the withdrawal of the five Writ Petition Nos. 552, 925, 1351, 1532 and 1809 of 1993 to this Court to be heard along with the Presidential reference and Writ Petition No. 208 of 1993 pending in this Court. The hearing of the preliminary issue framed by the High Court 'whether the suit has abated or survives' in both the suits will stand stayed till further orders. In order to expedite the hearing we direct as under:

> 8. The hearing of the withdrawn writ petitions as well as the pending Writ Petition No. 208 of 1993 filed under Article 32 of the Constitution and of the preliminary question regarding the maintainability of the Presidential reference shall be taken up one after the other in that order. The parties and their counsel may complete the paper books of the writ petitions before October 25, 1993 so that the hearing may not be delayed.
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> 9. The transfer petition is allowed accordingly with no order as to costs.

UNION OF INDIA V. AMRIK SINGH ORDER

1.Special Leaved granted.

2.The Employees State Insurance (Central)Rules,1950 were amended by the notification dated march 27,1992 with effect from April 1, 1992. By the amendment the wage-ceiling for coverage under the Employees State Insurance Act, 1948 (the Act) was enhanced from Rs 1600 to Rs 3000 per month. The amendment was challenged before the High Court on various grounds. While upholding the validity of the amendment a learned Single Judge of the High Court directed that the notification should be enforced + Arising out of SLP (C) Nos. 5194-95 of 1993 with effect from November 1, 1992 instead of April 1, 1992. The judgment of the learned Single Judge was upheld by the Division Bench of the High Court.

3. We have heard learned counsel for the parties. We are of the view that the High Court fell into patent error in postponing the date of the operation of the notification. The notification, amending the Rules, was a legislative act. The amendment of the Rules being a delegated legislation, the High Court could not have interfered with the date of operation of the notification.

4. We set aside the direction given by the High Court regarding the postponement of the enforcement of the notification and we direct that the notification dated March 27, 1992 shall be operative from April 1, 1992.

5. We, however, leave it open to the respondents to approach the appropriate Government, if so advised, under the Act for grant of exemption or for any other relief to which they may be entitled. We allow the appeals in the above terms. No costs.