State (Union Of India) vs Ram Saran on 4 December, 2003

Equivalent citations: AIR 2004 SUPREME COURT 481, 2003 (12) SCC 578, 2003 AIR SCW 6585, (2003) 9 JT 578 (SC), 2003 (9) JT 578, (2004) 14 ALLINDCAS 460 (SC), 2003 (10) SCALE 454, (2004) 2 JCR 220 (SC), 2004 (14) ALLINDCAS 460, 2003 (10) SRJ 563, 2003 (7) SLT 675, (2004) 1 MADLW(CRI) 351, (2004) 1 EFR 382, (2004) 1 FAC 160, (2004) 1 RECCRIR 770, 2004 FAJ 1 96, (2003) 10 SCALE 454, (2004) 1 EASTCRIC 219, (2004) 104 FJR 7, (2004) 101 FACLR 447, (2004) 1 RECCRIR 100, (2003) 4 CURCRIR 500, (2003) 8 SUPREME 954, (2004) 1 ALLCRIR 819, (2004) 13 INDLD 359, (2004) 48 ALLCRIC 890, (2004) 1 CHANDCRIC 10, (2004) 1 ALLCRILR 899, (2004) 1 CRIMES 232

Author: Arijit Pasayat

Bench: Doraiswamy Raju, Arijit Pasayat

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           CASE NO.:
Appeal (crl.)  410 of 1997

PETITIONER:
State (Union of India)

RESPONDENT:
Ram Saran

DATE OF JUDGMENT: 04/12/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.
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J U D G M E N T
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ARIJIT PASAYAT,J Questioning conviction made by the Assistant Commandant of Central Reserve Police Force (in short the 'CRPF') made under Section 10(m) of the Central Reserve Police Force Act, 1949 (in short the 'Act') and consequential sentences imposed, the respondent filed an appeal before the Sessions Judge, Solan and Sirmaur. The Sessions Judge held that the Assistant Commandant had no jurisdiction to record conviction and impose sentence. The said judgment was questioned before the High Court of Himachal Pradesh by a revision petition filed by the Union of India. The revision was also dismissed. Both the Sessions Judge and the High Court held that the Assistant Commandant, III Battalion, ITBP, Nahan could not have exercised powers of Judicial Magistrate Ist Class and, therefore, the trial and conviction of the accused-respondent were illegal. The High Court held that combined reading of Sections 11, 12 and 13 of the Code of Criminal Procedure, 1973 (in short the 'Code') clearly rule out the appointment of any person exercising powers of Judicial

Magistrate, Ist Class in the absence of conferment of powers by the High Court. This, according to the Sessions Judge and the High Court stemmed from the fact that there was separation of judiciary from the Executive in 1973 and thereafter the powers of appointment and conferment for functioning as Judicial Magistrate either of First Class or Second Class could only be done by the High Court and the Central Government or the State Government had no power to invest any person with powers of Judicial Magistrate of any class. Reference was also made to Section 5 of the Code and observed that the expression "in the absence of a specific provision to the contrary" used therein did not render Section 16(2) of the Act redundant.

At this juncture, it would be necessary to take note of the factual position.

The respondent while functioning as a Constable (Sweeper) in the III Battalion, ITBP, Nahan did not join duty after expiry of the leave granted to him. Though he was granted leave for the period from 9.4.1987 to 24.5.1987, he did not join after expiry of the period. There was no intimation to the competent authority or request for extension of leave. The respondent accepted that he had stayed beyond the period of leave, but indicated several reasons as to why the same was necessitated. Complaint was lodged by the concerned authorities and the Assistant Commandant exercising powers of Judicial Magistrate, Ist Class in terms of Section 10 (m) of the Act, issued notice in terms of Section 251 of the Code and after trial found him guilty and sentenced him to undergo imprisonment for three months. The said order as noted above was questioned before the Sessions Judge by the respondent and in view of the relief granted to him by the Sessions Judge, the matter was carried in revision by the Union of India. But the same having been rejected, this appeal has been filed.

In support of the appeal, learned senior counsel for the appellant submitted that the Sessions Judge and the High Court clearly lost sight of Section 16(2) of the Act and Rule 36 (a), (b), (e) and (f) of the Central Reserve Police Force Rules, 1955 (in short the 'Rules') as well as Sections 4 and 5 of the Code. Section 16(2) of the Act clearly indicates that notwithstanding anything contained in the Code, the provisions of the Act could be applied. Section 4(2) of the Code permits action under any law other than the Indian Penal Code, 1860 (for short the 'IPC'). Section 5 refers to absence of a specific provision to the contrary in any special or local law. The Act was a special law which operated in a specified field. These aspects were not considered in their proper perspective by the Sessions Judge and the High Court.

Per contra, learned counsel for the respondent submitted that the Sessions Judge and the High Court were justified in interfering with the order passed by the Assistant Commandant as he had no jurisdiction to function and his appointment by a Notification issued by the Central Government could not have conferred on him any power to act as a Judicial Magistrate when the sole repository of the power to so notify is the High Court after the Code was enacted in 1973. The position may have been different under the Code of Criminal Procedure, 1898 (in short the 'Old Code'), but the present position is entirely different and the Ministry of Home Affairs' Notification dated 25.1.1978 was really of no consequence.

The Courts below have overlooked certain essential and vital aspects necessary to appreciate the relevant issues arising in their proper perspective. Under Section 3(1) of the Act, CRPF is constituted to be an 'armed force' maintained by the Central Government, and consequently it would be 'any other armed forces of the union' as envisaged in Entry 2 of List I of the VII Schedule to the Constitution of India. Entry 93 of List I enables Parliament also to provide for offences against laws with respect to any of the matters enumerated in List I. Sections 9 and 10 create by enumerating what are stated to be 'more heinous offences' and 'less heinous offences' respectively and many of such specially created offences for the purposes of this Act cannot constitute or amount to be offences under the ordinary criminal law of the land. To that extent they are new class of offences created with punishments therefor, which are unknown to ordinary criminal law in force. Section 16 provides for empowering Competent Authorities in the hierarchy of the force itself with powers or duties conferred or imposed on a police officer of any class or grade by any law for the time being in force and by further enacting a provision with a specific "non obstante" clause stipulates that notwithstanding anything contained in the Code, the Central Government may invest the Commandant or Assistant Commandant with the powers of a Magistrate of any class for the purpose of inquiring into or trying any offence committed by a member of the force and punishable "under this Act" or any offence committed by a member of the force against the person or property of another member. Consequently, what is purported to be done by these provisions are merely to refer to the nature and extent of powers possessed by such authorities under the other laws being made available to the authorities designated under this Act, for discharging their duties under this Act, without exhaustively enumerating the details of all such powers or without re-enacting all such provisions in detail as part and parcel of this law the Act, and not to constitute them to be or empower them as Magistrates as such for all or any of the purposes for which Courts of ordinary criminal justice have been constituted under the Code. Section 5 of the Code sufficiently protects the authorities empowered to function and exercise powers under the Act, from any such challenge as are directed against them, in this case. The fallacy in the reasoning of the Courts below lies in their superficial and cursory nature of consideration undertaken therein, without reference to the competence and powers of the Parliament to specifically and specially provide for trial and punishment of offences separately created under a special enactment of Parliament, in a manner distinct and separate from the method of trying other ordinary criminal offences under the general criminal law of the country.

At the outset, it must be noted that certain infractions which are relatable to service broadly fall within the spectrum of disciplinary proceedings. Section 10(m) is an infraction which though normally would have attracted departmental proceedings, keeping in view the essentiality of force and imminent and ever alert situation in which with high sense of morale and duty consciousness the member of this service is expected to be demonstrate at all times, a serious view of the same is being taken. But the CRPF, the Army, the Navy and the Air Force are disciplined forces and even any infraction which otherwise would not be an offence is deemed to be an offence under certain provisions like Section 10(m) of the Act. Unauthorised absence of an employee staying beyond the sanctioned period of leave is not an offence in the normal course under the ordinary criminal law of the land. But as noted above, disciplined forces with the intention of enforcing discipline have made them punishable considering them as offences and have prescribed various sentences. For such particular purposes the designated officials have been conferred with magisterial powers. The

Assistant Commandant who passed the order undisputedly acted as a Judicial Magistrate in view of the powers conferred on him under the Act. The conferment of such power has not been distinctly questioned and could not have been questioned in a proceeding, appeal or a revision under the Code. As long as the specific provision in Act exists enabling the competent Authority to pass the order under challenge, the same will have full force and efficacy. It is well settled that creature of any statute cannot consider the vires of a particular provision in that statute or any other statute as well. Exclusive power for such purposes are vested under the Constitution of India, 1950 (in short 'the Constitution') only on Courts exercising powers of judicial Review under Articles 32/226 of the Constitution alone. While exercising appellate or revisional jurisdiction under the Code it is impermissible for any Court to decide on the vires of the provision. That is precisely what the Sessions Judge and the High Court have done in the present case. The vires of a provision can only be questioned in a writ proceeding before the Constitutional Court. That being the position, neither the Sessions Judge nor the High Court could have found fault with the exercise of jurisdiction by the Assistant Commandant in exercising magisterial powers. It will also be relevant to note that in List I of Seventh Schedule to the Constitution in Union List, Entry 2 makes the position clear that members of CRPF are part of the armed forces of the Union Government. The punishments to be imposed under the Act for various offences are defined by Sections 9 and 10, which have been created by statute. As noted earlier, they are deemed offences and in the scheme of enforcing discipline they have been treated as infractions unbecoming of members belonging to disciplined forces like the CRPF That being the position, the Sessions Judge and the High Court were not justified in holding that the Assistant Commandant had no jurisdiction to deal with the respondent in the concerned trial.

It would also be necessary to take note of Sections 10(m), 16(2) of the Act and Sections 4 and 5 of the Code:

> Act "Section 10 (m)- Every member of the Force who absents himself without leave, or without sufficient cause overstays leave granted to him shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to three months' pay, or with both".
>
> Section 16(2)- Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898) the Central Government may invest the Commandant or an Assistant Commandant with the powers of a Magistrate of any class for the purpose of inquiring into or trying any offence committed by member of the Force and punishable under this Act, or any offence committed by a member of the Force against the person or property of another member:
>
> Provided that-
>
> (i) when the offender is on leave or absent from duty, or
>
> (ii) when the offence is not connected with the offender's duties as a member of the Force, or

(iii)when it is a petty offence, even if connected with the offender's duties as a member of the Force, the offence may, if the prescribed authority within the limits of whose jurisdiction the offence has been committed, so directs, be inquired into or tried by an ordinary criminal court having jurisdiction in the matter".

Code Section 4: Trial of offences under the Indian Penal Code and other laws- (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

Section 5:Saving- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force".

Provisions of the Code would be applicable to the investigations, inquiries into and trials of cases by criminal Courts of various descriptions, being the parent statute, in the absence of any contrary provision in any special statute or special provision excluding jurisdiction or applicability of the Code. Sub-section (1) of Section 4 deals with offences under the IPC. Second limb of sub-section (2) deals with the exclusion, reading ".....but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences". (See Directorate of Enforcement v. Deepak Mahajan and Anr. (1994 (3) SCC

440). In a case involving Bombay Prevention of Gambling Act, 1887 it was held that the Act was a special law providing special procedures for the manner or place of investigating or inquiring into the offences under it, and therefore the provisions thereof must prevail and no provisions of the Code can apply. (See Nilratan Sircar v. Lakshmi Narayan Ram Niwas (AIR 1965 SC 1).

Section 5 consists of three components, and as observed in Maru Ram etc.etc. v. Union of India and Ors. (1981 (1) SCC 107), they are as follows:

"(1) The Code covers matters covered by it;

(2) If a special or local law exists covering the same area, the said law is saved and will prevail;

(3) If there is a special provision to the contrary, that will override the special or local law. A "special law", as observed in Kaushalya Rani v. Gopal Singh (AIR 1964 SC 260), means a law enacted for special cases, in special circumstances, as distinguished from the general rules of law laid down as being applicable to all cases

dealt with by the general law. The Act fits the description.

Additionally, Section 16(2) of the Act begins with a non obstante clause relating to the Code."

There are parallel provisions to Section 10(m) of the Act in the Army Act, 1950 (hereinafter referred to as the 'Army Act'). In fact Section 39 of the Army Act deals with 'absence without leave'. The maximum period of imprisonment may extend to three years or with such less punishment as is mentioned in the said Act itself.

The inevitable conclusion is that the Assistant Commandant was clothed with necessary jurisdiction for trial of the matter.

Residual question is what would be an appropriate sentence. It is not disputed and rather fairly conceded that for a person in a disciplined service like the CRPF, any act of indiscipline deserves adequate and stringent punishment under the Act. In terms of Section 10(m) an employee who absents himself without leave or without sufficient cause overstays leave granted to him can be punished with imprisonment for a term which may extend to one year or with fine which may extend to three months pay or with both. The offence has been treated as one of "less heinous offences". More heinous offences are provided in Section 9. The Assistant Commandant has found the explanation given by the respondent to be not acceptable. Therefore, he has been rightly held to have committed a less heinous offence. Taking note of the relevant aspects, we feel the fine of two months pay which respondent was drawing at the time when the proceedings were initiated would meet the ends of justice. By altering the punishment we are not belittling the gravity of offence but, in our view deterrent punishment must be resorted to when such absence is resorted to avoid and evade undertaking a testing or trying venture or deployment essential at any given point of time, and not as a routine in the normal course. The appeal is allowed to the extent indicated above.

+ 5 4617 1996 ! M/s. Sun Beverages (P) Ltd.

Vs. The State of Uttar Pradesh & Ors.

@ November 28, 2003.

P. Venkatarama Reddi & Dr. AR. Lakshmanan.

JUDGMENT:

J U D G M E N T Dr. AR. Lakshmanan, J.

The present appeal was filed against the judgment dated 19.05.1995 pronounced by the Division Bench of the High Court of Judicature at Allahabad by which the writ petition of the appellant bearing No. 1607 of 1988 was dismissed. The writ petition was filed by the appellant to issue a writ prohibiting the respondents from recovering Rs. 18,72,821.92 constituting cash subsidy plus interest thereon from the

appellant-Company as arrears of land revenue after quashing notice dated 15.09.1987 (Annexure 8 to the petition) and recovery certificate dated 31.10.1987 (Annexure 11 to the petition).

The sequence of facts and events leading to the filing of this civil appeal are as follows:-

By an order dated 30.09.1982, the Government of Uttar Pradesh formulated a scheme known as 'Capital Grant Scheme' (hereinafter referred to as 'Scheme') for the grant of subsidies to various industrial units for giving an impetus to the industrialisation of the backward areas i.e. zero industrial areas of the State. In the said Scheme, 'Pioneer Unit' has been defined as : "Such industrial units to be set up during the period from 01.10.1982 to 31.03.1985 firstly in any part of the Tehsil or at Tehsil level where no heavy industry is established prior to 01.10.1982 and that those capital investment is more than Rs. one crore shall be treated as a Pioneer Unit."

In view of the aforesaid incentive Scheme, Shri Rajan Sethi (since deceased) and his wife decided to incorporate a Company for bottling of aerated waters in the backward area of the District Agra. The Company was incorporated under the Companies Act on 01.10.1983 and it had entered into a franchise agreement with M/s Campa Beverages Private Limited on 06.05.1983 for bottling various brands of aerated waters. For the purpose of becoming entitled to the cash subsidy under the aforesaid Scheme, the appellant purchased land and building and made an investment of Rs. 17,11,845.95. The Company made further investment on installing plant and machinery in the unit. The total investment made by the appellant in establishing this unit amounted to Rs.1,07,78,368.34 with the location of the industrial unit in a zero industrial area. According to the appellant, because of the total investments made, the appellant became entitled to cash subsidy under the aforesaid Scheme as a pioneer unit.

The aforesaid Scheme prescribed the following two conditions for grant of cash subsidy to industrial units -

(i) That it will be a 'Pioneer Unit' within the terms of the Scheme.

(ii) That it is registered with the Director General of Technical Development. Under the Notification issued by the Government of India, in the year 1983, a Small Scale Industry has been defined under the Industries Development Regulation Act, 1948 as one which had made an investment of up to Rs. 20 lacs in plant and machinery alone apart from other assets. As a Small Scale Industry, the appellant was liable to be registered with the Government and as a Medium Scale Industry, the appellant was entitled to be registered with the Director General of Technical Development (in short 'the DGTD'), Government of India. The investment of the appellant in the plant and machinery exceeded Rs. 20 lacs. The DGTD was obliged to register the appellant industry as a Medium Scale Industry since the investment in the plant and machinery exceeded Rs. 20 lacs. The appellant accordingly applied to the Director General of Industries for registration and the appellant was registered on 28.11.1984 with the DGTD as a Medium Scale Industry for the manufacture of 43.2

million bottles of soft drinks per annum. The appellant applied for cash subsidy to the Government of U.P. as it fulfilled both the above stated conditions under the Scheme. The Government of U.P., on 31.03.1986, sanctioned a subsidy of Rs. 15 lacs to the appellant and this subsidy was paid to the appellant in two instalments. An agreement was entered into between the appellant and the respondents under which the mode and method of the payment of subsidy of Rs. 15 lacs was prescribed. It was covenanted :

> "1(b). That the grantee will comply with and faithfully observe all the provisions of the said Scheme as also any other conditions imposed by the order sanctioning the said subsidy.
>
> (c) That for a period of five years from the date of receiving the subsidy or any part thereof or from the date of production starts, whichever of these dates are earlier, the grantee will allow the officers subordinate to the Director or any other person or persons authorised by the Director or by the State Level Committee constituted under the said Scheme to inspect the work for which the Special State Capital Subsidy has been given and also the machine plant, appliances, tools, equipment for the procuring of which the grant has been made.
>
> (f) That within a period of five years from the date of going into production or of the date of receipt of the Subsidy or any part thereof whichever of these dates are later. The Grantee will not change the place or location of the said Industrial Unit entirely or partly, nor enter into partnership with anyone nor change its constitution nor will the grantee effect substantial contractive disposal of substantial part of its total fixed capital investment without the written prior permission of the Director.

2. It is hereby agreed and declared by and between the parties hereto that in any of the following cases the Director shall have the right to stop further payment of the State Capital Subsidy and to require the Grantee to refund the amount of subsidy already paid and the Grantee shall refund the same forthwith together with interest at the Bank lending rate then prevailing and in the case of Grantee's failure to do so, the Director may recover the same as arrears of land revenue.

(a) Where Grantee has obtained the said Subsidy by misrepresentation as to an essential fact or by furnishing of false information/or where his industrial unit does not go into production;

(b) Where the Grantee's said industrial unit goes out of production within five years from the date of commencement of production except in cases where the unit remains out of production for short periods extending to six months due to reason beyond its control such as shortage of raw material, power, etc. or

(c) Where the Grantee fails to furnish the prescribed statement and/or information which it is called upon to furnish, or

(d) If the Grantee commits a breach of any one of the covenants herein contained or of the Provisions of the said Scheme."

Subsequent to the registration of the appellant as Medium Scale Industry, the Government of India, by Notification dated 18.03.1985 altered the definitions of 'Small Scale Industry' and 'Medium Scale Industry'. By this notification, it was provided that if the investment of an industrial unit in plant and machinery alone (excluding other investments) was up to Rs. 35 lacs, it was entitled to be registered as a Small Scale Industry, but if it exceeded Rs. 35 lacs, it was entitled to be registered as Medium Scale Industry. In other words, the limit of investment in plant and machinery for Small Scale Industry was increased from Rs. 20 lacs to Rs. 35 lacs. The existing registered medium scale industries were given option to get themselves registered as small scale industries if they so chose within six months. The appellant was advised to apply to the DGTD for de-registration on the ground that its investment in plant and machinery was less than Rs. 35 lacs in view of the revised definition of the Small Scale Industry and the Medium Scale Industry made by the Government of India by its Notification issued on 18.03.1985. The appellant was advised to apply to the DGTD for de-registration more than a year after the cash subsidy had been sanctioned and granted to the appellant under the Scheme and much after the expiry of the option period. By letter dated 04.08.1987, the DGTD cancelled the registration of the appellant as a Medium Scale Industry and directed the appellant to approach the Director of Industries, U.P. for registration as a Small Scale Industry. According to the appellant, the registration could not be cancelled as the option period of six months had already expired. The appellant thereupon applied for registration with the General Manager, District Industries, Agra, for being registered as a Small Scale Industry.

On 24.09.1987, the appellant received a communication dated 15.09.1987 from respondent No.2 calling upon the appellant to refund the cash subsidy together with interest amounting to more than Rs.18,40,767.12 on the only ground that the unit of the appellant was required to continue to remain a Medium Scale Industry for five years from the date of the agreement and on account of the cancellation of its registration by the DGTD, the appellant had caused a violation of the scheme. It is also stated that the power to seek refund of the subsidy is also circumscribed by clause 2 of the Agreement dated 31.03.1986 executed between the parties. Clause 2 of the said Agreement has already been extracted above.

While so the respondent without waiting for a reply from the appellant or affording any opportunity of hearing straight away issued a recovery certificate on 31.10.1987 to the third respondent calling upon him to recover the sum of Rs. 18 lacs and odd as arrears of Land revenue from the appellant. The appellant thereupon made a representation to the Government of U.P. that the said demand and subsequent recovery order were illegal and contrary to the factual position. As no response was received to the aforesaid representation and as the respondents were taking recourse to coercive processes, the appellant filed a writ petition before the High Court.

It was contended before the High Court on behalf of the respondents that the appellant has not faithfully observed all the provisions of the Scheme as also other conditions imposed by the order sanctioning the scheme and that a perusal of the terms of the scheme under which the subsidy was allowed only show that a Pioneer Unit holding DGTD registration was eligible for subsidy under the

Scheme and a combined reading of the Scheme and the Agreement shows that the loanee that is the petitioner (appellant) had to retain its character as a Pioneer Unit holding DGTD registration for a period of five years to be computed from the year in which the disbursement of the subsidy was made. It was further submitted that after raising of the limit from Rs. 20 lacs to Rs. 35 lacs in the meanwhile, the appellant lost its DGTD registration which was cancelled on its own application vide order dated 04.08.1987 as a result of which the appellant was relegated to the character of a Small Scale Unit. It was further argued by the respondents that the inevitable consequence of the loss of the DGTD registration by the appellant as aforesaid was that the appellant ceased to be eligible for special subsidy paid to it under the Scheme and this indeed constituted violation of condition No.1(b) of the Agreement. Under such circumstances, the subsidy of Rs. 15 lacs paid to the appellant under the Scheme as a Pioneer Unit holding DGTD registration became recoverable by the respondents as provided in clause 2 and clause 2(d) of the Agreement along with interest at current bank lending rate calculated from the date of payment of subsidy till the date of recovery of the amount.

The Division Bench of the High Court held that the writ petition filed by the appellant was bereft of merits and that the respondents are entitled to recover the subsidy with interest as demanded. The High Court proceeded on the basis that there was breach of the terms granting subsidy by reason of the appellant being de- recognised by DGTD Aggrieved by the judgment of the High Court, the above appeal has been filed.

We have perused the pleadings, the judgment under appeal, the anneuxres and other relevant documents and, in particular, the Scheme, notice for recovery of subsidy, certificate for recovery issued by the Commissioner and Director of Industries, U.P., correspondence between the appellant and the respondents, Sanction letter dated 31.03.1986, Agreement dated 31.03.1986, cancellation order of DGTD registration dated 04.08.1987 and the proceedings issued by the Government of India in regard to the procedure for registration of units on transfer from DGTD etc., consequent upon revision in the definition of Small Scale Industries dated 17.01.1981 and the Notification dated 18.03.1985.

We heard the arguments of Mr. Kailash Vasdev, learned senior counsel for the appellant and Mr. R.K. Singh, learned counsel for the respondents. The counsel for the respective parties reiterated their submissions advanced before the High Court.

On the aforesaid facts and circumstances of the case, the following questions may arise for consideration :

> (1) If an industrial unit of a Company is granted subsidy in terms of the Scheme framed by the State Government when it fulfils all the terms and conditions of the Scheme, is it open to the State Government to call for refund of the subsidy at a later stage when the 'pioneer unit' chooses to get itself registered as a Small Scale Industry with the State Government instead of remaining registered as a Medium Scale Industry with the Director General of Technical Development, Government of India in accordance with the change effected in the definition of a Small Scale Industry and

> a Medium Scale Industry by the Government of India, although it continues to remain 'pioneer unit' and there is absolutely no change in the control of the State Government over the unit in the obligations, investments and assets of the pioneer unit? (2) Whether there is any provision in the Scheme or Agreement that a 'Pioneer Unit' which had been granted subsidy must continue to remain registered with the Director General of Technical Development for a period of five years and if it does not remain registered, are respondents 1 & 2 entitled to seek refund of the subsidy?

In the instant case, the following facts are not in dispute :-

> (1) That both the parties to this action have entered into an Agreement; (2) That the Government of U.P. formulated a scheme known as 'Capital Grant Scheme' for the grant of subsidies to various industrial units for giving an impetus to the industrialisation of the backward areas of the State;
>
> (3) That the Scheme provides for payment of subsidies to the industries sector in the zero industrial area;
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> (4) That the petitioner, in fact, had set up his industrial unit in the zero industrial area;
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> (5) That the industrial unit had been set up during the period from 01.10.1982 to 31.03.1985 in a backward area where no heavy industry is established prior to 01.10.1982;

(6) That the appellant's unit was treated as a Pioneer Unit within the terms of the scheme and that it was registered with DGTD;

(7) That the appellant had made a total investment of Rs.1,07,78,368/- on building, land and machinery etc. and became entitled to cash subsidy under the Scheme;

(8) That the appellant's unit was registered with DGTD as a Medium Scale Industry and that the appellant had fulfilled the conditions of the scheme; (9) That the sanction of subsidy of Rs.15 lacs to the appellant and payment of the same in two instalments;

(10) That the Government of India has issued fresh guidelines on 18.03.1985 which provided that an industry, investment of which did not exceed Rs. 35 lacs in plant and machinery alone shall be entitled to be treated as a Small Scale Industry;

(11) That the DGTD cancelled the registration of the appellant as a Medium Scale Industry on 04.08.1987 and directed the appellant to approach Director of Industries, U.P. for registration as a Small Scale Industry and as a consequence of de-registration as a Medium Scale Industry by the DGTD, the Government of U.P. issued notice for recovery of Rs. 15 lacs and again called upon the appellant to refund Rs. 15 lacs as DGTD had cancelled the registration contending that the appellant

had violated condition 1(b) of the Agreement.

A resume of the aforesaid undisputed facts clearly show that there has been absolutely no violation of any provision of the Scheme on the part of the appellant and that the demand for the refund was wholly illegal and arbitrary.

In this background, we have also to see as to whether the grantee/appellant complied with and observed all the provisions of the Scheme and of the covenants of the Agreement or violated any terms of the Agreement.

We have already noticed as a result of change in the definition of Small Scale Industry by the Development Commissioner, Government of India the industrial units which had invested upto Rs. 35 lacs in plant and machinery was liable to be treated as small scale industries and that it was on this ground alone, the appellant's industrial unit been de-registered as a Small Scale Industry but it continued to be a pioneer unit in terms of the scheme to which the subsidy had been granted to the appellant. In the circumstances, the appellant stated that the question of seeking refund of the amount from them did not arise as the appellant had not violated any terms of the Scheme or of the Agreement. In our view, the High Court has overlooked the aforesaid facts and documents in this regard.

It is also pertinent to notice that subsequent to the registration of the appellant as Medium Scale Industry, the Government of India, by Notification dated 18.03.1985 altered the definitions of Small Scale Industry and Medium Scale Industry. By this Notification, it was provided that if the investment of an industrial unit in plant and machinery alone was up to Rs.35 lacs. It was entitled to be registered as a Small Scale Industry, but if it exceeded Rs.35 lacs, it was entitled to be registered as a Medium Scale Industry. In fact, the respondents could not point out that there was any change in the investment, assets, production, land, building, plant and machinery of the appellant and that there had been any change in the control exercised by the respondent Nos. 1 and 2 over the appellant and its units. There has been no change in the obligations of the appellant. The appellant had applied for re-registration with DGTD as a Small Scale Industry more than a year after grant of subsidy on the advise that in view of the revised Notification issued by the Government of India, the appellant was liable to be registered as a Small Scale Industry. In our opinion, the registration of a unit as a Small Scale and Medium Scale Industry is done in pursuance of notifications issued under the Industries Development and Regulation Act, 1951 by the Government of India and that the subsequent cancellation of registration by DGTD on account of change of criteria has no bearing on the status of an industrial unit as a Pioneer Unit under the scheme framed by the State of U.P. The appellant was registered as a DGTD Unit on 21.10.1983 and the said registration continued. Thereafter, in the year 1985, there have been some changes in the definition of the Small Scale Industries by the Development Commissioner, Government of India by which the definition of a Small Scale Industries Unit has been amended and the limit of investment in the plant and machineries has been extended from Rs. 20 lacs to Rs. 35 lacs. It has also been made clear that while computing the value of the machineries, only the value of those machineries will be considered which are directly involved in the production, while the other accessories and other machineries which are used in the manufacturing process but are not directly involved in the process of

manufacture were not to be included for considering the unit as Small Scale Industry unit. In this view of the matter, even though the investment of the appellant in the machineries was more than Rs.35 lacs, but the machineries which are utilised for manufacturing was less than Rs.35 lacs i.e. Rs.32,15,861/-, hence the appellant was compelled to get it registered as Small Scale Industry unit, instead of a DGTD Unit. Thereafter, the appellant applied for registration as Small Scale Industry Unit and the requisite registration certificate was granted to the appellant by the General Manager, District Industries Centre, Agra, registering the appellant as a Small Scale Industry Unit.

It is also pertinent to notice that the respondents without issuing any show cause notice to the appellant as to why the said recovery be not made against the appellant and without affording any opportunity to show cause, a call notice dated 15.09.1987 has been issued to the appellant for recovering that amount and again followed by a recovery certificate from the office of the Commissioner and Director of Industries for recovering the sum of Rs.18,72,821.92 as the arrears of land revenue. In our opinion, the entire recovery proceedings initiated against the appellant by the respondents as arrears of land revenue is absolutely illegal and in gross violation of the principles of natural justice.

In this context, we may reproduce clause 13 of the Scheme which reads as follows :

> "13. Recovery of Special State Capital Grant: The Director of Industry, Uttar Pradesh shall have power to get the Special State Grant recovered as is the recovery of land revenue is done consequent to following circumstances:
>
> a) If the Industrial Unit has obtained the State Capital Grant by giving false facts or by submitting necessary facts in fraudulent manner.
>
> b) If the Unit has stopped the production work within five years of the commencement of the production. However, this condition of restriction shall not be applicable to such units where the production work has remained suspended for a short period of 6 months due to reasons beyond its control such as sick and shortage of power etc.
>
> c) If industrial Unit fails to provide prescribed details and information sought for. If Director of Industries of Uttar Pradesh could not get the Special State Capital Grant recovered from the Unit under the normal procedure, then he can get the amount of loan recovered as the arrear of land revenue recovery done under the Government of Uttar Pradesh rules.
>
> d) If the Director of any Unit who has partly or fully received the grant has to change the place of his unit or dispose of any part of immoveable property/assets within five years from the date of start of production.

Clause 2 of the Agreement has been extracted in paragraphs supra.

The above two clauses mentioned the circumstances under which the cash subsidy may be recovered as arrears of land revenue. None of the said clauses is applicable or attracted in the instant case. Therefore, we are of the opinion that the entire recovery proceedings are absolutely illegal and without jurisdiction. It is not the case of the respondents that the appellant has practised any fraud or guilty of making of any mis-representations in obtaining the sanction/eligibility. The only provision which refers for recovery of cash subsidy as arrears of land revenue is mentioned in the above two clauses and inasmuch as none of the conditions enumerated therein is attracted, the entire recovery of the cash subsidy as arrears of land revenue is illegal. Even otherwise, the allegations made in the call notice for recovery of the cash subsidy as arrears of land revenue is uncalled for.

We have carefully perused the entire Scheme which goes to show that the cash subsidy would be granted to the unit which is a Pioneer Unit i.e. having an investment of more than Rs. 1 crore and which has been established after 01.10.1982 and at the time of grant of cash subsidy, the said Unit should be registered as DGTD Unit. Nowhere it provides that the said industry should remain as a DGTD Unit for a period of five years as mentioned in clause 4 of the call notice. A perusal of the scheme further goes to show that it has been provided in the scheme that the production should not be stopped for a period of five years but it nowhere provides that the unit should remain as a DGTD Unit for a period of five years. In fact, the appellant had been compelled to get the registration under the Small Scale Industries Unit on account of the change in the definition of the Small Scale Industries Unit by the Central Government and not on account of any inaction of the appellant. Hence, if on account of the change in the definition of the Small Scale Industries Unit, the appellant was de-recognised as DGTD Unit then the appellant could not be denied the benefit of cash subsidy.

We have already seen that clause 13 of the Scheme and clause 2 of the Agreement has been invoked by the respondents for the recovery of the subsidy. A close scrutiny of the above two clauses goes to show that in the event of violation of any conditions, the recovery will be made as arrears of land revenue and so prior to initiating action for breach of the terms of clause 13 of the Scheme and clause 2 of the Agreement, the opportunity ought to have been provided by the respondent No.2 to the appellant to demonstrate whether the provisions of the Scheme and the Agreement are violated or not and that having not done so the entire recovery proceedings initiated against the appellant is bad for violation of principles of natural justice.

As already observed, a perusal of the pleadings would reveal that there is no allegation regarding playing of fraud or mis-representation in obtaining the sanction/eligibility. The argument of the learned counsel for the respondents that the appellant on his own freewill applied for de-registration vide letter dated 12.06.1987 and that the appellants were no more entitled to be registered under DGTD and since the constitution of the Company had undergone change and under the changed conditions the respondents were entitled to recover the subsidy given to the appellant cannot at all be countenanced.

Having taken note of the aforesaid factual situation, we have no hesitation to hold that the respondents have acted arbitrarily and contrary to the terms of the Scheme and the Agreement and on the basis of unwarranted assumptions in seeking to recover the amounts given as subsidy to the

appellant.

In the facts and circumstances of the aforesaid, we set aside the judgment of the High Court impugned in this appeal and allow this appeal. However, there will be no order as to costs.