Divisional Manager, Aravali Golf Club & ... vs Chander Hass & Anr on 6 December, 2007

Equivalent citations: 2008 AIR SCW 406, 2008 (2) AIR JHAR R 238, 2008 LAB. I. C. 4202, AIR 2008 SC (SUPP) 360, (2008) 1 PUN LR 485, (2008) 1 SCT 279, (2008) 146 DLT 1, (2008) 1 MAD LJ 155, (2008) 1 LAB LN 481, 2008 (1) SCC 683, (2008) 2 SERVLJ 349, (2008) 4 ALLMR 2 (SC), (2008) 1 CAL HN 102, (2008) 1 CURLR 266, (2008) 1 SERVLR 728, (2007) 4 ESC 616, (2007) 14 SCALE 1

Bench: A. K. Mathur, Markandey Katju

CASE NO.:
Appeal (civil) 5732 of 2007

PETITIONER:
Divisional Manager, Aravali Golf Club & Anr.

RESPONDENT:
Chander Hass & Anr.

DATE OF JUDGMENT: 06/12/2007

BENCH:
A. K. Mathur & Markandey Katju

JUDGMENT:

JUDGMENT O R D E R [Arising out of S.L.P(C) No.3358 of 2007]

1. Heard learned counsel for the parties.

2. Leave granted.

3. This appeal by special leave is directed against the judgment and order dated 17th February, 2006 passed by a learned Single Judge of the High Court of Punjab and Haryana in R.S.A. No.666/2006 whereby the learned Single Judge has affirmed the judgment and decree passed by the First Appellate Court.

4. The brief facts which are necessary for the disposal of the present appeal are that the plaintiffs (respondents in this appeal) were appointed as Mali (gardener) in the service of the defendant-appellant, which is a golf club run by the Haryana Tourism Corporation in the year 1989 and 1988 respectively on daily wages. Subsequently in the year 1989 they were told to perform the duties of Tractor Drivers, though there was no post of tractor driver in the employer s

establishment. However for a number of years they continued to be paid wages for the post of Mali.

5. Thereafter on a recommendation made by the Head Office, the appellants started paying them wages of tractor driver on daily wage basis, as per rates recommended by the Deputy Commissioner. Though they continued to work for about a decade as tractor drivers, their services were regularized against the post of Mali in the year 1999 and not as tractor driver. When despite representations their grievance was not redressed, the respondents herein filed civil suit in the month of April, 2001 claiming regularization against the posts of tractor driver. Their claim was rejected by the Trial Court which observed that there was no post of tractor driver in the establishment, and the suit was dismissed. The Trial Court held that plying a tractor is part and parcel of the job of Mali in a Golf Club, since the Golf Field of the Club is vast and needs to be maintained with mechanical gadgets.

6. Aggrieved against the said order of dismissal of the suit, the respondents herein preferred an appeal before the Additional District Judge, Faridabad. Their appeal was accepted and the judgment and decree of the Trial Court was set aside. The First Appellate Court observed that the defendants were taking the work of tractor driver from the plaintiffs since 13.8.1999, and hence it directed the defendants to get the post of tractor driver sanctioned, and to regularize the plaintiffs on that post.

7. Thereafter the Divisional Manager, Aravali Golf Club filed a second appeal before the High Court of Punjab and Haryana. The learned Single Judge held that the post of tractor driver should be created as there is no hitch in not creating the posts of drivers especially when tractors were available and there existed need to use those tractors. It was also observed by the learned Single Judge that simply by relying upon technicalities the State authorities cannot be allowed to suppress the individuals and to deny their lawful rights. The learned Single Judge also held that no substantial question of law arose in the matter. Hence, the second appeal was dismissed and the judgment of the First Appellate Court was upheld. Aggrieved against the said judgment of the learned Single Judge, the appellants are in appeal before us.

8. The plaintiff-respondents admitted in the plaint that they were appointed as Mali. In the suit the plaintiff-respondents stated that they were working as tractor driver at Aravali Golf Club. Initially they were engaged on daily wages. Thereafter their services were regularized on the post of Mali (gardener) instead of tractor driver. The respondents filed a representation before the concerned authorities for regularizing them on the post of Tractor Driver, but that was not done since there was no post of tractor driver. Therefore, the respondents filed a suit.

9. The suit was contested by the defendants-appellants. The appellants in their written statement submitted that the plaintiffs were appointed as Mali on a daily wage basis on 9.10.1989. The respondent No.1 had earlier filed Writ Petition No.6216/1991 for regularizing his services. The Hon ble High Court disposed of the said writ petition by passing the order directing the respondent No.1 to make a representation against the termination of his services and the appellants herein were restrained from terminating the services of the respondent No.1 till his representation was decided. The writ petition was accordingly disposed of.

10. In pursuance of the said order the respondent No.1 made representation for regularization of his service on 2.5.1991. The plaintiff- respondent was informed vide order dated 14.5.1991 that there was no post of tractor driver and his case for regularization would be considered as and when sanctioned post of the tractor deriver will be available.

11. The plaintiff-respondent was paid wages of tractor deriver from August 1990 to 11.5.1999 on daily wage basis on D.C. rate as he was asked to work as a tractor driver. He was also informed that whenever a post of tractor driver was created, his case for appointment of tractor deriver will be considered. In the meanwhile services of plaintiff No.1 was regularized as Mali vide order dated 11.5.1999 which was duly accepted by him without any protest. Similar is the case of respondent No.2 herein. He was engaged as Mali on daily wage basis w.e.f. 1.9.1988 and his services were also regularized as Mali vide order dated 11.5.1999.

12. In the written statement in the suit the appellants took preliminary objection that as there is no sanctioned post of tractor driver and hence there is no question of their being appointed on the post of tractor driver. It was also asserted in the written statement that as and when the post of tractor driver will be available their cases will be considered in accordance with law. On the basis of these pleadings, several issues were framed and a finding was recorded by the Trial Court that as there is no sanctioned post of tractor driver, the plaintiffs cannot be regularized in the said post. This is a finding of fact recorded by the Trial Court and it was never disputed at any stage. Aggrieved against the said judgment the respondents herein filed an appeal and the learned First Appellate Court without going into the merit of the matter set aside the judgment and decree of the Trial Court and directed creation of the post of tractor driver, and regularization of the respondents on the said post. Against the said order of the First Appellate Court, the appellants herein preferred a second appeal before the High Court of Punjab and Haryana. The learned Single Judge has affirmed the judgment and order of the First Appellate Court.

13. Learned counsel for the appellants submitted that there is no post of tractor driver, and therefore, there is no question of regularizing the respondents in the said post. It is not disputed that there is no sanctioned post of tractor driver in the appellant s establishment. Learned counsel for the respondents has also not been able to show that there are any sanctioned posts of tractor driver.

14. Since there is no sanctioned post of tractor driver against which the respondents could be regularized as tractor driver, the direction of the First Appellate Court and the learned Single Judge to create the post of tractor driver and regularizing the services of the respondents against the said newly created posts was in our opinion completely beyond their jurisdiction.

15. The Court cannot direct the creation of posts. Creation and sanction of posts is a prerogative of the executive or legislative authorities and the Court cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organization. This Court has time and again pointed out that the creation of a post is an executive or legislative function and it involves economic factors. Hence the Courts cannot take upon themselves the power of creation of a post. Therefore, the directions given by the High Court and First Appellate Court to create the posts of tractor driver and regularize the services of the respondents against the said posts cannot be sustained and are

hereby set aside.

16. Consequently, this appeal is allowed and the judgment and order of the High Court as well as that of the First Appellate Court are set aside and the judgment of the Trial Court is upheld. The suit is dismissed. No costs.

17. Before parting with this case we would like to make some observations about the limits of the powers of the judiciary. We are compelled to make these observations because we are repeatedly coming across cases where Judges are unjustifiably trying to perform executive or legislative functions. In our opinion this is clearly unconstitutional. In the name of judicial activism Judges cannot cross their limits and try to take over functions which belong to another organ of the State.

18. Judges must exercise judicial restraint and must not encroach into the executive or legislative domain vide Indian Drugs & Pharmaceuticals Ltd. vs. The Workman of Indian Drugs & Pharmaceuticals Ltd. (2007) 1 SCC 408 and S.C. Chandra and Ors. vs. State of Jharkhand and Ors. JT 2007 (10) 4 SC 272 (See concurring judgment of M. Katju, J.).

19. Under our Constitution, the Legislature, Executive and Judiciary all have their own broad spheres of operation. Ordinarily it is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction.

20. Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like Emperors. There is broad separation of powers under the Constitution and each organ of the State the legislature, the executive and the judiciary must have respect for the others and must not encroach into each others domains.

21. The theory of separation of powers first propounded by the French thinker Montesquieu (in his book `The Spirit of Laws ) broadly holds the field in India too. In chapter XI of his book `The Spirit of Laws Montesquieu writes :

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
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> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws,

> that of executing the public resolutions, and of trying the causes of individuals. (emphasis supplied) We fully agree with the view expressed above. Montesquieu s warning in the passage above quoted is particularly apt and timely for the Indian Judiciary today, since very often it is rightly criticized for `over-reach and encroachment into the domain of the other two organs.

22. In Tata Cellular vs. Union of India AIR 1996 SC 11 (vide paragraph 113) this Court observed that the modern trend points to judicial restraint in administrative action. The same view has been taken in a large number of other decisions also, but it is unfortunate that many courts are not following these decisions and are trying to perform legislative or executive functions. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimization of the Judges preferences. The Court must not embarrass the administrative authorities and must realize that administrative authorities have expertise in the field of administration while the Court does not. In the word of Chief Justice Neely:

> I have very few illusions about my own limitations as a judge. I am not an accountant, electrical engineer, financier, banker, stockbroker or system management analyst. It is the height of folly to expect Judges intelligently to review a 5000 page record addressing the intricacies of a public utility operation. It is not the function of a Judge to act as a super board, or with the zeal of a pedantic school master substituting its judgment for that of the administrator.

23. In Ram Jawaya vs. State of Punjab AIR 1955 SC 549 (vide paragraph 12), a Constitution Bench of this Court observed:

> The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the State, of functions that essentially belong to another (emphasis supplied)

24. Similarly, in Asif Hameed vs. State of Jammu and Kashmir, AIR 1989 SC 1899 a three Judge bench of this Court observed (vide paragraphs 17 to 19) :

> 7. Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs.

Legislature and executive, the two facets of people s will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self imposed discipline of judicial restraint.

18. Frankfurter, J. of the U.S. Supreme Court dissenting in the controversial expatriation case of Trop v. Dulles (1958) 356 US 86 observed as under :

All power is, in Madison s phrase, of an encroaching nature . Judicial powers is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self restraint .

Rigorous observance of the difference between limits of power and wise exercise of power between questions of authority and questions of prudence requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail to disregard one s own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court s giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do.

19. When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers.

25. Unfortunately, despite these observations in the above mentioned decisions of this Court, some courts are still violating the high constitutional principle of

separation of powers as laid down by Montesquieu. As pointed out by Hon ble Mr. Justice J. S. Verma, the former CJI, in his Dr. K.L. Dubey Lecture:

.Judiciary has intervened to question a mysterious car racing down the Tughlaq Road in Delhi, allotment of a particular bungalow to a Judge, specific bungalows for the Judges pool, monkeys capering in colonies, stray cattle on the streets, clearing public conveniences, levying congestion charges at peak hours at airports with heavy traffic, etc. under the threat of use of contempt power to enforce compliance of its orders. Misuse of the contempt power to force railway authorities to give reservation in a train is an extreme instance .

26. Recently, the Courts have apparently, if not clearly, strayed into the executive domain or in matters of policy. For instance, the orders passed by the High Court of Delhi in recent times dealt with subjects ranging from age and other criteria for nursery admissions, unauthorized schools, criteria for free seats in schools, supply of drinking water in schools, number of free beds in hospitals on public land, use and misuse of ambulances, requirements for establishing a world class burns ward in the hospital, the kind of air Delhities breathe, begging in public, the use of sub-ways, the nature of buses we board, the legality of constructions in Delhi, identifying the buildings to be demolished, the size of speed-breakers on Delhi roads, auto-rickshaw over-charging, growing frequency of road accidents and enhancing of road fines etc. In our opinion these were matters pertaining exclusively to the executive or legislative domain. If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it.

27. For instance, the Delhi High Court directed that there can be no interview of children for admissions in nursery schools. There is no statute or statutory rule which prohibits such interviews. Hence the Delhi High Court has by a judicial order first created a law (which was wholly beyond its jurisdiction) and has then sought to enforce it. This is clearly illegal, for Judges cannot legislate vide Union of India vs. Deoki Nandan Agarwal, AIR 1992 SC 96. In V.K. Reddy vs. State of Andhra Pradesh J.T. 2006(2) SC 361 (vide para 17) this Court observed The Judges should not proclaim that they are playing the role of law maker merely for an exhibition of judicial valour . Similarly, the Court cannot direct the legislature to make a particular law vide Suresh Seth vs. Commissioner, Indore Municipal Corporation & Ors. AIR 2006 SC 767, Bal Ram Bali vs. Union of India JT 2007 (10) SC 509, but this settled principle is also often breached by Courts.

28. The Jagadambika Pal s case of 1998, involving the U.P. Legislative Assembly, and the Jharkhand Assembly case of 2005, are two glaring examples of deviations from the clearly provided constitutional scheme of separation of powers. The interim orders of this Court, as is widely accepted, upset the delicate constitutional balance among the Judiciary, Legislature and the Executive, and was described Hon. Mr. J.S. Verma, the former CJI, as judicial aberrations, which he hoped that the Supreme

Court will soon correct.

> 29. Hon ble Justice A.S. Anand, former Chief Justice of India has recently observed : Courts have to function within the established parameters and constitutional bounds. Decisions should have a jurisprudential base with clearly discernible principles. Courts have to be careful to see that they do not overstep their limits because to them is assigned the sacred duty of guarding the Constitution. Policy matters, fiscal, educational or otherwise, are thus best left to the judgment of the executive.

The danger of the judiciary creating a multiplicity of rights without the possibility of adequate enforcement will, in the ultimate analysis, be counter productive and undermine the credibility of the institution. Courts cannot create rights where none exists nor can they go on making orders which are incapable of enforcement or violative of other laws or settled legal principles. With a view to see that judicial activism does not become judicial adventurism , the courts must act with caution and proper restraint. They must remember that judicial activism is not an unguided missile failure to bear this in mind would lead to chaos. Public adulation must not sway the judges and personal aggrandizement must be eschewed. It is imperative to preserve the sanctity and credibility of judicial process. It needs to be remembered that courts cannot run the government. The judiciary should act only as an alarm bell; it should ensure that the executive has become alive to perform its duties .

30. The justification often given for judicial encroachment into the domain of the executive or legislature is that the other two organs are not doing their jobs properly. Even assuming this is so, the same allegation can then be made against the judiciary too because there are cases pending in Courts for half-a-century as pointed out by this Court in Rajindera Singh vs. Prem Mai & others (Civil Appeal No. 1307/2001) decided on 23 August, 2007.

31. If the legislature or the executive are not functioning properly it is for the people to correct the defects by exercising their franchise properly in the next elections and voting for candidates who will fulfill their expectations, or by other lawful methods e.g. peaceful demonstrations. The remedy is not in the judiciary taking over the legislative or executive functions, because that will not only violate the delicate balance of power enshrined in the Constitution, but also the judiciary has neither the expertise nor the resources to perform these functions.

32. Of the three organs of the State, the legislature, the executive, and the judiciary, only the judiciary has the power to declare the limits of jurisdiction of all the three organs. This is a great power and hence must never be abused or misused, but should be exercised by the judiciary with the utmost humility and self-restraint.

33. Judicial restraint is consistent with and complementary to the balance of power among the three independent branches of the State. It accomplishes this in two ways. First, judicial restraint not only recognizes the equality of the other two branches with the judiciary, it also fosters that equality by minimizing inter-branch interference by the judiciary. In this analysis, judicial restraint may also be

called judicial respect, that is, respect by the judiciary for the other coequal branches. In contrast, judicial activism s unpredictable results make the judiciary a moving target and thus decreases the ability to maintain equality with the co-branches. Restraint stabilizes the judiciary so that it may better function in a system of inter- branch equality.

34. Second, judicial restraint tends to protect the independence of the judiciary. When courts encroach into the legislative or administrative fields almost inevitably voters, legislators, and other elected officials will conclude that the activities of judges should be closely monitored. If judges act like legislators or administrators it follows that judges should be elected like legislators or selected and trained like administrators. This would be counterproductive. The touchstone of an independent judiciary has been its removal from the political or administrative process. Even if this removal has sometimes been less than complete, it is an ideal worthy of support and one that has had valuable effects.

35. The constitutional trade off for independence is that judges must restrain themselves from the areas reserved to the other separate branches. Thus, judicial restraint complements the twin, overarching values of the independence of the judiciary and the separation of powers.

36. In Lochner vs. New York 198 US 45(1905) Mr. Justice Holmes of the U.S. Supreme Court in his dissenting judgment criticized the majority of the Court for becoming a super legislature by inventing a `liberty of contract theory, thereby enforcing its particular laissez faire economic philosophy. Similarly, in his dissenting judgment in Griswold vs. Cannecticut 381 U.S. 479, Mr. Justice Hugo Black warned that unbounded judicial creativity would make this Court a day-to-day Constitutional Convention . In `The Nature of the Judicial Process Justice Cardozo remarked : The Judge is not a Knight errant, roaming at will in pursuit of his own ideal of beauty and goodness . Justice Frankfurter has pointed out that great judges have constantly admonished their brethren of the need for discipline in observing their limitations (see Frankfurter s `Some Reflections on the Reading of Statutes).

37. In this connection we may usefully refer to the well-known episode in the history of the U.S. Supreme Court when it dealt with the New Deal Legislation of President Franklin Roosevelt. When President Roosevelt took office in January 1933 the country was passing through a terrible economic crisis, the Great Depression. To overcome this, President Roosevelt initiated a series of legislation called the New Deal, which were mainly economic regulatory measures. When these were challenged in the U.S. Supreme Court the Court began striking them down on the ground that they violated the due process clause in the U.S. Constitution. As a reaction, President Roosevelt proposed to reconstitute the Court with six more Judges to be nominated by him. This threat was enough and it was not necessary to carry it out. The Court in 1937 suddenly changed its approach and began upholding the laws. `Economic due process met with a sudden demise.

38. The moral of this story is that if the judiciary does not exercise restraint and over-stretches its limits there is bound to be a reaction from politicians and others. The politicians will then step in and curtail the powers, or even the independence, of the judiciary (in fact the mere threat may do, as the above example demonstrates). The judiciary should, therefore, confine itself to its proper sphere,

realizing that in a democracy many matters and controversies are best resolved in non-judicial setting.

39. We hasten to add that it is not our opinion that judges should never be `activist . Sometimes judicial activism is a useful adjunct to democracy such as in the School Segregation and Human Rights decisions of the U.S. Supreme Court vide Brown vs. Board of Education 347 U.S. 483 (1954), Miranda vs. Arizona 384 U.S. 436, Roe vs. Wade 410 U.S. 113, etc. or the decisions of our own Supreme Court which expanded the scope of Articles 14 and 21 of the Constitution. This, however, should be resorted to only in exceptional circumstances when the situation forcefully demands it in the interest of the nation or the poorer and weaker sections of society but always keeping in mind that ordinarily the task of legislation or administrative decisions is for the legislature and the executive and not the judiciary.

40. In Dennis vs. United States (United States Supreme Court Reports 95 Law Ed. Oct. 1950 Term U.S. 340-341) Mr. Justice Frankfurter observed:

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore, most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.
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> 41. In view of the above discussion we are clearly of the view that both the High Court and First Appellate Court acted beyond their jurisdiction in directing creation of posts of tractor driver to accommodate the respondents.

Appeal Allowed.