

PETITIONER:
SHIVSAGAR TIWARI

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT: 11/10/1996

BENCH:
KULDIP SINGH, B.L. HANSARIA

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

HANSARIA.J.

Edmund Burke stated as early as 1777: "Among a people generally corrupt, liberty cannot long exist." In 1778, he observed: "An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will, who did not soon find that he had no end but his own profit."

2. According to Francis Beanmount (1584-1616) corruption is a tree, whose branches are of an unmeasurable length, they spread everywhere, and the dew that drops from thence, hath infected some chairs and stools of authority.

3. In the Encyclopaedia of Democracy by Seymour Martin Lipset, Vol.1, page 310, in the Chapter "Corruption", it is stated that corruption is an abuse of public resources for private gain. It is known that bribes open the way for access to the State for those who are willing to pay and can afford to pay. The situation leaves non-corrupt citizen with the belief that one counts only if one has the right personal contact with those who hold power and also allow persons with money power to get things done to their advantage through back door.

4. In the present case, as we are concerned with alleged motivated, arbitrary and high-handed actions of a Minister, it would be worth-while to point out what role has been assigned in a parliamentary democracy to a Minister. The head of the State (President or Governor in our country, as the case may be,) calls upon the leader of the political party that commands majority to form government and appoints him as Prime/Chief Minister; and on later's advice appoints other Ministers. Business of the Government, gets allocated and is run as per business rules framed, which in our Constitution has been dealt by Article 166(3). The executive power of the Government is distributed department wise and one Government is distributed department wise and one Minister is made the head of that department. That Minister becomes responsible for the actions, acts and policies of his department. He becomes principally accountable and answerable to the people. His powers and duties are regulated by the law of the land. The legal and moral

responsibility or liability for the acts or omissions rest solely on the Minister.

5. Having noted the philosophy, sociology and etymology of corruption, as well as the essence of a parliamentary democracy, let it broadly be seen what had happened in the present case. For this purpose it would be enough to note some of the prima facie conclusions arrived at by the Central Bureau of Investigation (CBI) who was required by this Court to inquire into the matter (which has come to be known as Housing Scam) by order dated 14.2.1996.

6. The CBI has since inquired into the matter in some detail and has by now submitted 4 Interim the CBI, orders of allotment in respect of the shops/stalls in question were passed by Smt. Shiela Kaul, the then Minister of Urban Development, and "all the 6 shops have been allotted by her to her own relation/employees/domestic servants of her family members and family friends. She has allotted 2 shops to her 2 grandsons, one shop to the maidservant of her son, Sh. Vikram Kaul who is residing in Dubai, one shop to handloom manager of the firm owned by her son-in-law and another shop to a close friend. One shop has been allotted to the nephew of the Minister of State, Sh. P.K. Thungon. While making allotments in respect of stalls, she has allotted most of stalls to the relations/friends of her personal staff and officials of Dte. of Estates." The CBI has also reported that Smt. Shiela Kaul had made ten different categories of persons as the basis for deciding allotments, but even this categorisation was not adhered to while making allotments. The further findings are: (1) "Many other organisations/persons who had also applied for allotment of shops/stalls from time to time were not considered for allotment and no reasons, whatsoever, were assigned for non-allotment of shops/stalls to them"; and (2) "At the time of discretionary allotments made by Smt. Shiela Kaul in 1992 and 1994 persons who were relations of her personal staff were considered and allotted shops."

7. In the order dated 19.7.1996 this Court noted that a regular case under sections 120/B, 420, 468/471 IPC and section 13(2) read with 13(1) (d) of the Prevention of Corruption Act, 1988, has been registered against Smt. Shiela Kaul and her Addl. Private Secretary Rajan S. Lala and others. The order of that date has also noted about various other steps taken, which include issuance of show cause why allotments of shops/stalls should not be cancelled. It was desired that the notices be served within a week and the Estate Officer, after considering their replies, if any, place a report before the Court within four weeks.

8. Such a report was filed under the affidavit of Shri Harcharan Jeet Singh, Director of Estates, which was taken up for consideration on 16.9.1996. The affidavit of the Director has stated that from 1994 onwards 52 shops/stalls had been sanctioned by the then Minister of Urban Development (Smt. Shiela Kaul) out of which 7 shops were allotted by Smt. Kaul before she had approved policy of 1994 and the remaining 45 shops were allotted after the policy of 1994. In the affidavit the gist of the objections filed by the various allottees was enclosed. This Court thought it appropriate to give an opportunity of hearing to all these persons before any action was taken. A direction was, therefore, given to the Director to issue individual notices to the 52 persons (wrongly mentioned as 42 in the order) to be personally present in the Court or be represented through their counsel on 27th September. These allottees so appeared either in person or through counsel and they were

heard.. The sum and substance of the representations of the allottees was that they had been given an allotment either because of their being unemployed youths, freedom fighters, handicapped, members of Scheduled Castes/Scheduled Tribes, widow or poverty-stricken.

9. Question is whether they were selected in accordance with law, which aspect as its importance because apparently a large number of other persons could as well fall within the categories in question and had applied also? From the report of the CBI it is clear that the allottees had been selected, not by following the tender system, as required by the policy of 1994, but because of their relationship with the Minister or her personal staff, or being employees or friends of such persons. If that be so, the allotments were wholly arbitrary and speak of misuse of power. All important question is what is required to be done to undo the wrong and how the wrong doer is to be dealt with within the parameters known to law.

10. It would be apposite in this context to refer to the recent decision of this Court in Writ Petition (C) No. 26 of 1995 (Common Cause, a Registered Society v. Union of India) rendered on September 25, 1996, in which one of us (Kuldip Singh, J.) reiterated the need to act fairly and justly in the matter of grant of largesses, pointing out that any arbitrary distribution of national wealth would violate the law of the land. Mention was made of the judgment in Lucknow Development Authority v. N.K. Gupta, 1994(1) SCC 243, stating that the same approved "misfeasance in public office" as a part of the law of the tort. It was pointed out that public servants become liable in damages for malicious, deliberate or injurious wrong-doing.

11. A reference to Wade's 'Administrative Law' shows that a breach of statutory duty does give rise in public law to liability, which has come to be known as "misfeasance in public office", and which includes malicious abuse of power. This aspect has been dealt at pages 789 et al of 7th Edition. It has been stated that public authorities or officers may be liable in damages for malicious, deliberate or injurious wrong-doing. The Supreme Court of Canada in Ron Carelli v. Duplejais (1959) 16 DLR (2d) 689 awarded damages against the Prime Minister of Quebec personally for directing the cancellation of a restaurant-owner's liquor licence. The Supreme Court of Victoria in Farrington v. Thomson, 1959 VR 280, awarded damages against a licensing inspector and a police officer who had ordered the plaintiff to close his hotel and cease supplying liquor, though they knew they did not possess such a power. Smith J. referred in that case to the statement of Best CJ made in Henly v. Lyme Corpn., (1858) 5 Bing 91 at 107 reading as below:-

"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. The instance of this are so numerous that it would be a waste of time to refer to them."

12. The learned author has then opined that the cases establish that the tort of misfeasance in public offices goes at least to the length of imposing liability on public officer who does an act which to his knowledge

amounts to an abuse of his office.

13. We may also note what has been stated in this regard in "Cases and Materials on Administrative Law" by SH Bailey and others at pages 826 et al of 2nd Edition. The authors have noted the decision rendered in *Bourgoin SA v. Minister of Agriculture, Fishery and Food*, 1985-3 All ER 585, on the subject of misfeasance. In that case damages were claimed against a Minister, which was held permissible. Lord Diplock's observation in *Dunlop v. Woollahar Municipal Council*, 1982 AC 158, that this was "well established" position was noted.

14. From the aforesaid it is clear that the above has been accepted as a part of the law of tort practically all over the world. What is more, in some countries exemplary damages have been awarded for misuse of public power. Reference may be made to *Deshpriya and another v. Municipal Council, Nuwara Eliya & Others*, which is a decision of the Supreme Court of Sri Lanka dated 10.3.1995, noted at pages 115 to 117 of 1996(1) Commonwealth Human Rights Law Digest (CHRD). Therein, aggravated award was ordered where political discrimination was the motive for restricting freedom of expression. The Supreme court of Bahamas in the case of *Tynes v. Barr*, by a decision rendered on 28.3.1994, ordered for exemplary damages for arbitrary, oppressive or unconstitutional action by State Officials. A summary of this decision is reported at pages 117 to 120 of the aforesaid Law Digest. The need for awarding exemplary damages was felt by *Sauyer, J.* because of the arrogant, abusive and outrageous disregard shown by the police for the law. The learned Judge awarded \$40,505 as special damages; \$ 75,000 for assault, battery and false imprisonment; \$ 1,00,000 for malicious prosecution and \$ 40,000 for breach of the plaintiff's constitutional rights. Reference may also be made to the decision of supreme Court of Jamaica in *Samulls v. Attorney General* (noted at pages 120 to 122 of the aforesaid Digest) in which *Reckford, J.* by his decision dated 11.11.1994 awarded exemplary damages for assault, battery and malicious prosecution. The award was quantified at \$ 1,00,000.

15. The world jurisprudence has thus accepted misfeasance in public office as a species of tortious liability and, to prevent misuse, different courts across the sea have been awarding exemplary damages.

16. We are conscious that the aforesaid cases dealt with injury to a third party (following misuse of power) who had sought damages for the loss caused, whereas in the present case there is no injury as such to any third person. Even so, the aforesaid cases have been referred for two purposes. Firstly and primarily to bring home the position in law that misuse of power by a public official is actionable in tort. Secondly, to state that in such cases damages awarded are exemplary. The fact that there is no injury to a third person in the present case is not enough to make the aforesaid principles non-applicable inasmuch as there was injury to the high principle inasmuch as there was injury to the high principle in public law that a public functionary has to use its power for bonafide purpose only and in a transparent manner. Insofar as the aspect of loss is concerned, it deserves to be pointed out that there was loss in present case also; and this was to the State Exchequer resultant upon giving of allotments without calling tender as required by the policy. Needless to say that if tender would have been called, higher revenue would have been earned by the State on giving the allotments. For these reasons, we are of the view that the mere fact that

in the present case there is no injury to a third person and he has not come forward to claim damages, has no sequitur in so far as the tortious liability following misfeasance of public office is concerned.

17. Now, to take care of the illegality, we have to take two steps. First, cancel the allotments. To decide as to who should get the shops/stalls, the Government would first consider whether its policy of 1994 and categorisation made by it need alteration in any way. While undertaking this work, the Government would make such provisions in the policy which are just and fair. After the policy has been framed, the shops/stalls would be allotted as per the policy and by following a procedure having the sanction of law. In case it would be that any of the present allottees would not be the person so selected, he/she shall be asked to vacate the shop/shall by giving three months time. We would require the Government to formulate the policy within two months and thereafter to complete the exercise of allotment within two months. Till then, the present allottees would be allowed to continue.

18. Secondly, Smt. Shiela Kaul, who was prima facie personally responsible for the illegal allotments, has to be asked to show cause as to why damage should not be awarded against her for her alleged misuse of power. So, a notice be issued to her to show cause why she should not be asked to pay such sum as damages, for each of the illegal allotments made by her, as this Court would deem just and proper. The cause would be shown within three weeks of the receipt of this order.

19. The issue relating to the matter of illegal allotments of the aforesaid 52 shops/stalls, stands disposed of accordingly. It may be put up for further orders on 1st November, 1996.

20. Let a copy of this order be served on Smt. Shiela Kaul urgently to enable her to act as ordered in the judgment. Steps in this regard shall be taken by the Registry within three days.