

Before Anil Kshetarpal, J.

SUBHASH KHOBRA—Petitioner

versus

STATE OF HARYANA AND OTHERS—Respondents

CWP No.21006 of 2020

December 16, 2020

Constitution of India, 1950 – Arts. 141 and 226 – Writ petition seeking direction to relax the requirements/norms – Writ of mandamus – When can be issued – Doctrines of stare decisis, per incuriam and sub silentio – Judgments of co-ordinate and Division Benches – when binding – The petitioner approached the Court seeking a direction to the issue ‘No Objection Certificate’ for a petrol pump dealership by relaxing the laid down norms/guidelines, and finally decide his representation – relied upon judgments of co-ordinate and Division Benches of the Court – Held, a writ of mandamus cannot be issued directing the authorities to grant relaxation - A writ petition can be filed when relaxation is refused – Writ of mandamus can be issued when the petitioner establishes his legal and judicially enforceable right and the respondents’ legal duty to perform – The petitioner was found to be not having any such right, and had only the right to command the respondents to take a decision – Further held, the cited judgments of co-ordinate and Division Benches were not binding precedents under Article 141 since neither the question of law was taken up nor decided therein – Reliance was placed on the Hon’ble Supreme Court judgment in Synthetic and Chemicals Limited case (1991) 4 SCC 139 which took a decision not express and not founded on reasons nor it proceeded on consideration of issues and cannot be deemed to be a law declared to have a binding effect – Petition disposed of by directing the committee to take final decision.

Held that, before this Court adverts to the arguments of learned counsel for the petitioner, the fundamental question which arises for consideration is as to whether it is appropriate for the Court to issue a writ of mandamus directing the authorities to relax the norms. The Indian Roads Congress is an Expert Body. It has laid down certain guidelines to be followed by the authorities. The Court does not have more technical knowledge than the members of the Indian Roads Congress. Still further, a writ of mandamus can be issued when the

petitioner establishes that he has a legal and judicially enforceable right and the respondents are under a legal duty to perform. In the present case, the petitioner, in the considered view of this Court, does not have a right which is judicially enforceable. No doubt, the petitioner has only a right to command the respondents to take a decision thereon.

(Para 9)

Further held that, that it is, thus, apparent that in none of the case, the Court had examined the issue as to whether a writ of mandamus can be issued directing the respondents to give relaxation. A writ petition can be filed if the relaxation is refused. However, in the considered view of this Court, a writ of mandamus cannot be issued directing the authorities to grant relaxation. It is settled that such directions cannot possibly be issued so as to compel an authority to exercise a power which has substantial element of discretion.

(Para 15)

Further held that, the question which this Court is called upon to answer is whether the judgments passed by the Division Benches as also by the Co- ordinate Benches are binding precedents under Article 141 of the Constitution of India. On careful reading of the judgments referred to above, it is apparent that neither the question was taken up nor decided. On this aspect, there are two doctrines. One is per incuriam, whereas second is sub silentio. These have been beautifully explained by the Supreme Court in the **State of U.P. and Others v. Synthetic and Chemicals Limited and Others (1991) 4 SCC 139**.

(Para 16)

Further held that, the power to relax the guidelines is only an enabling power which does not authorize anyone to seek the same as a matter of right. It also does not cast corresponding duty on the authority to relax mandatorily. It, at the most, grants discretion to the competent authority. In the considered view of this Court, the guidelines are for public good and safety. These have been provided to avoid major tragedy in case any accident at the fuel station or railway happens. In these circumstances, this Court does not find it appropriate to issue a writ of mandamus.

(Para 17)

Kartik Gupta, Advocate
for the petitioner(s).

Ashish Yadav, A.Ad.G., Haryana
for respondents No. 1 to 5.

ANIL KSHETARPAL, J.

(1) The petitioner has filed this writ petition under Article 226/227 of the Constitution of India seeking the following substantive reliefs:-

“a) Issue an appropriate writ, order or direction in the nature of Mandamus praying that directions be issued to respondent Nos. 1 to 5 to issue “No Objection Certificate” qua Kisan Seva Kendra Retail Outlet Petrol Pump Dealership site situated at Village Balianwala on MDR-1 1, Block-Tohana, District Fatehabad in favour of the petitioner, after affording relaxation in the Indian Roads Congress Guidelines, 2009 (Annexure P9) as the same have been held to be merely directive and not mandatory in nature by this Hon’ble Court various cases (Annexure P-17);

b) further praying that directions be issued to respondent Nos. 1 to 5 to act and take final decision upon the representations (Annexure P-14) submitted by the petitioner within a time bound manner after affording opportunity of personal hearing to the petitioner, as considerable period has elapsed and till date no steps have been taken by respondents to issue the No Objection Certificate qua the proposed retail outlet site in favour of the petitioner;

c) further praying that dealership of the petitioner regarding retail outlet be not cancelled or withdrawn and the process of further allotment qua the Retail Outlet Dealership site in question be not undertaken during the pendency of the present writ petition before this Hon’ble Court”.

(2) In the considered view of this Court, the question which arises for adjudication is “whether it would be appropriate to issue a writ of mandamus to the State Government to relax the requirements/norms which directory circulated by an expert body to facilitate setting up of fuel stations”?

(3) Some facts are required to be noticed. Pursuant to a public notice, the petitioner claims to have applied for allotment of a fuel station (Kissan Seva Kendra Dealership) for MS/HSD at village Balianwala under the category Corpus Fund Site. It is pleaded that an applicant under such category is required to provide the land and super structure, whereas the pump, tank and automation are provided by the Indian Oil Corporation. The petitioner claims that he is owner of

2 kanals 8.5 marlas land and hence, applied under Scheduled Caste category. In the draw of lots held on 19.06.2019, he was declared successful. He is stated to have deposited initial scrutiny fee. The Land Evaluation Committee of the oil company visited the site and found it to be suitable. Thereafter, another committee deputed for field verification of credentials of the petitioner also did not find anything adverse against the petitioner. Thus, a letter of intent was issued on 22.09.2019. As per clause 10 of the letter of intent, the petitioner was required to assist the oil company to get the requisite “No Objection Certificate” from the appropriate authority. In clause 17, it was specified that this letter is merely a letter of intent and cannot be construed as a firm offer.

(4) Various applications, for “No Objection Certificate” were submitted to different departments/authorities including Public Works Department (B&R). The Executive Engineer found that the petitioner does not fulfill the requirements of clause 4.7 of the guidelines for access, location and layout of road side fuel stations published by Indian Roads Congress in 2009 reprinted in the year 2012 which provides that the fuel station shall not be located within distance of 1000 meters from any barrier and railway level crossing. It reads as under:

“4.7 The fuel station shall not be located within a distance of 1000m from any barrier including that of toll plaza and railway level crossing. No check barrier/toll plaza should be erected within 1000m of a fuel station. However, if such barriers are located on service roads only and are separated from the main carriageway, then this requirement shall not apply. Fuel Stations should be located at a minimum distance of 200 m and 500 m from the start of an approach road of a Road Over Bridge (ROB) and the start of a grade separator or a ramp respectively”.

(5) It is pleaded that the since the Government has the power to relax, therefore, the petitioner’s case was forwarded to the Committee. On 25.06.2020, a meeting was held and the matter was submitted to the competent Committee under the Chairmanship of Special Secretary. The Executive Engineer requested for convening the meeting. It has been pleaded that no action thereon has been taken. It would be noted here that the Committee on visit of the site found that the site being offered is at a distance of 695 meters from the railway crossing.

(6) In these facts, the petitioner prays for issuance of the writ in the nature of mandamus.

(7) This Court has heard learned counsel for the petitioner and the respondents who have appeared pursuant to the supply of an advance copy of the writ petition.

(8) Learned counsel for the petitioner contends that the guidelines issued by the Indian Roads Congress are directory and therefore, the petitioner is entitled to the relaxation as matter of right. He submits that in various cases such relaxation has already been granted. He, in support, relies upon the judgments in ***“Palwinder Singh Oberoi versus Union of India and Others”*** (Civil Writ Petition No. 14806 of 2011, decided on 16.02.2016) (Annexure P17), ***“Seema Makkar versus Union of India and Others”*** (Civil Writ Petition No. 27251 of 2015, decided on 03.02.2017) and ***Durga Dass versus Union of India and Others*** (Civil Writ Petition No. 11689 of 2012, decided on 03.12.2013).

(9) Before this Court adverts to the arguments of learned counsel for the petitioner, the fundamental question which arises for consideration is as to whether it is appropriate for the Court to issue a writ of mandamus directing the authorities to relax the norms. The Indian Roads Congress is an Expert Body. It has laid down certain guidelines to be followed by the authorities. The Court does not have more technical knowledge than the members of the Indian Roads Congress. Still further, a writ of mandamus can be issued when the petitioner establishes that he has a legal and judicially enforceable right and the respondents are under a legal duty to perform. In the present case, the petitioner, in the considered view of this Court, does not have a right which is judicially enforceable. No doubt, the petitioner has only a right to command the respondents to take a decision thereon.

(10) The first judgment relied upon is in ***Palwinder Singh Oberoi*** (*supra*). By the aforesaid judgments two writ petitions were disposed of. The petitioners in both the writ petitions challenged “No Objection Certificate” issued by the District Magistrate for establishing the retail outlets. The grievance of the petitioners was that the retail outlets, for which “No Objection Certificate” has been issued, does not fulfill the norms laid down. In one writ petition, the Court found that there is no violation and as the fuel station sought to be established fulfills the norms, whereas in the second case it was held that the guidelines issued by the Indian Roads Congress are directory.

(11) It would be noted here that the judgment in *Palwinder Singh Oberoi* (*supra*), refers to a judgment of the Division Bench in *Environment Society of India* versus *Administrator, Chandigarh Administration*¹. This Court has gone through the aforesaid judgment. In that case, the action of Chandigarh Administration in allotting land to the Bharat Petroleum Corporation for setting up a fuel station in Sector 21-C, Chandigarh was challenged. The Division Bench, after considering various aspects, held that the recommendations of minimum distance of 300 meters between two fuel stations is only a recommendation and therefore, directory.

(12) Learned counsel for the petitioner has further relied upon an order passed in *Seema Makkar* versus *Union of India and Others* (*supra*). In the aforesaid case, the petitioner had challenged letter dated 19.08.2015 refusing to grant “No Objection Certificate” to set up a fuel station. While relying upon the decision in Letters Patent Appeal Nos. 1573 and 1574 of 2014 decided on 22.09.2014, the Court held that the authorities would reconsider the matter.

(13) This Court has also carefully examined the judgment of the Division Bench dated 22.09.2014. In the aforesaid judgment, the Division Bench, after noticing that the learned Single Judge had held that the guidelines with regard to the distance between the existing and proposed retail outlets and also the distance from the road intersection etc., are directory refused to interfere. The Letters Patent Appeals were filed against the judgment passed in *Charan Dass* versus *Union of India and Others (Civil Writ Petition No. 19287 of 2011, decided on 22.10.2013)*. In that writ petition also, the petitioner had also challenged the order dated 06.09.2011 denying “No Objection Certificate”. In fact in the aforesaid judgment, the Court noticed the judgment passed in the previous round i.e. in Civil Writ Petition No. 6239 of 2010 allowed on 21.07.2011. The learned Single Judge found that the Court while passing order on 21.07.2011 allowed the writ petition and as a matter of grace only, the authorities were directed to reconsider the matter. In these circumstances, the writ petition was allowed.

(14) The next judgment relied upon by the learned counsel for the petitioner is in *Durga Dass* versus *Union of India and Others* (*supra*). In that case also, the petitioner was aggrieved against the order dated 03.05.2012 refusing to issue “No Objection Certificate”. While

¹ AIR 1998 Punjab and Haryana 94

relying upon the judgment in *Charan Dass* versus *Union of India and Others* (*supra*) the writ petition was allowed, particularly when the learned counsel appearing for the respondents did not oppose the writ petition.

(15) It is, thus, apparent that in none of the case, the Court had examined the issue as to whether a writ of mandamus can be issued directing the respondents to give relaxation. A writ petition can be filed if the relaxation is refused. However, in the considered view of this Court, a writ of mandamus cannot be issued directing the authorities to grant relaxation. It is settled that such directions cannot possibly be issued so as to compel an authority to exercise a power which has substantial element of discretion.

(16) The question which this Court is called upon to answer is whether the judgments passed by the Division Benches as also by the Co-ordinate Benches are binding precedents under Article 141 of the Constitution of India. On careful reading of the judgments referred to above, it is apparent that neither the question was taken up nor decided. On this aspect, there are two doctrines. One is *per incuriam*, whereas second is *sub silentio*. These have been beautifully explained by the Supreme Court in the *State of U.P. and Others* versus *Synthetic and Chemicals Limited and Others*². Paras 40 and 41 explain these doctrines, hence, extracted as under:

“40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratum.' English Courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratum of a statute or other binding authority'. (1944 IKB 718 *Young v. Bristol Aeroplane Ltd.* Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In *Jaisri Sahu v. Rajdewan Dubey* (1962) 2 SCR 558 this Court while pointing out the procedure to be followed when conflicting decisions are placed before a Bench extracted a passage from Halsbury Laws of England incorporating one of the exceptions when the decision of an Appellate Court is not binding.

² (1991) 4 SCC 139

41. Does this principle extend and apply to a conclusion of law, Which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. A decision passed sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular' point of law involved in the decision is not perceived by the Court or present to its mind' (Salmond on Jurisprudence 12th Edition). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd. (1941) IKB 675, 677 the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur (1989) 1 SCC 101. The Bench held that, 'precedents sub-silentio and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decedendi. In Shama Rao v. State of Pondicherry, AIR 1967 SC 1680 it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law”.

(17) The power to relax the guidelines is only an enabling power which does not authorize anyone to seek the same as a matter of right. It also does not cast corresponding duty on the authority to relax mandatorily. It, at the most, grants discretion to the competent authority. In the considered view of this Court, the guidelines are for

public good and safety. These have been provided to avoid major tragedy in case any accident at the fuel station or railway happens. In these circumstances, this Court does not find it appropriate to issue a writ of mandamus.

(18) However, the petitioner has, in the alternate, prayed for issuing directions to respondent No.1 to 5 to take a final decision on the representation. Keeping in view the aforesaid prayer, the writ petition is disposed of by directing the Committee to take final decision on a question whether the petitioner can be granted relaxation or not. It may noted here that this Court has not returned any finding on the merits of the case and the members of the Committee shall be free to take decision independently in accordance with law.

Tribhuvan Dahiya