N. K. S.

FULL BENCH

Before D. S. Tewatia, K. S. Tiwana and S. S. Sodhi, JJ.

JODH SINGH AND OTHERS,—*Petitioners.*

versus

THE JULLUNDUR IMPROVEMENT TRUST, JULLUNDUR AND OTHERS,—*Respondents.*

Civil Writ Petition No. 2131 *of* 1976

April 27, 1984.

Punjab Town Improvement Act (IV of 1922)—*Sections* 23, 36, 38, 40, 42 *and* 101—*Trust preparing a street scheme—Petitioners filing objections in response to a notice under section* 38—*Objections neither considered by the Trust nor forwarded to the State Government at the time of sanction—Government sanctioning the scheme in ignorance of the said fact and issuing notification under section* 42(1)—*Issuance of the notification—Whether bars a challenge to the validity of the scheme or the governmental sanction thereto—Expressions 'conclusive evidence' and 'duly framed and sanctioned' in section* 42(2)—*Import of—Provisions of sections* 36, 38, *and* 41(1) *and* (3)—*Whether mandatory—Such provisions whether in view of section* 42(2) *could be said to have been complied with although not actually complied with.*

Held, that when existence of 'A' fact is said to be the conclusive evidence of the existence of 'B' fact then what is required to be proved is the existence of 'A' fact. Once 'A' fact is established to exist then 'B' fact shall be conclusively deemed to exist and no enquiry shall be permitted in regard to the existence or non-existence of the 'B' fact. In substance, there is no difference between 'conclusive evidence' and 'conclusive proof'. Statutes may use the expression 'conclusive proof' where the object is to make a fact non-justiciable. But the legislature may use some other expression such as 'conclusive evidence' for achieving the same result. There is, thus, no difference between the effect of the expression 'conclusive evidence' from that of 'conclusive proof', the aim of both being to give finality to the establishment of the existence of a fact from the proof of another.

(Para 11)

Held, that all provisions preceding the provisions of section 42 of the Punjab Town Improvement Act, 1922 fall within the sweep of the provisions of sub-section (2) of section 42. First the necessity for a scheme is conceived by the Trust either *suo motu* or otherwise, the Trust then takes a policy decision that a given scheme be framed, then the technical department draws up the technical contours of the scheme and if the scheme involves acquisition of land then it would so provide. So far the matter remains confined to the Trust. Section 36 envisages involvement of the inhabitants of the given town or locality. So the scheme is brought to their notice by publishing a notice in terms of section 36 and any inhabitant or affected person would then, within the prescribed period, be competent to point out any defect in the scheme or that such a scheme is not necessary at all. The expression 'framed' used in section 36 has been used to indicate that the scheme so drawn up under the preceding provisions and does not refer to a scheme finally framed by a Trust under the Act, because the process of the framing of the scheme by the Trust shall not be complete till such time the scheme is brought to the notice of the inhabitants in terms of section 36 and if the scheme involves acquisition of land, then a compliance is made with the provisions of section 38 and objections, if any, raised to the scheme or to the acquisition are heard by the Trust under sub-section (1) of section 40 of the Act. If the Trust, after hearing the objections, adopts the proposed scheme as it is, then it is this scheme that is to be treated as a scheme framed under the Act and if the original scheme is modified as a result of the acceptance of the objections and representations made under sections 36, 37 and 38 of the Act, then this modified scheme shall be viewed as the scheme framed under this Act. The process of sanctioning of the scheme starts with the submission of an application by the Trust to the State Government and the actual consideration by the State Government of the scheme, which would, by necessary implication, involve the consideration of the fact as to whether the scheme had

been framed in accordance with the relevant provisions of the Act. The provisions of section 101 of the Act are general provisions providing for the validation of the Act and proceedings taken under the Act which would cure any irregularity and defect where the same are covered by clause (d), if no substantial injustice had resulted from the given failure to serve a notice or if the given matter falls under clause (e) if the omission, defect or irregularity does not affect the merits of the given case. The provision of sub-section (2) of section 42, on the other hand, is a specific provision dealing with defects and irregularities in the framing and sanctioning of the scheme and one of the well known principles of statutory construction is that a provision providing for a specific matter would exclude the application to that specific matter of a general provision.

(Paras 16, 17, 18 and 19).

Held, that a look at the provisions of sections 36, 38 and sub-section (1) of section 40 would reveal that the said provision besides creating a public duty of publication of the notice under section 36 and serving a notice under section 38 upon the owner/occupier of the immovable property proposed to be acquired and consideration of objection under sub-section (1) of section 40, also conferred rights on the inhabitants to file objections to the scheme and to the acquisition of their property and also right of personal hearing in support of their objection. Since these provisions do not merely provide for the framing of the scheme simpliciter but also provide for acquisition of property to enable the execution of the scheme and since no person can be deprived of his property without being heard and one cannot ask for hearing unless he knows that he is being deprived of his property, so, by necessary implication a notice of the intention of the authorities of acquiring a given person's property is impliedly necessary to enable him to bring to the notice of the concerned authority his objections against the acquisition of his property. Hence such provisions as provide for notice, raising of objections and personal hearing in support of the objection would be mandatory in character. Thus the provisions of sectoin 36 in so far as it provides for the publication of the notice and not for the frequency thereof, is mandatory in character, because the scheme is prepared for the convenience and welfare of the inhabitants. They are vitally interested in knowing as to what the scheme is. Therefore, the publication of the scheme to bring the same to their notice is vitally essential to enable them to bring their view point regarding the scheme to the notice of the concerned authorities. Equally essential and mandatory is the requirement of notice of the proposed scheme of acquisition to the landowners and occupiers of the land and building which are proposed to be acquired so that they may put in their objections. And so also is the case with regard to their right of hearing in support of their objection, for no person can be deprived of his property without affording him an opportunity of hearing, unless the legislature expressly takes away that right

of hearing. The provisions of sub-section (3) of section 40 of the Act merely intended to make the general public aware of the fact that the scheme had not been given up and, in fact, was being submitted to the State Government for sanction. This provision can certainly not be considered mandatory, for it thereby conferred no right on anybody—it merely placed an obligation upon the Trust.

(Paras 29, 30, 35, 36 and 37)

Held, that there is no scope for any doubt that so long it is held that the notification under sub-section (1) of section 42 of the Act was not vitiated the effect of the provisions of sub-section (2) of section 42 can be no less than this that after the issuance of notification under sub-section (1) of section 42 of the Act, the Court would take it that there has been full compliance with the relevant provisions pertaining to the framing and sanction of the scheme with only one exception and that is when the colourable exercise of power is established to the satisfaction of the Court. Colourable exercise of power in relation to the provisions pertaining to the framing and sanction of the scheme would arise where, for instance, there had not been even substantial compliance of provisions that are considered directory nor there had been requisite compliance of the provisions which are considered mandatory. An example of total non-compliance would be a case where say there is no publication whatever as required by section 36, or no notice is issued as required by section 38, or no consideration of the objections in terms of sub-section (1) of section 40, and even no publication of the factum that the scheme was being submitted for sanction to the State Government and the State Government sanctions the scheme. In a case like this, the provisions of sub-section (2) of section 42 would not save the scheme from being quashed. The legislature had not intended the provisions of sub-section (2) of section 42 to cover non-compliance with the relevant provisions of the Act and shield the colourable exercise of the power by the concerned authorities from scrutiny of the Court. In a case where there has been non-compliance on the part of the Trust of the relevant provisions of the Act and the Government gives its sanction, the scheme would clearly involve legal *mala fides* and thus amount to a colourable exercise of power which would vitiate both the action of framing the scheme and of sanctioning the same and so also the consequential action of modifying the said sanction under sub-section (1) of section 42 of the Act.

(Para 52)

Hari Singh and others *vs.* The State of Punjab and another, 1982 P.L.J. 149.

Naurata Ram *vs.* State of Punjab, 1975 P.L.J. 185.

Harcharan Singh *vs.* Shashpal Singh, 1966 Crl. L.J. 352.

OVERRULED.

The Hon'ble Mr. Justice S. S. Sodhi placed the case before the Hon'ble the Chief Justice on 20th April, 1982 for necessary orders as the case involved an important question of law. The Full Bench consisting of the Hon'ble Mr. Justice D. S. Tewatia, The Hon'ble Mr. Justice K. S. Tiwana and the Hon'ble Mr. Justice S. S. Sodhi decided the question involved on April 27' 1984 and remitted the case to be placed before the appropriate Bench for decision on merits in light of the law laid down in their judgment.

PETITION under Articles 226/227 of the Constitution of India praying that a writ of certiorari/mandamus *or any other suitable writ or direction or order be issued directing the Respondents to:—*

(*i*) *To produce complete record of the case;*

(*ii*) *That the Notice Annexure P-5 and Notification Annexure P-11 be quashed;*

(*iii*) *That this Hon'ble Court may be pleased to exempt the petitioners from filing certified copies of Annexures P-1 to P-11;*

(*iv*) *That Hon'ble Court may be further pleased to stay the operation of impugned Notice Annexure P-5 and Notification Annexure P-11 and restrain the Respondents from proceeding with the acquisition of the petitioners land and shops; and they be further restrained from dispossessing the property in dispute.*

AND

(*v*) *That the costs of this petition be also awarded to the petitioners.*

Gurcharan Singh and G. S. Amar, Advocates, *for the Petitioner.*

S. P. Jain and Sarita Gupta, Advocates, *for Respondent No. 1.*

H. S. Riar, D.A.G. (Punjab), *for Respondent No. 2.*

JUDGMENT

D. S. Tewatia, J.

(1) This petition is before us on a reference made by one of us (Sodhi, J.) raising a significant question of law as to whether issuance of a notification under sub-section (1) of section 42 of the Punjab Town Improvement Act, 1922, (hereinafter referred to as the Act) would bar a challenge to the validity of the scheme or the governmental sanction thereto for any reason including the reason that the scheme had been framed and sanctioned without compliance of the mandatory provisions, particularly those of sections 36, 38 and sub-section (1) of section 40 of the Act.

(2) Though in view of the pristinely legalistic nature of the question posed, it would hardly be necessary to bring within the focus the facts of this case, yet we feel that the real import of the legal question can only be viewed in correct perspective against the background of the facts. Hence these few facts:

(3) The Trust prepared a street scheme the validity whereof is under attack, relating to an area measuring approximately 2.5 Acres for the Bastian Road near Adda Guzan, Jullundur. Land measuring 1 Kanal 10 Marlas belonging to the petitioners on which 8 shops have been constructed by them has been included in the said scheme. Originally, a street scheme in respect of that very land had been prepared by the Trust in 1969, which, however, was dropped in 1971. The petitioners thereafter sought permission to construct 8 shops on their said land and in that regard submitted their plan of construction to the Municipal Committee, Jullundur on 3rd May, 1972. Their application was forwarded by the Municipal Committee to the Trust, the Chairman whereof returned the papers to the Municipal Committee on 25th May, 1972 with the remarks, "Returned. Since the site does not fall in any of the Trust Schemes, the plan may be dealt with in accordance with the bye-laws." On receipt on the said report the Municpial Committee,—*vide* its resolution, dated 31st January, 1973, granted permission to the petitioners to construct 8 shops in question and thereafter petitioners constructed those shops.

(4) The respondent-Trust on 11th March, 1974 adopted policy resolution for the framing of the street scheme in question and

issued notice under section 36 of the Act on 20th March, 1974. In that notice reference was to the map prepared in 1968 for the scheme framed in 1969. That map obviously did not reflect any changes that had taken place during the intervening period from 1968 to 1974.

(5) Later, a notice under section 38 of the Act was issued on 8th April, 1974. The petitioners responding to the said notice submitted objections on April 10, 1974. In the return filed on behalf of the Trust it has been admitted that due to over-sight, the petitioners could not be called for hearing along with other objectors as the objections filed by the petitioners had inadvertently got placed in some other file and that for the same reason their objections were neither considered by the Trust nor forwarded to the State Government along with the summary of the objections submitted at the time of sanction for the said scheme.

(6) It was contended on behalf of the Trust that the infirmity, if any, stemming from the non-consideration by the Trust of the objections filed by the petitioners and sanction of the scheme by the Government in ignorance of the said fact stood cured by the provisions of sub-section (2) of section 42 of the Act. Support for the above contention was sought from Supreme Court decision in *Laxmi Chand* v. *Indore Improvement Trust, Indore & Ors.* (1), Division Bench decision rendered in *Bhupindra Flour Mills* v. *The State of Punjab & another* (2) and *Harjinder Kaur and another* v. *State of Punjab and another* (3). On behalf of the petitioners contention advanced on behalf of Trust was considered to be untenable and they sought support for the above submission from decision rendered by a Single Judge in *Sarwan Singh and Others* v. *The State of Punjab and others,* (4).

(7) Chapter IV of the Act identifies various types of schemes, the circumstance in which these could be taken up by the Trust, the matter for which the given scheme, or combination of schemes, could provide for, the mode and manner of framing of the scheme by the Trust and the ultimate sanctioning of the same by the Government. Section 22 of the Act provides for a general improvement or rebuilding scheme; section 23 provides for street schemes

(1) A.I.R. 1975 S.C. 1303.
(2) C.W. 882/77 decided on 9th March, 1977.
(3) 1983 R.L.R. 131.
(4) C.W. 6008/75 decided on 2nd February, 1982.

and deferred street schemes; section 24 provides for development and expansion schemes; section 25 provides for housing accommodation scheme; section 26 provides for rehousing accommodation scheme; section 27 provides for rehousing of displaced resident house-owners; section 28 enables the Trust to adopt a composite scheme combining the feature of one or more of the aforementioned schemes and additionally to provide for the acquisition under the Land Acquisition Act, 1894; as modified by the Act; section 33 provides for the initiation of the scheme upon an official representation by the municipal committee or otherwise; section 34 provides for the consideration of such official representation; section 35 provides for matters to be considered when framing improvement schemes; section 36 provides for preparation, publication and transmission of notice as to improvement schemes and supply of documents to applicants and for receiving of objections thereto within the period prescribed therefor in the notification; section 37 deals with transmission to Trust of representation by committee as to improvement scheme; section 38 provides for issuance of notice of proposed acquisition of land to the owner/occupier of any immovable property which is proposed to be acquired and for filing of objections by them within a period of sixty days from the service of the notice; section 40 provides (i) for the consideration of the objections raised under sections 36, 37 and 38 in respect of any scheme and then either to abandon the scheme or apply to the State Government to sanction it in its original form or in modified form; (ii) for the furnishing the State Government along with its application with certain material to enable the Government to satisfy itself that the scheme had been duly framed by the Trust; and (iii) for the publishing of a notice for two consecutive weeks in the Official Gazette or in a newspaper or papers to the effect that the scheme had been submitted to the Government for sanction; section 41 enables the Government either to sanction the scheme with or without modifications or reject it; sub-section (1) of section 42 provides for the notification of its sanction of a given scheme; sub-section (2) of section 42 provides that a notification under sub-section (1) of section 42 in respect of any scheme shall be conclusive evidence that the scheme had been duly framed and sanctioned; Clause (b) of section 59 refers to the provisions of the Land Acquisition Act as modified by the Schedule to the Act; and clause 2 of the Schedule envisages that notification under section 4 and declaration under section 6 of the Land Acquisition Act would be replaced by notification under sections 36 and 42 of the Act.

(8) The relevant provisions require mentioning at this stage.

"28. (1) A scheme under this Act may combine one or more types of scheme or any special features thereof.

(2) A scheme under this Act may provide for all or any of the following matters:—

(i) The acquisition under the Land Acquisition Act, 1894, as modified by this Act, or the abandonment of such acquisition under sections 56 and 57 of this Act of any land or any interest in land necessary for or affected by the execution of the scheme, or adjoining any street, thoroughfare open space to be improved or formed under the scheme.

* * * *"

36. (1) When a scheme under this Act has been framed, the trust shall prepare a notice stating:—

(i) the fact that the scheme has been framed,

(ii) the boundaries of the locality comprised in the scheme, and

(iii) the place at which details of the scheme including a statement of the land proposed to be acquired and a general map of the locality comprised in the scheme may be inspected at reasonable hours.

(2) The trust shall:—

(a) notwithstanding anything contained in section 78 cause the said notice to be published weekly for three consecutive weeks in the Official Gazette and in a newspaper or newspapers with a statement of the period within which objections will be received, and

(b) send a copy of the notice to the president of the municipal committee and to the medical officer of health.

(3) The chairman shall cause copies of all documents referred to in clause (iii) of sub-section (1) to be delivered to any applicant on payment of such fees as may be prescribed by rule under section 74."

"38. (1) During the thirty days next following the first day on which any notice is published under section 36 in respect of any scheme under this Act the trust shall serve a notice on:—

(i) every person whom the trust has reason to believe after due enquiry to be the owner of any immovable property which it is proposed to acquire in executing the scheme,

(ii) the occupier (who need not be named) of such premises as the first proposes to acquire in executing the scheme.

(2) Such notice shall:—

(a) state that the trust proposes to acquire such property for the purposes of carrying out a scheme under this Act, and

(b) require such person, if he objects to such acquisition, to state his reasons in writing within a period of sixty days from the service of the notice.

(3) Every such notice shall be signed by, or by the order of, the chairman."

"40. (1) After the expiry of the periods respectively prescribed under clause (a) of sub-section (2) of section 36, by section 37 and by clause (b) of sub-section (2) of section 38, in respect of any scheme under this Act, the trust shall consider any objection, or representation received thereunder, and after hearing all persons or their representatives making any such objection or representation, who may desire to be heard, the trust may either abandon the scheme or apply to the State Government for sanction to the scheme with such modifications (if any) as the trust may deem necessary:

Provided that no scheme shall be abandoned by the trust without the prior approval of the State Government.

(2) Every application submitted under sub-section (1) shall be accompanied by:—

(i) complete plans and details of the scheme and an estimate of the cost of executing it;

(ii) a statement of the reasons for modifications (if any) made in the scheme as originally framed;

(iii) a statement of objections (if any) received under section 36;

(iv) the representation (if any) received under section 37;

(v) a list of the names of all persons (if any) who have objected under clause (b) of sub-section (2) of section 38, to the proposed acquisition of their property and a statement of the reasons given for such objection; and

(vi) a statement of the arrangements made or proposed by the trust for the re-housing of persons who are likely to be displaced by execution of the scheme and for whose re-housing provision is required.

(3) When any application has been submitted to the State Government under sub-section (1) the trust shall cause notice of the fact to be published for two consecutive weeks in the Official Gazette and in a newspaper or newspapers."

"42. (1) The State Government shall notify the sanction of every scheme under this Act, and the trust shall forthwith proceed to execute such scheme, provided that it is not a deferred street scheme, development scheme, or expansion scheme and provided further that the requirements of section 27 have been fulfilled.

(2) A notification under sub-section (1) in respect of any scheme shall be conclusive evidence that the scheme has been duly framed and sanctioned."

"59. For the purpose of acquiring land under the Land Acquisition Act, 1894, for the trust:—

(a) * * * *

(b) the said Act shall be subject to the further modifications indicated in the Schedule to this Act.

* * * * *

clause 2 of the Schedule (1) The first publication of a notice of any improvement scheme under section 36 of this Act shall be substituted for and have the same effect as publication in the Official Gazette and in the locality of a notification under sub-section (1) of section 4 of the said Act, except where a declaration under section 4 or section 6 of the said Act has previously been made and is still in force.

(2) Subject to the provisions of clauses 10 and 11 of this Schedule, the issue of a notice under sub-section (1) of section 32 in the case of land acquired under that sub-section, and in any other case the publication of a notification under section 42 shall be substituted for and have the same effect as a declaration by the State Government under section 6 of the said Act, unless a declaration under the last mentioned section has previously been made and is still in force.

(9) Sub-section (2) of section 42 of the Act declares that the publication of notification under section 42(1) would be conclusive evidence of the fact that the said scheme had been duly framed and duly sanctioned.

(10) The first aspect that one has to be clear about is regarding the import of the expression "conclusive evidence" and secondly as to what is the sweep of the expression 'duly framed and sanctioned'. Their Lordships of the Supreme Court had an occasion to examine the import of expression 'conclusive evidence' as used in section 6 (3) of the Land Acquisition Act in *Smt. Somawanti and others* v. *The State of Punjab* (5), which provisions reads as under:—

"6(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a Company, as the case may be; and after making such declaration, the appropriate Government may acquire the land in manner hereinafter appearing."

(5) A.I.R. 1963 S.C. 151.

(11) Their Lordships were considering the effect of the expression "conclusive evidence' in the aforesaid provision in the context of a challenge posed to the notification under section 4 on the ground that the land was not needed for a public purpose and the petitioner proposed to establish the said fact. Their Lordhsips first considered as to how a given fact is proved and then proceeded to enunciate that when existence of a fact is said to be the conclusive evidence of the existence of the 'B' fact then what is required to be proved is the existence of 'A' fact. Once 'A' fact is established to exist then 'B' fact shall be conclusively deemed to exist and no enquiry shall be permitted in regard to the existence of non-existence of the 'B' fact. The following observations of their Lordships are illuminating in this regard:—

> "The object of adducing evidence is to prove a fact. The Evidence Act deals with the question as to what kind of evidence is permissible to be adduced for that purpose and states in section 3 when a fact is said to be proved. That section reads thus:
>
> 'Evidence' means and includes—
>
> (1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
>
> (2) all documents produced for the inspection of the Court; such documents are called documentary evidence.
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> A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists.' Since evidence means and includes all statements which the Court permits or requires to be made, when the law says that a particular kind of evidence would be conclusive as to the existence of a particular fact it implies that that fact can be proved either by that evidence or by some other evidence which the Court permits or requires to be advanced. Where such

other evidence is adduced it would be open to the Court to consider whether, upon that evidence, fact exists or not. Where, on the other hand, evidence which is made conclusive is adduced, the Court has no option but to hold that the fact exists. If that were not so, it would be meaningless to call a particular piece of evidence as conclusive evidence. Once the law says that certain evidence is conclusive it shuts out any other evidence which would detract from the conclusiveness of that evidence. In substance, therefore, there is no difference between conclusive evidence and conclusive proof. Statutes may use the expression 'conclusive proof' where the object is to make a fact non-justiciable. But the legislature may use some other expression such as 'conclusive evidence' for achieving the same result. There is thus no difference between the effect of the expression 'conclusive evidence' from that of 'conclusive proof', the aim of both being to give finality to the establishment of the existence of a fact from the proof of another."

(12) Mr. Sibal, learned counsel, who primarily argued the case on behalf of the petitioners, argued that the provisions of sub-section (2) of section 42 of the Act, be read down as referring to the framing and sanctioning of the scheme by excluding from its ambit such provisions as envisaged the publication of the scheme, acquisition of the land for the implementation of the scheme, the sections providing for the notice to the person whose land is proposed to be acquired, the hearing of their objections regarding the scheme or against the acquisition of his land, and the provision which deals with the publication of a notice of the factum of the scheme having been forwarded to the State Government for sanction. In other words, the contention of the learned counsel boils down to this that the provisions of sections 36, 38 and sub-sections (1) and (3) of section 40 of the Act are not covered within the sweep of the provisions of sub-section (2) of section 42 and, therefore, if there occurs non-compliance with the said provisions, then despite of notification under section (1) of section 42 sanctioning the scheme, the Court would be entitled to inquire into the grievance regarding the non-compliance with the provisions of sections 36, 38 and sub-sections (1) and (3) of section 40.

(13) Mr. Sibal sought to buttress his argument by referring to the provisions of section 36 and clauses (d) and (e) of section 101 of the Act. He argued that the expression 'when a scheme under the Act has been framed' occurring in section 36 indicated that framing of scheme ended by the time it reached the stage of section 36 and so when sub-section (2) of section 42 refers to the duly framing of the scheme, it refers to the due compliance of the provisions preceding the provisions of section 36 of Chapter IV of the Act. Mr. Sibal also canvassed that provisions of section 101 too were enacted to cure irregularities and illegalities and provisions of clauses (d) and (e) of section 101 were intended to cure the irregularities resulting from non-compliance with the provisions of section 36, 38 and 40 (1) and (3).

(14) Mr. Sibal contended that if sub-section (2) of section 42 had been enacted as a cure—all of the irregularities arising out of non-compliance with the provisions of Chapter IV of the Act preceding the provisions of section 42 (1), then there was no necessity of providing for the same in clauses (d) and (e) of section 101.

(15) In my opinion, all provisions preceding the provisions of section 42 falls within the sweep of the provisions of sub-section (2) of section 42.

(16) The ball starts rolling somewhat like this: First the necessity for a scheme is conceived by the Trust either *suo motu* or otherwise, the Trust then takes a policy decision that a given scheme be framed, then the technical department drawns up the technical contoun of the scheme and if the scheme involves acquisition of land then it would so provide. So far the matter remains confined to the Trust. Section 36 envisages involvement of the inhabitants of the given town or locality. So the scheme is brought to their notice by publishing a notice in terms of section 36 and any inhabitant or affected person would then, within the prescribed period, be competent to point out any defect in the scheme or that such a scheme is not necessary at all. The expression 'framed' used in section 36 has been used to indicate that the scheme so drawn up under the preceding provisions and does not refer to a scheme finally framed by a Trust under the Act, because the process of the framing of the scheme by the Trust shall not be complete till such time the scheme is brought to the notice of the inhabitants in terms of section 36 and if the scheme involves acquisition of land, then a compliance is made

with the provisions of section 38 and objections, if any, raised to the scheme or to the acuqisition are heard by the Trust under sub-section (1) of section 40 of the Act. If the Trust, after hearing the objections, adopts the proposed scheme as it is, then it is this scheme that it is to be treated as a scheme framed under the Act and if the original scheme is modified as a result of the acceptance of the objections and representations made under sections 36, 37 and 38 of the Act, then this modified scheme shall be viewed as the scheme framed under this Act.

(17) The process of sanctioning of the scheme starts with the submission of an application by the Trust to the State Government and the actual consideration by the State Government of the scheme, which would, by necesasry implication, involve the consideration of the fact as to whether the scheme had been framed in accordance with the relevant provisions of the Act.

(18) As regards the provisions of section 101 of the Act it may be observed that the said provisions are general provisions providing for the validation of acts and proceedings taken under the Act which would cure any irregularity and defect where the same are covered by clause (d) if no substantial injustice had resulted from the given failure to serve a notice or if the given matter falls under clause (e) if the omission, defect or irregularity does not affect the merits of the given case. The provision of sub-section (2) of section 42, on the other hand, is a specific provision dealing with defects and irregularities in the framing and sanctioning of the scheme.

(19) One of the well known principles of statutory construction is that a provision providing for a specific matter would exclude the application to that specific matter of a general provision. In this regard the following passage from Maxwell on interpretation of statutes', Eleventh Edition, page 169, may be quoted with advantage:—

> "In such cases it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act. Having already given its attention to the particular subject and provided for it the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language,

or there be something which shows that the attention of the legislature had been turned to the Special Act and that the general one was intended to embrace the special cases provided for by the previous one, or there be something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. In the absence of these conditions, the general statute is read as silently excluding from its operation the cases which have been provided for by the special one."

This would be so more particularly in the present case when there are other provisions in the Act which support the necessity of the existence of the general provision in question for there are a number of other provisions which provide for giving of notices. These are sections 45, 46(1), 53, 72A, 72F(3) and 75(2).

(20) What is more in view of the following view of the Division Bench in *Bodh Raj* v. *Improvement Trust*, (6) with which we, with respect, entirely agree, the provisions of section 101 would in any case were not intended by the Legislature to provide a cover to the non-compliance of mandatory provisions and therefore if the provisions of section 36, 38 and 40 were intended by the Legislature to be mandatory which we would presently examine, then it must be understood, that it was not the provision of section 101 which was intended to cure the irregularity of non-compliance of the mandatory provisions and therefore, the provisions of section 101 are not relevant for the purpose in question:—

"Learned counsel for the respondents had then attempted to place some tenuous reliance on section 101 clause (d) of the Act, in an attempt to raise a cloak of protection against their otherwise untenable stand. However, on a plain reading of the statutory provision, section 101 would indicate that the same is hardly attracted to the situation. The present is not the case of the violation of any statutory prescription of the service of notice on any person. Therefore, clause (d) relied upon could have no possible application. Further this provision expressly pertains to a case where no substantial injustice has

(6) 1982 P.L.J. 310.

resulted. Whereas in the present case the petitioners aver and are able to show grave prejudice to their interests as also an infraction of the mandatory provisions of section 43."

(21) The next question that has been canvassed on behalf of the petitioners is that the provisions of section 36 providing for publication of the notice, of section 38 providing for issuance of notice to the landowners and occupiers of the land proposed to be acquired, of section 40(1) providing for the hearing of the objectors in person or through representatives where a request to that effect is made, and of section 40(3) providing for publication of the factum of the submission of the application to the State Government for the sanction of the scheme published under section 36 in its original or modified form, are mandatory in their nature and that it would be contradictory in terms is what if what required to be mandatorily done is by virtue of the provisions of sub-section (2) of section 42 is deemed to be done although not actually done.

(22) The aforementioned contention raises two vital issues (1) whether the compliance with the said provisions is mandatory, and (2) if they are held to be mandatory, then whether the same can be held to be complied with, although actually not complied with, in view of the provisions of sub-section (2) of section 42 of the Act.

(23) Mr. J. L. Gupta, learned counsel for the Trust, argued that neither of the provisions in question was mandatory. Mr. Gupta drew our attention to well known guidelines and criteria from the reported cases for judging as to whether a given provision is mandatory or directory in character. According to him, for a provision to be considered mandatory in character (i) it should be couched in prohibitory or negative language, (ii) the legislature should have provided penalty for the non-compliance thereof, (iii) the given provision should not be merely procedural, that is, it should not be laying down only a procedure, (iv) the provision should not merely provide for the performance of an official duty by an official, (v) that unless a provision is made for a nullification of an action taken in disobedience of a provision, the provision may not be considered mandatory, (vi) that where invalidation of an action taken in non-compliance of a provision would cause serious inconvenience to the general public, then complaince with such provision may not be considered mandatory and (vii) where invalidation of the action of an authority taken in disobedience of the

given provision would not result in promoting the object of the given statute, then compliance with the said provision would not be considered mandatory. Mr. Gupta in support of his aforesaid submission drew our attention to *State of U.P.* v. *Manbodhan Lal Srivastava*, (7) *Karam Singh Grewal* v. *State of Punjab and others*, (8), *Baldev Kapoor* vs. *Union of India*, (9) *and Vijay Kumar* vs. *P.G.I. Chd.* (10).

(24) In *Manbodhan Lal Srivastava's case* (supra) their Lordships were invited to hold that the provisions of Article 320(3)(c) were mandatory in terms primarily for the reasons that peremptory words like 'shall' were used in the said provision. Their Lordships repelled the contention and held that the use of word 'shall' in a statute, through generally taken in a mandatory sense, did not necessarily mean that in every case it would have that effect. Their Lordships also dispelled any notion that where the word 'may' had been used in statutory provision, it would always be correct to say that the provisions was only permissive or directory and not mandatory. Their Lordships after posing the question to themselves whether the given constitutional provision provided for the contingency as to what was to happen in the event of non-compliance with the requirements of Article 320(3)(c), proceeded to answer the same by observing that neither in express terms nor by implication did any provision provide that a non-compliance of the above provision would result in invalidation of the proceedings including the final order of the Government. Their Lordships quoted with approval the following observations of the Privy Council in *Montreal Street Rly. Co.* v. Normandin, (11).

> "..... The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th ed., p. 596 and following pages. When the provisions of a statute relate to the performance of a public duty and the case

(7) A.I.R. 1957 S.C. 912.
(8) 1975(2) S.L.R. 189.
(9) 1980(2) S.L.R. 309.
(10) 1982(2) S.L.R. 416.
(11) 1917 A.C. 170(B).

is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

(25) In *Karam Singh's case* (supra) the question before the Full Bench was as to whether the provisions of Rule 7 sub-rule (1) of Punjab Civil Service (Executive Branch) Rules 1930 were mandatory or directory in nature. Before the Full Bench the use of the word 'shall' in the said provision was held out to be a compelling reason for holding that the said provision was mandatory in character. The Full Bench following the ratio of *Manbodhan Lal Srivastava's case* (supra) repelled the contention and held that the said rule was merely directory and not mandatory in character. The Full Bench also observed that for holding one way or the other, the Court has also to consider as to whether the given provision of a statute creates public duties or confers private rights. If the former is the case the provision would be directory in character if the latter is the case, then the provision would be imperative in character and would be considered mandatory.

(26) In Baldev Kapoor's case (supra) the question posed for the consideration of the Bench was as to whether Regulation 6 of Indian Administrative Service (Appointment by promotion) Regulations 1955 as amended by notification of June 3, 1977 was mandatory or directory in character. Kang, J. who delivered the opinion for the Bench besides adverting to the following passages from the Maxwell and Craies on statute law referred to the Supreme Court decisions in *Dattatraya Moreshwar* v. *The State of Bombay and others,* (12), *Haridwar Singh* v. *Gagun Bumbrui and others,* (13) *Jagan Nath* v. *Jaswant Singh and others,* (14), *State of Punjab and another* v. *Sheolal Murari and another,* (15) and this Court's decision in *Karam Singh Grewal* v. *The State of Punjab and others* (supra).

(12) A.I.R. 1952 S.C. 181.
(13) 1973) 3 S.C.C. 889.
(14) A.I.R. 1954 S.C. 210.
(15) (1976) S.C.C. 719.

(27) In Maxwell on "the interpretation of Statutes" 10th edition, at page 381, it is recorded:—

> "On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescription seems to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in regard of them."

In Craies on Statute Law 5th edition, the following passage appears at page 242:—

> "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

In *Dattatraya Moreshwar case* (supra) their Lordships held:—

> "..... It is well settled that generally speaking the provisions of statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the Courts to hold such provisions to be directory only the neglect of them not affecting the validity of the acts done....."

In *Haridwar Singh's case* (supra) their Lordships observed as under:—

> "(iii) For determining the question whether a provision in a statute or a rule is mandatory or directory, no universal

rule can be laid down. In each case one must look to the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured.

Prohibitive or negative words can rarely be directory and are indicative of the intent that the provision is to be mandatory.

Where a prescription relates to performance of a public duty and to invalidate acts done in neglect of them would work serious general inconvenience or injustice to persons who have to control over those entrusted with the duty, such prescription is generally understood as mere instruction for the guidance of those upon whom the duty is imposed. Where, however, a power or authority is conferred with a direction that certain regulation or formality shall be complied with, it seems neither unjust nor incorrect to exact a rigorous observance of it as essential to the acquisition of the right or authority."

(28) In *Vijay Kumar's case* (supra) this Court was required to consider the nature of provision of rule 7 sub-rule (1) of Post Graduate Institute of Medical Education and Research, Chandigarh, Rules, 1967. Sandhawalia, C.J. speaking for the Bench, after noticing from *Haridwar Singh's case* (supra) that "no universal rule can be laid down for judging as to whether a given provision is a mandatory or directory in character. In each case one must look to the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object to be secured and that prohibitive or negative words could rarely be directory and could be indicative of the intent that the provision was to be mandatory," held the said rule to be mandatory in character as the said rule had been couched in prohibitory language.

(29) There is no dispute with the criteria indicated in the aforesaid judgments. A look at the provisions of sections 36, 38 and sub-section (1) of section 40 would reveal that the said provision besides creating a public duty of publication of the notice under section 36 and serving a notice under section 38 upon the owner/occupier of the immovable property proposed to be acquired and consideration of objection under sub-section (1) of section 40, also conferred rights on the inhabitants to file objections to the scheme

and to the acquisition of their property and also right of personal hearing in support of their objection.

(30) Since the given provisions do not merely provide for the framing of the scheme simpliciter but also provide for acquisition of property to enable the execution of the scheme and since no person can be deprived of his property without being heard and one cannot ask for hearing unless he knows that he is being deprived of his property, so, by necessary implication a notice of the intention of the authorities of acquiring a given person's property is impliedly necessary to enable him to bring to the notice of the concerned authority his objections against the acquisition of his property. Hence such provisions as provide for notice, raising of objections and personal hearing in support of the objection would be mandatory in character.

(31) A Full Bench of this Court in *Harbans Kaur and others* vs. *Ludhiana Improvement Trust, Ludhiana and others* (16) held that the acquisition of properties under the Act i.e. The Punjab Town Improvement Act has to be in accordance with the procedure prescribed in the Land Acquisition Act of 1894 as was clear from section 59 of the Act and schedule thereto. In the schedule of the Act modification to the various sections of the Act had been made for the purposes of the Act. The Full Bench referred to the decision of their Lordships in a judgment rendered in *Nagpur Improvement Trust and another* v. *Vithal Rao and others*, (17) holding that notice under section 39 and notification under section 45 of the Nagpur Improvement Trust Act are to be equated with the notification under sections 4 and 6 of the Land Acquisition Act and held that sections 39 and 45 of the Nagpur Improvement Trust Act being identical to sections 36 and 42 of the Punjab Town Improvement Act, a notification under section 36 of the Act would be deemed to be a notification under section 4 of the Land Acquisition Act and the notification under section 42 of the Act had to be considered as one issued under section 6 of the Land Acquisition Act and since notification under section 42 of the Act had to be made within two years from March 6, 1961, on which date notification under section 36 had been issued and notification under section 42 in the given case having been issued beyond two years of the said Act the same was held to be illegal. Regarding the poser whether the denial of benefits of Land Acquisition Act to the persons whose lands were

(16) 1973 P.L.R. 511.

(17) Civil Appeal 2139/68, decided on 11th December, 1972.

acquired under the Town Improvement Act would amount to violation of Article 14 of the Constitution because in both cases the land was acquired for the State for a public purpose and the person whose land was acquired under the Land Acquisition Act was treated more beneficially than the one whose land is acquired under the Act, the Full Bench sought the reply from the Supreme Court decision aforementioned where their Lordships held that the benefits under the Land Acquisition Act had to be allowed to the persons whose land or properties were acquired under the Act and different measures of compensation could not be laid down for acquisition made for different public purposes.

(32) In the light of the above, we may observe that so far as the provisions of sections 36, 38 and sub-section (1) of section 40 of the Act are concerned, this Court would be reluctant to subject the said provision to the scrutiny and analysis of the kind in order to judge their mandatory or directory character in view of the pronouncement of their Lordships in regard to the provisions of section 4 and 5A of the Land Acquisition Act (sections 38 and 40(1) which to an extent contain the elements of the provisions of section 4 so far as the question of giving of notice to the affected persons is concerned and of section 5A of the Land Acquisition Act in so far as the filing of objections and hearing thereof is concerned, which provisions have been held to be mandatory by their Lordships. The relevant decisions of their Lordships holding the provisions of section 4 and section 5A of Land Acquisition Act as mandatory are: *Khub Chand* v. *State of Rajasthan,* (18) *Narinderjit Singh* v. *State of U.P.,* (19) and *Mandir Sita Ramji v. Governor of Delhi etc.* (20).

(33) Before concluding the discussion regarding the contention of Mr. Gupta, it may be observed that so far as the general public is concerned, it does not acquire any right in the scheme till such time it is finalised and executed. At a stage where compliance with the provisions of sections 36, 38 and sub-section (1) of section 40 is envisaged, interest of the general public as such does not enter into consideration.

(34) And, in any case, the circumstances spelled out by Mr. Gupta are merely guidelines and not that everyone of those features

(18) A.I.R. 1967 S.C. 1074.
(19) A.I.R. 1973 S.C. 552.
(20) A.I.R. 1974 S.C. 1868.

must be present in the given provision before it could be considered to be mandatory in character.

(35) For the reasons aforementioned, we hold that the provision of section 36, in so far as it provides for publication of the notice as such and not the frequency thereof, is mandatory in character, because the scheme is prepared for the convenience and welfare of the inhabitants. They are vitally interested in knowing as to what the scheme is. Therefore, the publication of the scheme to bring the same to their notice is vitally essential to enable them to bring their view point regarding the scheme to the notice of the concerned authorities. Equally essential and mandatory is the requirement of notice of the proposed scheme of acquisition to the landowners and occupiers of the land and building, which are proposed to be acquired so that they may put in their objections. And so also is the case with regard to their right of hearing in support of their objection, for no person can be deprived of his property without affording him an opportunity of hearing, unless the legislature expressly takes away that right of hearing, as, for example it does in case of section 5-A of the Land Acquisition Act by enacting the provision of section 17(4) in the said Act. In this regard, the following observations of their Lordships in *Dharam Dass* vs. *State* of Punjab, (21) can be noticed with advantage.

> "It is true that a denial of a right to be heard as expressed in the maxim *audi alteram Partem* whether by legislative or executive action or in any other manner is abhorrent to a civilised society; it is destructive of the elementary principles of justice according to which every citizen has to be judged and is contrary to the cherished notions of the rule of law which is the sheet-anchor and the umbilical of the democratic system of Government embodied in our Constitution ....."

As to the provisions of sub-section (3) of section 40 of the Act, it may be observed that to hold it mandatory or directory in nature would depend upon identifying the purpose for which it was intended by the framers of the Act. This Court appears to have spoken in contradictory tones in regard to the purpose which this provision was sought to subserve. While one Division Bench that decided Civil Writ No. 882 of 1977 on 9th of March, 1977, held that the said provision impliedly confer a right upon the inhabitants to

(21) A.I.R. 1975 S.C. 1069.

submit objections to the scheme to the Government, the other Division Bench in *Hardit Singh Grewal and others* v. *The Punjab State,* (22) had come to a contrary conclusion (without of course being aware of the decision of C.W.P. No. 882 of 1977) and held that the said provision was merely intended to bring it to the notice of the inhabitants that the scheme, which was brought to their notice by publishing under section 36, had not been given up and it was being submitted to the Government for its sanction. With respect, we appear to agree with the view expressed in *Hardit Singh's* case (supra) that sub-section (3) of section 40 does not confer any right upon the general public to submit any objections to the scheme submitted for the sanction of the Government by the Improvement Trust. Because the legislature wherever it wanted to confer such a right has expressly provided for the same, as it has done under sections 36 and 38 of the Act.

(36) The provisions of sub-section (3) of section 40 of the Act merely intended to make the general public aware of the fact that the scheme had not been given up and, in fact, was being submitted to the State Government for sanction. The said provision can certainly not be considered mandatory, for it thereby conferred no right on anybody—it merely placed an obligation upon the Trust.

(37) From the above, we should not however, be understood as saying that no objections can be filed by the general public before the Government. An alert citizen would have been entitled to bring to the notice of the Government, even in the absence of the provision of the kind, that the Improvement Trust had disregarded the mandatory provisions of the Act in framing the scheme and the Government would not throw away that objection merely on the ground that there existed no provision envisaging the filing of such an objection. The Government would enquire into the truth of the objection before giving its sanction and take corrective measures if the objection spelled out the truth in order to avoid litigation and the consequent delay as a result thereof in the execution of the scheme.

(38) Now the stage is set to examine the *interse* relationship of such mandatory provisions with sub-section (2) of section 42 of the Act, for it is the conflict of two Division Benches of this Court in regard to the impact of sub-section (2) of section 42 upon the

(22) 1979 P.L.J. 56.

preceding provisions including the now held mandatory provisions and the compliance thereof that had primarily necessitated the present reference in question to the Full Bench. This Court in *Harcharan Singh* v. *Shashpal Singh*, (23) takes one view, while in the unreported judgment in *Bhupinder Flour Mills* v. *The State & anothers* (supra) it has taken the contrary view. From *Harcharan Singh's case* (supra) reliance has been placed on the following observations:—

> "The only other contention of Mr. B. R. Aggarwal which has to be noticed, is about the stand taken on the basis of section 42 of the Improvement Act. On behalf of the Trust it is vehemently argued that the scheme after it is sanctioned by the State Government under section 41(1) has become conclusive the operation of section 42 of the Act, cannot, therefore, be called in question on any ground. There is no merit whatever in this argument. If it is found that there is no valid scheme it is certainly open to this Court in exercise of its writ jurisdiction to strike down what merely purports to be a scheme under the Act. Section 42 of the Improvement Act cannot override the constitutional safeguard contained in Article 226....."

While the respondents have referred us to the following passage from the decision in Civil Writ No. 882 of 1977 decided on 9th March, 1977:—

> "Section 42(1) requires the Government to notify every Scheme sanctioned by it and section 42(2) prescribes that a notification under sub-section (1) shall be conclusive evidence that the Scheme has been duly framed and sanctioned. Therefore, once a scheme is notified under section 42(1), the Court cannot enquire into the irregularities, if any, alleged to have been committed before the issuance of the notification. It is, therefore, not open to this Court in the instant case to enquire into the question of non-compliance with the provisions of section 36(3) or section 38(1), or into the claim that the modified scheme should have been republished under sections 36 and 38.

(23) 1966 Cr.L.J. 352.

Shri Jawahar Lal Gupta relied on *Soma Wanti* v. State of *Punjab*, (supra) and argued that even when a notification was declared to be conclusive evidence, it would still be open to the Court to go behind the notification to enquire into the illegalities committed prior to the notification. The case relied upon does not lay down any such proposition. All that was decided there was that the provision which declared that the notification was conclusive evidence of the fact that the land was needed for public purpose, did not preclude the Court from going into the question whether the jurisdiction in making the declaration was a colourable exercise of jurisdiction. In the present case, for instance, it would be open to the petitioners to allege and prove that the Government had acted *mala fide* and that the exercise of jurisdiction was a colourable exercise of jurisdiction but they cannot be permitted to question the notification on the ground of irregularities committed in the process leading up to the issue of the notification.

In *Dharam Dass* v. *State of Punjab*, (supra) the Supreme Court considered a similar provision in the Punjab Sikh Gurdwaras Act. The question arose whether the non-service of personal notice under section 7(4) would vitiate the notification under sub-section (5) of section 7. The Supreme Court said,

"..... Once the provision of conclusive presumption under sub-section (5) of section 7 was held to be valid and constitutional that question could not be allowed to be agitated or reagitated as that would militate against the conclusive nature of the statutory presumption."

(39) On behalf of the respondents reliance is also placed on *Berar Swadeshi Vanaspati* v. *Sehgaon Municipality*, (24) Municipal *Board, Hapur* v. *Raghuvendra*, (25) *The Municipal Council Raichur* v. *B. A. Prasanna*, (26) and *Laxmichand* v. *Indore Improvement Trust*, (supra).

(40) In *Berar Swadeshi Vanaspati's case* (supra) the objections raised by appellant No. 1 though filed within time were not

(24) A.I.R. 1962 S.C. 420.
(25) A.I.R. 1966 S.C. 693.
(26) A.I.R. 1968 S.C. 255.

considered on merits and were rejected merely on the ground that there was only one objector. It was canvassed before their Lordships that since hearing of the objection was one of the essential steps for the validity of the imposition of the tax it could not be said that section 67 of C.P. and Berar Municipalities Act had been complied with and the imposition was, therefore, invalid. The High Court in view of the provisions of section 67(8) which envisaged that the issuance of notification imposing a tax would be conclusive evidence that the tax had been imposed in accordance with the provisions of the Act, rejected the plea observing that non-consideration of objections was a mere error in procedure.

(41) The ratio of *Berar Swadeshi Vanaspati's case* came up for consideration before the Constitution Bench in *R. B. Sugar Co.* v. *Municipal Board Rampur,* (27) Wanchoo, J. speaking for the majority observed:—

> "We may, however, point out that the decision in the Berar Swadeshi Vanaspathi's case (A.I.R. 1962 S.C. 420) is not a case where there was no compliance whatsoever with procedural provisions; all that had happened in that case was that the objections had been taken into consideration by the Board though they were rejected for reasons which were considered by the appellant in that case to be not sufficient. In that case therefore there was compliance with the provisions of the Act *and all that we need say is that that case is no authority for the proposition that even if there is no compliance whatsoever with a mandatory provision of a statute relating to procedure for the imposition of a tax, a provision like S.* 135(3) *of the Act of S.* 67(8) *of the C.P. and Berar Municipal Act would necessarily save such imposition.* If S. 135(3) means that where there is substantial compliance with the provisions of the Act that would be conclusive proof that they have been complied with there can be no valid objection to such a provision. But if the section is interpreted to mean, as is urged for the respondent, that even if there is no compliance whatever with any mandatory provision relating to imposition of tax and the only thing proved is that a notification under S. 135(2) has been made, the tax would still be good, the question may arise whether S. 135(3) itself is a valid provision."

(27) A.I.R. 1965 S.C. 895.

Their Lordships, however, left the question open as would be clear from the following observations:—

> "For present purposes however it is unnecessary to decide that question. In the present case the mandatory part of S. 131(3) has been complied with and its directory part has been substantially complied with and so. S. 135(3) will apply and the objection that the tax is not validly imposed must fail."

In Hapur Municipal Board's case (supra) the provisions of sub-section (3) of section 135, which read:

> "A notification of the imposition of a tax under sub-section (2) shall be conclusive proof that the tax has been imposed in accordance with the provisions of this Act,"

was invoked on behalf of the Municipal Board, Hapur, to sustain the water tax. The main grounds of objections were (a) that the resolution of the appellant Board framing the proposal was not published in a local paper of Hapur printed in Hindi and (b) that the rules framed for the imposition of the tax did not accompany the resolution which was affixed on the notice board at the office of the appellant Board in purported compliance with the requirements for publication. Their Lordships after observing, "It is the duty of Government to see that the various steps laid down for the imposition of the tax are followed. Before it notifies the resolution Government satisfies itself about the requirements. The notification is made conclusive proof that the tax is imposed in accordance with the provisions of the Act," posed the question. Is this rule of conclusive evidence such as to shut out all enquiry by Courts? Answering the said question their Lordships held that they had no hesitation in answering the said question in the negative for there are certain matters, which of course, could not be established conclusively by a notification under section 135(3). For example, no notification could be issued unless there was a special resolution. The special resolution was the *sine qua non* of the notification. The State Government could not impose a tax all by itself by notifying the imposition of the tax, without a resolution by the Board. Again, the notification could not authorise the imposition of a tax not included in section 128 of the Municipalities Act. Neither a Municipal Board nor a State Government could exercise such a

power. A tax could only be said to be imposed in accordance with the provisions of the Municipalities Act, if it was contemplated by the Act. There was a difference between the tax and the imposition of the tax. The former was the levy itself and the latter method by which the levy was imposed and collected. What the sub-section does was to put beyond question the procedure by which the tax was imposed, that was to say, the various steps taken to impose it. A tax not authorised could never be within the protection afforded to the procedure for imposing taxes. The Municipal Board or the State Government could not select a tax which the legislature had not mentioned in section 128 of the Municipalities Act. As the State Government could not impose a tax, it must have before it the special resolution of the Board before notifying the imposition. Between the special resolution selecting a tax for imposition and the special resolution imposing it sundry procedure is gone through and section 135(3) says that the notification by Government is conclusive proof that the procedure was correctly followed.

(42) It was further observed, "the defect in the imposition of the tax here being of the same character as in the two cases of this Court above cited i.e. *Berar Swadeshi Vanaspathi's case and R. B. Sugar Co's case,* the imposition would have the protection of S. 135(3) and the tax must be deemed to be imposed according to the procedure laid down in the Act." When their Lordships came to the answering of the question, which must have been posed to them as to what would happen if there had been non-compliance with the mandatory provisions. Their Lordships returned the following answer which again left the vital question undecided as would be clear from the following observations:—

> "As observed already some of the provisions controlling the imposition of a tax must be fully complied with because they are vital and therefore mandatory, and the others may be complied with substantially but not literally, because they are directory. In either case the agency for seeing to this compliance is the State Government. It is hardly to be expected that the State Government would not do its duty or that it would allow breaches of the provisions to go unrectified. One can hardly imagine that an omission to comply with the fundamental provisions would ever by condoned. The law reports show that even before the addition of the provision making the notification conclusive evidence of the proper

imposition of the tax, complaints brought before the courts concerned provisions dealing with publicity or requiring ministerial fulfilment. Even in the two earlier cases which reached this Court and also the present case, the complaint is of a breach of one of the provisions which can only be regarded as directory. In cases of minor departures from the letter of the law especially in matters not fundamental, it is for the Government to see whether there has been substantial or reasonable compliance. Once Government condones the departure, the decision of Government is rightly made final by making the notification conclusive evidence of the compliance with the requirements of the Act. It is not necessary to investigate whether a complete lack of observance of the provisions would be afforded the same protection. It is most unlikely that this would ever happen and before we pronounce our opinion we should like to see such a case."

In Raichur Municipal Council's case (supra) challenge to the octroi was on two grounds; (i) that there was no valid resolution by the Municipal Council under section 94 of the Act selecting the octroi duty for imposition; and (ii) that the model bye-law having been altered by adding a tariff of storage fee in the bonded warehouses without following the procedure prescribed under section 324(4) and (5), the model bye-law could not be deemed to have been validly adopted by the Municipal Council. It was found as a fact that there was no substance in the contention that the Municipal Council had not passed a resolution selecting the octroi tax for imposition. When it was urged that the original resolution had not been modified or cancelled by a resolution passed in the manner prescribed in that behalf their Lordships found as a fact that there was no materials on the record to prove that the requirements of S. 57 were not complied with and then observed that section 97(2) which makes publication of the notice under section 97(1) conclusive evidence that the tax had been imposed in accordance with the provisions of the Act and the rules framed thereunder, prohibited an inquiry into irregularity in the procedure for the imposition of the tax after a notice under section 97(1) was published. In support of the above view reference was made to the following observations of Hidayatullah, J. as he then was, in *Hapur Municipal Board's case* (supra):—

"There is a difference between the tax and the imposition of tax. The former is the levy itself and the latter the

method by which the levy is imposed and collected. What the sub-section does is to put beyond question the procedure by which the tax is imposed that is to say, the various steps taken to impose it."

(43) Hidayatullah, J. as he then was, no doubt in *Hapur Municipal Board's case* (supra) had expressed the minority view but the majority had left the question undecided and now in *Raichur Municipality's case* (supra) their Lordships have accepted the minority view as would be clear from the following observations:—

"Section 97(2) makes the publication of the notice under S.97(1) conclusive evidence that the tax has been imposed in accordance with the provisions of the Act and the rules made therenuder. The expression "imposed" in accordance with the provisions of this Act," in our judgment means "imposed in accordance with the procedure provided under the Act." All enquiry into the regularity of the procedure followed by the Municipal Council prior to the publication of the notice is excluded by S. 97(2). This is not a case in which the Municipal Council had not selected a tax for imposition by a resolution nor is it a case in which the Municipal Council was seeking to levy tax not authorised by law."

(44) So, it would have to be taken that their Lordships have finally come to subscribe to the view, though they had not specifically addressed themselves to the question as to what would happen if there had been disregarded of the mandatory provision, that the non-compliance with the procedural part would not be a grievance that could be enquired into in judging the validity of the tax if once there is a notification, the publication whereof is declared by the legislature as the conclusive evidence of the fact that the tax had been imposed in accordance with the provisions of the Act.

(45) In *Municipal Council, Khurai* v. *Kamal Kumar*, (28) and *Dharangadhra Chemical Works* v. *State of Gujarat*, (29) on being satisfied that the mandatory procedure had not been followed by Municipal Committee in imposing the tax, their Lordships had

(28) A.I.R. 1965 S.C. 1321.
(29) A.I.R. 1973 S.C. 1041.

declared the tax to be illegal but in these decisions any such provision which declared that once there is a notification, the publication thereof would be conclusive evidence that the tax has been imposed in accordance with law either did not exist in the Acts in question or were not brought to their Lordship's notice and their Lordships had no occasion to consider the question whether non-compliance with the mandatory provision would render the tax invalid in spite of the tax having been notified and the said notification being considered as conclusive evidence of the fact that the tax had been imposed in accordance with law.

(46) In *Laxmichand's case* (supra), Goswami, J. speaking for the Court made light of the objection that there had been non-compliance with section 46(2) of the Act which required weekly publication in the Gazette for three consecutive weeks, and held that section 52(2) appears to be conclusive on the question. That sub-section provided that the publication of the notification by the State Government sanctioning the scheme shall be conclusive evidence that the scheme had been duly framed and sanctioned. Hence, in view of this, ticklish skirmishes over publication on technical grounds at a distant date was completely out of place. In that case his Lordships had found as a fact that the petitioner was well aware of the scheme and had submitted objections and representations.

(47) Then there are single Bench decisions of this Court rendered in the light of one or the other Division Bench judgment and their Lordships' decision in *Laxmichand's case* (supra) for and against the proposition under consideration by us.

(48) In this category would fall judgment of R. N. Mittal, J. in *Naurata Ram* v. *State of Punjab*, (30). That was a case in which only the acquisition part of the scheme was sanctioned by the Government under section 41 of the Act. When the petitioner challenged the sanction of the scheme *qua* the acquisition part thereof a plea was raised on behalf of the Trust that in view of the provisions of sub-section (2) of section 42, it would have to be held that the scheme was duly sanctioned. Mittal, J. repelled the plea raised on behalf of the Trust holding that the Government could not sanction the acquisition part of the scheme and defer the

(30) 1975 P.L.J. 185.

sanction of the scheme for a later date and that in case the scheme was invalid it could not be held that the Court could not strike down the same. Mittal, J. also observed that section 42(2) of the Punjab Town Improvement Act could not override the constitutional safeguard contained in Article 226 of the Constitution.

(49) R. N. Mittal, J. in *Sarup Chand and others* v. *The State of Haryana and others,* (31) however held that from the reading of section 42, it is evident that the Legislature wanted to give finality to the scheme sanctioned by the Government so that thereafter objections regarding the non-fulfilment of certain formalities might not be raised. The purpose in enacting this section appeared to be that if the landowners etc. went on filing objections even after notification, the Trust might not be able to carry out the scheme which was finally sanctioned by the Government.

(50) Kang J. in *Harjinder Kaur and another* v. *State of Punjab and another,* (32) too subscribed to the view expressed in *Sarup Chand's case* (supra). He repelled the contention that non publication of notice under section 36 of the Act rendered acquisition proceedings without jurisdiction. After adverting to the provisions of section 42(2) of the Act, he held that the issuance of a notification thereunder was conclusive proof of the fact that the scheme had been validly framed and sanctioned by the Government.

(51) R. N. Mittal, J., however, in a later decision in *Hari Singh and others* v. *The State of Punjab and another,* (33) appears to have taken a view contrary to the one expressed in *Sarup Chand's case* (supra). In this case his Lordship upheld a challenge to the scheme on the ground that the notification under section 36 of the Act was illegal, in that it was published on May 7, 1976, but mentioned May 5, 1976 as the last date for filing the objections thereto and repelled the contention of the Improvement Trust that the Court could not do so in view of the provisions of sub-section (2) of section 42 of the Act. The learned Judge held that notification under section 36 of the Act was invalid as the petitioners had been deprived thereby of their valuable right of filing objections to the scheme and that defect could not be cured by the sanctioning of the scheme by the State Government by virtue of section 42(2) of the Act.

(31) 1976 P.L.R. 297.
(32) 1983 R.L.R. 131.
(33) 1982 P.L.J. 149.

(52) In the light of the enunciation of the import of the expression 'conclusive evidence' or 'conclusive proof' by their Lordships already noticed in the earlier part of the judgment, there is no scope for any doubt that so long it is held that the notification under sub-section (1) of section 42 of the Act was not vitiated the effect of the provisions of sub-section (2) of section 42 can be no less than this that after the issuance of notification under sub-section (1) of section 42 of the Act, the Court would take it that there has been full compliance with the relevant provisions pertaining to the framing and sanction of the scheme, with only one exception, which again is spelled out by their Lordships in *Somawanti's case* (supra) that is, when the colourable exercise of power is established to the satisfaction of the Court. Colourable exercise of power in relation to the provisions pertaining to the framing and sanction of the scheme would arise where, for instance, there had not been even substantial compliance of provisions that are considered directory nor there had been requisite compliance of the provisions which are considered mandatory. An example of total non-compliance would be a case where say there is no publication whatever as required by section 36, or no notice is issued as required by section 38, or no consideration of the objections in terms of sub-section (1) of section 40, and even no publication of the factum that the scheme was being submitted for sanction to the State Govenrment and the State Government sanction the scheme. Would in a case like this, provisions of sub-section (2) of section 42, save the scheme from being quashed? In our opinion, the legislature had not intended the provisions of sub-section (2) of section 42 to cover non-compliance with the relevant provisions of the Act and shield the colourable exercise of the power by the concerned authorities from scrutiny of the Court. In a case where there has been non-compliance, on the part of the Trust of the relevant provisions of the Act and the Government gives its sanction, the scheme would clearly involve legal *mala fides* and thus amount to a colourable exercise of power, which would vitiate both the action of framing the scheme and of sanctioning the same and so also the consequential action of notifying the said sanction under sub-section (1) of section 42 of the Act.

(53) For the sake of clarity I consider it necessary to hold that the view taken by O. Chinnappa Reddy, J. in C.W.P. No. 882 of 1977 decided on 9th March, 1977 in regard to the effect of provision of section 42(2) of the Act and by R. N. Mittal, J. in *Sarup Chand's case* (supra) and Kang, J. in *Harjinder Kaur's case* (supra)

with respect appears to be a correct view and is approved with one modification that in case the Court finds that there has been colourable exercise of power as observed earlier in this judgment, then the action of framing the scheme and the sanction thereof and the consequent action of notifying the said sanction would stand vitiated despite the provision of section 42(2) of the Act.

(54) The decisions of R. N. Mittal, J. in *Hari Singh's case* (supra) and *Naurata Ram's case* (supra) and R. S. Narula, J. in *Harcharan Singh's case* (supra) with respect do not lay the correct law and are hereby overruled.

(55) In the result the writ petition is remitted back to be placed before the appropriate Bench for decision on merits in the light of the law laid down in this judgment.

N.K.S.

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