

Smt. Vimla Devi Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Aug-02-2000

Reported in : 2001(1)WLN333

Judge : Rajesh Balia, J.

Appeal No. : S.B. Civil Writ Petition No. 1860 of 2000

Appellant : Smt. Vimla Devi

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Mr. S.L. Jain

Disposition : Petition allowed

Judgement :

Rajesh Balia, J.

1. Heard learned Counsel for the parties.

2. Petitioner was elected as a Member from Ward No. 15 of Municipal Board, Padampur in the election held in August, 1995 and was thereafter also elected as Chairperson of the Board. The impugned order was made to remove the petitioner from Chairperson as well as membership of the Board and she was declared disqualified to contest any election for five years, which reads as under:

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3. The petitioner has challenged above order through this writ petition. It was contended by Mr. S.L. Jain, learned Counsel for the petitioner that the order has been made in violation of statutory provisions. It has been contended that enquiry has been conducted in respect of an allegation falling under Sec.63(1)(d), obviously because the charges levelled against him does not fall within clause (a)(b) and (c) of Section 63(1) of the Act. For enquiry into such charges an enquiry can be conducted only by a judicial officer of the rank of District Judge. The enquiry into charges has been conducted by the Sub-Divisional Officer, who could not in law be entrusted with such enquiry and State Govt. could not have acted on such findings recorded by any authority who is not authorised under law to make such enquiry. In that connection it was also urged that if for any reason it is held

that enquiry is not vitiated, then too the findings recorded by the SDO/Collector as an enquiry officer do not enjoy the same status as the findings recorded by a judicial officer enjoys under Sec.63(2) of the Act. Such findings by enquiry officer is bound to be considered by the State Govt. on merits to reach its own conclusion. It is also urged that the order has been made in breach of principles of natural justice inasmuch as before making the order no opportunity of hearing was afforded to the petitioner to explain his conduct even if the charges levelled were found to have been proved before the Govt., the Authority empowered to make the order under Section 63 of the Rajasthan Municipalities Act, 1959. It has also been contended by the learned Counsel for the petitioner that the impugned order is also not a speaking order inasmuch as it does not disclose for what charges of misconduct the order of removal and disqualifying the petitioner from contesting future elections has been made.

4. Mr. Rajesh Joshi, learned Counsel appearing for respondent No. 1, has contended firstly that because no finding on the competence of SDO to act as enquiry officer has been recorded by the Court in earlier writ petition filed by the petitioner against order of suspension, though such grievance was raised by the petitioner, the petitioner is debarred from raising such plea in this petition on the principles of constructive res judicata. It was also urged that since enquiry envisaged under Section 63(2) is a judicial enquiry to be conducted by a judicial officer of the rank of a District Judge and the findings recorded in such enquiry is binding on the State Govt. inasmuch as the State Govt. has to make an order in conformity with those findings, the principles of natural justice requiring furnishing a copy of the enquiry report and findings to the concerned member of the Board are by necessary implication excluded. At any rate merely because of non-supply of the enquiry report it cannot be inferred that any prejudice has been caused to the petitioner on account of non-supply of the enquiry report unless the petitioner establishes that any prejudice has been caused, the order passed on the basis of such enquiry cannot be set aside. He places reliance on the decision of this Court in Smt. Sushilla Dugar v. State of Rajasthan and Ors. S.B. Civil Writ Petition No. 1129/2000, decided on July 28, 2000. It will be appropriate to refer to the provisions of Section 63 in order to appreciate and analyse the contentions raised before me by the respective parties.

63. Removal of members.-(1) The State Government may, subject to the provision, of Sub-sections (2) & (3) remove a member of a board on any of the following ground namely:

(a) that he has absented himself from the meetings of the board from more than three consecutive months or three consecutive ordinary general meetings, whichever is the longer period, without leave of the board:

Provided that the period during which such member was in jail as an under Trial prisoner or as a detenue or as a political prisoner shall not be taken into account.

(b) that he has failed to comply with the provisions of Section 61.

(c) that after his election he has incurred any of the disqualification mentioned in Section 18 or Section 26 or has ceased to fulfill the requirements of Section 24.

(d) that he has-

(i) been guilty of misconduct in the discharge of duty or

(ii) been guilty of any disgraceful conduct, or

(iii) become incapable of performing his duties as a member, or

(iv) otherwise flagrantly abused in any manner his position as such member:

Provided that an order of removal shall be passed by the Government after such enquiry as it considers necessary to make either itself or through such officer or authority as it may direct and after the member concerned has been afforded an opportunity of explanation.

(1A) The power conferred by Sub-section (1) may be exercised by the State Govt. of its own motion or upon the receipt of a report from the board in that behalf or upon the facts otherwise coming to the knowledge of the State Govt.:

Provided that, until a member is removed from office by an order of the State Govt. under this section, he shall not vacate his office and shall, subject to the provisions contained in Sub-section (4), continue to act as, and to exercise all the powers and

perform all the duties of a member and shall as such be entitled to all the rights and be subject to all the liabilities, of a member under this Act.

(2) Notwithstanding anything contained in Sub-section (1) where it is proposed to remove a member on any of the grounds specified in Clause (c) or Clause (d) of Sub-section (1), as a result of the inquiry referred to in the proviso to that Sub-Section and after hearing the explanation of the member concerned, the State Govt. shall draw up a statement setting out distinctly the charge against the member and shall send the same for inquiry and findings by judicial officer of the rank of a District Judge to be appointed by the State Govt. for the purpose.

(3) The judicial officer so appointed shall proceed to inquire into the charge in the prescribed manner, hear the member concerned if he makes appearance, record his findings on each matter, embodied in the statement as well as on every other matter he considers relevant to the charge and send the record alongwith such findings to State Govt., which shall thereupon pass orders in conformity with those findings.

(4) Notwithstanding the foregoing provisions of this section, the State Govt. may place under suspension a member against whom proceedings have been commenced under this section until the conclusion of the inquiry and the passing of the final order and the member so suspended shall not be entitled to take part in any proceedings of the board or otherwise perform the duties of a member thereof.

(5) Every order of the State Govt. passed under this section shall be published in the Official Gazette and shall be final and no such order shall be liable to be called in question in any court.

5. A perusal of the scheme of Section 63 makes it clear that it is quite different and not analogues to the provisions of conducting a departmental enquiry into the charges levelled against the delinquent Govt. servant for the purposes of imposing various punishment of variable nature depending upon the gravity of the misconduct. The principles enunciated in the context of the service rules, therefore, cannot be invoked automatically while considering the aforesaid provision and the issue has to be considered in the light of specific provision and

general principles of just and fair procedure governing all State actions.

6. The salient feature of the aforesaid provision are that enquiry into the alleged misconduct in the discharge of duties or on any disgraceful conduct or about the member becoming incapable of performing his duties as a member or other-wise flagrantly abused in any manner, his position as such member of the Board for which he has incurred any disqualification mentioned in Section 18 or Section 26, on the member has ceased to fulfill the requirement of Section 24. In respect of misconduct of nature referred to in Clause (c) and (d) viz. where he was incurred any disqualification referred to in Section 26 or 24 after his election or he is guilty of a conduct which (i) amounts to a misconduct in discharge of his duties, or (ii) is considered disgraceful conduct for a member or (iii) which amounts to flagrant abuse of his office or that he has become incapable of performing his duties as such member (that is distinct from his becoming disqualified), the enquiry has to be conducted by an officer of the rank of a District Judge to be appointed by the State Govt. for it. Thus, the choice of appointing an enquiry officer under the provisions has been limited to the officer of a rank of District Judge in the case governed by Section 63(i)(a) and (d) and it has not been left open to the State Govt. to choose any person outside that field. The provision has ensured that enquiry is conducted by a trained judicial mind which is also trained to take and appreciate things objectively by the very nature of duties he is otherwise appointed to discharge in his day to day business. In consonance with this scheme under Sub-section (3) in the matters in which the enquiry is to be conducted by a judicial officer under Sub-section (2) it has not been left open to the State Govt. to reach findings contrary to the findings reached by said enquiry officer. It is ordained to make an order in conformity with those findings. Sub-section (4) empowers the State Govt. to place a member under suspension during pendency of enquiry under Sec.63(1) or (2) and disabled him for participating in the proceedings of Board. Sub-Section(5) makes the orders made by State Govt. under Section 63(1) as final not subject to challenge in any forum, which by itself does not take away the authority of High Court to judicial review.

7. It is on the premise of Sub-section (3) of Section 63 the learned Counsel for the respondent urged that once the finding that the charges alleged against the

delinquent member has been proved, the finding has to be accepted by the State Govt. and the order for removal has to be made. It is only if the charges are not proved that the enquiry is to be dropped and no order is to be made under Sub-section (1). Thus, according to the learned Counsel, making of an order by the State Govt. in accordance with the findings reached by the enquiring officer under Sub-section (2) is mere a matter of formality and therefore, by necessary implication the furnishing of enquiry report before making an order of removal is not required looking to the nature an authority to be exercised by the State Govt. no other view is possible by the State Govt. to take in the matter as the only conclusion to which the State could reach in the circumstances is to find the petitioner guilty and remove him from the office. It uncessarily follows that no prejudice is caused unless it is otherwise shown by the concerned member.

8. After careful analysis of the provision. I am unable to sustain the contention of the respondents. Firstly, it is to be understood that enquiry under Section 63(2) is not a judicial enquiry as the term suggested by the learned Counsel. The fact that choice of enquiry officer is limited to an officer of the rank of District Judge by Statute in respect of enquiry into certain facts, does not render the position any less or more of an enquiry officer appointed by the State. It is clearly envisaged under proviso to Section 63(1) that order of removal of a member can be made by State only after an enquiry into the cause of removal is held by the State or any officer appointed by the State Govt. in this behalf. The second part further envisages that before making an order of removal the State, the only authority entitled to make such orders, shall afford an opportunity to the concerned member to explain his conduct and he gets a chance to satisfy the State Govt. that removal is not warranted. The provision does not envisage that the order of removal automatically follows the finding of enquiry. It may be noticed that duty to call for explanation before making an order of removal is part of the statutory obligation, and is not confined to enquiry held through enquiry officer. Whether enquiry is conducted by the State or by the enquiry officer the opportunity to explain following the enquiry must follow. Obviously when an enquiry is envisaged, principles of natural justice are not excluded. The enquiry has to be conducted in accordance of just and fair procedure known to law which inheres into it participation by the delinquent or accused member in such enquiry and giving due consideration to

explanation if any furnished by the accused member in the light of such findings recorded by the enquiry officer. Where State itself holds enquiry, it does not review finding arrived by it on charges. Yet before making an order of removal, adequate opportunity is required to be afforded to explain such conduct. That only clears the position that where any alleged conduct is not found to be proved there is no question of giving any opportunity for any explanation or for making any order under Section 63. It is only where the conduct alleged is proved, the question may still require consideration, the question being of removal of an elected member from the office where he has been installed by the collective wisdom of people, is the alleged conduct which is held proved is of such a nature that must entail depriving his office, and incurring disqualification for the specified period. This is all the more necessary, looking to the nature of seriousness of consequences and the fact that no remedy by way of appeal or revision of such order has been provided. It that be so merely because of finding of an enquiry conducted by the judicial officer has been placed as par with enquiry held by the removing authority itself the position cannot be better than that Depriving the right of the accused member of this minimal safeguard against nullifying the people's verdict cannot be inferred. Proviso to Section 63 is clear in its term which not only provides that an order of removal shall be passed by the State Govt. after such enquiry as it considers necessary to make either itself or through such officer or authority as it may direct but it also provides that the order of removal shall be made after the member concerned has been afforded an opportunity of explanation. Therefore, on receipt of the enquiry report whether from the judicial officer or from any other enquiring officer where it is permissible to hold enquiry through other person, the order of removal does not follow as a matter of course and automatic. It still needs application of mind whether in the facts and circumstances of the case on accepting the finding recorded by the enquiring officer an order of removal is required to be made It is for this purpose before the State Govt. makes up its mind to make an order on the receipt of the enquiry report under Sub-section (1) of Section 63 or otherwise that an opportunity of hearing is to be afforded to the concerned Ward member before order of removal is made. Once such obligation is cast on the State, it must be presumed that statute confers a right of hearing which is effective and provides an opportunity to the delinquent to explain to the

Govt. that no penalty is impossible. In my opinion, such an opportunity can only be availed by the person concerned if he has been provided with the findings reached by the enquiry officer and the reasons therefor. If that be so, it cannot be presumed that in the absence of enquiry report disclosing the finding and reasons therefore, no prejudice is caused to the member unless otherwise proved, nor it can be accepted that the making of an order by the State Govt. on receipt of an enquiry report from judicial officer with the finding of the charges proved, removal order is automatic and the disqualification from contesting the election also follows automatically. Taking that view would render the proviso to Section 63(1) otiose. It is well settled that any interpretation which renders any part of the statute otiose ought not to be accepted if reasonably it is possible to reach any other conclusion which gives it a meaning.

9 I am, therefore, unable to accept the contention of the learned Counsel for the respondents that order of removal follows automatically on recording the finding that the charge against the accused member is proved, by the judicial officer in an enquiry under Sub-section (2) of Section 63 and therefore, in such circumstances, passing of the order by the State Govt. being a formality, principles of natural justice are excluded by necessary implication. It is well established that where the principles of natural justice forms part of a fair and just procedure before making any order adverse to the person, non-adherence of the principles itself is a prejudice and no prejudice need to be shown independently. The doctrine of prejudice can be invoked only where in the circumstances only one conclusion is possible to reach.

10. One is tempted to recall the opinions of some of the reknown jurists which found their approval by the apex Court about the prejudice that is caused by non-adherence to principles of natural justice. Lord Denning in his speech in *Annamunthodo v. Oilfields Workers Trade Union* (1961) 3 All. E.R. 621 (H.L.) said:

Counsel for the respondent union did not suggest that a man could not complain of a failure of natural justice unless he could show that he had been prejudiced by it. Their Lordships cannot accept this suggestion. If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always

seek redress in the courts. It is a prejudice to any man to be denied justice.

11. In *Margarite Fuentes Elab v. Robert of Sherin* 407 U.S. 67, the U.S. Court said

The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. To one who protest against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defence upon the merits.

12. In *John v. Rees* 1970 1 Chl 345 Megarry J. posed a question on behalf of those who decried the necessity to adhere to principles of natural justice on the ground that answer is obvious.

Why force everybody to go through the fire some waste of time involved in framing charges and giving an opportunity to be heard ?'The result is obvious from the start?

13. He answered the question

Those who take this view do not think do themselves justice. As everybody who has anything to do with the law well knows the path of law is strewn with examples of open and shut cases which somehow were not of unanswerable charges, which in the even of were completely answered of inexplicable conduct which was fully explained: of fixed and unalterable determinations that by discussion suffered a charge. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

14. The principle that minimal requirement of submitting a copy of the petition on which action contemplated in order that a proper and effective representation can be made, cannot in any circumstance be dispensed with was accepted by the Supreme Court in *Chintapalli Agency Taluk Arrack Sales Co-op. Society Ltd. etc. v. Secretary (Food & Agriculture) Govt. of Andhra Pradesh* in : [1978]1SCR563 . The High Court has rejected the petition challenging the order on the ground that

somehow representation against charge has been made by the petitioner and same has been considered hence no prejudice has been caused and there is substantial compliance of natural justice. The Court did not accept this conclusion of the High Court, Reversing the judgment the Court said:

The minimal requirement can on no account be dispensed with by relying upon the principles of absence of prejudice or imputation of certain knowledge to the party against whom action is sought for.

15. The above enunciation negating plea of requirement to show prejudice before interference can be made by Court when breach of principles of natural justice is established was fully approved and endorsed by the Supreme Court in *S.L. Kapoor v. Jagmohanlal* : [1981]1SCR746 , wherein it said:

In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It will come from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because Courts do not issue futile writs.

16. The Court did explain the situation where the Court may decline to issue writ even in case of breach of principles of natural justice has been made.

Linked with this question is the question whether the failure to observe natural justice does at all matter if the observance of natural justice would have made no difference, the admitted or indisputable facts speaking for themselves. Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it approves the non-observance of natural justice but because Courts do not issue futile writs. But it will be a

pernicious principle to apply in other situations where conclusions are controversial, however, slightly, and penalties are discretionary.

17. The above passage clearly shows that question of prejudice is not so much as to the dispensation with requirement but with the futility of issuing writs in given case, where no other view is at all possible. However the Court amply made it clear that where it rests in the discretion of authority to make an order, then however slight the chance to explain his conduct and persue such authority to exercise the discretion otherway than it has been exercised, prejudice is inherent in non -observance of rule and Court will not substitute its own judgment in favour or against the exercise of such discretion by the original authority the decision referred to by the learned Counsel for the respondent and referred to by the learned Judge in Sushila. Dugar's case, in my opinion do not overrule or take a different view on the principle. The fact that in given facts and circumstances the Court finds that issuing of writ shall be futile the Court may refuse to issue a writ, not because of lack of prejudice for non-adherence to principles of natural justice, but because it does not Issue futile writs. Obviously such conclusion must rest in each case on its own facts and circumstances, including whether in a given case delinquent has a remedy of appeal, revision or review to correct such error within the framework of statutory provision and such defect could be cured because of such remedial measure, as is often in the case of disciplinary action taken against the public servant.

18. It may be noticed that Section 63(3) does not enjoin an obligation on the State to make an order of removal once finding is recorded by the enquiring officer. It only leaves to the State Govt. to make an appropriate order in conformity with the findings recorded by the enquiry officer. Thus, while accepting the findings, the question of making of an order of removal has still been left with the discretion of the State Govt. under Section 63(2). That being so, non-observance of the principles of natural justice by the State Govt. is fatal to the order.

19. In the decision of this Court in Smt. Sushila Dugar's case, I am unable to find support for the contention of the learned Counsel for the respondents that in all cases falling under Section 63(2) of the Rajasthan Municipalities Act it can be

presumed that no prejudice has been caused on account of non-supply of the enquiry report on the basis of which order of removal is made unless otherwise shown. The Court has merely stated that Court would not interfere in the case of order of removal in cases where enquiry report has not been submitted if no prejudice is caused, whether in a given case prejudice is caused or not would depend on the facts and circumstances of each case. This is apparent from the facts that the learned Single Judge while deciding Sushila Dugar's case has found the earlier judgment rendered in Rameshwari Devi Mewara v. State of Rajasthan and Ors. 1999(1) WLC (Raj.) 420 holding need for such compliance is distinguishable on facts. It is pointed out by learned Counsel for the petitioner that in fact decision in Rameshwari Devi has since been affirmed by a Division Bench of this Court in D.B. Special Appeal (Writ) No. 1230/98 State of Raj. v. Rameshwari Devi and Anr. decided on 17.5.1999. Thus whether in the given case prejudice is caused or not would depend on the facts and circumstances of the case. The fact that in Smt. Sushila Dugar's case the Court found that no prejudice has been caused, cannot be treated as a precedent for holding in all cases that where enquiry report has not been submitted it would be presumed that no prejudice has been caused. As stated by the apex Court in S.L. Kapoor's case, non-supply of relevant material on which the impugned order has been founded itself is a big prejudice in that person is deprived of explaining to the authority concerned that no penalty is impossible in the circumstances of the case. It may be recalled that even in the case a person is found guilty of the charges levelled, it can still be urged by the concerned member of the Board that either the charges are of trivial nature and the circumstances in which the finding is reached or the other circumstances warrant that non supply of enquiry report has caused prejudice. It is equally important to notice that the penalty with which a member can be visited is removal from the office and incur disqualification from contesting for the public office for the next five years. When a punishment of such harsh nature follows on the finding of the enquiring officer which is not a disciplinary authority and ultimately it rests with the State Govt. it would be too broad a proposition to state that the question of prejudice has to be seen in a pedantic and narrow manner and it should be left to the delinquent to explain what prejudice is caused in the absence of supplying the enquiry report containing conclusions and

reasons for conclusions which need to be explained by him before the ultimate authority vested with power of removal which further results in disqualification from contesting election which is otherwise inherent right of every member of the society in the democratic state.

20. As I have come to conclusion that making an order of removal of a member on the foundation of findings reached by the enquiry officer rests with the discretion of the State Govt. which discretion it has to exercise only after the concerned member is given an opportunity to furnish his explanation against intended action, the principle stated in S.L. Kapoor's case fully governs the present case. Moreover, a clear case of unfairness of enquiry too has been made out by the petitioner. As per undisputed facts, the present enquiry was founded on the basis of a preliminary enquiry conducted by SDO/Collector. That enquiry was commenced on the basis of a complaint lodged by one Rakesh Kumar. When the petitioner was asked to explain the allegations levelled against her by said Rakesh Kumar in his written complaint, the petitioner repeatedly demanded the copy of such complaint filed by Rakesh Kumar, which was not supplied to her during preliminary enquiry, and it was completed. On the basis of report of preliminary enquiry the enquiry under Sec.63(2) was instituted by appointing Joint Legal Remembrancer as the enquiry officer. He served the memo of charges on the petitioner and required her response. At that stage she was supplied with a copy of the complaint lodged by said Rakesh Kumar. In response, petitioner immediately demanded vide Annexure 10A copies of documents referred to in the complaint filed by Rakesh Kumar, which were annexed with the complaint and on the basis of which preliminary enquiry conducted but which had not been supplied to her, so that she could effectively defend herself.

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21. Yet the same had not been supplied to her on the ground that it was not incumbent upon the respondents to have supplied the copy of preliminary enquiry and documents produced thereunder. The prosecution witnesses were examined on the very day reply Annx. 10A as filed, without supplying the copies of such documents or copy of enquiry report. Conducting enquiry in this manner militates against a just and fair procedure. The grievance about non-supply of documents was again made in Ex.15 while making submission after recording of evidence.

22. Suffice it to say that where the prosecution does not rely on any document, it need not disclose such documents to the delinquent, nor need not supply the same to the delinquent as part of its evidence, yet if such documents or statement are demanded by the delinquent, to defend him/her effectively, which undoubtedly are in possession of respondents, and the same is denied, it undoubtedly amounts to breach of principle of natural justice and is serious prejudice to the delinquent, as it amounts to denial of fair opportunity to effectively defend himself. Denial of such documents vitiates the enquiry. The same cannot be terms as fair and just. In this connection, reference may be made to a decision of Supreme Court in Tirlok Nath v. U.O.I. 1967 SLR 759, wherein the Court said:

We shall assume for the present that Rule 55 of the Civil Services (Classification, Control and Appeal) Rules applies to this case. But this rule requires that the public servant concerned must be afforded an adequate opportunity of defending himself. It is for this reason that it is obligatory upon the Inquiry Officer not only to furnish the public servant concerned with a copy of the charges levelled against him, the grounds on which those charges are based and the circumstances on which it is proposed to take action against him. Further, if the public servant so requires for his Offence, he has to be furnished with copies of all the relevant

documents, that is, documents sought to be relied on by the Inquiry Officer of required by the public servant for his defence.

23. From the above both the obligations are distinctly discernible viz. (1) to supply such documents and statements without askance on which prosecution rests to substantiate the charges and (ii) document and statement which delinquent requires for the purpose of his defence and require the prosecuting agency to furnish copies of the same to him for his defence. The latter type of document may or may not be one on which prosecution relies. Such documents can only be withheld if any privilege is claimed in respect thereof and so found to exist.

24. Thus, a case of conducting the enquiry in a manner prejudicial to the petitioner is also made out and the case squarely falls within the ratio laid in Rameshwari Devi's case since affirmed by Division Bench of this Court, as stated above.

25. In view of these findings I am not entering on the merits of other contentions raised by the petitioner at this stage.

26. As a result, this petition is allowed. Impugned order Annx. 16 dated 16.6.2000 is quashed. There shall be no orders as to costs.