R.K.SHUKLA

v.

SUDHRIST NARAIN ANAND (DEAD) BY L.RS.

(Civil Appeal No.7238 Of 2005)

MAY 12, 2008

[A.K. MATHUR AND TARUN CHATTERJEE, JJ.]

Constitution of India, 1950 — Arts. 226 and 136:

Rent Control & Eviction Officer (RC & EO) declared the disputed premises to be vacant and thereafter passed order of allotment in favour of Appellant – Against the allotment order, Respondent filed revision petition which was dismissed – Respondent filed writ petition – High Court allowed it thereby setting aside the allotment order and further held the vacancy declaration order to be invalid.– Whether High Court erred in considering the validity of the vacancy declaration order while hearing the writ petition against the allotment order – Held, No – The High Court had permitted Respondent to amend the writ petition whereby he sought to challenge the order declaring vacancy – When such order of High Court allowing the amendment was challenged by filing SLP, this Court had remanded the matter to High Court for fresh decision – Since this Court had not decided that SLP on merits, it cannot be said that the vacancy declaration order had attained finality – Therefore, High Court was fully justified in considering the question of vacancy, which was a core issue in the writ petition because if the vacancy declaration itself was bad in law, the consequent allotment order which was passed cannot be said to be not in violation of s.16 of the Act – No reason for interference under Art. 136 of the Constitution – U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 – ss.12 and 16.

Applications were filed before the Rent Control & Eviction Officer (RC & EO) for allotment of the disputed

A premises. Eventhough Respondent/landlord filed objections thereagainst, specifically bringing to the notice of the RC & EO that he was in physical occupation of the disputed premises and nothing was vacant which could be said to be available for allotment, the RC & EO, on
B 24th January, 1981, declared the disputed premises to be vacant and subsequently, on 18th November, 1981, passed an order of allotment in favour of the Appellant. Against the allotment order, Respondent filed revision petition under s.18 of the Uttar Pradesh Urban Buildings
C (Regulation of Letting, Rent and Eviction) Act, 1972 which was dismissed. Respondent thereafter filed writ petition before the High Court which allowed the same thereby setting aside the order dated 18th November, 1981 passed by the RC & EO. The High Court also considered the
D validity of the order dated 24th January, 1981 declaring vacancy passed by the RC & EO and held the same to be invalid.

In appeal to this Court, it was contended by Appellant that the High Court was not justified in interfering with
E the order dated 24th January, 1981 in exercise of its writ jurisdiction under Art. 226 of the Constitution. It was contended that during pendency of the writ petition before High Court, an application praying for amendment of the writ petition for challenging the order dated 24th Janu-
F ary, 1981 was filed, which was allowed by the High Court; that Appellant had filed an application for recall of the said order of the High Court but the same was also rejected; that aggrieved by the said orders of High Court, the Appellant had filed a special leave petition before this Court
G which was allowed and that by virtue of that, the fact of existence of vacancy had attained finality.

In sum and substance, it was contended that it was not open to the High Court to adjudicate upon the question of vacancy after the decision of this Court and also
H in view of the concurrent findings of fact of the RC & EO

and the Revisional Court. A

Dismissing the appeal, the Court

HELD:1.1. The question whether Respondent was given sufficient opportunity to object and lead evidence to disprove the fact of vacancy was taken into consideration by the High Court and from the materials on record and the evidence adduced by the parties, it was open to the High Court, even in the exercise of its power under Art.226/227 of the Constitution, to come to a finding of fact that such opportunity was not at all given to Respondent. [Para 11] [385, G-H; 386, A] B C

1.2. Even assuming that the High Court was wrong in coming to a conclusion of fact that no opportunity was given to the respondent to file objections, then also, this Court is not inclined to interfere with the judgment of the High Court in the exercise of its discretionary power under Art.136 of the Constitution for the following reasons: D

a. The passing of the allotment order without declaring vacancy was a gross error committed by the RC&EO because under the scheme of the provisions of the Act, the preliminary step was to declare a vacancy, which was not done and even if done, the same was not in a *bonafide* manner. The RC&EO should have at least conveyed their decision on that point. E F

b. The Rent Control Inspector (RCI) and the RC & EO while submitting the report and passing the order declaring vacancy respectively did not adhere to the provisions governing the allotment of vacant buildings. No neighbour was enquired to ascertain vacancy, much less two neighbours as mandated by the rules. G

c. The finding of the High Court that simply because the gate was locked, it was no ground to conclude that the disputed premises was vacant cannot be ignored. The fact that the gate was locked cannot be a conclusive proof H

A to hold that the respondent had removed his effects therefrom or that he had allowed it to be occupied by any person who was not a member of his family or even that he and members of his family had taken up residence elsewhere. The question of deemed vacancy cannot arise at
B all in view of the facts, which would be evidenced from the order of the RC & EO and the report of the RCI.

d. The High Court had permitted the respondent to amend the writ petition whereby he sought to challenge the order dated 24th January, 1981 declaring vacancy.
C Such order of the High Court allowing the amendment was challenged before this Court. Since this Court had remanded the matter to the High Court for a fresh decision on the question whether the amendment should be allowed or not along with the merits of the writ petition, it
D cannot be said that the High Court was in error after the order of this Court to allow the application for amendment on facts as this Court did not decide the merits as to whether the application for amendment should be allowed or not. The High Court had simply followed the di-
E rections made by this Court in the order passed in that special leave petition and came to a conclusion that the order dated 24th of January, 1981 declaring vacancy was bad in law.

e. It was open to the respondent to challenge the or-
F der declaring vacancy in the writ petition against the allotment order even though the said order was not challenged independently there and then. Therefore, the High Court was fully justified in considering the validity of the vacancy declaration order while hearing the writ petition
G against the allotment order. Since this Court had not decided that special leave petition on merits, it cannot be said that the vacancy declaration order had attained finality. Therefore, the High Court was fully justified in considering the question of vacancy, which was a core issue
H in the writ petition because if the vacancy declaration it-

self was bad in law, the consequent allotment order which was passed cannot be said to be not in violation of s.16 of the Act.

f. In any view of the matter, the question regarding vacancy was a core issue in the writ petition and the High Court, on consideration of the materials on record was entitled to look into it by invoking its writ jurisdiction under Art. 226 of the Constitution. Since the order passed by the High Court was based on consideration of facts, which cannot be interfered with except in exceptional cases, there is no reason to interfere with the same under Art. 136 of the Constitution. [Paras 11, 12, 13, 14, 16] [386, B; F; G-H; 387, A-C; 388, H; 389, A-E; 389, F-H; 390,A; A-C]

1.3. There is another aspect of this matter for which, in the facts and circumstances of this case, this Court would not exercise discretionary power under Art.136 of the Constitution. The Appellant stormed into the disputed premises more than two decades back and started enjoying the same without paying a single penny in respect of the same. It was only after the judgment of the High Court that he had deposited the amount as directed by the High Court. Therefore, there is no reason to interfere with the impugned judgment of the High Court under Article 136 of the Constitution in the facts and circumstances of the case. The Appellant is, however, granted time to vacate the disputed premises by 30th of November, 2008 subject to filing an usual undertaking before this Court within one month.[Paras 17, 18] [390,C-G]

Ganpat Roy and Others vs. A.D.M. and others, **(1985) 2 SCC 307 – relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7238 of 2005

From the Order dated 9.11.2004 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 4621 of

A 1982

J.C. Gupta, S.R. Singh, Harish C. Kharbanda, Manoj Swaroop, Prakash Chandra Shukla, Shrish Kumar Mishra, M.P.S. Tomar and Sandhya Goswami for the Appellant.

B Ranjeet Kumar, Rani Chhabra for the Respondent.

The Judgment of the Court was delivered by

TARUN CHATTERJEE,J. 1. One Parsuram Pandey filed an application for allotment of a part of House No.21, George C Town, Hamilton Road, Allahabad, U.P. (in short "the disputed premises") which had allegedly fallen vacant. There were in all, thirteen applications for allotment of the disputed premises by various persons before the Rent Control & Eviction Officer (in short "the RC & EO"). On the said application of Parsuram D Pandey for allotment of the disputed premises, an order was passed by the RC & EO on 9th of September, 1980 directing the Rent Control Inspector (in short "the RCI") to inquire and report on the issue of vacancy of the said disputed premises. Consequent to the order dated 9th of September, 1980, the RCI, after inspecting the disputed premises, submitted his report to the RC & EO regarding vacancy. Thereafter, the RC & EO on 18th of September, 1980 passed an order issuing notice to the landlord/respondent calling upon him to appear on 6th of October, 1980 and directed that the matter of allotment of the disputed premises would be considered on that date. Notices dated 15th of November, 1980 and 1st of December, 1980 were again issued to the respondent for the aforesaid purpose. On 3rd of January, 1981, the respondent was directed to appear before the RC & EO and accordingly, the respondent did appear before the RC & EO but no other person was present there. The RC & EO noted the presence of the respondent and passed the following order: -

"Today the file was placed in presence of the landlord. None else was present."

2. The RC & EO passed an order dated 24th of January,

1981, on the question of vacancy and also directed the matter to be put up on 31st of January, 1981 for arguments on allotment and orders. It was the case of the respondent that by the aforesaid order dated 24th of January, 1981, he came to know that certain applications were filed before the RC & EO for allotment of the disputed premises although he along with his family members was very much living in the disputed premises and there was no occasion for anyone to make any application for allotment. Accordingly, the respondent had brought to the notice of the RC & EO that he was occupying the disputed premises and the question of allotment of the disputed premises to anyone else could not arise at all. Therefore, all the applications for grant of allotment of the disputed premises must be dismissed. It was all along the case of the respondent that he had filed his objections with regard to the matter of allotment of the disputed premises on 24th of January, 1981 to the extent that the disputed premises which was occupied and possessed by the respondent was No. 21, Hamilton Road and not No. 21, Georgetown, Allahabad, with which the respondent had no concern and the allotment applications, if they related to No. 21, Hamilton Road, Allahabad were liable to be rejected as no part of the same was lying vacant. At this stage, it would not be out of place to mention that the notice received by the respondent was not indicative of the fact that the question of allotment of the disputed premises would be considered on 3rd of January, 1981. It was also all along the case of the respondent that the notice was served on him at his address although the notice mentioned the address of the respondent as 103, Chowk Gangadas, Allahabad and on the back of the notice, there was the process server's report that the respondent was residing at No. 21, Hamilton Road, Georgetown, Allahabad. According to the respondent, without considering the objections filed by him, the RC & EO on 24th of January, 1981 declared the vacancy particularly when the respondent himself had appeared before the RC & EO specifically bringing to his notice that he was in physical occupation of the disputed premises and nothing was vacant which could be said to be available for allotment. It was

A B C D

A also the case of the respondent that the RC & EO without considering the objection filed by him passed the order dated 24th of January, 1981 declaring vacancy in the following manner: -

> "The file was put up. The report of RCI seen. On the spot the house was locked. No body was living. At the main
B gate a Board of Shri Prasidh Narain Anand was there. Landlord has appeared. He has made no objection. It is clear that the disputed portion, which is western portion of the house is vacant because there is no objection from Sri S.N.Anand, hence vacancy is being notified. To be put up
C on 31st January for argument on allotment and orders."

3. A bare perusal of the aforesaid order of the RC & EO passed on 24th of January, 1981 would make it clear that the said order was passed without considering the objection of the
D respondent and by even mentioning that the respondent had no objection when it was all through his case that the objections were submitted before the RC & EO. It is also an admitted position that the alleged report of the RCI would only show that the disputed premises was locked at the time of inspection and it did not indicate that no body was residing there. Therefore, it
E was the case of the respondent that the fact that the disputed premises was locked cannot by any stretch of imagination mean that no body was residing in the disputed premises entitling the RC & EO to declare the same vacant for allotment.

F 4. On 20th of April, 1981, the respondent was heard and he was given time to file evidence. Thereafter, on 3rd of June, 1981, an order was passed directing the respondent to file evidence on that very date and the case was adjourned to 3rd of July, 1981 for arguments on vacancy. On 26th of September,
G 1981, the respondent and the applicants were present and were heard and on 18th of November, 1981, the RC & EO passed an order of allotment in favour of the appellant. Against the aforesaid order of allotment, the respondent filed a revision petition under Section 18 of the Uttar Pradesh Urban Buildings (Regu-
H lation of letting, Rent and Eviction) Act, 1972 before the District

Judge, Allahabad, which was, however, dismissed by order dated 4th of March, 1982. Feeling aggrieved by the allotment order and the dismissal of the revision petition, the respondent filed a writ petition before the High Court of Judicature at Allahabad wherein a challenge was made to the allotment order and a prayer was made for quashing the same. By a judgment and order dated 9th of November, 2004, the High Court had allowed the writ petition thereby setting aside the order dated 18th of November, 1981 passed by the RC & EO allotting the disputed premises in favour of the appellant and the order dated 4th of March, 1982 passed by the District Judge, Allahabad dismissing the revision directed against the said allotment order. The High Court in the impugned judgment had also considered the validity of the order dated 24th of January, 1981, declaring vacancy passed by the RC & EO and held the same to be invalid. It is this judgment of the High Court, which is impugned in this appeal.

5. We have heard the learned counsel for the parties and examined the judgment of the High Court and the District judge as well as the order of allotment passed by the RC & EO and the order declaring vacancy and other materials on record. Before we consider the rival submissions made on behalf of the parties, we may, at this stage, record the findings of the High Court while allowing the writ petition which are as follows :

(i) The report of RCI had only shown that the main gate of the disputed premises was locked and that if found appropriate, it was the duty of the RC & EO to call the parties to ascertain the correct position. This by itself did not amount to vacancy. There was nothing in the report to show that there was vacancy in the house of the premises in question.

(ii) The order dated 24th of January, 1981 declaring vacancy did not show that on that date, either the landlord or any applicant was present.

(iii) It was not clear from the order sheet as to whether the

A RCI had inspected the disputed premises and submitted his report on the direction of the RC & EO.

(iv) The RCI report, the order sheet and any other document did not show that any notice was given to the landlord before inspection by the RCI or that he was made
B aware of the RCI Report.

(v) No order directing the landlord to file objection against vacancy was passed.

(vi) In view of sub-rule (3) of Rule 9 of the Rules framed
C under the U.P.Act No. 13 of 1972 and the case reported in *Yogendra Tiwari Vs. D.J. Gorakhpur* AIR 1984 SC 1149, it was essential to issue notice to the landlord so that he could file release application if he so desired.

D (vii) From the orders dated 20.4.1981, 3.7.1981 and 7.8.1981 on the order sheet, it would be clear that the RC & EO had heard the question of vacancy again.

(viii) The landlord did not file any copy of the release order of 1952.

E

(ix) Against the order dated 24.1.1981, declaring vacancy, although no challenge was made independently but the same was challenged by an application for amendment subsequently filed.

F (x) The vacancy declaration order was bad in law for the following reasons : (a) Inspection was made by the RCI without notice to the landlord. (b) there was no material or evidence which could justify declaration of vacancy. The RCI Report, even if it was correct, did not disclose
G existence of vacancy; (c) Vacancy was declared without issuing notice to the landlord. (d) Vacancy declaration order was reconsidered by the RC & EO but no fresh order declaring or holding vacancy was passed by the RC & EO.

H (xi) The allotment order was in violation of Section 16(9)

of the Act inasmuch as while making the allotment order, the allottee was not required to pay to the landlord advance presumptive rent of one month.

6. On the aforesaid findings arrived at by the High Court, the writ petition was allowed. Before we proceed further, we may also record the findings arrived at by the revisional court which are as follows :-

(i) Subsequent to the receipt of the Rent Control Inspector, a notice was formally sent to the landlord who had put in appearance on 3.1.1981 but he did not file any objection nor had sought time for filing objection.

(ii) There was no objection filed by the landlord as to the vacancy before passing the order dated 24.1.1981.

(iii) The finding of the RC & EO that the building in dispute was vacant was a finding of fact not vitiated by any error of jurisdiction.

(iv) There was ample evidence on record to show that the landlord was residing at 103, Chowk Gangadas, Allahabad and the disputed premises was vacant. The name of the landlord had been entered in the electoral roll consistently from the year 1966 to year 1980.

(v) The affidavit of Smt. Prabha Shukla, wife of the appellant to the effect that the disputed premises was let out to different university students was not contradicted by the landlord.

(vi) All the persons who had applied for allotment had alleged that the disputed premises was formerly in occupation of one Sri S.K.Misra but even in the objection purported to have been filed on 24.1.1981, there was no averment that the building in dispute was not occupied by S.K.Misra or any other person.

These were the findings made by the revisional court while

A rejecting the revision petition filed by the respondent.

7. Keeping in mind the findings arrived at by the revisional court and the High Court, let us now deal with the submissions of the learned counsel for the parties.

B 8. The learned senior counsel for the appellant Mr. Gupta submitted before us that the High Court was not justified in interfering with the order dated 24th of January, 1981 declaring vacancy, in the exercise of its writ jurisdiction under Article 226 of the Constitution. In this context, it was brought to our notice C that during the pendency of the writ petition before the High Court, after almost 20 years, on 18th of February, 2002, an application praying for amendment of the writ petition for challenging the order dated 24th of January, 1981 by which the vacancy was declared was filed, which was allowed by the High Court D by its order dated 22nd of May, 2002. Against this order of the High Court, the appellant had filed an application for recall of the said order but the same was also rejected by the High Court by its order dated 14th of February, 2003. Aggrieved by the orders of the High Court, the appellant had filed a special leave petition before this court challenging the aforesaid orders. This E court had allowed the special leave petition by setting aside the orders dated 22nd of May, 2002 and 14th of February, 2003 in the following manner: -

> "On going through the materials on record and keeping in F view the limited notice we ordered when the special leave petition initially came up for orders relating to admission, the fact that has to be kept into consideration is not even so much as is to what really transpired on that day in court but how best the situation should be solved and the G interests of justice could be served. On that view of the matter, we are fully satisfied that the orders of the High Court under challenge are to be set aside and convinced that the interest of justice can be better served only if the orders dated 22.5.2002 and 14.02.2003 are set aside and the Civil Misc. Writ Petition No. 4621 of 1982 is H

restored to its file to be disposed of afresh on merits and in accordance with law, after hearing both the parties and giving them due opportunity. A

Having regard to the further fact that the writ petition is of the year 1982, in the interest of justice and in order to avoid any further delay, the High Court may ensure the disposal of the matter as expeditiously as possible, atleast within three months from the date of receipt of a copy of this order. B

The appeals are disposed of on the above terms. No costs." C

9. The learned senior counsel for the appellant Mr. Gupta, therefore, sought to argue before us that by virtue of the order passed by this court in the aforesaid special leave petition, setting aside the aforementioned two orders of the High Court, the D fact of existence of vacancy had attained finality. The learned senior counsel thus submitted that it was not open to the High Court to adjudicate upon the question of vacancy after the decision of this court and also in view of the concurrent findings of fact of the RC & EO and the revisional court. The learned senior E counsel for the appellant Mr. Gupta also sought to argue that it was not open to the High Court to reconsider the question of vacancy which had been fully answered by the RC & EO and affirmed by the revisional court in view of the decision of this court in *Ganpat Roy and others* Vs. *A.D.M. and others* [(1985) F 2 SCC 307], and that the High Court was not justified in not following the dictum of *Ganpat Roy's* case merely because it had been referred to a larger bench.

10. These submissions of the learned senior counsel for the appellant were hotly contested by the learned senior counsel appearing on behalf of the respondent. G

11. After considering the rival submissions of the parties, we may note that the question whether the respondent was given sufficient opportunity to object and lead evidence to disprove H

A the fact of vacancy was taken into consideration by the High Court and from the materials on record and the evidence adduced by the parties, it was open to the High Court, even in the exercise of its power under Article 226/227 of the Constitution, to come to a finding of fact that such opportunity was not at all B given to the respondent. Even assuming that the High Court was wrong in coming to a conclusion of fact that no opportunity was given to the respondent to file objections, then also, we are not inclined to interfere with the judgment of the High Court in the exercise of our discretionary power under Article 136 of the C Constitution for the reasons stated hereinafter.

12. First, the finding of the High Court, as noted herein earlier, in clause (vii) viz., that from the orders dated 20th of April 1981, 3rd of July, 1981 and 7th of August, 1981 on the order sheet, it was clear that the RC & EO had heard the question of D vacancy again is very crucial. Having done so, it was imperative that the RC&EO should have passed a fresh order to the effect whether the disputed premises was vacant or not. However, in a rather peculiar and strange manner, the RC&EO proceeded and fixed a date for passing of the allotment order on E the basis of the order dated 24th of January, 1981. We may note at this stage that the provisions regarding allotment of vacant buildings are governed by Sections 12, 16 and 34(8) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (in short "the Act") and the rules framed under F the said Act. The passing of the allotment order without declaring vacancy was a gross error committed by the RC&EO because under the scheme of the provisions of the act, the preliminary step was to declare a vacancy, which, in our view, was not done and even if done, the same was not in a bonafide G manner. The RC&EO should have at least conveyed their decision on that point.

13. Secondly, the RCI and the RC&EO while submitting the report and passing the order declaring vacancy respectively did not adhere to the provisions governing the allotment of va- H cant buildings, as enumerated herein above We find from record

that no neighbour was enquired to ascertain vacancy, much less two neighbours as mandated by the rules. A

14. Thirdly, the finding of the High Court that simply because the gate was locked, it was no ground to conclude that the disputed premises was vacant cannot be ignored. The learned senior counsel for the appellant contended that in this case, a deemed vacancy had occurred and ingredients of Section 12 of the Act which deals with Deemed vacancy of buildings were satisfied. As rightly pointed out by the High Court in the impugned judgment, the fact that the gate was locked cannot be a conclusive proof to hold that the respondent had removed his effects there from or that he had allowed it to be occupied by any person who was not a member of his family or even that he and members of his family had taken up residence elsewhere. In our view, the question of deemed vacancy cannot arise at all in view of the facts, which would be evidenced from the order of the RC & EO and the report of the RCI. From the said order of the RC & EO, it does not appear that the respondent had substantially removed his effects from the disputed premises. As stated hereinabove, the fact of the gate being locked and the absence of the respondent at the time of the inspection would not mean that substantial removal of effects of the respondent had been made. In view of our discussions made hereinabove, we are not of the view that any deemed vacancy had occurred and on this ground, we are not inclined to interfere with the judgment of the High Court. B C D E F

15. As regards the objection raised by the learned senior counsel for the appellant to the effect that the High Court should have followed the dictum in Ganpat Roy's case (Supra) the same is not acceptable. At that time, the matter was referred to a larger bench. The decision was, therefore, debatable and not conclusive. But now all doubts regarding the dictum in Ganpat Roy's case [supra] have been set at rest by a decision of this court in *Achal Mishra Vs. Rama Shanker Singh and ors.* [(2005) 5 SCC 531], wherein this court in Para 14 observed as under: - G H

"It is thus clear that an order notifying a vacancy which leads to the final order of allotment can be challenged in a proceeding taken to challenge the final order, as being an order which is a preliminary step in the process of decision-making in passing the final order. Hence, in a revision against the final order of allotment which is provided for by the Act, the order notifying the vacancy could be challenged. The decision in Ganpat Roy case which has disapproved the ratio of the decision in Tirlok Singh and Co. cannot be understood as laying down that the failure to challenge the order notifying the vacancy then and there, would result in the loss of right to the aggrieved person of challenging the notifying of vacancy itself, in a revision against the final order of allotment. It has only clarified that even the order notifying the vacancy could be immediately and independently challenged. The High Court, in our view, has misunderstood the effect of the decision of this court in Ganpat Roy case and has not kept in mind the general principles of law governing such a question as expounded by the Privy Council and by this court. It is nobody's case that there is anything in the Act corresponding either to section 97 or to section 105(2) of the Code of Civil Procedure, 1908 precluding a challenge in respect of an order which ultimately leads to the final order. We overrule the view taken by the Allahabad High court in the present case and in Kunj Lata V. Xth ADJ, that in a revision against the final order, the order notifying the vacancy could not be challenged and that the failure to independently challenge the order notifying the vacancy would preclude a successful challenge to the allotment order itself. In fact, the person aggrieved by the order notifying the vacancy can be said to have two options available. Either to challenge the order notifying the vacancy then and there by way of a writ petition or to make the statutory challenge after a final order of allotment has been made and if he is aggrieved even thereafter, to

approach the High Court. It would really be a case of election of remedies." A

16. In the present case, the High Court had permitted the respondent to amend the writ petition whereby he sought to challenge the order dated 24th of January, 1981 declaring vacancy. Such order of the High Court allowing the amendment B was challenged before this court and this court had remanded the matter to the High Court setting aside such order requesting the High Court to decide the writ petition afresh. Since this Court had remanded the matter to the High Court for a fresh decision on the question whether the amendment should be allowed or not along with the merits of the writ petition, it cannot C be said that the High Court was in error after the order of this court to allow the application for amendment on facts as this court did not decide the merits as to whether the application for amendment should be allowed or not. We have already quoted D hereinearlier the substantial portion of the order of this court in that special leave petition and from the same, it is clear that it was passed without going into the merits of the orders allowing the application for amendment of the writ petition and this court had simply set aside the said orders of the High Court remand- E ing the matter to the High Court for disposal of the same afresh and in accordance with law after hearing both the parties and after giving them due opportunity. The High Court by the impugned judgment had simply followed the directions made by this court in the order passed in that special leave petition, as F quoted hereinearlier, and came to a conclusion that the order dated 24th of January, 1981 declaring vacancy was bad in law. That apart, it is clear from the decision of this court in Achal Mishra's case [supra] that it was open to the respondent to challenge the order declaring vacancy in the writ petition against G the allotment order even though the said order was not challenged independently there and then. Therefore, the High Court was fully justified in considering the validity of the vacancy declaration order while hearing the writ petition against the allotment order. In view of our discussions made hereinabove, we H

A are, therefore, of the view that since this court had not decided that special leave petition on merits, it cannot be said that the vacancy declaration order had attained finality. Therefore, the High Court was fully justified in considering the question of vacancy, which was a core issue in the writ petition because if the B vacancy declaration itself was bad in law, the consequent allotment order which was passed cannot be said to be not in violation of Section 16 of the Act. In any view of the matter, the question regarding vacancy was a core issue in the writ petition and in our view, the High Court, on consideration of the materials on C record was entitled to look into it by invoking its writ jurisdiction under Article 226 of the Constitution. Since the order passed by the High Court was based on consideration of facts, which cannot be interfered with except in exceptional cases, we do not find any reason to interfere with the same under Article 136 D of the Constitution of India.

17. There is another aspect of this matter for which, in the facts and circumstances of this case, we would not exercise our discretionary power under Article 136 of the Constitution. The vacancy declaration order and the consequent allotment in E favour of the appellant was made in the manner indicated herein earlier and the appellant stormed into the disputed premises more than two decades back and started enjoying the same without paying a single penny in respect of the same. It was only after the judgment of the High Court that he had deposited the F amount as directed by the High Court. Therefore, we do not find any reason to interfere with the impugned judgment of the High Court under Article 136 of the Constitution in the facts and circumstances of the present case.

18. For the foregoing reasons, we do not find any merit in G this appeal. The appeal is thus dismissed. There will be no order as to costs. The appellant is, however, granted time to vacate the disputed premises by 30th of November, 2008 subject to filing an usual undertaking before this court within one month from this date.

H B.B.B. Appeal dismissed.