A

STATE OF HIMACHAL PRADESH & ANR.

v.

UMED RAM SHARMA & ORS.

FEBRUARY 11, 1986.

B

[V.D. TULZAPURKAR, R.S. PATHAK & SABYASACHI MUKHARJI, JJ.]

Constitution of India, 1950, Articles 19(1)(d), 21 & 38 - Right to life embraces not only physical existence of life but the quality of life - For residents of hilly areas - Access to road, access to life itself - Roads for communication - Provision of - Constitutional obligation - Court - Whether entitled to give directions in cases of executive inaction or slow action.

C

The petitioner, State sanctioned construction of a road known as Ghanna-Hatti-Bhukho road in district Simla. The total length of the road was about 5 kms. and the construction was started immediately in 1977. When the construction of the road approached about 3/060 kms., there was obstruction and the construction was stopped due to one reason or the other. Thereafter the work had been resumed once or twice in a half hearted manner but it could not be completed, due to lack of funds since a sum of Rs. 40,000/- allocated during the financial year 1984-85 for the construction of this road had already been fully utilised.

D

E

Respondents Nos. 1 to 15, residents of nearby villages, addressed a letter to the Chief Justice of the High Court complaining (i) that they had been totally deprived of the road facility; (ii) that they had to go to the city after negotiating steep ascent of 4/5 miles and only after such a strenuous effort they were able to establish contacts with the city; and (iii) that democracy was meaningless to them. In those circumstances, they prayed for court's intervention and action on this behalf.

F

G

The High Court treated the aforesaid letter as a writ petition and after receiving reply from the State Government, it found that the people of the area were denied the benefit

H

of the use of the road in a contiguous length and that some remedial action was expedient in the public interest. The High Court also recorded the statement of the Superintending Engineer that there was no reason why the road could not be constructed gradually onwards and that during the financial year to make the road serviceable an expenditure of about Rs. 90,000/- would be necessary and as against this requirement under the budget allocation, a sum of Rs. 40,000/- had been set apart for the purpose of widening the road. The High Court directed (1) that the Superintending Engineer of the PWD should proceed with the construction of the road and to complete the same during the course of the current financial year; (2) that the Superintending Engineer should make an application to the State Government demanding additional sum of Rs.50,000/- being sanctioned for the construction of the said road; (3) that the State Government should favourably consider the demand of the Superintending Engineer. While giving the above directions, the High Court noted that the construction of the road had progressed in varying degrees and in a somewhat haphazard manner and the road had not become serviceable beyond 3/060 kms.

The petitioner, in this special leave to appeal under Article 136, questioned the power of the High Court to issue prerogative writs under Article 226 of the Constitution to direct the State Government either to allot any particular sum for expenditure on account of particular project or to allot amounts in addition which have already been allotted under the current financial budget of the State Government and thus to regulate even the procedure in financial matters of the State, which, according to the petitioner, were the exclusive domain of the legislature as contained in Articles 202 to 207 of the Constitution.

Disposing of the petition,

HELD : 1(i) There was nothing improper or illegal in the order passed by the High Court directing the State Government to carry out the construction as quickly as possible within the sanctioned limits. The High Court has not transgressed its jurisdiction of supervising executive action in view of the time taken to construct the road. It has not transgressed its limits by substituting its priorities. There has been

allocation. The court has directed the executive to bring it to the notice of the legislature if some re-allocation was feasible amongst the sanctioned expenditure for roads leaving the priorities to the discretion of the competent authorities. [261 A-B; 267 E; H; 268 A] A

1(ii) The court's direction was not intended to supervise the action taken and to enforce its implementation but only to be apprised of the action taken in order to bring about a certain sense of urgency so that there was no delay. However, there was no need for the High Court to direct that the matter be listed again before it. [268 B; 269 B] B

2(i) Every person is entitled to life as enjoined in Article 21 of the Constitution. He has the right under Article 19(1)(d) to move freely throughout the territory of India and he has also the right under article 21 to his life and that right under article 21 embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself. Therefore, there should be road for communication in reasonable conditions in view of constitutional imperatives and denial of that right would be denial of the life as understood in its richness and fullness by the ambit of the Constitution. [259 H; 260 A-B] C D

In re: Sant Ram, [1960] 3 S.C.R. 499; **Kharak Singh**, [1964] 1 S.C.R. 332; **A.V. Nachane & Anr. etc. etc. v. Union of India & Anr. etc. etc.**, [1982] 1 S.C.C. 205; **Olga Tellis and Others etc. v. Bombay Municipal Corporation and Others etc.**, [1985] 3 S.C.C. 545; **Municipal council, Ratlam v. Shri Vardhichand and Ors.**, [1981] 1 S.C.R. 97 & **Francis Coralie Mullin v. Administrator, Union Territory of Delhi & Ors.**, [1981] 2 S.C.R. 516 relied upon. E F

2(ii) The Constitution envisages a broad division of the power between the legislature, the executive and the judiciary. Although the division is not precisely demarcative there is general acknowledgement of its limits, there is certain time overlapping. It is for the legislature to legislate, the executive to implement and carry out that legislation and the judiciary to supervise. Affirmative actions are some-times necessary to keep the judiciary in tune with the legislative intention. However, the directions of the court cannot and should not run counter to the specific provisions of the Constitution. In other words, the court cannot G H

A arrogate to itself any function which is left to the domain of the other two branches namely the executive and the legislature. [267 C-D; 261 C-D]

2(iii) Read in the background of the Directive Principles as contained in article 38(2) of the Constitution, B access to life should be for the hillman an obligation of the State but it is primarily within the domain of the legislature and the executive to decide the priority as well as to determine the urgency. Judicial review of the administrative action or inaction where there is an obligation for action should be with caution and not in haste. It depends upon the facts and C circumstances of each case. Its dimension is never close and must remain flexible. [266D-E; 269 H; 270 A]

3. Affirmative action in the form of some remedial manner, in public interest, in the background of the constitutional aspirations as enshrined in Article 38 read D with Articles 19 and 21 of the Constitution by means of judicial directions in cases of executive inaction or slow action is permissible within the limits. [269 E]

In the instant case, the respondents have been affected by the denial of the proper roads in a hilly State. Therefore E there is no dispute as to their locus. There is also no dispute that the State Government was willing and had indeed sanctioned money for the construction of the road. Constitutional and legal imperative on the part of the State to provide roads for residents of hilly state is not in issue. The High Court has noted the statement of the Superintending F Engineer that a sum of Rs. 90,000 would be required for the completion of the road. The High Court has suggested that Superintending Engineer may make a proposal to this effect to the appropriate Government. The High Court has not directed the State Government to spend Rs. 90,000 which clearly in view of the system of budgeting and the budget would be in excess G of the annual statement of income and expenditure sanctioned by the legislature. The court could not direct the State Government to spend beyond the sanctioned amount which is in the domain of the legislature in view of the provisions of Articles 202 to 207 of the Constitution so far as the State expenditures are concerned. The Superintending Engineer as the H administrative authority has been directed to carry out the

directions of the court for the widening of the road subject to funds being available during the time limit. [260 E-F; 263 E-H]

Commonwealth of Massachusetts v. Andrew W. Mellon, U.S. Supreme Court Reports, 67 Lawyers' Edn. p. 1078 at p. 1085 **Bandhua Mukti Morcha v. Union of India & Ors.,** [1984] 2 S.C.R. 67; **Dr. P. Nalla Thamby Thera v. Union of India and Ors.,** [1984] 1 S.C.R. 709; **State of Himachal Pradesh v. A Parent of a Student of Medical College, Simla and Ors.,** A.I.R. 1985 S.C. 910 & **Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others. v. Union of India and Ors.,** [1981] 2 S.C.R. p. 67 at p. 71 referred to.

CIVIL APPELLATE JURISDICTION : Special Leave Petition (Civil) No. 12621 of 1984.

From the Judgment and Order dated 20.8.84 of the Himachal Pradesh High Court in C.W.P. No. 231 of 1984.

K. Parasaran, Attorney General and A.K. Ganguli for the petitioners.

T.U. Mehta and C.P. Pandey for the respondents.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J. From one angle in this case there is much ado about nothing, from another point of view there is a great deal than that meets the eye. It is better, however, to proceed to deal with the matter as far as eye can see without telescope but also without blinkers. The facts are few - the issues in controversy are fewer still - the directions given by the High Court in this case which are under challenge a e brief but their consequences are of some relevance and importance on the question of ambit of judicial power over administrative inaction. To the facts first, therefore, in immitation of the inimitable style of Lord Denning - This petition for special leave to appeal under article 136 of the Constitution is directed against the order of the Division Bench of the High Court of Himachal Pradesh dated 20th August, 1984. Respondents 1 to 15 herein, who claimed to be poor and mostly Harijans and are residents of villages Bhainkhal,

A

mostly Harijans and are residents of villages Bhainkhal, Baladi and Bhukha, Tehsil and district Simla in Himachal Pradesh, addressed a letter on or about 4th June, 1984 to the Hon'ble Chief Justice of the said High Court, complaining, inter alia, that (i) in 1972, the State Government had sanctioned the construction of Road known as Ghanna-Hatti-
B Bhukho Road, (ii) by about August, 1980 half the portion of the road i.e. about 3 Kms. had been constructed and that when the road had reached the village Gharog, the residents of the village obstructed further construction, (iii) the Government initiated compulsory acquisition proceedings in respect of the lands belonging to the villagers of Gharog village and the
C same were finally acquired in 1982. The villagers of Gharog who were disinterested in further construction of the road in collusion with the authorities got the construction stopped at that stage.

It was alleged that after the construction had been made
D upto the village Gharog, 200/250 metre portion of the road had to be constructed through a privately owned piece of barren land belonging to two families. As the road had reached upto their village, they objected to further construction of the road and also obtained 'stay orders' from the Court. The compulsory acquisition proceedings had been taken by the
E government in 1980 and the land was acquired by it in 1982.

But the grievances of the said respondents were that, in collusion with the authorities, the said two families of village Gharog along with other residents of the village who were no longer interested in the further construction of the
F road, got the construction work stopped. Work had been thereafter resumed, it was further alleged, once or twice in a half-hearted manner but the residents of the aforesaid village reached the place of work in protest and got the work stopped again. Though the land was government land, the construction had been, according to the said respondents, completely
G abandoned.

The said respondents alleged that they had been totally deprived of the road facility till then. They alleged that they had to go to city after negotiating a steep ascent of 4/5 miles and by carrying load worth maunds on their shoulders.
H Only after such a strenuous effort, it was their allegation, that they were able to establish contacts with the city. They asserted that 'democracy was meaningless to them'. In those

circumstances they by the aforesaid letter prayed for court's intervention and action on this behalf.

After receiving the letter on 22nd June, 1984, the letter was treated by the High Court as a Writ Petition and the State Government filed its reply to the same stating, inter alia, that on 29th July, 1977 the government had sanctioned construction of the said road for a total expenditure of Rs.4,99,000. The total length of the road was about 5 Kms.; construction work started immediately in 1977 and most part of the road including widening at various places had been constructed till 1984 on a total expenditure of Rs.2,99,216; when the construction of the road approached about 3/060 Kms. at that time there was obstruction as mentioned hereinbefore and a civil suit was filed and injunction was obtained. The injunction was vacated by the civil court on the 30th April, 1982. The government stated further that some other villagers again filed another suit which was dismissed in June, 1983. In the meantime the portion of the said land had been acquired and compensation had been paid to the land owners and in the financial years 1984-85, a sum of Rs.40,000 had been allocated for the construction of this road which amount had been fully utilised. In those circumstances it was stated in the said affidavit filed on behalf of the state government that due to lack of funds, construction of the entire road could not be completed.

When the matter came up for hearing before the High Court on 27th June, 1984, the Court desired to know from the learned Advocate General of the State as to the decision of the government regarding the completion of the road to the extent of the first three kms. The hearing was adjourned for this purpose. The respondents 16 and 17 filed an application on 24.7.1984 for impleading themselves as parties to the proceedings as they claimed that they would be affected by the decision of the High Court in the said proceedings. They were so allowed to be impleaded by the High Court on 30th July, 1984. Learned Advocate General informed the High Court that the State Government had agreed to the alignment of the road being maintained in the same position as had been earlier decided. After affidavit, the matter came before the High Court on 20th August, 1984.

A

The High Court directed the Superintending Engineer of the P.W.D. to proceed with the construction of the road between 3/060 Kms. onwards upto 3/886 Kms. and to complete the same during the course of the current financial year. The Court, further, directed the Superintending Engineer to make an application to the State Government demanding additional sum of Rs.50,000 being sanctioned for the construction of the said road and directed further that the state government should favourably consider the demand of the Superintending Engineer.

B

C

The High Court further, in its order dated 20th August, 1984, noted that the work of the construction of the road had been taken up in patches. The High Court felt that although public money had been invested in the construction of the road and the construction of the road had, in fact, progressed in varying degrees 'almost to the end of the road', because the construction work had been taken up in a somewhat haphazard manner, the road had not become serviceable beyond 3/060 Kms. except in intermittent patches. The High Court found that the people of the area were, therefore, denied the benefit of the use of the road in a contiguous length. The High Court was of the opinion that some remedial action was expedient in the public interest. The High Court, further, noted the information supplied by the Superintending Engineer that during the financial year to make the road serviceable from 3/060 Kms. and 3/886 Kms. by making it 5/7 metres wide **katcha** constructed road, an expenditure of about Rs.90,000 would be necessary, as against this requirement, under the budget allocation, a sum of Rs.40,000 has been set apart for the purpose of widening the road. The Superintending Engineer further stated that the two intervening patches in which no construction work whatever has been undertaken, had been left out because of the then pending litigation which, however, had ended in June, 1983. In those circumstances, the High Court noted the requirements for the completion of the road and/or to make the same serviceable.

D

E

F

G

The High Court recorded the statement of the Superintending Engineer that there was no reason why the road could not be constructed gradually onwards. In giving the direction the High Court took into consideration the statement made before it by the Superintending Engineer that the road

H

could be constructed gradually onwards. According to the estimate of the Superintending Engineer for the purpose of widening of the road between 3/060 Kms. to 3/886 Kms., Rs.90,000 would be required on rough estimate but only Rs.40,000 was there. The High Court, thereafter, directed as follows:

> "The State Government is directed to favourably consider the demand for additional funds which the Superintending Engineer will make to complete the widening of the road between 3/060 Kms. to 3/886 Kms. in the course of the current financial year.
>
> The case to be listed again on November 20, 1984. The Superintending Engineer will, on that day, place on the record of this case a report with regard to the progress made during the intervening period in the direction of completing and widening of the road between 3/060 Kms. and 3/886 Kms."

This petition seeks special leave to appeal to canvass before this Court the question whether in view of the provisions of articles 202 to 207 of the Constitution, the High Court had power to issue prerogative writs under article 226 of the Constitution to direct the State Government either to allot any particular sum for expenditure on account of particular project or to allot amounts in addition which have already been allotted under the current financial budget of the State Government and thus to regulate even the procedure in financial matters of State which, according to the Government, were the exclusive domain of the legislature as contained in articles 202 to 207 of the Constitution.

It appears to us that in the facts of this case, the controversy lies within a short compass. It is well-settled that the persons who have applied to the High Court by the letter are persons affected by the absence of usable road because they are poor Harijan residents of the area, their access by communication, indeed to life outside is obstructed and/or prevented by the absence of road. The entire State of Himachal Pradesh is in hills and without workable roads, no communication is possible. Every person is entitled to life as enjoined in article 21 of the Constitution and in the facts of this case read in conjunction with article 19(1)(d) of the

Constitution and in the background of article 38(2) of the Constitution every person has right under Article 19(1)(d) to move freely throughout the territory of India and he has also the right under article 21 to his life and that right under article 21 embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself. These propositions are well-settled. We accept the proposition that there should be road for communication in reasonable conditions in view of our Constitutional imperatives and denial of that right would be denial of the life as understood in its richness and fullness by the ambit of the Constitution. To the residents of the hilly areas as far as feasible and possible society has constitutional obligation to provide roads for communication.

We need not in this connection refer in detail to the numerous decisions. Reference may, however, be made to in re: **Sant Ram,** [1960] 3 S.C.R. 499, **Kharak Singh,** [1964] 1 S.C.R. 332, **A.V. Nachane & Anr. etc. etc. v. Union of India & another etc. etc.,** [1982] 1 S.C.C. 205, **Olga Tellis and Ors. etc. v. Bombay Municipal Corporation and Ors. etc.,** [1985] 3 S.C.C. 545, **Municipal Council, Ratlam v. Shri Vardhichand and Ors.,** [1981] 1 S.C.R. 97, **Francis Coralie Mullin v. The Administrators, Union Territory of Delhi & Ors.,** [1981] 2 S.C.R. 516.

The persons who have complained about the non-availability of road are the persons who have been affected by the denial of proper roads in a hilly state. Therefore, there is no dispute as to their locus. There is also no dispute that the state Government was willing and has indeed sanctioned money for the construction of the road. Constitutional and legal imperative on the part of the State to provide roads for residents of hilly state is not in issue. So in this petition we need not examine how for is the obligation to provide roads.

The citizen has come to the court complaining only that the construction of the road has not been completed with sufficient energy and zeal and there should be more funds available. The budget allocation has been placed before us. We are satisfied that Rs.40,000 had been sactioned for the year and whatever sum is available during this year, the State Government is willing to spend for the construction of the road during the year as per allocation already made. So,

A

therefore, there was nothing improper or illegal in the order passed by the High Court directing the State Government to carry out the construction as quickly as possible within the sanctioned limits. It is clear that communication in the hills is difficult and to a hillman, road is life line. About spending money for a particular socially needed and community wise B desirable expenditure it is necessary to bear in mind the Constitutional provisions in this regard.

The expression 'budget' does not appear as such in the Constitution. It is one of the terms sanctified by usage. So far as the provision for public expenditure is concerned, this must be in consonance with the requirements of the Constitution. The directions of the Court cannot and should not run C counter to the specific provisions of the Constitution. In other words, the court cannot arrogate to itself any function which is left to the domain of the other two branches namely, the executive and the legislature.

D

The provisions regarding the central allocation of funds are contained in articles 112 to 117 of the Constitution with which we are, in the facts of this case, not concerned. We are concerned here with the procedural and financial matters in the State which are dealt with in articles 202 to 207 of the Constitution. It is not necessary to refer in detail to the E said articles. It suffices to say that certain expenses are charged on the consolidated fund of the State. Discussions regarding these though take place in the assembly, these are not subject to alterations by the assemblies. It is necessary in this connection to bear in mind the item contained in article 202(3)(e) namely, 'any sums required to satisfy any F judgment, decree or award of any court or arbitral tribunal'. Such an expenditure is a charge on the consolidated fund. Therefore, it would have required elaborate consideration, which fortunately in view of the nature of the directions of the court in this case these cannot be termed as decree or judgment of the court for any specific amount. Had it been G otherwise it would have required delicate handling, because how far and to what extent the court can be permitted, if at all, to have its order sanctified by making it a charge on the consolidated fund is a matter of some importance and requires serious consideration.

H

A

The recommendations apart from those under article 203 (2) shall be submitted in the form of demands for grants to the Legislative Assembly, and the Legislative Assembly shall have power to assent, or to refuse to assent, to any demand, or the assent to any demand subject to any reduction of the amount specified therein. Sub-article (3) of article 203 B stipulates that no demand for a grant shall be made except on the recommendation of the Governor.

Under our constitutional set up, the said demand by the Governor in terms of sub-article (3) of Article 203 must be on the recommendations of Council of Ministers. Article 204 C deals with the Appropriation Bills. After the passing of the Appropriation Bill, making provision for grants for money which are charged on the consolidated funds should be sanctioned by the Legislature. In case of supplementary, additional or excess grants, these must be in compliance with article 205 of the Constitution which in a sense provides that D if any fund is found insufficient for a particular purpose of the year or need has arisen then the Governor i.e. the Government must get sanction to another statement showing the estimated amount of the additional expenditure and such would be the demand for excess grant and would be passed in accordance with the provisions contained in the other articles E of the Constitution.

In this case as appears from the Financial Hand-Book of the Himachal Pradesh Budget Manual which provides by paragraph 2.12 the 'Detailed Estimates', in paragraph 2.13 'Demand for Grant', in paragraph 2.15 'Detailed Head' is a division of F minor head which provides that provision should not ordinarily be made under a new detailed head without the prior approval of the Accountant General. Then 'Major Head' and 'Minor Head' are defined. Paragraph 2.38 stipulates for 'Supplementary appropriation' which means an addition to the amount included in the schedule of authorised expenditure.

G

The Budget is presented under Chapter 7 of the said Hand-Book, paragraph 7.4 to the Legislature and as soon as the budget is presented, it is either passed or not in accordance with the detailed requirements contained and stipulated. The power of appropriation out of the allotments is contained in H paragraph 10.2. Chapter 12 deals with the expenditure not

provided for in budget estimates - Reappropriations - Supplementary estimates and excess grants. Paragraph 12.1 of Chapter 12 provides that no expenditure shall be incurred which may have the effect of exceeding the total grant of appropriation authorised by the Appropriation Act. In case of additional expenditure, a supplementary Appropriation Bill have to be presented to the Legislature.

There are detailed instructions regarding the preparation, submission etc. of applications, for re-appropriation. The sum and substance of the said requirements are that total sanction of bill for a project is within the domain of the legislature and the executive has no power to exceed the total sanction without the consent of the legislature and the court cannot impinge upon the field of legislature. The executive, however, on the appreciation of the priorities determine the manner of priorities to be presented to the legislature. The court cannot also, in our opinion, impinge upon the judgment of the executives as to the priorities.

We were taken to the budget allocation in the instant case in the further affidavit filed which provides for instructions for the preparation of re-appropriation as well as appropriation of grants and the High Court was quite conscious of the same. The High Court has noted that the Superintending Engineer has stated that a sum of Rs. 90,000 would be required for the completion of the widening of the road between 3/060 Kms. and 3/886 Kms. The High Court has suggested that the Superintending Engineer may make a proposal to this effect to the appropriate Government. The High Court has not directed the State Government, as we read the order, to spend Rs.90,000 which clearly in view of the system of budgeting and the budget in this case would be in excess of the annual statement of income and expenditure sanctioned by the legislature. The court could not direct the State Government to spend beyond the sanctioned amount which is in the domain of the legislature in view of the provisions of articles 202 to 207 of the Constitution so far as the State expenditures are concerned. As we read the order, the Superintending Engineer as the administrative authority has been directed to carry out the directions of the court for the widening of the road subject to funds being available during the time limit. The financial period has expired. Whatever sum remaining for this financial

year, the State Government has assured us that they will carry out such direction. So far as the additional grant of the sum was required, it is entirely in the domain of the legislature to sanction it or not. The members of the legislature know the needs of the people. Under the Constitution, they are authorised and entitled to fix the priorities for the expenditure to satisfy the basic needs of the people, upon the judgment and recommendation of the Executive.

Three questions, however, remain to be considered, namely, how far the court could give directions which are administrative in nature and secondly whether any direction could be given to build roads where there are no roads for the enrichment of the quality of life or access to life, and thirdly whether the court could direct that the administration should report from time to time so that action taken can be supervised by the court.

In order to decide the propriety and the legality of the direction given by the High Court of Himachal Pradesh we have to bear in mind that there are three distinct functions in a government and these should be kept separate though in constitutional set up, they very often at places over-lap. In **Commonwealth of Massachusetts v. Andrew W. Mellon,** U.S. Supreme Court Reports, 67 Lawyers' Edn. p. 1078 at p.1085, it was observed about the American constitution thus:- "The functions of government under our system are apportioned. The legislative department has been committed the duty of making laws; to the executive the duty of executing them: and to the judiciary, the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other, and neither may control, direct, or restrain the action of the others." It is also well to remember that freedom depends upon the separation of three organs of the State. Each must function within its own domain and remain distinct.

On this aspect, it is appropriate to recall what Montesquien in 'The Spirit of the Law' (1949 Reprint 1962) observed at pages 150-152:

> "Democratic and aristocratic states are not in their own nature free. Political liberty is to be

found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits?

.....
.....

In every government there are three sorts of powers: the legislative the executive in respect of things dependent on the law of nations and the executive in regard to matters that depend on the civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.

The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch of senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the

A

> life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> B There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

C It is well, however, to remember that Alexander Hamilton, John Ray and James Madison - in Federalist by means of as many as eighty five essays had to support the founding fathers of the American Constitution by trying to prove that in essence there is separation of powers in American Constitution as practised in reality in England.

D

In the instant case, administrative action or administrative inaction is being sought to be reviewed. Read in the background of the directive principles as contained in article 38(2) of the Constitution access to life should be for the hillman an obligation of the State but it is primarily within E the domain of the legislature and the executive to decide the priority as well as to determine the urgency. Judicial review of the administrative action or inaction where there is an obligation for action should be with caution and not in haste.

In this case, as mentioned before, the executive is not F oblivious as is evident from the facts stated herein of its obligation. Its sense of priority it has determined, there may have been certain lethargy and inaction. It has been said by Adam Smith in his **'Wealth of Nation'** that whenever you see poverty widespread rest assured that either of the two causes must have operated, either energy has not been applied or G energy has been misapplied.

In the instant case there has been at the highest a slow application of energy in the action by the executive. By the process of judicial review, if the High Court activises or energises executive action, it should do so cautiously. Reme- H dial action in public interest must be with caution and within

limits. Reading down the order in the manner we have indicated, in our opinion, the High Court has not transgressed the limits of its power.

So far as the first and second question are concerned, in **Bandhua Mukti Morcha v. Union of India & Ors.**, [1984] 2 S.C.R. 67, this Court has given guidance. One of us (Pathak, J.) speaking about the nature and extent of relief which has to be given in litigation where public interest was concerned, observed at page 161 of the report that there were certain fundamental constitutional concepts which need to be recalled, namely, the Constitution envisaged a broad division of the power of the State between the legislature, the executive and the judiciary. Although the division is not precisely demarcated, there is general acknowledgement of its limits, there is certain time over-lapping. It is for the legislature to legislate, the executive to implement and carry out that legislation and the judiciary to supervise. Affirmative actions are sometimes necessary to keep the judiciary in tune with the legislative intention. Having regard to the observations made in this case at pages 161 to 163 of the report in the light we read the present order, we do not think that the learned judges of the Himachal Pradesh High Court have transgressed this jurisdiction of supervising executive action in view of the time taken to construct this road.

In **Dr. P. Nalla Thamby Thera v. Union of India and Ors.** [1984] 1 S.C.R. 709, a writ petition was dismissed under article 32 of the constitution for implementing the report of the Kunzru, Wanchoo and Sikri Committees, and for appointing a fact finding Commission to inquire and report about the train accidents by a certain commuter. The Court held that giving directions in a matter like one which was before the court where availability of resources had a material bearing, policy regarding priorities was involved, expertise was very much in issue was not prudent to issue any directions. The court felt that whether a committee should be appointed or not was primarily a matter in the domain of the executive.

In the instant case before us, the court has not transgressed its limits by substituting its priorities. There has been allocation. The court has directed the executive to bring it to the notice of the legislature if some re-allocation was

A feasible amongst the sanctioned expenditure for roads leaving the priorities to the discretion of the competent authorities.

The only other aspect, which is the third aspect, is the direction of the court to report to the court what progress had been done. In our opinion, if we read the order properly, the court's direction was not intended to supervise the action B taken and to enforce its implementation but only to be apprised of the action taken in order to bring about a certain sense of urgency so that there was no delay.

In this connection reliance may be placed on the observations of this Court in **State of Himachal Pradesh v. A Parent of a Student of Medical College, Simla and Ors.**, A.I.R. 1985 S.C. 910, where the High Court recommended introduction of a bill to prevent ragging. It was held that this was an indirect attempt to direct the executive to initiate legislation with a view to curbing the evil of ragging. There periodic directions were given by the High Court. This Court reiterated that it was entirely a matter for the Government to decide whether or not to introduce any particular legislation. Any member of the legislature could also introduce legislation but the Court could not mandate the executive or any member of the legislature to initiate any legislation and supervise the action of initiation.

The Court in this case has directed 'to favourably consider the demand for additional funds'. This was enough.

The State Government has assured this court that they would carry out this direction. The court must know its limitations in these fields. The court should bring about an urgency in executive lethargy if any, in any particular case but it must remember the warning of Benjamin N. Cardozo in 'The nature of judicial process' at page 141 of the book:-

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by

> analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains."

Therefore, there was no need for the High Court to direct that the matter be listed again before the Court on 20th November, 1984.

Out of deference, however, to the High Court, we do not delete this part of the order of the High Court but direct that this be placed before the High Court only to inform it as to what steps had been taken and thereafter the High Court may not take any further action and leave it to the judgment of the priorities and initiative both of the executive and the legislature to pursue this matter. The High Court has served its high purpose of drawing attention to a public need and indicated a feasible course of action. No further need be done by the High Court in this matter.

So much has been done. So little remains to be done. We trust that this would be done by the State Government in proper spirit.

Affirmative action in the form of some remedial measure, in public interest, in the background of the constitutional aspirations as enshrined in article 38 read with articles 19 and 21 of the Constitution by means of judicial directions in cases of executive inaction or slow action is permissible within the limits. The way we read the High Court's order with the clarification indicated does not transgress that limit.

It is necessary to bear in mind that interference with the administration cannot be meticulous in our Constitutional system of separation of power. It is not necessary to express our opinion in this case whether our Constitution is truly based on Montesquien system of separation of power. We accept the position that court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. See the observations of Krishna Iyer J. in **Fertilizer Corporation Kamgar Union (Regd.), Sindri and Ors. v. Union of India and Others** [1981] 2 S.C.R. p.67 at p.71. It is, however, neither possible nor desirable to define for all purposes that parameter. Judicial review of adminis-

A

trative action depends upon the facts and circumstances of each case. Its dimension is never closed and must remain flexible. But in this case the order of the High Court in the light we have read it, does not exceed that parameter.

The petition for special leave is disposed of in the
B aforesaid manner without grant of any leave to appeal. Except the directions indicated above, there will be no further order on this application. In the facts and circumstances as the State Government has not shown any lack of initiative, the parties will pay and bear their own costs.

C

M.L.A. Petition dismissed.