HIGH COURT OF GUJARAT

STATE OF GUJARAT
Versus
S C AGRAWAL

Date of Decision: 31 March 1998

Citation: 1998 LawSuit(Guj) 159

Hon'ble Judges: S D Pandit

Eq. Citations: 1998 AIR(Guj) 193, 1999 4 GCD 3078

Case Type: Miscellaneous Petition (Civil)

Case No: 35 of 1998

Subject: Civil, Constitution

Acts Referred:
Constitution Of India Art 226
Code Of Civil Procedure, 1908 Or 7R 1
Gujarat High Court Rules, 1993 R 178

Final Decision: Application dismissed

Advocates: S B Vakil, V M Trivedi, R S Sanjanwala, Nanavati Associates

Cases Cited in (+): **1**

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[1] These four Misc. Civil Applications are filed to review and recall the judgment and order passed by this Court in Special Civil Application No. 8579 of 1997 on December 15, 1997. As these four applications are pertaining to one and the same matter and are against one and the same order and the relief sought for is one and the same, I am disposing of these four Misc. Civil Applications by this common judgment.

[2] Special Civil Application No. 8679 of 1997 was filed by S.C. Agrawal, managing partner of Confised Printers against the present applicants to challenge the action of the applicant in Misc. Civil Application No. 35 of 1998 by which they gave a contract of supplying 'Khedut Poti' to the original respondents No. 4 to 6 who are the applicants in other 3 applications viz., Misc. Civil Applications No. 45 of 1998, 48 of 1998 and 50 of 1998 respectively. It was the claim of the said petitioner who is respondent No. 1 in all

these Misc. Civil Applications that said action of the applicant in Misc. Civil Application No. 35 of 1998 was contravening the provisions of Arts. 14 and 19 of the Constitution of India and to quash and set aside the said contracts executed by the present applicants original respondents No. 1 to 3 in favour of the original respondents No. 4 to 6. It was the claim of the applicant that the cost money of the said work is nearly Rs. 5 crores and the said contract work was given without following the normal procedure of calling for the tenders by issuing public advertisement. Said contract was also contrary to the Resolution passed by Government of Gujarat that any work involving the amount of more than Rs. 25,000/- was to be given by issuing advertisement and by calling tenders. It was further alleged by him that said contract was given in order to do favoritism. It was also claimed by him that the cost of printing of one 'Khedut Poti' given to the respondents Nos. 4 to 6 was excessive. According to him, he was ready to supply said 'Khedut Poti' at the rate of Rs. 51- per copy; whereas the respondents No. 4 to 6 were giving the costs of Rs. 0.95 p. per copy. That selection of respondents No. 4 to 6 for the said work was not honest and proper. The respondent No. 1 in this application as original petitioner in Special Civil Application No. 8579 of 1997 had also sought an interim relief in the said application to restrain the respondents No. 4 to 6 to proceed further with the said contract and further to restrain the respondents No. 1 to 3 from making any further payments to the respondents Nos. 4 to 6.

[3] When the said petition came up for admission before my learned predecessor, my learned predecessor was pleased to pass the following order :

> "Notice to the respondents returnable on 2.12.1997. Learned Government Pleader Mr. P.G. Desai waives service of notice on behalf of respondents Nos. 1, 2 and 3. Direct service is permitted."

[4] On behalf of the respondents No. 1 to 3 Mr. B.C. Bhatt, Joint Secretary in the Industries and Mines Department, Government of Gujarat has filed affidavit in reply on behalf of the respondent Nos. 1 to 3 on December 2, 1997. Affidavit in reply on behalf of respondent No. 4 was filed by Shreyas Vishnuprasad Pandya, director of respondent No. 4 on December 3, 1997. Affidavit in reply was also filed on behalf of respondent No. 5 Yogesh V. Pandya, director of respondent No. 5 on December 3, 1998. Yogesh Parikh the sole proprietor of respondent No. 6 has filed his affidavit in reply on behalf of respondent No. 6 on December 3, 1997. Affidavit in rejoinder was filed on behalf of the petitioner to the affidavit in reply filed on behalf of respondents No. 1 to 3 on the same date i.e., December 3, 1997. One Mr. B.M. Paliwal Technical Consultant in the office of Director of Printing and Stationery Government of Gujarat filed his affidavit on December 5, 1997. Along with him, M.R. Patel Dy. Director in the office of the Director of Printing and Stationery, Government of Gujarat has filed his affidavit on the same day i.e., December 5, 1997. The petitioner had also filed his further affidavit on

December 9, 1997 and along with his affidavit he has produced certain documents including four affidavits and a press note issued by Gujarat State Government Presses Class-Ill Employees Association. Thereafter, the matter was heard by me at length for more than two days and I have finally disposed of the said matter by my judgment and order dated December 15, 1995. Present applications are filed to challenge the said order by seeking recalling of the order by reviewing the said order.

[5] On behalf of the applicants it is contended that the order passed by me deserves to be reviewed and recalled and set aside on the following grounds:

1. That the Court was hearing the petition only for the consideration of the admission of the matter and for granting of the interim relief. The matter was not fixed for final hearing and therefore, the Court ought not to have passed final order in the matter. The applicants and their advocates had understood that the matter was only for admission and for granting of interim relief. That the applicants had not filed further affidavit and that has caused prejudice to them.

2. That in the final order the Court had ordered the appointment of a Committee and directed the said Committee to consider and decide the issues framed by the Court. This action on the part of the Court is without the pleadings of the parties. The Court had no jurisdiction to grant such a relief when the same is not pleaded by the parties.

3. The relief which the Court has granted could be granted only by the Apex Court under Art. 142 of the Constitution of India and this Court while exercising powers under Art. 226 cannot have the jurisdiction to give such a relief.

4. That during the course of the arguments, learned advocate for the petitioner had submitted that he was giving up the claim of malafides and malice against the concerned Minister, and in spite of the said submission of the learned advocate for the petitioner, this Court was not justified in directing the committee to go into the question as to whether there was any giving of kick back money or any under table dealing in giving said contract.

[6] It is vehemently submitted before me by the learned advocates for the applicants that the matter was heard only for the purpose of granting interim relief and for the purpose of consideration of admission and that the applicants had never understood that the matter was to be heard for the purpose of even final consideration. It is submitted before me that in view of the provisions of Rule 178 of Gujarat High Court Rules, 1993, it is not open for this Court to decide the petition finally unless initially the Court had issued Rule Nisi.

[7] I will first deal with the second submission. In order to consider said submission, it is necessary to refer to the provisions of Rule 178 of Gujarat High Court Rules, 1993. Rule 178 runs as under :

> "178. Summary dismissal or Rule Nisi: The Court may either summarily dismiss the petition or order a rule nisi to be issued against the respondent against whom it is sought, as it thinks fit. Any rule so granted shall not be made returnable within less than 15 days after the service thereof on the respondent, unless otherwise directed by the Court."
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> Rule 177 is regarding examination of writ petition and after examination of the writ petition, the writ petition is to be placed before the Court for orders under Rule 178 quoted above. Now if the above Rule 178 is carefully read, then it would be quite clear that when the petition was placed before the Court, the Court may either summarily dismiss or order to issue Rule Nisi to the respondent as it thinks fit and proper. Admittedly when this petition was placed before the Court, the Court had passed the following order : "Notice to the respondents returnable on 2.12.1997. Learned Government Pleader Mr. P.O. Desai waives service of notice on behalf of respondents No. 1, 2 and 3. Direct Service is permitted." Therefore, in view of the above order passed by the Court, it is quite clear that the Court had not summarily dismissed the petition. No doubt the order of the Court also does not say specifically that a notice of Rule Nisi be issued or that Rule Nisi be issued. But one thing is quite clear that the Court was not pleased to summarily dismiss the petition. If the provisions of Rule 178 are carefully read, then it would be quite clear that when a petition is filed before the Court, two options are open for the Court after hearing the petitioner or his advocate i.e., either to to summarily dismiss the petition or to issue Rule Nisi. No doubt, as a matter of fact, some time the Court passes one of the * following orders: 1. Issue Notice to the respondents to show cause as to why Ad-interim relief sought for by the petitioner should not be granted. 2. Issue Notice of Rule. 3. Issue Notice to show cause as to why the petition should not be admitted and allowed. 4. Notice.

[8] In the instant case, the Court has passed the 4th order as mentioned above. When the Court has passed the order of issue of Notice, the registry must serve the notice of the petition on the respondents as per the order of the Court. It is not open for the registry to add any words or phrases to the order passed by the Court. Learned advocates for the applicants have brought to my notice the Notice issued in this petition which reads as under:

> "Notice Despatch No. To be Returned to this Court/to be Served on Respondent No.) In the High Court of Gujarat at Ahmedabad Special Civil Application No. 8579

of 1997 Fixed on 2.12.1997 District Ahmedabad City Mr. S.C. Agrawal...Petitioner(s) Advocate V.M. Trivedi vs. State of Gujarat & Ors. To 4. Sahitya Mudranalaya Pvt. Ltd., Address : City Mill Compound, Ahmedabad. 5. Print Vision Pvt. Ltd., Address : City Mill Compound, Ahmedabad. 6. Gujarat Offset Works, Address : Station Road, Offset House, opp: Jain Temple, Vatva, Ahmedabad. Take Notice that the petitioner(s) above named having presented a petition to this High Court under Arts.'226 & 227 of the Constitution of India to grant relief as prayed in prayer Clause 15 (A to G) as stated in the accompanying copy of the petition with notice/writ and the same having been registered in this Court as Special Civil Application and this Court having on 28.11.1997 ordered Notice to issue, it is ordered by this Court that the hearing of the said Special Civil Application. as to why it should not be admitted will take place on the 2nd December, 1997 at 11.00 A.M. peremptorily and if no appearance is made on your behalf by yourself, it will be determined in your absence. Witness, Ramesh Amrutlal Mehta, Esquire Acting Chief Justice at Ahmedabad aforesaid this 28th November, 1997. Clerk Assistant By the Court For Deputy Registrar This day of True Copy For Deputy Registrar Court's Order: Coram : M.H. Kadari, J. (28.11.1997) Notice to the respondents returnable on 2nd December, 1997, Learned Govt. Pleader Mr. P.G. Desai waives service on - behalf of respondents No. 1, 2 and 3, Direct Service is permitted."

No doubt, if the above words contained in the notice are seen then it would be quite clear that in the first part of the said notice, the registry has added the words" to show cause as to why the petition should not be admitted" by making insertion in the original proforma of the Notice. It is urged before me by the learned advocate for the applicants that when the applicants were served with the said notice, they took it that the petition was to be considered only on the question of admission of the petition and the petition was not to be considered for final hearing. At the cost of repetition it must be stated that there is no doubt that in the first part of the notice, the registry has added the words after the words issue Notice "as to why the petition should not be admitted". But said notice is also in the concluding portion has quoted in verbatim the order passed by the Court in which there is a mention of only 'Issue Notice'. There, the words "show cause as to why the petition should not be admitted" are not written. Therefore, the party when has to read the notice, the party has to read it as a whole. Therefore, merely because the registry has added some words to the order of the Court, it could not be said that the Court is bound by the said addition made by the registry. Similarly when the notice has quoted as stated above in verbatim, the order of the Court in the concluding portion of the notice, it is not open for the party to say that the party had taken into consideration only the first portion of the notice and had taken

notice of the first portion of the notice viz., as to why the petition should not be admitted.

[9] Mr. S.B. Vakil learned advocate for the applicant in Misc. Civil Application No. 50 of 1998 had drawn my attention to the following observations in V.C. Ramchandran's Law of Writs 5th Edition revised by Mr. Justice C.K. Thakker on page 946 under the caption of Preliminary Hearing, has stated as under :

"Preliminary Hearing After the petition is filed and is ready for the first hearing, it is notified for preliminary hearing. It is knwon as admission stage. The Court taking admission matters will hear the petitioner or his counsel at the preliminary hearing and may admit the matter by issuing rule nisi thereon if it is satisfied that prima facie, the points raised in the petition have some substance and they require consideration. If on the other hand, the Court does not find any substance in the petition or is of the opinion that the petition is frivolous, the Court may dismiss it summarily (in limine) though ordinarily by recording reasons in support of such dismissal. But instead of adopting any of the above two courses, the Court may issue notice to the opposite party asking him to show cause as to why the petition should not be admitted and may fix a date of hearing of petitions, and on that fixed day, after hearing the petitioner and the respondent, may either admit or dismiss the petition."

If the above observations made in the said book is considered then it would be quite clear that it is open for the Court to incidentally adopting any of the two courses viz., (1) issuing rule nisi and (2) summary dismissal of the petition. The Court may issue notice to the opposite party asking him to show cause as to why the petition should not be admitted. When such a notice is issued to the opposite party to show cause as to why the petition should not be admitted, only the Court can either admit or dismiss the petition.

[10] But with due respect to the learned author it must said that by mere admission of a writ petition neither any right is created in favour of the petitioner nor any obligation is created against the respondent. The admission of a petition is only a question between the petitioner and the Court. The respondent has no locus standi in the decision, the respondent gets locus standi only after the notice is issued by the Court to file his opposition to the petition. Even if the respondent happened to file a caveat, he has got the right of being heard only in case if the Court is going to give any interim or final relief in favour of the petitioner. The mere admission of the petition is neither granting of any interim relief nor granting of any final relief. Therefore, the respondent cannot claim and contend that he should be heard on the point of admission. But if the only order passed by the Court is of "Notice", then the opposite party may come before

the Court and may address the Court on the merits of the petition and will have to file an affidavit in reply opposing the averments made in the petition. In my opinion, when there is only an order of issuing notice, it is not open for the party to say that it will take the said notice only 'as a notice as to why the petition should not be admitted'. It must be also mentioned here that as per the law of pleadings when the opposite party is filing a pleading, the opposite party may file the pleading controverting the averments made by the applicant or the petitioner in the petition. It is not open for the party to say that it is filing reply only for some limited purpose and that the party reserves its right to file a further and fuller affidavit in detail later on; As per the law of pleadings, the opposite party may file an affidavit in reply to the petition as a whole and not for any limited purpose.

[11] Mr. Vakil further drew my attention to the affidavits in reply filed by the present applicants in the main petition. In all these affidavits in reply each of the deponent on behalf of the present applicants has stated as under:

> "I say that I am filing this affidavit only for the purpose of opposing the admission of Ethel petition and/or grant of interim relief. I reserve my right to file a fuller and further affidavit as and when necessary."
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> According to Mr. Vakil, in view of the said pleading by the applicants, the applicants had filed affidavit only for the limited purpose of admission. But it is not open for the party while filing the pleading to suo motu reserve his right for filing a detailed affidavit later on. As per the law of pleading, the pleading must be complete. Only in certain cases, the party can obtain leave from the Court for filing additional pleading. But the party cannot have suo motu reservation of the right to file additional pleading later on. If the Court had issued the notice by saying "Issue notice to the respondents to show cause as to why the interim relief should not be granted" then only it is open for the party to contend and say that the respondent was called upon by the Court only to show cause as to why the interim relief should not be granted and then he could urge and contend that he had filed the pleading only for the purpose for which he was served with the notice and as he was not called upon to meet with the claim made in the petition, he may meet with the limited claim of interim relief and may file his pleading to that effect only. But when there is no such order by the Court then it is not open for the respondent to contend that he has filed his pleadings only for the limited purpose.

[12] As per the provisions of Rule 178 of the Gujarat High Court Rules, the Court can issue Rule Nisi. The Rule Nisi has been defined in Black's Law Dictionary VIth Edition as under : "Rule Nisi : A Rule which will become imperative and final unless cause be shown against it. This Rule commands the party to show cause why he should not be

compelled to do the act required or why the object of the Rule should not be enforced. In P. Ramanatha Aiyar's Law Lexicon 1997 Edition which has been revised and enlarged by former Chief Justice of India Mr. Justice Y.V. Chandrachud and other jurists defines Rule Nisai and Rule Absolute as under :

> "An order made by the Court on motion requiring a person to show cause why he should not do some particular act, or commanding the performance of the particular act forthwith. When the rule is to show cause, it is called a Rule Nisi, which is served on the opposite party and when it comes on for hearing the Court, having heard counsel, discharges the rule or makes it absolute. When it directs the preformance of the act forthwith, it is called a rule absolute."
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> Concise Law Dictionary 5th edition by P.G. Osborn gives definition of Rule Nisi as under: "Rule Nisi i.e., calling upon the opposite party to show cause why the rule applied for should not be granted. If no sufficient cause is shown, the rule is made absolute; otherwise it is discharged" If the above definition of Rule Nisi are taken into consideration, then it would be quite clear that when the Court issues a Rule Nisi, the Court issues certain directions in the said Rule Nisi and calls upon the respondent to show cause as to why he should not be compelled to comply with the said directions. Such directions by way of issuing Rule Nisi are generally issued by this Court or the Apex Court in the writ petition seeking writ of Habeas Corpus. In all other writ petitions or proceedings generally, the word used is only "Rule" and then as per the final out come of the proceedings, the rule is either made absolute or discharged. As a matter of fact neither the Rules of this Court nor any other law making a specific provision for issue of Notice. When the petition is filed before the Court seeking any writ other than the writ of Habeas Corpus and when the Court has not summarily dismissed the petition, issuing of notice by the Court without the further addition to the words 'Notice' viz., as to why the ad-interim relief sought for should not be granted or as to why the petition should not be admitted and allowed, will have to be treated as a Rule. The Notice in that case, would amount to issue of Rule when the Court is not in a position to summarily dismiss the petition. But as the Court had not initially used the word "Rule", and had used the word "Notice" while finally dictating the judgment at the commencement of the judgment, the Court begins the judgment with the word "Rule" and then as per the final conclusion either makes the Rule absolute or discharged.

[13] I have already pointed out that neither the High Court Rule nor any provision of either of the Constitution of India or any other law specifically mentions that when the matter is placed before the Court for the purpose of admission, the High Court can pass an order to issue of Notice. Before considering the question of order of issuing Notice, it is also to hear in mind the working of the High Court. In the beginning when

the writ petitions or Special Civil Applications were being filed in the High Court the Court was passing the order of either summary dismissal of the petition or was issuing Rule and the petition was being heard and finally disposed of within a very short period. But as time passed, the pendency of the proceedings in the High Court went on increasing. Every High Court is having pendency of thousands of petitions and a petition is coming up for final hearing after 8 to 9 years. As per the procedure and practice of the working of the High Court when the Court passes an order of Rule on a Special Civil Application, the Special Civil Application is treated as having been admitted and then that proceedings go in the registry to be enlisted in the matters which are fixed for final hearing. Thereafter such matters are listed for final hearing, the matters are placed before the Court as per the serial number for final hearing before the Court which is given or assigned the roaster of final hearing matters by the Honourable Chief Justice of this Court for final hearing as per the roster fixed by Honourable Chief Justice of this Court. In every High Courts thousands of Special Civil Applications are pending for final hearing. Therefore, in the circumstances, when the Special Civil Application/Writ Petition is placed before the Court for the purpose of admission and after going through the said proceedings, the Court forms an opinion, that the relief sought in the proceedings is of such a nature that its consideration and decision is immediately required and if such a relief is not considered and decided very promptly and if merely a Rule is issued, then by lapse of time, the relief sought may become infructuous. Therefore, in these circumstances the Court started issuing notices to the respondent or opposite side as in that case the matter remains on the admission board before the same Court and the Court can proceed to decide and dispose of the same according to law after hearing the other side. Thus, this procedure of issuing Notice is being followed or is being implemented in order to meet the need of the day.

[14] I have considered in details this technical aspect in view of the contention raised by the applicant that the Court had issued only 'Notice' and therefore, the Court had no jurisdiction to finally dispose off the petition. It is my experience here that when the 'Notice' is issued and in spite of filing of the affidavit in reply after issuance of notice and even number of days together are taken for concluding the arguments and after the conclusion of the long arguments when the Court is about to dictate the judgment, if the respondents find that the Court is to deliver the judgment allowing the petition, then a prayer is made that the respondent was not prepared for this contingency and the respondent wants time to file additional affidavit or the Court should issue Rule but should not finally dispose of the petition. But in case if the Court is inclined to dismiss the petition then it is submitted that Rule be issued and the respondent waives notice of Rule. Thus this practice is leaving the Court to act at the sweet-will of the learned advocates for the parties. In my opinion, such a practice should not be approved by the

Court and should not be made a law by practice. (See para 9 on page 725 State of Maharashtra vs. T.P. Kalaparia, AIR 1996 (SC) 722) Only with that intention. I have gone into in detail this aspect of the matter before going to decide the matter on the facts.

[15] According to the applicants they were under the impression that they had understood that they were arguing the matter before the Court only for the purpose of consideration of admission of the petition and granting of interim relief. As against this, the petitioner has stated in his affidavit-in-reply that the application was for the final disposal. I have already stated in the earlier Para No. 4 about the affidavits filed by the parties and the fact that the matter was heard for more than two days and I took it that the matter was to be disposed of finally and not only to consider the question of admission and grant of interim relief. As a matter of fact the hearing of the petition was protracted in order to accommodate the learned advocates for the applicants. Learned advocate for the petitioner Mr. Haroobhai Mehta was repeatedly opposing the said accommodation and was saying that the petitioner be in that case granted interim relief but only because the . petition was going to be considered and decided finally, I had differed granting of any interim relief in his favour.

[16] No apart from this, if the relief which was sought for by the petitioner in the petition and if the final order passed by the Court in the petition are read and considered together then it would be quite clear the final relief granted to the petitioner is as a matter of fact in the nature of interim relief. No doubt the petition stands disposed of by the order in question. But if the relief granted to the petitioner is taken into consideration, then it would be quite clear that the relief granted to the petitioner is in the nature of interim relief. The petitioner has sought for the following prayers in his petition in Para 15 of the petition which are as under: "

> (A) direct the respondents No. 1, 2 and 3 to produce whatever contract or agreement or orders that they have executed with the respondents No. 4, 5 and 6 in the subject matter of printing, publishing, doing job work, delivery and transportation of Khedut Pothi, before this Hon'ble Court.
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> (B) quash and set aside the orders, agreements, contracts that has been executed between respondents No. 1, 2 and 3 with respondents No. 4, 5 and 6 separately, jointly or in any other manner and direct the Government not to make any payment to respondents No. 4, 5 and 6 for printing, publishing or binding or doing anything in respect of Khedut Pothi and, further direct the government-respondents No. 1, 2 and 3 to recover whatever amount they have paid to respondents No. 4, 5 and 6 either by way of advance or by way of payment against any delivery or against any contemplated delivery of Khedut Pothi;

(C) direct the respondents No. 4, 5 and 6 to refund whatever amount they have received as advance or against the payment for doing any job work to print, bind and deliver any Khedut Pothi, to the government;

(D) direct the respondents No. 1, 2 and 3 to publish tender in the newspaper inviting offers from the parties for the purpose of supplying Khedut Pothis either entirely or to do job work of publishing and printing Khedut Pothis as per the specification set out by the respondents No. 1 to 3 not to award any contract or order to any party without inviting tenders of the same.

(E) Pending admission hearing and final disposal of this petition, direct the respondents No. 4, 5 and 6 to stop the printing, binding, cutting and delivery of any Khedut Pothi to the respondents No. 1, 2 and 3, and further be pleased to injuct the respondents No. 1, 2 and 3 from lifting or taking delivery of any Khedut Pothi from the respondent Nos. 4, 5 and 6 and, be pleased to restrain the respondent No. 1, 2, and 3 from making any further payment to respondents No. 4, 5 and 6 in respect to printing of Khedut Pothi, by way of interim relief, in the interest of justice.

(F) direct the Registrar or any other officer of the Hon'ble High Court to immediately visit the press of respondents No. 4, 5 and 6 and to seal and seize entire printing work done by the respondents No. 4, 5 and 6 and to report the same before the Hon'ble Court by doing necessary panchnama in the facts and circumstances of the case;

(G) grant such other and further order/s that/those may be deemed, just and proper in the facts and circumstances of the case."

The final order passed in the judgment in question is as under :

"But in view of all the above discussion and the material on record, the conduct of respondent Nos. 1 to 3 in assigning the contract to respondent Nos. 4 to 6 is suspicious and it deserves a thorough inquiry and investigation into the whole affair. From the above discussion it would be quite clear that it is very difficult to hold that there was any justification in not following the normal procedure of calling tenders for giving such contract which was involving crores of rupees and it is also not possible to hold that the selection of respondents No. 4 to 6 by respondent Nos. 1 to 3 is reasonable and proper and is done by following the normal and usual course. It is also doubtful as to whether the rate of Rs. 8.95 at which the job work is assigned to respondent Nos. 4 to 6 is reasonable and proper rate. Therefore, in these circumstances, instead of quashing the contract in question I would direct the Accountant General of State of Gujarat to appoint a Committee to hold an inquiry

as regards giving the contract by the respondent Nos. I to 3 in favour of the respondent Nos. 4 to 6. The said committee should record its findings on the following question :

1. Whether the respondent No. 1 was justified is not inviting tenders by giving an advertisement for the contract in question ?

2. Whether the procedure followed by respondent Nos. 1 to 3 in selecting respondent Nos. 4 to 6 for the job in question is proper and correct in the circumstances of the case.

3. Whether there was any giving of kickbacks or under-table dealing in giving the said contract ?

4. Whether the rate of Rs. 8.95 per Khedut Pothi given to the respondent Nos. 4 to 6 is the reasonable and proper rate ? If not, what is the reasonable rate ?

5. Whether any action-Civil or Criminal is to be taken against anybody ?

The said committee should be formed by him within one month from today and the said committee to hold and complete its inquiry within 4 months from the date of the constituting the said committee. Without being influenced any way by the observation made in the judgment the said Committee should record its findings on the above issues and then to make recommendations to the State Government as per its findings as to whether the full amount to respondent Nos. 4 to 6 should be paid or not and whether any action against any Government employee and public officer of the Government is to be taken by filing proceedings either in the Criminal Court or Civil Court or in the Department. Therefore, in the meantime I will restrain the Government-respondent No. 1 to withhold the payment to respondent No. 4 to 6 to the extent of 40% of their bills till the report of the committee is finally published. The respondents Nos. 4 to 6 be paid the amount withheld by this order as per Committe's findings on point No. 4. Rule is thus made absolute accordingly.

[17] The further contention raised on behalf of the applicants that the order passed by this Court directing the Accountant General, Gujarat, Ahmedabad to appoint a Committee to hold inquiry as regards giving of contract by respondents No. 1, 2 and 3 in favour of respondents No. 4, 5 and 6 and to record its finding on the three questions referred to the said Committee, is a relief granted by this Court when there was a no specific pleading by the petitioner to that effect. According to Mr. Vakil learned advocate for the applicant in Misc. Civil Application No. 5 of 1998 and Mr. R.A. Sanjanwalla learned advocate for the applicant in Misc. Civil application No. 45 of 1998, this action of the Court in granting such a relief is a suo motu action and this

Court cannot have the jurisdiction to take suo motu action. In support of that submission, they have placed reliance on the decision of the Division Bench of this Court (Coram K. Shreedharan, C.J. & M.S. Shah, J.) dated January 23, 1998 in Special Civil Application No. 616 of 1995 with Special Civil Application No. 2798 of 1996. In Special Civil Application No. 2798 of 1996, the proceedings were initiated by the learned Single Judge (Hon'ble Mr. Justice, K.J. Vaidya) of this Court after reading the news item given in Gujarat Samachar dated April 3, 1996 by way of suo motu proceedigs and had passed certain orders. That action of the learned Single Judge has been set aside by the Division Bench of this Court by following the decisions of the Apex Court in the case of Indermani & Ors. vs. Madhuvaniprasad & Ors., 1996 (9) JT SC 135 and State of Rajasthan vs. Prakashchand, 1997 (9) JT SC 492. Said action was set aside on the ground that as per the roster, the public interest litigation matters were to be heard by a specially constituted Division Bench and therefore, the learned Single Judge of this Court (K.J. Vaidya as then he was) who had initiated the said suo motu proceedings and who was not assigned the roster of Public Interest Litigation had no jurisdiction to initiate the suo motu action. In my opinion, said case has no bearing at all whatsoever on the matter before me. The order passed by me is an order passed in a proceedings which has been assigned to me as per the roster order passed by Honourable the Chief Justice of this Court and I have not taken suo motu action in this original proceedings of Special Civil Application No. 8579 of 1997. No doubt I have granted a relief in this petition which has not been specifically pleaded by the petitioner in the petition or has not even urged when the arguments were submitted before me. But merely because there is no specific pleading for the relief which the Court has granted in the petition or merely because the parties had not claimed for that relief at the time of submission of the arguments, it could not be said that the Court has passed suo motu order without jurisdiction. I will hereinafter discuss the question as to whether this Court has jurisdiction to grant such a relief or not but suffice it to only mention here that suo motu action which was considered by the Division Bench of this Court in Special Civil Applications No. 616 of 1995 and 2798 of 1996 is quite distinct and different. This Court has granted an alternative relief.

[18] It is further urged before me by Mr. Vakil as well as Mr. R.S. Sanjanwala learned advocates that the relief which this Court has granted by the final order in the proceedings could be granted only under Art. 142. Power under Art. 142 could be used only by the Apex Court and this Court while exercising power under Art. 142 of the Constitution of India cannot exercise the powers under Art. 226 of the Constitution. In order to support that submission they cited before the cases of State of Haryana vs. Nareshkumar Bali, 1994 (4) SCC 448, Mohmed Hanif vs. Union of India, 1994 (1) SCC 145, State of Gujarat vs. Shankerji Chatitrji & Ors., 1996 GLR 755 and J.J. Thakore vs. Chief Commissioner of Income Tax. 1998 (1) GLR 45. There could not be any dispute

on the submission that the powers under Art. 142 of the Constitution of India could be exercised only by the Apex Court and High Court cannot exercise such powers while dealing with the matter under Art. 226 of the Constitution of India. In the case of State of Haryana vs. Nareshkumar Bali, 1994 (4) SCC 448 the following principles are laid down:

> "That the exercise of extra ordinary jurisdiction constitutionally conferred on the Apex Court under Art. 142 (1) of the Constitution can be of no guidance on the scope of Art. 226." Similarly in the case of Mohamed Hanif vs. Union of India, 1994 (1) SCC 145, it has been held that power under Art. 142 of the Constitution is at an entirely different level and of a different quality. Prohibition and limitation on the provisions contained in extraordinary laws cannot Ipso facto act as prohibition or limitation of Constitutional powers under Art. 142 of the Constitutional powers under Art. 142 of the Constitution of India. By referring to earlier decision of the Apex Court in Union Carbide Corporation vs. Union of India, 1991 (4) SCC 524."

In State of Gujarat vs. Shankerji Chaturji & Ors., 1996 SC 755 the Division Bench of this Court has held that the compounding of non compoundable offence by the Supreme Court in exercise of its plenary power under Art. 142 cannot be relied upon to insert powers of High Court which cannot be exercised contrary to the statutory provisions. The view of this Division Bench that extraordinary powers under Art. 142 of the Constitution of India cannot be exercised by the Apex Court while exercising powers under Art. 226 of the Constitution of India has been again reaffirmed by another Division Bench in the case of J.J. Thakhore vs. Chief Commissioner of Income-tax, reported in 1998 (1) GLR 45. But in my opinion none of these cases are applicable to the facts of the case before me. I have not referred to or relied upon any decision of the Supreme Court while granting the relief by way of final order in the proceedings before me. I have no where stated that in view of the earlier decisions of the Apex Court I was exercising the same powers while dealing with the matter under Art. 226 of the Constitution of India. It has been repeatedly emphasised by the Apex Court that the powers of the High Court under Art. 226 of the Constitution of India are wider than the powers of the Apex Court under Art. 32 of the Constitution of India. It must be remembered that the writ proceedings under Art. 226 is neither a statutory remedy nor. a continuation of the original civil proceedings but it is only an extraordinary discretionary, constitutional remedy. While exercising powers under Art. 226, as it is in the fitness of things in appropriate cases, in order to do justice between the parties, considering the balance of convenience, the Court is not to be guided by extreme technicalities. Jurisdiction under Art. 226 being extraordinary and discretionary jurisdiction cannot be encapsulated and confined in terminological and technical

formulation so as to limit its plenitude nor can this extraordinary constitutional power be crippled and confined in a legal absolutism. Thus where the extraordinary situation calls for an extraordinary remedy, the Court need not fold its hand and withhold the relief that the limitation imposed a conventional technical rules.

[19] The proceedings before me was to challenge the administrative action of the State Government as regards giving of a contract. It is by now very well settled that even though the said power of giving contract is of discretionary power of the State Government, the State Government cannot act arbitrarily or as per its sweet will and award a contract to any private individuals it wishes. The State Government must act in conformity with the normal rules and regulations and standards of awarding the contract which are not arbitrary, irrational or irrelevant. The Court can have the jurisdiction to review the Act of the State Government in order to prevent arbitrariness or favoritism. The judicial review is not concerned with the merits of a decision but the decision making process itself. In the case before me, when I was delivering the judgment in question, the contract was already given by respondent No. 1, 2 and 3 to respondents No. 4, 5 and 6 and 90 per cent of the contract work was completed. But on the material placed before me I have found that the procedure adopted by respondents No. 1, 2 and 3 in giving the contract to respondents No. 4, 5 and 6 was not the normal procedure and that there was no fairness in selecting the respondents No. 4, 5 and 6 in awarding the said contract. In view of these findings of mine, if I merely happened to order that the writ petition is admitted and I happened to say only Rule, then by the time of return of notice of Rule, the contract would have been completed and thus the matter would have become infractuous by lapse of time. When knowing this very well, if I merely happened to issue Rule and not to finally decide the matter, then I wax definitely going to become a party to an unjustice being done. Therefore, I am of the view that in these circumstances, though the contract work in question is completed, when I have found that the procedure followed by the respondent Nos. 1, 2 and 3 in selecting the respondents No. 4, 5 and 6 was not fair and a normal procedure and when the contract was involving public money of crores of rupees, justice required me to grant the relief as has been granted by me in the circumstances of the case. It is settled law that every Court is possessing inherent powers to give relief and to modify the relief in the circumstances of the case to do justified between the parties, the powers of the High Court while exercising powers under Art. 226 in modifying the relief and giving appropriate relief in a just and fair manner has been recognized by the Apex Court in the case of State of Rajasthan vs. Hindustan Sugar Mills Ltd., AIR 1988 (SC 1621) and in Para 4 at page 1624, following principles are laid down :

". . . . The High Court was exercising high prerogative jurisdiction under Art. 226 and could have moulded the relief in a just and fair manner as required by the demands of the situation."

I have only directed that the Accountant General, Gujarat, to appoint a committee and to go into the questions as formulated by me in order to find out whether the procedure in giving the said contract was proper or not and whether in fact the rate accepted by the respondents No. 1, 2 and 3 was a high rate or not. I have also stated that the Committee is to record findings on issues formed without being influenced by my observation. I have directed to take appropriate action as per the finding of the inquiry committee and in my opinion that was the only relief which could be granted in the peculiar circumstances of the case in view of the nature of the proceedings. After all it is a question of public money and it is the duty of the Court to see that public monies are not spent by the State Government as per its sweet-will. The Division Bench of this Court in the case of Unioin of India vs. New India Industry, 1983 (24) (ii) GLR 1108 has held that the Courts in India are acting on the principle of justice, equity and good conscious. In such a situation the Courts have inherent powers nay it is the duty of the Court to exercise its inherent powers so as to meet the ends of justice and to prevent the abuse of the process of the Court.

[20] Mr. Vakil learned advocate has cited before me the case of the Director of Handloom Textiles, Madras vs. K. Venketesan & Ors., reported in Madras Law Journal Reports Page 226. Incidentally xerox copy of the said report is produced before me but it does not give the year of the Madras Law Journal Reports. But the facts of the said case will clearly show that it has no bearing at all to the facts before me. The writ petition was filed by a A class member of the 3rd respondent society by alleging that there are in all 648-A. Class members and 244-B. Class members and though the said society was in existence for the last 16 years, no election was conducted for the Committee and the Board of the Co.op. Society as per the provisions of Tamilnadu Co.op Societies Act and the rules and the petitioner has further alleged that holding of election has been prevented by one reason or another and that the respondents are under legal duty to conduct the elections to the committee of management and under Rule 36 (1) it shall be holding the election within 90 days of the expiry of the term of the existing committee which expired on October 9, 1987 and as no steps has been taken to conduct the election, the writ petition was filed to issue that a writ of mandamus to respondents No. 1 to 3 to conduct the election to the committee of the management of the respondent No. 3 Society. When the said petition came up for admission before the Court on September 7, 1987, the learned Single Judge had passed an order which was challenged in a writ appeal, the judgment of which is

reported. Para 4 of the said judgment discloses as to how and what order was passed. It runs as under-: "The writ petition came up for admission on September 7, 1987. Learned advocate for the petitioner was heard. After extracting the prayer in the Writ Petition, without assigning any reason or referring to any of the relevant provisions, the writ petition was straightaway ordered by stating as follows : "Respondents 1 to 3 are hereby dierected to conduct the election to the Committee of the third respondent-Society on or before 31st December, 1987, in accordance with law. The writ Petition is ordered accordingly." The above portion of the judgment itself clearly shows that on the first occassion when the matter was placed before the Court for admission, the Court had finally disposed of the judgment by the above order without appearance of respondents No. 1, 2 and 3. Respondents No. 1, 2 and 3 either appeared suo motu by way of filing of caveat nor a notice was issued to them prior to the date of September 7, 1987 nor copy of the writ petition was served on them and therefore, in the circumstances said order has been quashed and set aside in the said writ Appeal. In the case before me not only the respondents are served with the notice of the writ petition but they have also filed the pleading and they are heard in this case and thereafter the Court has passed the final order. ' thus, this case has no bearing on the facts before me and said case is not at all applicable to the facts of the case before me.

[21] It was also submitted before me that as stated earlier this relief which is granted in the original petition is a suo motu relief and that could not be granted by this Court. But as stated earlier, not only this Court is having inherent powers to grant appropriate and alternative relief though not specifically pleaded, but it is also the duty of the Court to do so in the circumstances of the case. The Court has to look to substance of claim in determining the relief to be granted. It is not at all necessary for this Court to disclose to the parties as to what relief this Court will grant to the petitioner before actually granting the same. It was urged before me by the learned advocates for the applicants in Misc. Civil Applications No. 45 and 48 and SO of 1998 that this Court ought to have actually before passing the final relief, put forth said relief which the Court intended to grant before them and they ought to have been heard. I am unable to accept the said submission. When the Court is granting the alternative relief which according to this Court, to be proper and just and in order to give proper justice to the parties in the facts and the circumstances of the case, it is not at all necessary for the Court to disclose in advance as to what relief the Court intends to grant. They primary duty of the Court is to do justice and therefore, it is the duty of the Court to grant relief as the circumstances of the case warrant even though it may not be asked for. This power of the Court to grant the just and proper relief to a party without his asking is also recognized by the provisions of Civil Procedure Code in Order 7 Rule.

[22] The relief which I have granted is a relief which the petitioner could have asked for in the alternative and said relief granted by me could not be said to be unjust or improper in the circumstances of the case. No doubt in my order I have directed the committee to consider the question No. 2 which is running as under:

> "Whether there was any giving of kickback or undertable dealing in the said contract ?"
>
> It is contended vehemently before me by the learned advocates for the applicants that said question ought to have been referred to the committee in view of the submission made by the learned advocate for the petitioner. But during his submissions he submitted that he was not pressing for the political malice and political malafides as mentioned in the petition. But when I have found that the procedure followed by respondents No. 1, 2 and 3 in selecting respondents No. 4 to 6 is not normal, fair and just and when it is specifically contended by the petitioner that the cost of the said Khedut Pothi will be not more than Rs. 5/- per copy and that he was ready to give the same at Rs. 5A per copy if the committee finds that said claim of the petitioner was true and correct. Thus necessarily the committee may go into the question as to whether said contract was bonafide one or not and similarly it was also necessary to direct the Committee to consider the question as to whether in view of its finding any Civil, Criminal or Departmental procedure to be initiated, against any person, then these directions are necessary to be given in order to have a complete inquiry into the matter. Without such directions and powers, the committee would not be in a position to take appropriate final decision in the matter. Therefore, there is no illegality or irregularity in issuing such directions. It must be also further mentioned that once the Court is ceased of the matter under Art. 226 of the Constitution of India, even if the party gives up its claim on certain aspect, the Court is not bound to accept the giving up and the Court is entitled to act according to its good conscience to see that proper justice is done in the matter.

[23] I have already quoted the prayer clauses made by the petitioner in his petition and the final order passed by me in this matter. No doubt by my final order, I have disposed of the petition. But if the final order passed by me is after taking into consideration of the prayer clauses of the petitioner and the allegations of the petitioner, then is not quite clear that the final order in the matter is in the nature of interim relief ?

[24] It was vehemently urged before me that the Court cannot entrust its job to any other authority and the Court has no power to delegate its power to any other authority, it is submitted before me that the accountant General, Gujarat is not an

authority having judicial powers. But the action of respondent No. 1 which was challenged before me in the proceeding in question is admittedly an administrative action. It pertains to the spending of public money and therefore, the Accountant General of the State has to audit the accounts of the State and to control and to detect its financial irregularities. As I have found that in view of the material produced before, it is necessary to investigate and inquire into the conduct of respondents No. 1, 2 and 3 in giving the contract to respondents No. 4, 5 and 6 and therefore, in the nature of the proceedings the Accountant General is the proper authority to hold such an inquiry and investigation. The High Court acting and exercising powers under Art. 226 has got ample power and jurisdiction to direct the Accountant General to inquire and investigate into a particular transaction of the State Government involving public money so as to find out whether there are any irregularities or illegalities, in the same or not. Therefore, in the circumstances I am unable to accept the said submission made on behalf of the applicants.

[25] It is further urged before me that at the most this Court could have awarded damages or compensation to the petitioner on account of his suffering loss in his business and that no such direction of inquiry and investigation could be ordered. But this submission is not proper and correct. It is settled law that in such proceedings the Court is to review the administrative action of the State Government with a view to find out that the same was arbitrary, irrational or unreasonable and only after finding out the same, the Court can quash and set aside said action. The Court cannot direct the State Government to give a contract to the present petitioner. The Court can only direct the State Government to assign the contract as per usual norms and procedures and to see that said transaction is not entered into arbitrarily, irrationally and unreasonably and unfairly.

[26] Now in view of the above discussion it would be quite clear that the registry was not at all justified in adding the words in the order of the Court. When the Court has passed only the order of "Notice", the registry cannot add in the order of Notice the words "as to why the petition should not be admitted." This practice of the registry should be discontinued forthwith. The registry has no authority or jurisdiction to add anything to the orginal order. The Registrar of this Court is required to communicate to the parties only the actual order of the Court. Copy of this judgment should be sent to the Registrar of this Court so that he can act accordingly by issuing necessary instructions.

[27] In view of all the above discussion and consideration, there is no ground for reviewing the order passed by this Court on 15.12.1997. Therefore, in the circumstances I hold that present applications deserve to be rejected. In view of the filing of the preseni applications and the interim relief granted in favour of the

applicants, the Accountant General, Gujarat has to form a Committee as per the original order within one month from the date of receipt of the writ of the original petition. The interim stay granted by this Court in view of the fact that the applicants were to file these review aplications stands vacated. Similarly the order of the Court not to issue certified copy to anybody and to show the judgment to any report also stands vacated. Copy of the operation part of this judgment and operative part of the judgment delivered on December 15, 1997 in Special Civil Application No. 8579 of 1997 be sent to the Accountant General, Gujarat State, Ahmedabad along with the writ of this Court for necessary compliance.