FULL BENCH

Before Mehar Singh, C.J., Harbans Singh, D. K. Mahajan, Gurdev Singh, and Bal Raj Tuli, JJ.

HARDIAL SINGH AND OTHERS,—*Petitioners.*

versus

DIRECTOR OF CONSOLIDATION OF HOLDINGS, PUNJAB, JULLUNDUR AND OTHERS,—*Respondents.*

Civil Writ 1594 of 1969

December 1, 1969

East Punjab Holdings (Consolidation and Fragmentation) Act (L of 1948)—Section 42—Scheme of consolidation of a village—Whether can be amended in an individual case—Opportunity of hearing to an affected party—Nature and extent of—Stated.

Held, that a scheme of consolidation of a village can be amended under section 42 of East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act in an individual case and the amendment need not necessarily be actual re-writing of a particular provision of the scheme. (Para 11)

Held, that it is proper and adequate compliance with the proviso to section 42 of the Act if a change or amendment or variation in a scheme of consolidation is made after the authority making the same has before its mind the particular provision of the scheme to be thus affected and the arguments of the parties in respect to the effect of the change. Once the matter is present to the mind of the authority exercising power under section 42 of the Act, and after considering the relevant provision of the scheme it gives a decision or makes an order, that is sufficient compliance with the proviso to section 42 of the Act and no more is required. (Para 11)

Case referred by the Hon'ble Mr. Justice Prem Chand Jain, on 7th October, 1969, to a larger Bench for decision of an important question of law involved in the case. After deciding the question of law the Full Bench consisting of the Hon'ble the Chief Justice Mr. Mehar Singh, the Hon'ble Mr. Justice Harbans Singh, the Hon'ble Mr. D. K. Mahajan, the Hon'ble Mr. Justice Gurdev Singh and the Hon'ble Mr. Justice B. R. Tuli, sent this case back to the Single Judge on 1st December, 1969.

PETITION under Article 226 of the Constitution of India, praying that a writ in the nature of Certiorari or any other appropriate writ, order or direction be issued quashing the order passed by the Respondent No. 2, dated 10th February, 1966 and the scheme of Consolidation inasmuch as it makes illegal reservation of the land which is hit by the 17th Amendment of the Constitution.

B. S. CHAWLA, ADVOCATE, for the Petitioners.

MELA RAM SHARMA, DEPUTY ADVOCATE-GENERAL (PB.), *with* RATTAN SINGH, ADVOCATE, for *Respondent Nos.* 1 to 3. H. S. TOOR, ADVOCATE, for Respondent No. 4.

JUDGMENT OF THE FULL BENCH

MEHAR SINGH, C.J.—The facts of these two references, one in Civil Writ No. 1594 of 1966, *Hardial Singh, Gurdial Singh, Gurcharan Singh and Harcharan Singh,* petitioners v. *The Director of Consolidation of Holdnigs, Additional Director of Consolidation of Holdings, Settlement Officer, and Nanak Singh,* respondents 1 to 4, and the other in Civil Writ No. 378 of 1969, *Mohinder Singh and Gurdial Singh,* petitioners v. *State of Haryana, the Assistant Consolidation Officer, Sadhu Singh and Gurcharan Singh,* respondents 1 to 4, are as below.

(2) In the first case consolidation of holdings began in village Khandoor in the year 1964. In the scheme of consolidation a path was provided from village Khandoor to the land of Santa Singh, father of the petitioners, in the area of the adjoining village Chokhar along the land allotted in repartition to respondent 4. In an application under section 42 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 (East Punjab Act 50 of 1948), respondent 4 sought relief that the path provided to the land of Santa Singh be deleted because another path is available from village Khandoor to village Chokhar. Respondent 2, Additional Director of Consolidation of Holdings, accepting the application of respondent 4, set aside the order of respondent 3, Settlement Officer, of November 18, 1964, whereby the path in question had been provided in the scheme, and made consequential changes by his order, copy annexure 'C' to the petition, of February 10, 1966. In their petition the sons of Santa Singh have prayed that that order of respondent 2 be quashed. In paragraphs 9 and 10 of the petition the petitioners have taken the position that respondent 2, disallowed the path inspite of it having been provided in the scheme, and that he had no power to vary such a provision of the scheme for the sake of one right holder (respondent 4). There are of course other grounds of attack so far as the order of respondent 2 is concerned, but those are not material for the present purpose. In the second case in the draft scheme of consolidation of holdings in village Patti Khurampur Majri a part of survey No. 623, under garden was reserved in the scheme for the petitioners as garden area. On an application by the petitioners the Settlement Officer on July 2, 1966, cancelled that reservation from the scheme because the petitioners requested for that, giving up his claim for the fruit

trees. While making that order the Settlement Officer reduced the valuation of survey No. 623 from sixteen annas to fourteen annas. In repartition, this survey No. 623 came to the lot of one Inder Ram, on whose objections under section 21(2) of the Act the Consolidation Officer changed his lot with respondents 3 and 4, who then filed an appeal against that order under section 21(3) of the Act before the Settlement Officer, in which appeal, among others, the petitioners were made respondents. The copy of the order of the Settlement Officer is annexure 'A' to this petition, and therein one of the objections of respondents 3 and 4 was that contrary to the provisions in the scheme for making adjustments according to a rightholder's major portion, they had been given as overflow the inferior quality land of the petitioners, obviously referring to the land of survey No. 623. The Settlement Officer says in his order that he found that this land of the petitioners was of inferior quality and in spite of that it was valued at fourteen annas and that respondents 3 and 4, to whom it came to be allotted, had been hard-hit. He, therefore, gave back the area of this survey number to the petitioners. On a second appeal by the petitioners from the appellate order of the Settlement Officer, the Assistant Director of Consolidation of Holdings on February 21, 1968, set aside that order. Against the order of the Assistant Director of Consolidation of Holdings, respondents 3 and 4 made an application under section 42 of the Act, which was disposed of by respondent 1 on November 28, 1968. It appears from the order of respondent 1, copy annexure 'C', that in another case the matter had also been referred to him by the Assistant Director of Consolidation of Holdings under section 42 of the Act. Respondent 1 accepted an argument on the side of respondents 3 and 4 that inferior quality land of the petitioners of survey No. 623 had been given to those respondents. He, therefore, allowed the application and made changes giving back the inferior quality land of survey No. 623 to the petitioners. In paragraph 10(vii) of their petition the petitioners have stated that they were given their major portion according to the scheme and that major portion could not include survey No. 623. So the order of respondent 1 giving back to them their survey No. 623 is against the scheme as thereby the land allotted to them has come in two blocks and they have been fitted at a place where according to the scheme they could not be fitted. There are again in this petition also other grounds of attack against the order of respondent 1 but those are not material here.

(3) On the facts as given above in these two petitions, among other questions, two questions as given below came for consideration before P. C. Jain, J., and the learned Judge has by his orders of reference made on October 7, 1969, referred the same to a larger Bench—

(1) Can a scheme be amended in an individual case by the Additional Director, Consolidation of Holdings, under section 42 of the Act ?

(2) If answer to the first question is in the affirmative, what is the nature and extent of opportunity of hearing that must be given to a party affected by such an order in view of the proviso to section 42 of the Act ?

These are the two questions that are for consideration of this Bench.

The answer to the two questions are in substance available from the decision of their Lordships of the Supreme Court in *Johri Mal* v. *The Director of Consolidation of Holdings, Punjab* (1), but, as in *Rur Singh* v. *The Director of Consolidation of Holdings, Punjab* (2), S. B. Capoor, J., *Karnail Singh* v. *Additional Director of Consolidation of Holdings, Patiala* (3), Grover, J., *Hans Raj* v. *Shri Jaspal Singh*, (4) Pandit, J., *Jai Kishan Singh* v. *The State of Punjab* (5) Grover, J., *Ratti Ram* v. *State of Punjab* (6), Shamsher Bahadur, J., and *Ram Singh* v. *Punjab Government* (7), J. N. Kaushal, J., indicated tendency towards opinion which does not appear to be quite in accord with the decision in *Johri Mal's case* (1), on the first question. and in *Mange* v. *The Additional Director, Consolidation of* Holdings, (8) of the learned Judges constituting the Full Bench, Grover and Narula, JJ., have made observations, though obiter, not quite in accord with what appears apparent from the facts and circumstances of *Johri Mal's case* (1), on the second question, so it has become necessary to go in quite a detail of the facts and circumstances of *Johri Mal's case* (1) and the decision rendered therein.

(4) The scheme of consolidation of holdings in *Johri Mal's case* (1), in clause (vii) provided—"The existing houses and permanent

(1) 1967 P.L.R. 824.
(2) C.W. 1928 of 1963 decided on 11th March, 1964.
(3) C.W. 1728 of 1963 decided on 7th January, 1965.
(4) 1965 Curr. Law Journal (Pb.) 807.
(5) C.W. 1057 of 1963 decided on 12th Nov., 1965.
(6) C.W. 1551 of 1964 decided on 12th May, 1966.
(7) C.W. 659 of 1965 decided on 25th May, 1966.
(8) 1967 P.L.R. 835.

enclosure shall be kept in the ownership and possession of those proprietors who were owners in possession prior to the consolidation and in addition if these persons so desire, they shall be entitled to be given additional area up to one Bigha of extension of the Abadi. In the case of such persons or rightholders who have constructed houses or enclosures, etc., within the Shamilat area they would keep them in their possession but adjustment would be made out of their Khewat land . . . . . ". Johri Mal had his enclosure in Survey No. 3942. When the matter was brought up before the Director of Consolidation of Holdings, he made this order with regard to Johri Mal's enclosure in Survey No. 3942—"So far as Khasra No. 3942 is concerned I quite agree with the Settlement Officer that there is no reason why it should have remained reserved for Shri Johri specially. It is ordered under section 42 of the Act that Khasra No. 3942 shall not remain reserved for Shri Johri but shall be reserved for area for extension of Abadi for non-proprietors. Johri's claim for any area within the Phirni shall be considered independently. The consolidation records be changed to that extent". The order of the Director of Consolidation of Holdings, a copy of which was annexure 'A' to Johri Mal's Civil Writ No. 728 of 1957, referred to the reservation made in the scheme, without, however, making any reference to clause (vii) of it. The arguments were heard by the Director with regard to the change of such reservation and he made the order with regard to Johri Mal's enclosure exactly as reproduced above and no more. The Director (a) did not inform the parties, including Johri Mal, that he proposed to amend the scheme, and (b) that he proposed to amend the scheme to the extent of taking away Johri Mal's enclosure alone from the scope of clause (vii) of the scheme. It is, however, quite and clearly apparent from the order of the Director in that case that the matter whether Johri Mal should be permitted to retain the enclosure in the terms of the scheme or not was considered by him and parties were heard with regard to the same, without his saying that he was going to so amend the scheme as to deprive Johri Mal of his enclosure. It was Johri Mal who came to this Court from the Director's order, under Articles 226 and 227 of the Constitution, and his petition was disposed of by Grover, J., on May 21, 1958, when the learned Judge proceeded to quash the order of the Director observing—"This petition must be allowed on the ground that the Director had no authority to make an order which is contrary to the scheme without amending the scheme. The scheme could have been ordered to be amended under

section 36 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, no such order was ever made. As stated before, no objections were ever filed or have been shown to have been filed to the scheme as confirmed, and the order of the Director was passed on the report of the Settlement Officer made at the instance of Molar. It has already been observed by me in Civil Writ No. 51 of 1957, decided on December 6, 1957, (*Fauja Singh-Ram Singh* v. *Director of Consolidation of Holdings, Jullundur* (9), that it is not open to the Director under section 42 of the Act to make such orders which are contrary to the scheme as confirmed unless the scheme is first ordered to be amended in accordance with the procedure laid down in the Act. I consider, therefore, that the Director has exceeded his powers which he has under the statute, and his order must be quashed."

(5) There was an appeal under clause 10 of the Letters Patent from the judgment and order of Grover, J., by the Director of Consolidation of Holdings, Jullundur, which came to be heard by a Full Bench consisting of Dulat, Tek Chand and Pandit, JJ. The judgment of the Full Bench is reported as *The Director, Cosolidation of Holdings, Jullundur* v. *Johri Mal* (10). The counsel for Johri Mal urged two arguments (a) that the scheme of consolidation could not be varied, altered or revoked under section 42 but that could only be done under section 36 of the Act, which did not happen, and (b) that the scheme of consolidation was not in fact varied, as the scheme itself, particularly clause (vii), remained intact but the order was made prejudicial to the interests of Johri Mal contrary to the scheme and it could not be said that the Director had the jurisdiction to make variation of the scheme in the case of an individual. Tek Chand, J., accepted the arguments, and after reproducing the operative part of the Director's order with regard to the enclosure of Johri Mal, the learned Judge proceeded to observe—"He (Director) is certainly not expressly referring to the scheme. If it was his intention to vary the scheme, he should have at least indicated in what manner the scheme was to be varied. A scheme as confirmed is a formal and a written document containing all the major details of consolidation. Whenever a scheme is varied in a particular manner, the specific amendments to it have to be incorporated in it. This scheme may be linked to an Act of the Legislature or to the statutory rules which are published . . .

(9) A.I.R. 1958 Pb. 305.

(10) I.L.R. (1961) 2 Pb. =1961 P.L.R. 93 (F.B.).

. . . . . It is couched in precise language and after due confirmation it is adopted as such. The language of the scheme, so long as it stands in its existing form, cannot be paraphrased, explained or otherwise altered, while still retaining its identity intact. The scheme in this case, as in all such cases, is a written document. So long as the scheme is left unaltered and untouched by the respondent (Director), such order, as he has passed in this case in respect of the petition (Pohri Mal) *re.* Khasra No. 3942, cannot be treated as a variation of the 'scheme prepared or confirmed' . . . .It will lead to inescapable confusion, if a scheme is deemed to have been notionally or inferentially varied, without bringing about a corresponding variation in the langauge, to indicate such an intention. The word 'scheme' is not merely an idea, a proposal, or an intention unclothed in words. A statutory scheme must wear the garb of language. A scheme which is in the mind, not committed to the paper, is non-existent..... .... The word 'scheme' whenever used in the Consolidation Act and particularly in section 42, is a technical term which has a definite meaning assigned to it by the legislative draftsman. The expression 'scheme of consolidation' must perforce be read in the sense of a written and published document which has been duly confirmed by the Settlement Commissioner (Consolidation) ... ...To my mind section 42, as amended, contemplates variation of the actual scheme as published and confirmed. If the Director of Holdings passes an order purporting to interfere with the rights of an individual, which is in contravention of the scheme, but leaves the scheme intact, that order cannot be supported under section 42 as amended. So long as he does not order variation in the scheme itself, no order affecting an individual, can be deemed to be tantamount to variation of the scheme ... ... Section 42 of the Act does not empower the Director to interfere with the rights of an individual without varying the scheme. But what he has done in this case is that he has left the scheme unimpaired though he had the power to alter it; and on the other hand he has interfered with the rights of an individual which section 42 does not permit him to touch". The learned Judge, therefore, was of the opinion (i) that without varying the scheme itself expressly, the Director could not make an order having the effect of varying it in the case of an individual, (ii) that thus the Director had not infact varied the scheme in that case, and (iii) that if it was the intention of the Director to vary

the scheme, he should have at least indicated in what manner the scheme was to be varied, which was not done., Dulat, J., on the contrary, rejected the arguments on the side of Johri Mal and observed, after reproducing section 36 of the Act, that "It is apparent that this section authorises the authority confirming a scheme to alter or revoke it, and, in that case, of course. the new scheme has to be published and confirmed once again in accordance with the ordinary procedure. This provision, however, does not touch the power of the State Government conferred on it by section 42 of the Act, for it is only when the authority confirming a scheme decides to vary or revoke it that recourse has to be had to section 36, while the power of the State Government under section 42, is wholly independent of the power of the authority confirming the scheme, and the only limitation prescribed in section 42, as contained in the proviso, is that before the State Government makes any order the parties interested in the matter are given notice to appear and opportunity to be heard. There is, therefore, no force in the contention that a scheme of consolidation cannot be varied even by the State Government except in accordance with section 36 of the Act, and the recent amendment of section 42 leaves no room for doubt about that matter. I am, in the circumstances unable to accept Mr. Sachar's main argument that, if the scheme of consolidation was to be disturbed even by the State Government, it was necessary to proceed under section 36 of the Act. The reason for these two different provisions in sections 36 and 42 of the Act is also clear, for if a scheme is varied or revoked by the authority confirming it, then the new scheme has to be published so that interested parties may object and their objection decided by competent authorities set up under the Act, those decisions being finally appealable to the State Government, but, when a scheme is to be varied by the State Government itself, there is not much point in publishing the varied scheme, for the State Government is required to hear the interested parties before the variation is made. Mr. Sachar's next contention is that in the present case the scheme of consolidation has not infact been varied, for the scheme in general stands intact, and the Director of Consolidation or the State Government has merely made an order touching a particular individual in respect of a particular piece of land, and this cannot be called an order varying the scheme. I am unable to see much point in this contention. There is no doubt that a scheme of consolidation was prepared and confirmed, and equally no doubt that the Director of Consolidation considered that scheme and concerning a part of that scheme he

made an order, and that order is that in spite of the scheme the particular *gher* in Khasra No. 3942 will not be retained by Johri Mal, but will be reserved for the extension of the Abadi. It is, to my mind, impossible to accept the suggestion that the scheme of consolidation has not been varied although, of course, the variation only is in respect of a small part of the scheme. Nor can it be seriously urged that the order of the Director is not in reference to the scheme of consolidation, and section 42 of the Act clearly empowers the State Government to make any order in reference to a confirmed scheme". Pandit, J., agreed with Dulat, J. So by a majority the learned Judges held (a) that under section 42 of the Act a scheme of consolidation can be varried in the case of a particular individual, (b) that such a variation need not necessarily be an express variation of the scheme itself so long as the substance of the order amounts to variation of the scheme even though of a small part of it, (c) that a scheme can be varied under section 42 without having recourse to section 36 of the Act, and (d) that in that particular case—Johri Mal's case—the Director of Consolidation of Holdings considered the scheme and concerning a part of it made the order adversely affecting Johri Mal, and that the order of the Director of Consolidation of Holdings had reference to the scheme of consolidation in that case. Tek Chand, J., on the contrary, held (i) that a scheme of consolidation could not be varied by an order favouring a particular individual unless that was expressly so done in the scheme itself, (ii) that in that case the order of the Director of Consolidation of Holdings could not be taken to be variation of the scheme in any sense, (iii) that the scheme could not be varied under section 42 and that it can only be varied, altered or amended in the terms of section 36 of the Act, and (iv) that the Driector of Consolidation of Holdings not having expressly referred to the scheme in his impugned order, had not indicated the manner in which he was intending to vary the scheme. So the judgment and order of Grover, J., was reversed and the petition of Johri Mal was dismissed. The majority of the learned Judges in the Full Bench thus upheld (a) the variation of the scheme of consolidation by the order of the Director without his actually interfering with the text of the scheme, without his saying in so many words that he was going to amend the scheme and without his saying the extent to which he intended to amend the scheme, and (b) that the variation could be made by an order under section 42 of the Act in an individual case.

(6) There was an appeal from the judgment and order of the Full Bench to the Supreme Court and the case is reported as *Johri Mal* v. *The Director of Consolidation of Holdings, Punjab* (1). Their Lordships reproduced clause (vii) of the scheme and the substance of the order of the Director of Consolidation of Holdings under section 42 of the Act in regard to Johri Mal's Survey No. 3942, and then rejected the argument urged on the side of Johri Mal that the scheme of consolidation could not be varied by the State Government under section 42 except in accordance with section 36 of the Act. Their Lordships observed—"What the amending Act [The East Punjab Holdings (Consolidation and Prevention of Fragmentation) (Second Amendment and Validation) Act, 169 (Punjab Act 27 of 1960) section 42] has done is to substitute for the words 'any order passed by any officer under this Act', the words 'any order passed, scheme prepared or confirmed or repartition made by any officer under this Act', Section 36 of the Act, on the other hand, authorises the authority confirming a scheme to alter or revoke it and in that case the new scheme must be published, objections heard and decided and the scheme has to be confirmed once again in accordance with the procedure under section 19 and 20 of the Act. In our opinion, the power conferred on the State Government under section 42 is a separate power independent of section 36 of the Act which deals with the power of the authority confirming the scheme. There is hence no force in the contention that the scheme of consolidation cannot be varied by the State Government under section 42 of the Act except in accordance with section 36 of the Act. The reason for the two different provisions in sections 36 and 42 of the Act is also clear for if a scheme is varied or revoked by the authority confirming it, then the new scheme has to be published so that interested parties may object and their objection decided by competent authorities set up under the Act, those decisoins being finally appealable to the State Government. But when a scheme is to be varied by the State Government itself under section 42 of the Act, there is no requirement of the statute that the varied scheme should be published, for the State Government is required to give notice and to give an opportunity to the interested parties to be heard before the variation is made". So there was only one argument before their Lordships having regard to the provisions of sections 36 and 42 of the Act, which argument did not prevail, and so far as this matter was concerned, the judgment of the majority in the Full Bench was endorsed by the decision in the Supreme Court. The other

arguments before the Full Bench, (a) that the scheme had in fact not been varied by the Director of Consolidation of Holdings, (b) that it could not be varied in regard to an individual, and (c) that the Director has not indicated to the parties in what manner and to what extent he was going to interfere with and vary the scheme, were not urged before their Lordships in the Supreme Court. Those arguments were before the learned Judges in the Full Bench and have been dealt with both by Dulat, J., and Tek Chand, J. It cannot, therefore, be that the learned counsel who argued Johri Mal's case before their Lordships were not aware of those arguments and that they had not read the judgments delivered by the learned Judges in the Full Bench. Equally, it cannot be accepted that the judgments of the learned Judges of the Full Bench were not before their Lordships and thus all the points and arguments dealt with in those judgments were not present to the mind of the learned Judges. The other arguments apparently were not urged for absence of substance, and it cannot be expected that their Lordships in their judgment would express themselves on the obvious and the matter not considered worthwhile on the side of the parties as one to be made the subject of an argument in the Supreme Court.

(7) In Johri Mal's case the Director of Consolidation of Holdings was, while not intefering at all with clause (vii) of the scheme, making an exception against Johri Mal and taking out his enclosure from the scope of that clause in the scheme. He was thus varying the scheme *qua* one individual only. This the majority of the learned Judges in the Full Bench maintained as having been done correctly and within jurisdiction by the Director and their opinion has been upheld by their Lordships of the Supreme Court. So, in the wake of the decision of their Lordships in Johri Mal's case, it is no longer a matter of argument that under section 42 of the Act a scheme can be varied or interfered with in or in relation to a particular individual as affecting his rights alone. In his opinion Tek Chand J., definitely said that the Director could not do so in the case of a particular individual. The Director had actually done so in that case. His order in this respect was maintained by their Lordships in the Supreme Court. It is, therefore, patent that Johri Mal's case is an authority that a scheme of consolidation can be varied and interfered with under section 42 of the

Act in a particular case in regard to a particular individual. Any opinion expressed in the cases already referred to above with a tendency to a different approach cannot, therefore, be supported and must be taken to have been overruled by the decision in Johri Mal's case in this respect.

(8) In his Civil Writ No. 728 of 1957 Johri Mal never made a ground of attack against the order of the Director of Consolidation of Holdings that he had not an opportunity of hearing in the terms of the proviso to section 42 of the Act before the Director made the order adverse to him varying the scheme. This was not a matter which was referred to by Grover, J., in his order. In the Full Bench, however, the matter apparently seems to have been made the subject of argument because Tek Chand, J., observed clearly that if it was the intention of the Director to vary the scheme, he should have at least indicated in what manner the scheme was to be varied. Dulat, J., observed equally clearly that the Director considered the scheme and then made the order adverse to Johri Mal. Pandit, J., agreed with Dulat, J. What then was the manner of consideration of the scheme by the Director when making the order adverse to Johri Mal ? All that happened was that the provision of the scheme was present to the mind of the Director that the land under the enclosures was reserved for the owners in possession of the enclosures and with that before him he said that Johri Mal's *gher* shall no longer remain reserved for him, but shall be available for extension of the habitation of non-proprietors. The Director did not say in so many words that he was going to vary or amend the scheme and in what manner and to what extent he was going to do so. He did not tell the parties any such thing. In spite of this, in the circumstances of the case, the majority of the learned Judges in the Full Bench were of the opinion—"Equally no doubt that the Director of Consolidation considered that scheme and concerning a part of that scheme he made an order.....", and it was that order which was upheld by the majority of the learned Judges in the Full Bench and that decision has been sustained by their Lordships in the Supreme Court. If there was any possible substance in an approach that Johri Mal had not had a proper and an adequate hearing as envisaged by the proviso to section 42 of the Act in that the Director of Consolidation of Holdings, (a) had not held himself back for a while and said to the parties that he was about to amend the

scheme of consolidation, and (b) had not indicated the manner in which and the extent to which he intended to interfere with the scheme, that would be the obvious and the simplest ground on the basis of which the order of the Director could have been quashed as having been made in defiance of the proviso to section 42 of the Act, and no other argument need have been attended to either before the Full Bench or in the Supreme Court. So that the facts and circumstances of Johri Mal's case and the nature of hearing given to him by the Director under the proviso to section 42 of the Act when making an order adverse to him and contrary to the scheme of consolidation, which order has been held to have been the variation of that scheme, provided the exact and the precise manner in which in such cases the proviso to section 42 of the Act is to be applied for the matter of giving a notice and a hearing to the party that might be adversely affected by an order made under that provision. So the Director of Consolidation of Holdings or any other officer exercising powers under section 42 of the Act complies with the proviso to that section when the provisions of a scheme are in his mind, having been brought before him either because of the matter having been considered with regard to the same in the orders of the authorities below or for the first time raised before him seeking relief either within the scheme or outside the scheme, and are thus under his consideration, in view of which he makes his order which as the effect of varying or modifying the scheme in an individual case. If he does that, that is ample compliance with the proviso to section 42 of the Act and he need not say to the parties (a) that he intends to amend the scheme, and (b) that he intends to amend the scheme in a particular manner and to a particular extent. The reason for this is quite simple, because once the provisions of the scheme are prssent to his mind and claims and counter-claims are made before him by the parties contrary to the scheme or in regard to the provisions of the scheme, it becomes immediately apparent to every body connected with the case at the stage of arguments that an argument accepted by the Director, in the circumstances, may affect the provisions of the scheme, and when it actually does, there is sufficient compliance with the proviso to section 42 of the Act. To lay down more than this and a rigid formula in this respect would be to re-write the language of the proviso to section 42 of the Act, which obviously is not permissible. So the answer to the second question is also available in the decision of their Lordships in Johri Mal's case, in

that the manner of hearing given by the Director to Johri Mal remained unquestioned even up to the Supreme Court.

(9) The decision in Johri Mal's case was rendered by their Lordships in the Supreme Court on March 28, 1967. On August 8, 1967, came for hearing before a Full Bench consisting of Grover, Pandit and Narula, JJ., the case of *Mange* v. *Additional Director, Consolidation of Holdings* (8). The learned Judges concurred in the conclusion that no miscarriage of justice had resulted in that case and so Mange was not entitled to any relief in his petition under Articles 226 and 227 of the Constitution. So the learned Judges concurred, on this ground, in dismissing his petition. It is obvious that that being the approach of the three learned Judges, no other question then could possibly arise in that case for decision. In spite of this, with regard to the scope and ambit of the proviso to section 42 of the Act, Grover, J., observed—"With the utmost deference to the views expressed in the majority judgment of the Full Bench (Johri Mal's case reported as 1961 PLR 93). I find it difficult to accept that whenever the State Government or the Director or Additional Director who exercises its powers, orders readjustments or changes in repartition between various individual rightholders in petitions under section 42 of the Act without either giving any notice in writing or even oral at the time of hearing to the parties that it is intended or proposed to amend the scheme qua *an* individual rightholder, the Courts are bound and indeed should imply a variation or amendment of the scheme. Indisputably the provisions of the Act provide first for the framing of a scheme leading to its confirmation under section 20. Then the stage of repartition commences. The scheme of consolidation and repartition are two entirely distinct matters. When a rightholder approaches the State Government under section 42 with regard to the lands allotted to him, and while giving him relief the authority concerned allots to him or changes allotment of others in a manner contrary to the scheme, its order would be open to challenge on the ground that repartition has not been made in accordance with the scheme. If, however, the authority is convinced that without amending the scheme proper relief cannot be given to the petitioner or to any other aggrieved person. I venture to think that the proper course to follow under the proviso to section 42 would be to inform the parties concerned that the scheme is proposed to be amended to the extent it is necessary to give the required relief.

The parties would then have notice as to what is proposed to be done and make their submissions supporting or opposing the amendment. Only then if an amendment is ordered, can it be said that it has been made after giving the parties interested proper hearing and opportunity to explain their case and in such a situation no express order may be necessary that the scheme is being amended. This does not mean that any specified or set procedure is required for amendment of the scheme under section 42 but there must be something to indicate firstly that the authority concerned applied its mind to the question of amendment and secondly, that it followed a procedure which conformed to the requirements of the proviso to section 42. To my mind, the parties interested will have no notice in the matter of amendment if all that they have been informed is that relief is being sought on the merits in regard to repartition. In order to sustain an order which contains no mention of amendment of the scheme as such, the least that should be shown is that the mind of the authority concerned was brought to bear on the question of amendment of the scheme. It may be mentioned that this point was neither canvassed nor decided in the judgment of the Supreme Court in Johri Mal's case." It has already been pointed out above that these observations were not necessary for the decision in *Mange's case* (8), and hence are obiter. It has also been pointed out above that Tek Chand, J., had in Johri Mal's case, when before the Full Bench, said quite as much, but the majority of the Judges took a different view and supported the order of the Director of Consolidation of Holdings made against Johri Mal, which order was then sustained by their Lordships in the Supreme Court. No doubt this part was not an argument before their Lordships, but an obvious thing which was before the Full Bench, which was considered by the learned Judges of the Full Bench, and which was a subject-matter of divergence of opinion between them, was a thing that was directly and pointedly present before their Lordships in the Supreme Court, unless something quite unacceptable is suggested that the judgments of the learned Judges in the Full Bench were never read by the learned counsel in Johri Mal's case, before the Supreme Court nor even by their Lordships. Anything so obviously and not needing any argument whatsoever, could not possibly be expected to be dealt with and discussed by their Lordships in their judgment when the parties themselves saw no substance in an argument in that respect. So that the reason that this matter was not canvassed

before their Lordships in Johri Mal's case does not justify the inference that the minority opinion of Tek Chand, J., has been accepted as the correct opinion, particularly when the decision of the Director in Johri Mal's case, in this respect, was accepted to have been correctly made and nobody complained that it suffered from the defect or the irregularity of defiance of the provisions of the proviso to section 42 of the Act. In that case Pandit, J., did not subscribe to these observations. However, Narula, J., after referring to the decision of their Lordships in Johri Mal's case, observed—"The question, however, still remains as to what should broadly be the contents of a notice required to be served on interested parties in a case in which variation of a confirmed scheme is either specifically prayed for or otherwise intended to be effected: and also about the nature of opportunity required to be afforded to the interested parties in a case of that kind. I do not think that it would ever be argued on behalf of the State that it can vary a scheme under section 42 (except in cases where the scheme is vitiated by unlawful considerations) at any time and to any extent in an arbitrary and unguided manner at the time of writing the orders even though the interested parties had no notice of the particular variation proposed. To allow such a course to be adopted would, in my opinion, relegate the statutory safeguard contained in the proviso to section 42 to a mere illusion. I am in full agreement with the opinion expressed by my learned brother Grover, J., in the penultimate paragraph of his judgment. Adopting any other view may make it impossible to distinguish by looking at an order passed under section 42 of the Act as to whether the Director unwillingly and possibly oblivious of the relevant provision in the scheme passed an order in contravention thereof, or where the officer really intended to vary the scheme in the given case. I am also substantially inclined to agree with the view taken by various Single Benches of this Court (noticed by my Lord Grover, J.), while applying and interpreting the dictum of the Full Bench judgment of this Court in Johri Mal's case, to individual cases which came up for hearing after the pronouncement of the Full Bench." It needs no reiteration that the learned Judge was concurring in obiter observations of Grover, J. If those observations are to be adopted as the nature of opportunity envisaged under the proviso to section 42 of the Act, it would mean, at the least, that the Director must first tell the parties that he intends to amend the scheme and then must proceed to tell them the manner in which and the extend to which he intends to do so, and then only will there be a proper compliance with the proviso to section 42 of the Act. The

opinion of the majority of the learned Judges in Johri Mal's case before the Full Bench has been endorsed by their Lordships in the Supreme Court, and Grover and Narula, JJ., took note of the decision of their Lordships in that case, but in spite of that they thought it necessary to make these obiter observations unnecessary in *Mange's case* (8). This has led to quite a considerable deal of confusion in the handling and decision of similar cases not only in this Court but also with the authorities under the provisions of the Act. It has been pointed out that in this respect the definite opinion of Tek Chand, J., which exactly conformed to the opinions of Grover and Narula, JJ., was not accepted by the majority of the Full Bench in Johri Mal's case, and nobody had the courage to urge an argument against that before the Supreme Court and it was a matter so obvious that if there was substance in it, their Lordships would obviously have struck down the order of the Director in *Johri Mal's* case on this very simple consideration alone, particularly as the requirement of the proviso is emphasised by their Lordships as that was one of the reasons for repelling the argument with regard to section 36 of the Act. In the wake of the decision in Johri Mal's case by the Supreme Court on the nature of the order made by the Director in that case, the opportunity of hearing that is to be given in accordance with the proviso to section 42 of the Act is adequate and proper if in the case of variation or amendment of a scheme, the provisions of the scheme are present to the mind of the authority attending to the case under section 42 of the Act and the argument before such an authority leads to a claim or opposition in regard to a certain relief to be granted so far as the scheme is concerned. The matter may come before such an authority as directly raised by the parties before it as it happened in *Johri Mal's case* (1). It may arise where it has been a matter of consideration and discussing in the orders of the authorities below. It will obviously arise if one party is seeking relief contrary to the provisions in the scheme, or if one party complains against an order having been made against its interests contrary to the provisions of the scheme. Once the particular provision of the scheme varied or modified is present to the mind of such an authority and in relation to it an order is made which is contrary to it, then that has to be taken as modification or variation of the scheme even though in an individual case as happened in Johri Mal's case. This would be a sufficient compliance with the proviso to section 42 of the Act. No more is to be done by

such an authority and no ritualistic formula is to be followed by it in this respect. It is the substance of the matter that has to be seen. The Director has not definitely to use the language that he was going to amend the scheme and that he was going to amend the same in a particular manner so long as the provisions of the scheme in regard to which there is an argument by the parties before him is present to his mind and the parties have urged their cases for and against such argument. There may be any number of cases in which a scheme of consolidation operates so harshly as between individual cases that its rigor may have to be relaxed in the interests of justice, but such modification of the scheme only affects individual parties and so when relief is granted under section 42 of the Act in this respect, that is sufficient compliance with the proviso, for the particular relevant proviso in the scheme is present to the mind of every body and the parties have an opportunity to put forward their case before the authority concerned with regard to the same. Consequently no manner of hearing as given in the observations of Grover and Narula, JJ., in *Mange's case* is envisaged by the proviso to section 42 of the Act.

(10) The learned counsel in Civil Writ No. 1594 of 1966 has in this respect referred to the judgment of Narula, J., in *Bachint Singh* v. *The Additional Director, Consolidation of Holdings, Punjab* (11). The record of the petition under Articles 226 and 227 of the Constitution in that case has been seen. The impugned order of the Additional Director of Consolidation of Holdings was annexure 'A' to that petition. There is nothing in that order which showed that any change contrary to the scheme so as to increase the number of the lots of Bachint Singh was present to the mind of the Additional Director. No such thing appears from his order and no such thing appears from any order of the authorities below. In paragraph 8 of his order he deals with Bachint Singh's case before him and nothing of the sort appears in it. What happened was that while at the end of his order he was giving a statement of the adjustments of areas to various parties, he came to make adjustment with regard to Bachint Singh which increased the lots of Bachint Singh of 'A' grade from two blocks to three blocks, which was contrary to the provisions of the scheme of consolidation. Nothing in the order of the Additional Director indicated that when he was at the end of his order

(11) 1968 P.L.R. 249.

giving details of the changes made with regard to the parties affected by the order and adjusting the land to be given to Bachint Singh, he knew that what he was doing had the effect of increasing the lots of Bachint Singh from two to three, contrary to the scheme of consolidation, which provided that there shall be no more than two lots to a rightholder. So that this was a case in which, on facts, it was patent that the Additional Director while giving his decision under section 42 of the Act had not present to his mind the particular provision of the scheme relating to the number of lots that could be allotted to a rightholder in repartition, and nothing indicated in his order that there was ever an argument before him whether Bachint Singh's lots should or should not be increased from two to three. If there had been an argument before him in this respect and then he had increased Bachint Singh's lots from two or three, the case would have been exactly parallel to Johri Mal's case, but this did not happen. It is on this ground that Narula, J., was justified in quashing the order of the Additional Director of Consolidation of Holdings in *Bachint Singh's case* (11). No doubt, the learned Judge reproduces obiter observations of himself and those of Grover, J., in *Mange's case* (8), as supporting his decision in *Bachint Singh's case* (11), but, on facts, it is obvious that, those observations aside, the order aganist Bachint Singh could not be sustained because the provisions of the scheme were never present to the mind of the Additional Director in that case when he made that order. An appeal under clause 10 of the Letters Patent in *Bachint Singh's case* (11), was dismissed *in limine* in view of these circumstances on August 14, 1968. This case, therefore, does not advance the argument on the side of the petitioners.

(11) Consequently, the answer to the first question is that a scheme of consolidation can be amended under section 42 of the Act in an individual case and the amendment need not necessarily be actual rewriting of a particular provision of the scheme, and the answer to the second question is that it is proper and adequate compliance with the proviso to section 42 of the Act if a change or amendment or variation in a scheme of consolidation is made after the authority making the same has before its mind the particular provision of the scheme to be thus affected and the arguments of the parties in respect to the effect of the change. Once the matter is present to the mind of the authority exercising power under section

42 of the Act, and after considering the relevant provision of the scheme it gives a decision or makes an order, that is sufficient compliance with the proviso to section 42 of the Act and no more is required.

HARBANS SINGH, J.—I agree.

D. K. MAHAJAN, J.—I agree.

GURDEV SINGH, J.—I agree.

BAL RAJ TULI, J.—I also agree.

K.S.K.

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